

December 13, 2010

Chairman Julius Genachowski  
Commissioner Michael Copps  
Commissioner Robert McDowell  
Commissioner Meredith Baker  
Commissioner Mignon Clyburn  
Federal Communications Commission  
The Portals, TW-A325  
445 12th Street SW  
Washington, DC 20554

**Re: *Ex Parte* Presentation  
GN Docket 09-191,  
WC Docket No. 07-52**

Dear Mr. Chairman and Commissioners:

Preserving an open Internet is essential to our nation's educational achievement, freedom of speech, and economic growth. The Internet has become a cornerstone of the educational, research, and computer services that libraries and higher education offer to students, teachers, and the general public. We rely upon the widespread public availability of open, affordable Internet access for school homework assignments, distance learning classes, e-government services, licensed databases, job-training videos, medical and scientific research, and many other essential services.

The American Library Association (ALA), the Association of Research Libraries (ARL), and EDUCAUSE believe that an open and neutral Internet is necessary to ensure that the public's access to our content and services will receive the same priority as their access to entertainment and other commercial offerings. Without an open and neutral Internet, there is great risk that *prioritized* delivery to end users will be available only to content, application and service providers who pay extra fees, an enormous disadvantage to libraries, education, and other non-profit institutions. In short, education should have the same priority as entertainment and other commercial offerings.

Libraries and higher education institutions are prolific generators and users of Internet content. The attachment to this letter lists several examples of critical Internet-based applications that our communities have developed to serve students, teachers, the elderly, the disabled and other members of the public. As these examples demonstrate, libraries and higher education increasingly depend on the open Internet to fulfill our missions to the general public. In particular, our community has developed a wide range of mobile applications and research tools

so that students, teachers, librarians and library patrons may obtain web-based information and services no matter where they are located.

The following data points illustrate why open, non-prioritized Internet access is so critically important to the public that we serve:

- a. 80% of college students live off-campus. Net neutrality is vitally important so that these students receive the same quality of access to web-based information as on-campus students;<sup>1</sup>
- b. 97% of public two-year colleges have online distance education programs;<sup>2</sup>
- c. 99% of public libraries provide patrons with access to the Internet at no charge; in 67% of communities, public libraries are the only provider of such access (73% in rural communities).<sup>3</sup>

#### 1. Substantive Issues:

ALA, ARL, and EDUCAUSE wish to make sure that the upcoming Internet (net) neutrality order contains sufficient protections for library and higher education services made available to the public. Our organizations understand that the current proposal is based on the legislative language submitted into the record of this proceeding by U.S. Rep. Waxman. While there are many positive aspects of the Waxman language, there are also some problematic components of that language that need to be addressed to ensure that the Internet remains open and available for the full range of educational and public services that our community provides. ALA, ARL and EDUCAUSE ask the Commission to include the following ideas and language in its net neutrality order:

- a. The definition Broadband Internet Access Service should not be limited to “consumer” retail services. If the word “consumer” is defined as a “residential” consumer, then libraries and higher education would not be protected by the proposed net neutrality rules and policies. The word “consumer” should be dropped. In the alternative, the word “consumer” should be clearly defined as including not-for-profit institutions such as higher education institutions and libraries.

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<sup>1</sup> National Retail Federation 2010 Back-to-School and Back-to-College Surveys<sup>2</sup>, available at [http://www.nrf.com/modules.php?name=News&op=viewlive&sp\\_id=966](http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=966).

<sup>2</sup> Fast Facts, Institute for Education Sciences, National Center for Education Statistics, U.S. Department of Education, (last visited Dec. 13, 2010) <http://nces.ed.gov/fastfacts/display.asp?id=80>.

<sup>3</sup> Center for Library & Information Innovation, *2009-2010 Public Library Funding and Technology Access Survey: Survey Findings and Results*. June 2010. Figure 4, Page 12, (last visited Dec. 13, 2010) [http://cli.umd.edu/sites/default/reports/PLFTAS\\_Report\\_2009-10\\_Full.pdf](http://cli.umd.edu/sites/default/reports/PLFTAS_Report_2009-10_Full.pdf).

