

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544**

**In the Matter of
Restoring Internet Freedom**

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WC Docket No. 17-108

**REPLY COMMENTS OF
THE ASSOCIATION OF RESEARCH LIBRARIES**

August 29, 2017

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EXECUTIVE SUMMARY

Maintaining an open Internet is central to the non-profit mission of research libraries. After reviewing the record in this proceeding, ARL is convinced that the wisest course is to maintain the FCC's existing net neutrality policy. ARL members are undertaking cutting edge research and building the information platforms that are, in turn, building-blocks for other innovations that reverberate throughout the commercial and nonprofit sectors. A persistent theme runs through this work: it depends upon open, fast broadband Internet access services.

Consumers and library patrons are entitled to strong open Internet protections. If the FCC nonetheless decides to move away from the strongest source of jurisdiction, Title II, the agency should do all it can to replace its existing rules with a meaningful substitute.

However if the FCC reclassifies, the resulting conundrum is this: if the FCC attempts to adopt strong rules, the stronger they are the more judicially-vulnerable they are. If the FCC responds to this appellate vulnerability and adopts relatively weak rules, it shifts the risk to consumers, exposing them to abusive ISP practices.

ARL's Joint Principles submitted with other higher education commenters provide the FCC with a roadmap out of this bind. A straightforward policy prohibiting blocking, throttling and paid-priority schemes best serves consumer interests.

Finally, ARL takes this opportunity to remind the Commission that strong network neutrality rules are necessary to protect library patron's substantial First Amendment rights to use the Internet as a medium of free expression.

I. SUMMARY AND INTRODUCTION

Maintaining an open Internet is central to the non-profit mission of research libraries. After reviewing the record in this proceeding, ARL supports maintaining the FCC's current net neutrality policy. ARL members are undertaking cutting edge research and building the information platforms that are, in turn, building-blocks for other innovations that reverberate throughout the public and private sectors. A persistent theme runs through this work: it depends upon open, fast broadband Internet access services.

ARL is filing these comments individually to discuss this important work and offer its support for the Commission's current approach to network neutrality. Given the non-profit mission impacted by these rules, ARL urges the FCC to stay the course and ground its policy in the most stable legal authority available to it, Title II of the Communications Act. If the Commission nonetheless decides to reclassify broadband Internet Access Service (BIAS) however, ARL urges the Commission to adopt a policy consistent with ARL and Higher Ed's *Joint Principles*.

ARL's Reply Comments proceed as follows: First, we highlight the unique role that research libraries play in the nation's Internet ecosystem. Research libraries provide access to vast amount of information reachable through BIAS connections and serve library communities directly as an Internet access point. Second, ARL reviews the record submitted in this proceeding with an eye toward adopting practical, non-ideological solutions to the questions posed by the NPRM. ARL's review of the record in this docket shows that the FCC is fully empowered to affirm a policy that is consistent with the *Joint Principles* endorsed by ARL and other Higher Ed commenters. Finally, ARL takes this opportunity to remind the Commission that strong network

neutrality rules are necessary to protect library and library patron's substantial First Amendment rights to use the Internet as a medium of free expression.

II. THE COMMISSION SHOULD RECOGNIZE THE UNIQUE WORK OF THE NATION'S RESEARCH LIBRARIES AS INNOVATION HUBS AND INTERNET ACCESS POINTS

A. The Commission's Open Internet Policies Should Support Not Hinder ARL's Non-Profit Mission

Research libraries depend upon an open Internet to fulfill their missions and serve their communities. Research libraries retrieve and contribute content on the World Wide Web and the other databases that are exposed to consumers on the Internet. ARL suggests that the public interest missions of libraries are inextricably intertwined with the openness upon which the Internet is based. The democratic nature of the Internet as a neutral platform for carrying information to students, researchers and the general public is strongly aligned with the public interest missions of libraries.

ARL institutions also provide access to the Internet. For example, at the New York Public Library, 4,700 public computers have enabled three million wireless connections to the Internet in 2017 alone. Those connections provide access to 241 databases provided by the NYPL. This demand from NYPL patrons led to 265,000 unique remote sessions to these databases.

Below are some specific examples of projects that highlight our institutions' value in providing access to information and the importance of the open Internet in accessing and disseminating such information:¹

- *Providing Access to Vast Agricultural and Medical Datasets.* The National Agricultural Library (NAL) is one of the largest and most accessible agricultural research libraries in the world. NAL is the premier library for collecting, managing, and disseminating agricultural knowledge. NAL supports specialized databases and services such as PubAg.

