

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Restoring Internet Freedom)	WC Docket No. 17-108
)	
)	
Bridging the Digital Divide for Low Income Consumers)	WC Docket No. 17-287
)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	

REPLY COMMENTS OF FREE PRESS

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Executive Summary

Public interest commenters, including public safety officials, overwhelmingly agreed with Free Press’s assessment that the Commission’s misguided repeal of Net Neutrality and its authority over broadband internet access service (“BIAS”) harms the Lifeline program, pole attachment regulation, and public safety. These commenters also overwhelmingly agreed that the best remedy for such harms would be for the Commission to once again correctly classify broadband as a Title II service protected by strong open internet rules. While a few commenters proposed alternative legal theories, none of these suggestions are likely to withstand judicial scrutiny or serve the Commission’s statutory mandates. Many industry commenters proposed that the Commission rely on alternative authority over some broadband services through commingled voice and broadband facilities, but this is as short-sighted as it is disingenuous.

Commenters opposed to restoring Title II authority largely fall into two camps: (1) Broadband industry lobbyists who ignore the court’s decision in *Mozilla v. FCC* by insisting that the Commission has already sufficiently addressed the remand and reiterating the same arguments that already failed the Commission in court, and (2) ideological pro-deregulation groups that by and large fail to address the specific remand areas, and instead proclaim their perpetual and hardly germane distaste for Net Neutrality and Title II. Both camps rely heavily on baseless claims that the *RIF Order*¹ has somehow spurred broadband investment, which they argue must outweigh any other considerations. But these investment claims are spurious and devoid of evidentiary support.

¹ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) (“*RIF Order*”).

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I. Public Interest Commenters Agree the Best Remedy on Remand is to Restore Title II Authority Over Broadband Internet Access Service.

In their initial comments on the remand, numerous public interest commenters emphasized the damaging consequences that could materialize and that have already resulted from the Commission abdication of its Title II authority in the *RIF Order*. The California Public Utilities Commission echoed the court when it noted that “broadband’s eligibility for Lifeline subsidies turns on its common-carrier status.”² Greenlining argued that the Commission is statutorily required to support broadband through the Lifeline program in order to satisfy its universal service obligations, but rightly said that duty is in “irreconcilable conflict” with the *RIF Order*’s abandonment of authority.³ Others expressed parallel concerns that the *RIF Order* has summarily removed BIAS-only providers from the Commission’s federal pole attachment regulatory regime, creating “a competitive bottleneck limiting new network entrants.”⁴ These concerns were unsurprisingly prominent for BIAS-only competitors,⁵ but of course should be a concern for anyone interested in promoting broadband deployment and choice.

A majority of commenters who addressed the impact on Lifeline argued that restoring BIAS to its Title II classification is the best, if not the only, way to ensure support for broadband.

² Comments of the California Public Utilities Commission, WC Docket Nos. 17-108, 17-287, 11-42, at 16 (filed Apr. 20, 2020) (“CPUC Comments”). Unless otherwise indicated, all citations in this Reply to other parties’ comments are to initial comments filed in these same three dockets on the April 20, 2020 due date.

³ Comments of the Greenlining Institute, at 3-5.

⁴ CPUC Comments at 13; *see also generally* Comments of the Electronic Frontier Foundation (“EFF Comments”); Comments of Public Knowledge, Access Humboldt, Access Now, and National Hispanic Media Coalition (“PK *et al.* Comments”).

⁵ *See* Comments of INCOMPAS (“INCOMPAS Comments”); and Comments of Google Fiber Inc.

AARP clearly stated that “[t]o support the Lifeline program, broadband must be a Title II service.”⁶ The National Consumer Law Center and the United Church of Christ, OC, Inc. made plain that “the clearest path for Lifeline to support BIAS would be to classify BIAS as a Title II service.”⁷ The National Association of Regulatory Utility Commissioners urged the Commission to “re-examine its reclassification of BIAS service in light of the potential ramifications for the federal Lifeline program.”⁸ New America’s Open Technology Institute and Common Cause articulated what the court’s remand already made clear: “The Commission’s 2015 framework under Title II provides the most legal certainty to fully support broadband services in Lifeline.”⁹

Meanwhile, commenters opposing reclassification of BIAS as a Title II service by and large failed to even consider the ramifications for Lifeline. A few openly indicated their opposition to the Lifeline program’s mere existence.¹⁰ Those who ignore the program or advocate for its removal are not the voices the Commission should heed if it is truly following the court’s order and seeking advice on how to support it, not whether to do so at all.