- b. We agree that net neutrality protections should be limited to “lawful traffic” (as in the Waxman draft legislation). Broadband operators, however, should not be given absolute discretion to block traffic based on their own private determination that it is unlawful. The order should make clear that determining which content is lawful must have the benefit of due process, including a prior judicial determination by a court. Determining which content is lawful necessarily depends upon the interpretation of complex criminal statutes, carefully balanced copyright doctrines, and other legal authority that is outside the expertise of either the broadband operator or the FCC. It is inconsistent with core First Amendment values to allow broadband operators to impose prior restraints on Internet speakers without the benefit of a prior judicial determination or other adequate due process.
- c. ALA, ARL, and EDUCAUSE believe “paid prioritization” should be banned altogether. Higher education and libraries already pay subscriber fees to obtain access to the Internet. There is no public interest rationale for permitting the broadband providers to impose additional “prioritization fees” to enhance the delivery of certain Internet traffic. Our concern is that such prioritization puts not-for-profit education at a disadvantage compared to entertainment and for-profit educational entities. Our organizations support the non-discrimination principle and suggest that paid prioritization be considered a violation of this principle.
- d. Wireless services should be treated the same as wireline services. All Internet subscribers, whether using wireline or wireless technologies, should have the same right to a neutral, non-prioritized Internet. Wireless services are becoming especially important to education and libraries. Libraries and higher education are increasingly developing and making available a variety of applications that are targeted only to wireless services. Wireless services may well become the primary mode of Internet access for our constituencies in the near future. There is no defensible reason to apply weaker safeguards to wireless than wireline technologies. Any technical difference between modes of broadband access can be accounted for in the Commission’s determinations of what constitutes “reasonable network management” for a particular provider.
- e. The definition of Broadband Internet Access Service should not be limited to providers serving “all or substantially all Internet end points.” This could be a loophole that allows a broadband provider to construct a service limited to a subset of Internet access points as a way to evade net neutrality protections. ALA,

ARL, and EDUCAUSE prefer the broader definition of Broadband Internet Access Service that was contained in the FCC's NPRM from last October.

## 2. Legal Basis:

For the reasons set forth above, we are very supportive of the effort to keep the Internet open and neutral. Although ALA, ARL and EDUCAUSE believe that broadband services should be classified as common carriage under Title II of the Communications Act, we appreciate that the Commission has identified and is pursuing a different approach. Below, we offer a few thoughts on how to bolster the legal arguments in support of a Title I approach from the perspective of libraries and higher education.

ALA, ARL, and EDUCAUSE respectfully suggest that one way to support the legality of a Title I approach is to demonstrate how broadband services are competing with, and sometimes replacing, traditional common carrier services that are regulated under Title II and traditional cable television services that are regulated under Title VI. The cases that originally supported the FCC's use of "ancillary authority" (such as *Southwestern Cable* and *Midwest Video I*) upheld the FCC's ancillary regulation of cable television systems in order for the Commission to satisfy its statutory responsibilities (under Title III) governing radio and television broadcasting. Similarly, we believe that ancillary regulation of broadband services is necessary for the FCC to satisfy its statutory responsibilities (under Title II) governing common carrier services and (under Title VI) governing cable television services. In *Comcast v. FCC*, the court further emphasized that ancillary authority must arise from express statutory authority under Title II, III or VI.<sup>4</sup> Because broadband services are competing with, and sometimes replacing common carrier and cable television services, the Commission must regulate broadband services to meet its statutory obligations in Title II and Title VI.

Libraries and higher education can cite many examples of how broadband services are replacing traditional common carrier and cable television services. In general, libraries and higher education are increasingly dependent on broadband services to serve all their communications needs, not just Internet access. For instance,

- a. Libraries and higher education are increasingly using Voice over IP (VoIP) services over broadband connections for their basic telephone services. It is commonly recognized that VOIP is the technology of the future.<sup>5</sup>

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<sup>4</sup> *Comcast v. FCC*, 600 F.3d 642, 654 (U.S. Ct. App. D.C. 2010).

<sup>5</sup> See, "Going VOIP," by Elizabeth Millard, in UniversityBusiness: Solutions for Higher Education Management, (last visited Dec. 13, 2010), <http://www.universitybusiness.com/viewarticle.aspx?articleid=867>. See also, "The UMass Amherst Voice over IP Pilot Project," Office of Information Technologies, UMass Amherst (last visited Dec. 13, 2010) [http://www.oit.umass.edu/voip/pilot\\_about.html](http://www.oit.umass.edu/voip/pilot_about.html).