¹ For additional examples, see Association of Research Libraries, "[Access to Information and Reliance on an Open Internet.](#)"

In September 2016, PubAg reached 49,000 full text scientific articles written by USDA researchers and 1,340,030 citations to peer-reviewed, agriculture related scientific articles. Likewise, the National Library of Medicine (NLM), the world's largest medical library, provides a vast amount of information-based services, ranging from video tutorials to downloads of large genomic datasets. Every day, NLM receives ten terabytes of new data and publications, adds value by enhancing quality and consistency and integrating them with other information in NLM databases, and responds to millions of inquiries from individuals and computer systems by serving up more than 75 terabytes of information, including 4.4 million published journal articles from PMC. Patients, families and others used 2.2 million pages of health information from MedlinePlus each day. NLM dispatches an average of more than 6,500 million bits of data per second, making it one of the Federal government's largest providers of digital content and an average outbound traffic speed is 6.1 Gbps, which is the traffic of all data used by NLM consumers which includes scientists making discoveries in the human genome. Tools developed by NLM researchers are used by the scientific community to analyze high throughput genomic data to identify promising drug targets, to mine journal articles and EHRs to discover adverse drug reactions, and to detect transplant rejection earlier so that interventions to help clinical research participants can begin more quickly. Notably, a major breakthrough in gene editing technology, CRISPR-Cas, was founded upon the work on bacterial evolutionary genomics by a research group at NLM. It is worth remembering that access to information such as that provided by NAL, NLM and PubAg is important not only to the country's urban centers but also to the rural or agricultural communities. All of it is reachable via the BIAS connections provided by ISPs.

- *Interactive Broadband-Connected Classrooms Not Book Stacks.* ARL members such as Purdue University, which hosts the Wilmett Active Learning Center (ALC), challenge the outdated notion of libraries as static institutions content with rows and rows of book-stacks. Instead, high-speed broadband connections have enabled the ALC to literally alter its building's architecture by creating open spaces that enable a new kind of learning environment. Twenty-seven active learning classrooms rely upon BIAS connections to create "a range of team-based learning experiences." The power of fast broadband connection has enabled these sorts of learning innovations; and at the same time, the ALC has not forgotten a traditional element of a library—a place for people to gather and convene in person in large reading rooms and other forums. Similarly, North Carolina State University's James B. Hunt Jr. Library ("Hunt Library") was designed to integrate technological advances within a research library. The Hunt Library allows for their students, faculty and researchers "to immerse themselves in interactive computing, multimedia creation, and large-scale visualization—tools that are enabling revolutionary ways to see and use information." The space includes technology-enabled furniture, high-definition video walls, collaborative projection, 3D computing and large-scale visualization space, immersive technology, videoconferencing and telepresence facilities.

The Hunt Library is home to the robot-driven, connected bookBot automated book delivery system, which holds nine times the number of books as traditional shelving, allowing the library to provide more space for learning and collaboration. BookBot can deliver books within minutes of a user requesting materials made through the online catalog or virtual browse display from any computer with an Internet connection. It is this blending of the historic and the new enabled by fast broadband connections that should remind the Commission of the importance of an Open Internet to institutions such as the ALC and Hunt Library and the people who gather there.

- *Preserving and Sharing the Nation's Culture.* Open Internet policies also touch on the way the nation's cultural history is recorded and shared. The University of North Carolina at Chapel Hill has embarked on a project entitled "Documenting the American South" or DocSouth. The UNC library has made available a vast cache of material upon which researchers are using emerging data science technology to look for linguistic patterns across entire texts or compare patterns across multiple texts. In this way, the American South's unique cultural history is preserved, accessed and shared via an Open Internet. The University of Iowa Libraries houses over 78,000 pages of historic documents in its digital library, transcribed by volunteers through its DIY History project. The DIY History project crowdsources its transcription project, appealing to the public to transcribe, tag and comment on digitized artifacts, allowing them to become searchable. The project began with the Civil War Diaries and Letters Transcription Project to commemorate the sesquicentennial of the Civil War and has now expanded to cover a wide range of historic, handwritten documents, business correspondence from the time the Transcontinental Railroad was built, World War I and World War II diaries and letters, pioneer diaries and letters, pre-1600 manuscripts, civil rights documents and more. It also catalogs historic photographs with appropriate tags to enable searching of these collections.
- *Research Libraries Facilitate Discovery.* Librarians collect, describe, and index resources so that they can be discovered and used to acquire knowledge. Through next-generation indexing—or linked open data (LOD)—the internet is itself like an index or database, also known as the semantic web, through which libraries can expose and connect their vast collections. Libraries build the semantic web by describing their resources, such as images, research data, or publications, according to established thesauri or ontologies (often created and maintained by libraries in collaboration with scholars) and publishing that metadata in a particular format on the open web. This results in distributed yet interrelated assets and information connected via linked open data. For example, a user finding a digitized painting at an art museum could follow a link out to material related to the subject of the painting, students of the painter, or background materials on the genre, no matter where on the open web those additional resources were held. Semantic web