Regarding public safety communications, public interest commenters and especially public safety practitioners emphasized the importance of the nondiscrimination protections eviscerated by the *RIF Order*, and criticized the Commission’s overly narrow perspective on

⁶ Comments of AARP at 7.

⁷ Comments of the National Consumer Law Center and the United Church of Christ, OC, Inc. at 6.

⁸ Comments of the National Association of Regulatory Utility Commissioners at 11.

⁹ Comments of New America’s Open Technology Institute and Common Cause at 7 (“OTI & Common Cause Comments”).

¹⁰ Comments of Americans for Tax Reform and Digital Liberty at 4; Comments of the American Consumer Institute at 6 (“ACI Comments”).

what constitutes public safety communications.¹¹ Contrary to the Commission’s bizarre suggestion in the remand *Public Notice*¹² that public safety officials don’t utilize mass market BIAS, the Association of Public-Safety Communications Officials (“APCO”) International pointed out that “[p]ublic safety agencies commonly rely on retail broadband services for a variety of public safety applications,” including “accessing various databases, sharing data between [Emergency Communications Centers] and emergency responders, translating communications with 9-1-1 callers and patients in the field, streaming video into 9-1-1 and emergency operations centers, and accessing critical information about a 9-1-1 caller (such as improved location information) that is not delivered through the traditional 9-1-1 network.”¹³

As APCO and other commenters showed, the Commission’s public safety obligation is not satisfied by merely protecting the networks utilized exclusively by public safety officials themselves, or even those used by first responders to communicate with the general public. Especially during the COVID-19 pandemic, public safety also depends on people communicating with healthcare providers, online grocery delivery services, and other essential businesses, or with one another, typically using mass market communications.¹⁴ Social media

¹¹ Comments of the County of Santa Clara, Santa Clara County Central Fire Protection District, and the City of Los Angeles at 4-5 (“Santa Clara Comments”) at 4-5; INCOMPAS Comments at 10.

¹² *Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit’s Mozilla Decision*, WC Docket Nos. 17-108, 17-287, 11-42, Public Notice, 35 FCC Rcd 1446 (2020) (“*Public Notice*”).

¹³ Comments of APCO International at 2.

¹⁴ PK *et al.* Comments at 9-10 (“During a crisis such as the one we are currently living through, it’s not only important that public safety agencies have access to nondiscriminatory communications services that are guaranteed to work when they need to. Everyone needs to access public safety information, and might need to call for first responders.”)

sites are increasingly important for people to share on-the-ground emergency information with each other too, and for official entities to gather situational awareness, meaning that BIAS is indeed an important vector for transmitting all sorts of information impacting public health.¹⁵

Precisely zero local public safety entities filed in this docket to express their appreciation for the Pai Commission's greenlighting paid prioritization arrangements or any other discriminatory conduct made possible by the *RIF Order*. Since public safety communications are properly understood to be extremely broad, encompassing government channels and numerous forms of mass market public communications alike, it would be impossible for an internet service provider to isolate and identify, let alone universally prioritize, all public safety communications – or by the same token, to ensure that no public safety communications are degraded by other prioritization arrangements.¹⁶ In fact, public safety officials expressed universal concern that paid prioritization would be used to degrade public safety communications, which, while critical for health and well-being, should not and could not be made to compete with for-profit services.¹⁷ Any such degradation is particularly concerning considering that it is extremely difficult, if not impossible, for public safety officials to identify when such degradation is taking place.¹⁸ This inherent technological opacity severely undercuts the utility of transparency rules and *ex post* regulation by the Federal Trade Commission or any other agency. That is yet another reason public safety officials joined the chorus of public

¹⁵ Comments of the Broadband Institute of California @ Santa Clara University School of Law at 21-30.