- b. Libraries and higher education used to provide access to information services such as Dow Jones and Lexis/Nexis via a dial-up modem connection. Today information services such as these are accessed over a broadband connection to the Internet.
- c. Libraries and higher education increasingly use web-based video services for classroom instruction or job-training courses instead of traditional public, educational and governmental (PEG) channels offered over traditional cable television systems.<sup>6</sup>
- d. Libraries and academic institutions are replacing multi-party voice conference calls with multimedia, cloud-based, interactive services, including voice, video, shared document access, and similar features.<sup>7</sup>

The proliferation of these broadband services could, if left unregulated, undermine several statutory goals and responsibilities in Title II. For instance, if broadband services attract large numbers of subscribers away from the public switched telephone (common carrier) network, the costs and prices for those subscribers that remain on the network will be driven higher. This will undermine the Commission’s statutory responsibilities to make telephone services available at just and reasonable rates under Section 201(b)—an express grant of statutory authority that the *Comcast* court offered as an example that could provide the basis for ancillary authority.<sup>8</sup> The potential harm to the telephone service rates posed by unregulated broadband services mirrors the concern over unregulated cable television services, which the *Southwestern Cable* Court relied upon in recognizing the FCC’s ancillary jurisdiction over cable services. In *Southwestern Cable* and *Midwest Video I*, the Court found that “the explosive growth of [cable television] . . . threatened to ‘deprive the public of the various benefits of (the) system of local broadcasting that the Commission was charged with developing and overseeing under § 307(b) of the Act.’”<sup>9</sup> The ability of the Commission to fulfill its duty to protect broadcast via cable regulation mirrors its need to impose requirements on broadband providers in order to fulfill its express statutory mandate to provide just and reasonable rates for telephone services under Title II of the Act.

Furthermore, Section 254(b) states that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, . . . that are reasonably comparable to those services provided in urban areas. . .” Allowing unregulated broadband services to siphon off customers from common carrier services, thereby increasing the costs of serving those who continue to use common carrier services, will make it difficult for “low-income consumers and

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<sup>6</sup> Libraries often offer access to job-training courses. See the Janesville WI PL library, which has a Job Resource Center, at [http://www.hedbergpubliclibrary.org/adult\\_programs.html](http://www.hedbergpubliclibrary.org/adult_programs.html).

<sup>7</sup> See e.g., “Beam Me to the Faculty Senate,” *Chronicle of Higher Education* (Oct. 18, 2009) <http://chronicle.com/article/Beam-Me-to-the-Faculty-Senate-/48830/>.

<sup>8</sup> *Comcast*, 600 F.3d at 654.

<sup>9</sup> *United States v. Midwest Video Corp.*, 406 U.S. 649, 661-62 (1972).

those in rural, insular, and high cost areas” to obtain comparable services. Adopting net neutrality rules for broadband network operators will level the playing field and allow broadband services and traditional common carrier services to compete on equal footing.

The regulation of broadband networks is not only needed to protect traditional common carrier services but also to advance the Commission’s express statutory authority to promote the development of diverse video programming services. In *Midwest Video I*, the Court emphasized that cable television regulation is “not just a matter of avoidance of adverse effects, but extends to also requiring [cable television] to affirmatively further statutory policies.”<sup>10</sup> While the *Comcast* court clarified that policies alone may not prove sufficient, the *Comcast* court suggested that the Commission can impose regulation based on furtherance of specific statutory authority. Here, the regulation of broadband is necessary to further the Commission’s statutory authority under Section 612 (47 U.S.C. Sec. 532) of the Communications Act, which requires the Commission “to promote competition in the delivery of diverse sources of video programming.” Allowing broadband services to operate in a closed, non-neutral environment that limits the opportunities for Internet-based video programming to flourish would undermine this important statutory obligation. Thus, adopting net neutrality safeguards on broadband operators is necessary for the Commission to meet its express statutory obligation to promote the diversity of programming in Section 612.

Furthermore, Section 616 of the Act (47 U.S.C. Sec. 536) requires the Commission to regulate program carriage agreements between cable operators and video programming distributors and vendors in order to promote fair competition among video programming distributors. If, however, broadband operators are permitted to give preferential Internet access to their affiliated video programs and discriminate against unaffiliated video programmers, the result would limit the Commission’s ability to promote the fair competition purposes of Section 616.