indexing benefits nonprofit services such as libraries and educational institutions as well as commercial services and enterprises such as Google.

- *International, Interconnected Wifi Access.* ARL institutions also participate in EduRoam, an international consortium that provides secure, authenticated access to wifi connectivity at participating campuses. The system uses a network of servers run by the institutions, and the participating National Research and Education Networks (NRENs) to securely route these requests back to a user's home institute. Providing easy access to BIAS when consumers are mobile or away from home is consistent with ARL's mission to expand access to Internet resources.

B. The Record Supports The Commission Preserving An Open Internet for Non-Profit Institutions, Notably Research Libraries

ARL has been a long-standing participant in the FCC's Network Neutrality proceedings. It has worked with several Commissions to educate policymakers on the unique role that research libraries play in the Internet ecosystem filing comments and reply comments at critical junctures in the policy process. ARL takes its obligation to serve its community as a non-commercial entity seriously. It is this community orientation that leads ARL to review the record in this proceeding with an eye toward identifying policies that maximize overall consumer and Library user benefits.

ARL's emphasis on consumer-centricity discards positions that depend upon hyperbole or the narrow perspectives of bickering economists. Where elements of a party's position include both useful and unhelpful features, we have tried to assimilate various views into a coherent, practical approach that the FCC can use in adopting its final rules.

C. The Commission Can Adopt the Joint Principles without a Material Effect on ISP Investment

ARL appreciates the challenging position this Commission finds itself in on several foundational questions posed by the NPRM. On the one hand, it has received alarmist comments from ISPs claiming the investment sky will fall if Title II rules are not immediately and

completely reversed.² On the other hand, edge providers have offered support for the Commission’s Network Neutrality *policy*; but precious little to respond to the central question that prompted the NPRM in the first place: whether the policy should be grounded in Title I or Title II of the Communications Act.³

Instead of offering an additional, polarizing position, ARL proceeds from a principled, non-ideological position as outlined in our *Joint Principles*, released with higher education and library associations. For example, ARL agrees with Verizon that the first principle in this proceeding should be the adoption of a framework that encourages new ideas and innovation and does not curtail them.⁴ That said, ARL believes that the record does not conclusively demonstrate that ISP investment has been materially harmed by the current Title II rules.⁵

Instead ARL’s view is that neither the ISPs nor their opponents is completely correct on the important question of whether the 2015 rules have harmed investment in BIAS networks that support ubiquitous deployment of the Internet. There are a variety of factors that affect an ISP’s decision to invest in BIAS networks. FCC regulation is one of many factors—and perhaps not even the most significant factor—that affects an investment decision. ISP investment decisions necessarily include complex evaluation of things outside of the FCC’s control (e.g., the cost of capital, internal budgetary constraints, long-term returns on invested capital etc.). Because of the attenuated connection between FCC regulation and investment, ARL is skeptical of the view that the 2015 FCC rules significantly depressed ISP investment in BIAS networks. Even NCTA’s economist concedes that it is “challenging” to quantify the investment effects of the 2015 Order

² AT&T Comments at Pg. 53.

³ Internet Association Comments at Pg. 26.

⁴ Verizon Comments at Pg. 18.