¹⁶ Santa Clara Comments at 4-5.

¹⁷ CPUC Comments at 6, 8.

¹⁸ Santa Clara Comments at 11.

interest commenters calling for strong nondiscrimination protections like those guaranteed under Title II and the *Open Internet Order*.¹⁹

Supporters of the *RIF Order*, on the other hand, were hardly unified in their assessments of its impacts on public safety. Some claimed that the *RIF Order* made it possible for first responder traffic to be prioritized, providing consumer benefits previously blocked by the *Open Internet Order*.²⁰ Others argued that the *Open Internet Order* already allowed for public safety prioritization,²¹ which is the correct view in light of the fact that the *Open Internet Order* only banned prioritization in exchange for payment from third parties or to benefit an ISP's affiliated video or voice offers, not prioritization of first responders' communications during times of emergency.²²

But whatever the 2015 rules may have allowed, what matters now is the impact of the repeal on public safety going forward. And even there, repeal supporters on the same team simply can't agree. Comcast insists that neither it nor other ISPs engage in paid or affiliate prioritization, and thus the *RIF Order* allowing it has no impact on public safety.²³ Yet others call

¹⁹ OTI & Common Cause Comments at 3; *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report & Order On Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015).

²⁰ ACI Comments at 2.

²¹ Comments of High Tech Forum at 3.

²² See Matthew F. Wood, Free Press and Free Press Action, "From Core to Edge: Perspective on Internet Prioritization," before the Committee on Energy & Commerce, Subcommittee on Communications & Technology, at 1 (Apr. 17, 2018), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Wood-CAT-Hrg-on-From-Core-to-Edge-Perspective-on-Internet-Prioritization-2018-04-17.pdf>.

²³ Comments of Comcast Corporation at 6.

such commitments to treat all traffic equally “unreasonable,”²⁴ while the cable lobbying association to which Comcast belongs even claims that the *RIF Order* will usher in a new wave of beneficial prioritization.²⁵ In any case, for all of the uncertainty that ISPs wrongly claimed in the wake of the *Open Internet Order*, look at the uncertainty they now promise to public safety officials and the public at large: they swear they won’t try to charge for prioritization of vital health and safety messages, but they sure do love “the increased flexibility afforded by the *RIF Order*”²⁶ just in case they figure out a way to make a buck.

This inconsistency is indicative of these commenters’ greatest failing: They arrived at their conclusion before considering the arguments. They support the *RIF Order* and thus retroactively justify its impacts on public safety – no matter how inconsistent their own justifications are. Such backwards and circular reasoning flies in the face of the court’s instructions for the Commission to reconsider the arguments and evidence that it previously failed to adequately analyze in its rulemaking.

Led by a chairman who once dismissed the “raw number” of comments espousing a particular viewpoint as less relevant than the substantive nature of those comments, the Commission would be wise to listen to the substance of better answers and to ignore the loud but poorly-reasoned comments of ISPs moving in a bloc. Instead, it should particularly heed the wisdom of public safety experts, united in their comprehensive assessment of both needs and solutions, despite the pressure these experts and agencies faced when filing comments on a

²⁴ Comments of Public Safety Broadband Technology Association at 4.

²⁵ Comments of NCTA – The Internet & Television Association at 8-9 (“NCTA Comments”).

²⁶ *Id.* at 9.

limited timeline during a global emergency and when most of their resources were properly directed towards securing public health.

II. Alternative Legal Theories That Rest on Providing Support or Retaining Authority Only for Commingled Services Fail to Live Up to the Commission's Promises.

Industry commenters pushed for minimal if any changes in light of the remand, justifying this inaction with the same tired arguments that already failed the Commission in court. The most frequently repeated of these claims was that the Commission could continue supporting broadband with Lifeline and continue regulating broadband pole attachments whenever broadband service is commingled with traditional voice or other telecommunications services. While these commenters openly admitted that this status quo would leave the Commission unable to support or protect BIAS-only providers, industry incumbents insisted this would be immaterial because so few BIAS-only providers currently exist. That's a very convenient tautology for entrenched, legacy providers – the Commission need not worry about continuing to starve new entrants of support and protection because they've already been starved and failed to take root as a result.