### **3. CONCLUSION: The Ability to Access Library, College and University Services Should Not Depend on Location.**

Libraries and higher education institutions must be able to ensure that they can deliver their services equally to on-campus and off-campus members of the community, including the general public. As learning and research become less dependent on physical location and more reliant on Internet access, it is critical to ensure that off-campus students and library patrons are not impeded by unnecessary restrictions from their local Internet Service Providers. Any benefit afforded by distance learning services and digital data collections will be undermined if off-campus users and library patrons are denied equal access to the Internet content and services of their choice. Every Internet user should have the right to access online library and higher

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<sup>10</sup> *Id.* at 664.

education resources regardless of whether they are connecting at home, at work, at a library, from a wireless device, or physically on campus.

Respectfully Submitted,

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December 13, 2010

**Network Neutrality is Essential for Libraries and Higher Education Institutions**

**Libraries, Colleges and Universities Depend Upon the Intellectual Freedom Afforded by the Open Internet to Develop Content and Applications that Serve the Public Interest**

The Internet empowers educators, students, library patrons, and members of the public to share opinions and information on equal footing with major commercial and media interests—a democratic ideal realized for the first time by a free and open Internet structure. It is essential that the Internet remains a network neutral environment so that libraries and higher education institutions have the freedom to create and provide innovative information services that are central to the growth and development of our democratic culture.

Allowing broadband transmission providers or Internet service providers to serve as “gatekeepers” to control access to information is antithetical to the openness and level playing field upon which the Internet has thrived. A closed, non-neutral environment—akin to the cable television market—would only exacerbate the digital divide and reduce consumer choice. It would also limit the ability of libraries and higher education institutions to provide content and applications that serve the public interest. This is not an environment the Commission should strive to emulate or allow to happen to the Internet through benign neglect. For this reason, we believe the Commission must adopt enforceable language to preserve the openness of the Internet.

The following provides specific examples of how libraries and higher education rely upon an open, neutral Internet in serving the public:

**1. Libraries and Higher Education Institutions are Prolific Providers of Content, Services and Applications on the Open Internet**

- a. Implementation of Distance Learning Services: Educational institutions provide distance learning services and online course instruction over the Internet to reach a growing population of off-campus students.
  - i. Ninety-seven percent of 2-year public colleges offer a distance education program, and more than 12 million students enrolled in a college-level distance-learning course between 2006-2007, according to the U.S. Department of Education’s National Center for Education Statistics.



- ii. K-12 schools have also long relied upon distance learning and have only increased the use of these programs through Internet technology. For example, over 60% of the school districts in Wisconsin belong to the state's BadgerNet network. This began as a distance learning program in the 1980s via teleconferencing and today offers over 1500 interactive online courses in a typical school year over the Internet.
  - iii. “*World Campus*,” created and maintained by Penn State, is essentially “Penn State Online.” It delivers more than 50 distance education programs to learners around the world and promotes flexibility in learning by allowing students to participate in classes directly through a home, work, or public Internet connection.
  - iv. MIT’s “*OpenCourseWare*” offers online video lectures taught by MIT professors and digital copies of class notes to members of the general public, free of charge. This online database goes to the heart of creating a more informed citizenry via the open Internet, but it depends on the ability to stream multimedia content without interruption from ISPs.
  - v. *English For All (EFA)*, developed by the National Internet2 K20 Initiative, is a free, multimedia system for older adolescents and adults seeking to learn English as a Second Language (ESL). Because learning to speak English is a complex process, EFA utilizes online streaming video, digitized at a high frame rate, so that learners can see mouth formation and important body language.
- b. Development of New Applications and Services: Colleges and universities conduct research and experiment with new network applications to develop services that can ultimately be made available over the public Internet.
- i. *Muse* is a new social utility tool that enables educators and practitioners to collaborate, comment, and create online educational services and applications relevant to the “Internet2 K20 community”—institutions and innovators from primary and secondary schools, colleges and universities, libraries, and museums.
  - ii. *The Digital Corinth Synchronized Database Project*, an Internet2 project, connects two separate online databases, one in Philadelphia and one in Athens, Greece, so that applications may be built for K20 education and tools developed for archaeological research. A user can connect to the database from the public Internet presuming, however, that ISPs allocate the bandwidth necessary for the transmission of content and services.

- c. Creation of Digital Data Collections: Libraries and higher education institutions maintain digital data collections to preserve research and scholarly content and to make resources more accessible to off-campus students and faculty, as well as the general public.
  - i. Institutional repositories, such as Harvard's *DASH Project* and University of Michigan's *Deep Blue*, collect and make available online data sets, scholarly publications, streaming videos and multimedia collections, free of charge, in order to promote access to research and scholarly communication.
  - ii. Libraries also create digital versions of content for the purposes of preservation and historical reference. The San Francisco Public Library, for example, digitized a collection of over 250,000 historical photographs and provides access to over 10,000 popular songs from the Dorothy Starr Sheet Music Collection through the library's website.
  