⁵ Internet Association Comments at Pg. 4; Incompas Comments at Pg. 92.

with confidence because the ‘industry has so many possible futures.’”⁶ Accordingly, ARL’s view is the FCC can proceed to adopt rules along the lines of those stated in the *Joint Principles* without a material, negative impact on ISP investment decisions. This is the right course because the harm to ISP investment is speculative while the threat to openness is very real for consumers.⁷

III. THE RECORD CONFIRMS THAT STRONG NET NEUTRALITY RULES ARE NECESSARY TO PROTECT CONSUMERS AND INNOVATION

The record confirms that there is substantial consensus to enact several of the *Joint Principles* offered by ARL, including a prohibition on blocking, paid priority and throttling BIAS. To the extent there is disagreement in the comments, it reflects the polarizing nature of the Title II debate rather than a disagreement about the consumer benefits of a ‘no blocking’ and ‘no paid prioritization’ policy.

A. The Commission’s Response to the NPRM Should Be Consistent with the *Joint Principles*

ARL’s support for the *Joint Principles* offers the Commission a roadmap for a simplified, middle-ground approach to the FCC’s Open Internet policy.

After years of ISPs arguing that no Open Internet rules are necessary, nearly all of the nation’s ISPs now concede that some safeguards are both necessary and consistent with the public interest though there is disagreement about the source of legal authority to adopt those

⁶ NCTA Bruce Owen declaration at 9 (“The direction of the effect of added risk on associated broadband investment incentives is unambiguously negative. Nevertheless, quantifying the impact of the Title II Order at this early date is challenging. One difficulty is specifying the “counterfactual”—that is, the world as it would have been but for the imposition of Title II status. Using the world as it was prior to the regulatory change as a proxy for the counterfactual (the common practice) is especially challenging in this case because the industry has so many possible futures.”)

⁷ The D.C. Circuit found that the Commission “adequately supported and explained” that, absent open Internet rules, “broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.” *Verizon*, 740 F.3d at 645. As the Commission explained in the Open Internet Order, examples such as the *Madison River* case, the *Comcast-Bit Torrent* case, and various mobile wireless Internet providers restricting customer’s use of competitive payment applications, competitive voice applications, and remote video applications, indicate that broadband providers have the technical ability to act on incentives to harm the open Internet. *Id.* at 17925, para. 35 & n.107.

safeguards and the extent which they are required.⁸ That is progress on an issue as contentious as this one is. This evolution demonstrates the wisdom of ARL’s position as stated in its opening comments, and acknowledged by the Court of Appeals for the D.C. Circuit, that ISPs have both the incentive and ability to harm a consumer’s open Internet experience and some public policy response to those incentives is required. Nothing in the record convinces ARL that the FCC should abandon its settled approach to the 2015 Policy.

The record further reflects significant disagreement about the level of competition in the BIAS market. ARL members are institutions themselves and users of broadband; but as libraries they also enable consumers who access their facilities to connect to the Internet. Particularly in campus environments, these consumers are people who do not have the luxury of multi-homing or “walking with their feet” even if there were broadband competition—which the NPRM overstates.⁹ The situation is no different for consumers in University communities who live in multi-tenant environments, where there is evidence that landlords lock up ISP choice and prevent students for example, from choosing a broadband ISP other than the one chosen by the building owner.¹⁰

Several parties including Verizon, claim that whatever the statutory complexities associated with whether BIAS includes a separable telecommunications service component, the FCC is without authority to impose Title II requirements on ISPs because they “lack market

⁸ Verizon Comments at Pg. 15; AT&T at Pg. 18.

⁹ See Comments of Electronic Frontier Foundation at 16; See also *id.* at 7-8 (citing continuing consolidation and concentration in the market for high-speed Internet access); Comments of ITIF (Information Technology and Innovation Foundation) (*ITIF Comments*) at 18 (“Construction of large scale broadband networks, particularly wired ones, is an incredibly expensive and complicated undertaking. . . While the FCC continues to undertake steps to make network deployment easier, the reality is that network infrastructure is likely to remain concentrated in a relatively small number of broadband providers. A small number of providers is not necessarily a bad thing—indeed, it is likely the most efficient way to provide high-quality broadband access at reasonable cost. However, it does mean that these markets are unlikely to rely on competition to police conduct in a way that will be satisfactory to a political majority.”) (citations omitted).