This argument is blatantly anti-competitive and anti-innovation. New technologies and innovative business models are not less important because they are not as widespread – indeed, one could argue that in a market like broadband where households are lucky to have any choice at all between providers, supporting these burgeoning competitors and new entrants is especially crucial. Incumbents that have worked so hard to reduce competition can't seriously point to the fruit of their lobbying labors and wonder why new business models and new entrants have been slow to materialize, only to then say this proves they don't need universal service support or access to rights-of-way. Furthermore, it is deeply hypocritical of internet service providers such

as Charter Communications to suddenly abandon their long histories of advocating for elimination of every possible marginal regulatory cost and now refer to the cost of an internet provider offering a voice service merely to contort itself into a different regulatory classification as “trivial.”²⁷

NCTA went so far as to argue that “retreating from the Commission’s light-touch regulatory regime would not be justified even if there were evidence that a smattering of broadband-only providers have been prevented from entering and competing in the marketplace.”²⁸ The question is not simply a matter of what providers and services households subscribe to today, but what services they may subscribe to tomorrow. This is particularly true in light of the Commission’s obligation to ensure that universal service supports an evolving level of communications services.

Relying on the commingled services logic for authority is especially disingenuous in the context of the Lifeline program, where the Commission has elected to reduce then eliminate Lifeline support for traditional voice service over time. As one filing from a group of Concerned Berkeley Law Students succinctly put it, “[i]t is difficult to make the argument that subsidizing broadband is ancillary to subsidizing voice services if the latter is being phased out.”²⁹

Other commenters issued well-intentioned calls for utilizing direct or ancillary authority under 254(e) to support the critical goal of maintaining and extending Lifeline support to broadband, relying on the Tenth Circuit’s ruling upholding a distinction between USF-supported

²⁷ Comments of Charter Communications, Inc. at 6.

²⁸ NCTA Comments at 11.

²⁹ Comments of Concerned Berkeley Law Students at 10.

“facilities” and “services” in relation to the Connect America Fund. However, this theory ignores key differences between the programs, namely that Lifeline’s primary purpose is to support adoption rather than deployment,³⁰ and is at odds with the D.C. Circuit’s interpretation that reclassification “facially disqualifies broadband from inclusion in the Lifeline program.”³¹ While we strongly empathize with the desire to find an immediate solution to the devastating threats posed by the Commission’s reclassification order, the fact remains that classifying BIAS as a Title II service remains the only certain legal foundation for a truly modernized Lifeline program.

III. Industry Commenters’ Investment Claims Don’t Hold Water.

With respect to every remand issue area, but particularly regarding public safety, industry commenters and other Title II detractors resorted to the thoroughly debunked claim that the *RIF Order* actually benefited these interests by increasing broadband investment and deployment. The once-more utterly circular logic here supposes that the repeal really benefited public safety because the repeal benefitted public safety – and all merely because classifying BIAS providers as Title II common carriers would and did somehow hamper their capital investments, so without the *RIF Order*’s reclassification the public would be forced to rely on less robust infrastructure.

This claim is steeped in logical fallacy and utterly lacking any evidentiary basis. Free Press has demonstrated the error of these assumptions over³² and over³³ and over³⁴ again, and we

³⁰ *Id.* at 6-7.

³¹ *Mozilla v. FCC*, 940 F. 3d. at 69.

³² S. Derek Turner, *Finding the Bottom Line: The Truth About Network Neutrality & Investment*, Free Press (October 2009) https://www.freepress.net/sites/default/files/legacy-policy/Finding_the_Bottom_Line_The_Truth_About_NN_and_Investment.pdf.

will continue to do so for as long as is necessary. In fact, our latest comprehensive update to be filed separately in the *RIF* docket and other relevant proceedings this week shows once again the truth that neither Title II classification nor its repeal materially impacted longstanding and continuing investment trends.