- d. Incorporation of Mobile Wireless Applications and Services: Libraries and higher education institutions increasingly offer resources via mobile wireless platforms to reach a broad range of demographic groups and to ensure that users can access content and services at any time, from any location.
  - i. Many university and research libraries now offer mobile online public access catalogs (OPACs), mobile versions of library websites, and text-messaging services to correspond with patrons. For example, Duke University has a free iPhone application that allows patrons to browse the library's digital photo archive, presuming their wireless connection is not throttled or slowed from a network provider.
  - ii. Public libraries also provide online library environments in order to improve community access to resources. In Wisconsin, the Outagamie Waupaca regional library system allows both its website and online catalog to be viewed via mobile devices. Similarly, the Orange County (Fla.) Library System utilizes a free mobile application that creates a virtual "shelf browse" for material selection. Using a randomized "shake" feature, users can receive material recommendations for books, audio books, and DVDs. When a match result is displayed, the user touches the material title to be taken to the mobile catalog. From there they have access to the title's availability, ratings, and library location, as well as the ability to place the title on hold.
  - iii. Through the adoption of mobile wireless technology, libraries, colleges and universities can more effectively deliver content and services to traditionally

underserved groups. While ethnic minority populations are connected to broadband at home less than are other demographic groups, they access the Internet via the mobile platform at higher rates than whites. For example, according to 2010 study by John Horrigan, “for African-Americans, home broadband adoption trails the national average by six percentage points; for mobile Internet use, African-Americans outpace the national average by nine percentage points.”<sup>11</sup>

- iv. In particular, minority Americans lead the way when it comes to mobile access using a hand-held device. A 2010 study by the Pew Research Center notes that “[n]early two-thirds of African-Americans (64%) and Latinos (63%) are wireless internet users, and minority Americans are significantly more likely to own a cell phone than are their white counterparts (87% of blacks and Hispanics own a cell phone, compared with 80% of whites). Additionally, black and Latino cell phone owners take advantage of a much wider array of their phones' data functions compared to white cell phone owners.”<sup>12</sup> The ability of these groups to access higher education and library resources over the Internet depends on successful transmission via mobile wireless platforms.

## **2. Research Libraries and Institutions Rely on the Open Internet as End-Users in Order to Collaborate with and Obtain Content and Services from Outside Sources**

- a. Access to Outside Resources: Research libraries dedicate significant funds to licensing electronic resources that they make available to students, and faculty, and other off-campus users. For example, the *MESL* Project—the Getty’s Museum Education Site Licensing Project—provided access to over 4,500 digital images of paintings, photos, textiles, ceremonial objects, and other cultural artifacts through a collaborative effort of the Getty Information Institute, several museums, the U.S. Library of Congress, and seven universities. More than 45 state libraries now provide their states’ residents with access to thousands of online magazines, newspapers and other reference resources. Without net neutrality, libraries will need to judge the brokers of this content not based on the quality of their online resources but based on whether they have paid to ensure their resources are accessible in a timely manner.
- b. Use of Online Communication Services: Universities rely on Internet access to communicate with students and faculty. Currently, more than 750 colleges and universities subscribe to *e2Campus*, a web-based application that simultaneously

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<sup>11</sup> John B. Horrigan, “Broadband Adoption and Use in America,” FCC, OBI Working Paper Series No. 1, February 2010, pp. 35-37, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296442A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf).

<sup>12</sup> Aaron Smith, “Mobile Access 2010,” Pew Research Center, Pew Internet and American Life Project, July 2010, pp. 3, <http://pewresearch.org/pubs/1654/wireless-internet-users-cell-phone-mobile-data-applications>.

broadcasts alerts to school websites, student email-accounts, wireless PDA's, Facebook, and many other devices that rely on Internet access.

- c. Collaboration with Outside Institutions: The Smithsonian Institute has partnered with Arizona State University to implement a wireless connection in Barro Colorado—an island in the middle of the Panama Canal's Gatun Lake where the Smithsonian manages its Institute for Tropical Research—that transmits images and data back to the University and K-12 classrooms in Arizona.