¹⁰ Statement of Chairman Ajit Pai, Improving Competitive Broadband Access to MTEs, *Notice of Inquiry*, (released June 27, 2017).

power.”¹¹ As mentioned above, there is no consensus about the level of competition in ISP markets and ARL is concerned that an over-stated description of the competitive conditions in the ISP market ignores an ISP’s last-mile, terminal access monopoly status when providing BIAS. What cannot be ignored in a manner that is consistent with the APA, however, is the Commission’s very recent statements confirming an ISP’s incentive and ability to discriminate on the Internet, the limited nature of competition in certain geographic markets and the high switching costs faced by consumers should they be fortunate enough to be in a position to choose from competing ISPs. ARL agrees with the Commission’s previous description of the “convincingly detailed” broadband providers’ market position, which gives them “the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers,” and further stated that the Commission reasonably explained that “this ability to act as a ‘gatekeeper’ distinguishes broadband providers from other participants in the Internet marketplace who have no similar ‘control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers.’”¹² Failure to confront these previous findings—regardless of whether they happen to have appeared in a different docket—is the very definition of an arbitrary and capricious approach to reversing the agency’s policy.

Furthermore, the most natural reading of the statute is that when ARL members use BIAS either for their research mission or to support the goal of providing an Internet access point for consumers, consumers expect a ‘pure transmission path’ to the Internet. When library users enter our member institutions and log onto BIAS-connected WIFI networks their settled expectation is that the connection will allow them to access any of the information resources described in Section I of this Reply Comment. It is our consumer’s expectation that in using a BIAS

¹¹ Verizon Comments at Pg. 37–39.

¹² See *Verizon*, 740 F.3d at 646 (quoting *2010 Open Internet Order*, 25 FCC Rcd at 17919, 17935, paras. 24, 50).

connection an ISP is supplying a ‘pure transmission path’ to its consumers- to go where they wish on the Internet—whether that is to access the large databases hosted by the nation’s research libraries or to browse other information resources on the web. These user expectations are not only relevant to the correct policy in this proceeding but bear on the critical question of how to construe the statutory definition of telecommunications services. If the long history of the *Computer II/III* proceedings and the subsequent statutory definitions mean anything, they mean that a pure transmission service is quintessentially a telecommunications service while services which utilize telecommunications and ride atop telecommunications services are information services. The most natural reading of the statute is that consumer BIAS provided by ISPs meet the plain meaning of a telecommunication service in large part because consumers expect this basic transmission capability.

Related to this statutory finding, ARL emphasizes the foundational importance of a strong, unequivocal ‘no blocking’ policy. If there is any consensus in the record thus far, it is that ISPs should not be free to arbitrarily block BIAS connections. ARL therefore does not understand how the FCC can put in place a strong ‘no blocking’ rule but then reserve, as some parties have suggested, the authority to block in an effort to sell “curated service experiences’ or ‘capabilities that differ from traditional, best-efforts broadband Internet access service”¹³ The record does not diminish concerns that non-profit entities will face a tiered Internet where providers who can pay will receive differentially better speeds while those who cannot pay will be subject to a slower version compared to prioritized service.¹⁴ ISP commenters that dismiss the incentives to offer prioritized services while simultaneously holding out the very possibility of

¹³ Verizon Comments at Pg. 19.

¹⁴ See e.g. Verizon Comments at Pg. 20 (on the one hand supporting rules against paid priority while in the same paragraph arguing that any such rule should allow ISPs “to choose to prioritize certain content or applications, where technologically practicable.” Claiming such QoS arrangements are necessary for “services that need high bandwidth and extremely low latency such as is necessary for virtual or augmented reality applications. Verizon Comments at Pg. 21.

offering these services, create genuine concern on behalf of ARL. The MOOC, distance learning, tele-health or video-intensive applications used by ARL members are particularly sensitive to latency and jitter, but nonetheless can thrive over adequately-provisioned BIAS connections that comply with a clear ‘no blocking’ rule. This is why a no-blocking rule must be a feature of any policy developed by the Commission in this docket. The record suggests that ISP incentives to engage in paid-prioritization schemes are as strong as ever. The FCC should meet that incentive with an equally-strong statement of policy that paid-prioritization arrangement allow ISPs to pick winners and losers on the Internet instead of consumers.

In addition, several commenters support transparency rules with regard to BIAS.¹⁵ ARL included such a provision in its *Joint Principles*. The Commission need not alter its existing transparency rules in a material way. However, we share the view that to the extent the Commission rolls back other open Internet protections, it should not adopt the view that transparency requirements cure otherwise discriminatory conduct. It is not a complete solution for a Library consumer to *know* that they have experienced discrimination on their BIAS connection. Instead, the Commission should address the underlying violation of Net Neutrality norms, and not merely inform consumers through transparency requirements that those violations have occurred.