First, there is no evidence that classifying broadband as a Title II service had any detrimental impact on investment. Aggregate capital investment by publicly-traded ISPs was nearly 8 percent higher during 2015-2016, the two years after adoption of the Commission's *Open Internet Order*, than it was in the two years prior to that.³⁵ Far more meaningful than this aggregate metric is the fact that any increases and decreases in capital spending by specific providers were explained by each of these individual firms as part of the typical peaks and valleys of the investment cycle. Any declines in investment were the result of completing major upgrade projects as planned or even ahead of schedule.³⁶ No providers cited Title II or any other

³³ S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era*, Free Press (May 2017) (“*It's Working*”) <https://www.freepress.net/sites/default/files/2018-06/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>.

³⁴ Free Press *Ex Parte*, WC Docket No. 17-108 (filed Dec. 11, 2017).

³⁵ Free Press' analysis of publicly-traded ISP's U.S. capital expenditures indicates that on an inflation-adjusted basis, aggregate industry capital expenditures were approximately \$153 billion during 2013-2014 and approximately \$165 billion during 2015-2016. (These aggregate expenditures were approximately \$140 billion and \$154 billion respectively on a nominal basis.) These figures are based on publicly-traded companies' most-recent SEC filings, which include historical revisions at certain companies like Sprint, and are therefore slightly different from prior Free Press analysis. *See generally It's Working*, Part I.

³⁶ *See generally id.*, Part III.

Commission action as a factor in their investment decisions, and many executives at major ISPs told investors that there were no negative impacts from Title II.³⁷

Second, there is no evidence that reclassifying broadband as a Title I service under the *RIF Order* had any beneficial impact on investment. Chairman Ajit Pai has variously taken credit for increases in fixed speeds as measured by Ookla, supposed increases in infrastructure investment, what he calls a record number of newly-connected homes, and record-setting fiber deployment; but on each point the chairman's grandstanding is based on false data, false interpretation, or false causation. For instance, as our forthcoming update explains in greater detail, Ookla data indeed shows average downstream speeds increasing by 136 percent since the beginning of the Trump administration, but in the three years prior (including under Title II), the same data shows that speeds increased by 169 percent. Aggregate industry investment at publicly-traded ISPs has actually declined nearly five percent during 2018-2019. Broadband adoption is actually slowing as we reach the top of an S-curve and the market becomes more saturated, so the chairman's supposed "record" of "newly connected" homes is as vague a claim as it is unlikely.

And virtually all the record-setting fiber deployment the chairman is so keen to take credit for is the result of providers carrying out the network investment plans they made prior to his chairmanship – during 2015-2016, when Title II was still the law of the land. Approximately 92 percent of fiber deployments made under Chairman Pai's tenure came from projects that the nation's top incumbent phone carriers announced during 2015-2016, and the remaining percentage can be chalked up to the "natural" greenfield rate of growth driven by new home

³⁷ *Id.* at 10.

construction. Investment and deployment rates have continued exactly as one would expect, as a continuation of the trends observed under the previous Commission. Consequently, all available evidence demonstrates that the *RIF Order* had no observable impact on the growth in U.S. fiber deployment, let alone a positive impact significant enough to outweigh the massive threats reclassification poses to the stability of the Lifeline broadband program, an equitable pole attachment regime, and public safety.

Conclusion

The Commission cannot ignore the urgent and consistent demonstration of serious harms repeated by public interest organizations, communities, and public safety entities, all in the name of upholding the fact-free ideological narrative spun by industry lobbyists. The *RIF Order* has set the Lifeline program, pole attachment regulation, and public safety communications on an unstable and dangerous path. In order to fulfill its statutory duties of ensuring universal service, promoting competition, and protecting public safety, the Commission must return to the strong legal framework laid out in both the *Open Internet Order* and the *2016 Lifeline Modernization Order*,³⁸ based firmly in Title II.

Respectfully Submitted,

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³⁸ *Lifeline and Link Up Reform and Modernization*, WC Dockets Nos. 11-42, 09-197, 10-90, Third Report & Order, Further Report & Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016).

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