B. The Commission’s Rule Should Treat Wireless and Wireline Access in a Competitively Neutral Manner

A broad cross-section of commenters support the idea that the FCC’s rules should not differ based on whether a user accesses the Internet on a fixed or mobile Internet connection. Many library patrons connect to the Internet through the Wi-Fi connections made available to them by ARL’s Member institutions. Likewise, it is increasingly common for library researchers

¹⁵ IA Comments at Pg. 27; Verizon Comments at Pg. 52.

to do their research in the field, far away from University communities. Given the disparate geographic location of university researchers and the fact that they routinely roam between fixed and mobile networks, the experience of interacting with a library's databases or other information resources should not be materially different if a user is on a university campus or in the field.

Furthermore, as wireless networks deploy 5G services, those services may increasingly compete with and substitute for fixed-line BIAS. A policy that applies the open Internet rules equally to both types of technologies is one that is competitively neutral and does not skew this evolving level of competition.

The record also reflects the fact that minority communities rely upon mobile connections to a greater extent than other communities and that poorer communities tend to utilize mobile connections to access the Internet at greater rates than even more affluent communities.¹⁶ A policy that applies openness protections to both fixed and wireless BIAS connections is one that treats communities of color and poorer constituencies equitably.

IV. TITLE II IS THE CLEAREST PATH TO REGULATORY CERTAINTY

After a careful review of the various arguments submitted in this docket, ARL is of the view that Title II remains the strongest legal basis upon which to enact strong Network Neutrality safeguards such as those found in the *Joint Principles*. That said, ARL understands

¹⁶ Citing data from the Pew Research Center's Internet & American Life Project, the 2015 Order states that "[t]he share of Americans relying exclusively on their smartphone[s] to access the Internet is far higher among Hispanics, Blacks, and adults aged 18-29, and households earning less than \$30,000 a year." 2015 Order at para. 90. According to data from the National Health Interview Survey, 44 percent of households were "wireless only" during January-June 2014, compared to 31.6 percent during January-June 2011.¹⁸⁰ These data also show that 59.1 percent of adults living in poverty reside in wireless-only households, relative to 40.8 percent of higher income adults January-June 2014, compared to 31.6 percent during January-June 2011.¹⁸⁰ These data also show that 59.1 percent of adults living in poverty reside in wireless-only households, relative to 40.8 percent of higher income adults. Stephen J. Blumberg & Julian V. Luke, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2014 at 5, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (Dec. 2014), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf>.

that the FCC is considering a shift from the 2015 Order. If the Commission does proceed to reclassify BIAS away from Title II, the Commission should be cautious about relying upon the results of the recent Presidential election as the rationale for a change in the legal landscape as some commenters have suggested. This rationale would be similar to the accusations made by ISP's regarding Presidential involvement in the 2015 Order.¹⁷ If politicization of this expert agency was wrong in 2015 then it is equally wrong in 2017.

The NPRM is unfortunately myopic when it addresses the issue of ISP investment incentives. Large ISPs are not the only parties impacted by regulatory uncertainty. Research libraries, their patrons, and a wide variety of commercial and non-commercial interests rely on settled expectations of how an open Internet will work. There is no reason to believe a new statute or a Title I approach offers ARL Members, library users or consumers generally any more regulatory certainty than the FCC's current approach under Title II. Regulatory certainty is best served by affirming the *Verizon* Court's roadmap to re-affirming the FCC's 2015 approach.

Specifically, a number of commenters, mostly facilities-based ISPs have urged the FCC to discard Title II and adopt a policy under Section 706 of the Act.¹⁸ At the same time, most commenting parties agree that the agency has Title II authority to adopt Network Neutrality rules grounded in nondiscrimination; but if it declines to do so, its rules under Section 706 cannot replicate common carrier duties defined under Title II.¹⁹ ARL agrees with this view and suggests an alternative standard of "reasonableness" under Title I that would provide the Commission with sufficient authority to adopt the no-blocking, no-throttling, no-paid priority rules described above. This formulation would prohibit "unreasonable" exclusive dealing between ISP and

¹⁷ Verizon Comments at Pg. 35.

¹⁸ AT&T Comments at Pg. 7; NCTA Comments at 15-17 and INCOMPAS Comments at 64-65; Akamai Comments at Pg. 16.

¹⁹ Id. Verizon concedes that 706 has limits under the DC Circuit's decisions and cannot be used to impose common carrier duties on ISPs. Verizon Comments at Pg. 17;; Incompas Comments at Pg. 46.

purchasers of BIAS as well as the offering of ‘paid priority’ arrangements that prioritize affiliated content over unaffiliated content provided by the ISP.

Many commenters recognize the importance of clear guidance that will enable the Commission to perform meaningful, case-by-case assessments of potentially harmful conduct.²⁰ As ARL previously proposed, creating a presumption against specific conduct that harms an open Internet—while allowing the presumption to be rebutted upon an appropriate showing—is a framework that is in the public interest.²¹

In this way, ARL supports the FCC utilizing presumptions to communicate guidelines that will distinguish permitted from impermissible ISP conduct. Just as ARL urged the Commission to adopt presumptively *unlawful* categories of ISP behavior, the Commission could evenhandedly establish presumptively *lawful* categories of ISP behavior using similar presumptions. For example, the Commission could declare that a wireless or fixed-line ISP that zero-rates bits in a competitively neutral manner would be engaged in presumptively lawful conduct. If it were shown however, that the ISP zero-rates only its affiliated video programming and charges all other video sources against the consumer’s cap, or zero-rates one Library institution’s bits travelling to and from a given databases but does not similarly zero-rate comparable database traffic, a party would have rebutted the presumption of legality by showing, essentially, the existence of an unlevel playing field. This approach would not be inconsistent with the Wireline Competition Bureau’s recent termination of its investigation into wireless ISP

²⁰ See, e.g., *ITIF Comments* at 17 (“A case-by-case approach, with clearly defined guidelines of acceptable behavior, would allow the Commission to predictably step in where any practice harms consumers, competition, or innovation in any part of the Internet ecosystem. This approach also allows for adaptability in the network and economically efficient, welfare-enhancing deals that enable applications for which best-efforts Internet is not sufficient.”); *ESA Comments* at 9 (“[T]he Commission can—and should—retain a general standard to protect against discriminatory broadband provider practices on a case-by-case basis. Such a standard has always been a component of the Commission’s open Internet principles.”).

²¹ See Higher Ed Net Neutrality Comments at 22-25.

zero-rating plans and would provide all interested parties with an opportunity to inform the Commission about marketplace developments that bear on the FCC's rules.

Of course none of these policies should be read to impair deployment goals or to impose an amount of regulatory uncertainty that would cause the Internet's development to slow down. For example, ISP pricing practices that capture the full range of market demand through pro-consumer price discrimination should be undisturbed by this case-by-case framework. And if fees for faster connections have been paid by an end user or consumer, ISPs who behave neutrally are acting in ways that meet consumer expectations of a continually evolving, ever-faster Internet speed environment. ARL does not object to non-commercial entities paying more for faster connections to the Internet. This does not mean that ISPs should be permitted to leverage higher payments from ARL Members for unproven, QoS schemes that break the end-to-end principle upon which the Internet was based.

V. STRONG NETWORK NEUTRALITY RULES SHOULD PROTECT LIBRARY PATRON FIRST AMENDMENT RIGHTS.

Libraries have been repositories of culture, learning, scholarship and public engagement—from the time when the great library at Alexandria was built to Thomas Jefferson replenishing the Library of Congress when it was destroyed. Libraries have long supported and advocated for robust First Amendment rights, in keeping with their missions to uphold intellectual freedom, provide free and equal access to information, facilitate teaching and learning, and promote new creation and advancement. Libraries are often uniquely positioned to assert the First Amendment rights of their patrons, to guard against scrutiny of the behavior of their users who might change or curtail their reading or research habits.²² Given ARL's unique

²² See Brief of American Booksellers Association, American Library Association, Association of Research Libraries, Freedom to Read Foundation, and International Federation of Library Associations and Institutions, *Wikimedia Foundation v. National Security Agency*, No. 1:15-cv-00662-TSE (D. Md. 2015).

position, we are well-placed to advocate for the First Amendment rights of non-commercial speakers both at member institutions and consumers who access the Internet at our libraries.

The Commission should concern itself with the free speech rights of consumers, and not exclusively the rights of BIAS providers. Defining an ISP as a common carrier properly prioritizes the speech interests of consumers over those of the ISP.²³ Conversely, a move to a Title I theory should not de-prioritize the speech interests of consumers by promoting those of the entity charged with carrying the protected speech, the ISP.

The 2015 rules adopted by the FCC do not curtail broadband providers' free speech rights. When engaged in providing BIAS, broadband providers are not speakers, but instead serve as conduits for the speech of others. ARL agrees with the 2015 Order that the manner in which broadband providers operate their networks does not rise to the level of speech protected by the First Amendment. As telecommunications services, broadband Internet access services, by definition, involve transmission of network users' speech without change in form or content, so open Internet rules do not implicate providers' free speech rights.

The Commission set the correct context for this discussion in its prior Orders. The Commission has held previously that its Open Internet policy serves economic and noneconomic interests including free speech values.²⁴ Furthermore, the FCC has repeatedly recognized the benefits of diverse individual voices, and the reality that gatekeeper control of one of the most critical means of societal discourse threatens such diversity.²⁵ Against this backdrop, the NPRM does an incomplete job of quantifying the benefits of the Internet as a mode of free expression.

²³ 2015 Order at para. 544.

²⁴ 2015 Order at para. 544.

²⁵ See 47 U.S.C. § 257(b) (“[T]he Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”); see also Strategic Plan of the FCC, FCC, <https://www.fcc.gov/general/strategicplan-fcc> (last visited July 11, 2017).

The NPRM recognizes the presence of societal costs, but it does not propose a method by which they can be measured, especially as to a value like freedom of expression. ARL is concerned about this omission and agrees that “the Commission is attempting to obtain the unattainable” by not ascribing a more specific value to the First Amendment speech interests of consumers utilizing an Open Internet particularly given the Libraries mission of increasing consumer access to information resources found on the Internet.

If the FCC defines BIAS as something other than a telecommunications service, the FCC risks unsettling the First Amendment guarantees of both the transmission platforms and consumers who use BIAS to transmit protected speech. Presumably, the logic of an information services classification suggests that ISPs who provide Internet access can elect to provide a ‘curated’ Internet experience that fall outside of the mass market, standardized definition of a common carrier found in the 2015 Order. Such an Internet access service which does not provide access to all IP endpoints involves a type of editorial decision-making that, presumably, converts ISP into something other than neutral transmission companies unprotected by the First Amendment into speakers protected by the First Amendment.²⁶ The FCC’s definitional flip-flop leads to an absurd result: ISPs who have held themselves out for decades as neutral carriers of consumer messages are magically converted into speakers themselves. Worse, the transfer of First Amendment rights to ISPs provides them with a legal right to snuff out the speech of consumers under the banner of ‘editorial’ decision-making. This outcome is upside down. The Commission should make clear that whatever editorial decision-making resides with an information service provider who provides access to the Internet, it does not extend to arbitrarily blocking protected consumer speech. The current debate about whether social media platforms discriminate against conservative viewpoints is a vital one; but it should exist outside the issues

²⁶ See *Turner Broadcasting v. Federal Communications Commission*, [512 U.S. 622](#) (1994).

presented in this docket. The Commission should resist parties' invitation to become the arbiter of viewpoint discrimination claims. Instead, it should remain focused on defining transmission platforms outside of the zone protected by the First Amendment and at the same time, emphasize the variety of consumers that use the Internet to transmit protected speech.

The core mission of research libraries is the dissemination of information. The examples ARL has provided above describe the creation of powerful databases that users access to further their research purposes. Library patrons typically access these databases through BIAS connections. In this way, BIAS connections are not only mediums for speakers but they are also important to listeners—for those members of the community who are on the receiving end of disseminated information. The First Amendment protects both—speakers and listeners—because both are important to the growth and functioning of an informed, democratic society. Regardless of its reclassification decision, the Commission has a rare opportunity to reaffirm the free speech rights of citizens to send and receive messages of their choosing over the most important information resource of our time, the Internet.

VI. CONCLUSION

ARL has been a long-standing participant in the FCC's Network Neutrality proceedings over the years and has approached these Reply Comments in a non-ideological and practical manner. We urge the Commission to look closely at the Joint Principles referred to above and adopt rules consistent with those principles. The Commission can do so without materially harming the investment incentives of ISPs and be rightly proud that it has adopted a policy that puts consumers—instead of any particular industry segment—at the center of its approach to restoring Internet freedom.

Respectfully submitted,

A handwritten signature in cursive script, reading "Krista L. Cox", is positioned above a horizontal line.

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