

October 20, 2020

Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: Notice of Written *Ex Parte* Presentation, WC Docket Nos. 17-108, 17-287, 11-42

Dear Ms. Dortch:

In its proposed *Order on Remand*¹ regarding the egregiously misnamed *Restoring Internet Freedom Order*,² the Commission has come to a series of staggeringly wrong conclusions which are as indefensible in terms of their public policy impacts as they are in terms of their analytical justification.

The D.C. Circuit last year upheld the *RIF Order*'s repeal of the Open Internet rules and reclassification of broadband as an information service.³ Yet the same judges who ruled they were bound to follow Supreme Court precedent on deference to the agency for this statutory interpretation question acknowledged that the Commission's typically wide berth in such matters "cannot be invoked to sustain rules fundamentally disconnected from the factual landscape the agency is tasked with regulating."⁴ Those judges also noted that "critical aspects of broadband Internet technology and marketing . . . have drastically changed"⁵ since the Commission first argued more than fifteen years ago to treat broadband as something other than an essential telecommunications service. And they criticized the "worrisome" results-oriented reasoning suggesting that "the Commission has drifted far beyond the statutory design and exceeded its interpretive discretion,"⁶ unflatteringly but rightly describing the *RIF Order* as "unhinged from the realities of modern broadband service."⁷

That kind of "praise" was the good news for the Commission. The *Mozilla* court upheld parts of the decision despite these flaws, but rejected outright the Commission's claim to preempt all state and federal laws designed to fill the vacuum created by the repeal.⁸

¹ *In the Matter of Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 17-108, 17-287, 11-42, Order on Remand, FCC CIRC2010-01 (rel. Oct. 6, 2020) ("*Order on Remand*").

² *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) ("*RIF Order*").

³ *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir 2019).

⁴ *Id.* at 94 (Millett, J., concurring) (emphasis added).

⁵ *Id.* at 95 (Wilkins, J., concurring).

⁶ *Id.* at 93 (Millett, J., concurring).

⁷ *Id.* at 87.

⁸ *See, e.g., id.* at 74.

Most importantly for this remand proceeding, the court also handed significant portions of the *RIF Order* back to the agency. It found that the Pai majority had utterly failed to explain or even explore the impact of the agency’s Net Neutrality repeal and reclassification decisions on three critical areas: public safety, competitive broadband providers’ ability to deploy their networks, and the use of Lifeline universal service funding for broadband.

Yet the circulated *Order on Remand* draft defies the court’s instruction to take a more serious look at these three topics, and essentially says that the reasons found wanting in the *RIF Order* were good enough all along. Worse yet, the Commission’s fallback position in case its brilliant “told you so” defense falters, is to claim that any harms to public safety, competition, and Lifeline are worth it on balance⁹ – nothing more than collateral damage necessary to achieve all of the supposed tremendous investment and innovation benefits unleashed by Pai’s misadventure and misguided repeal.

The draft holds to this conclusion even as the Commission acknowledges that its investment claims are subject to “dispute,”¹⁰ to put it mildly. A more accurate label than disputed would be thoroughly debunked, both at the time the Pai Commission made these claims in 2017 and for the years since. There are now almost three years of contrary evidence after the initial repeal decision, all showing that broadband investment has not in fact increased as a result of the *RIF Order*.¹¹ Yet the Commission bizarrely insists that assessing the veracity of its own investment assertions is “outside the scope” of the remand, all while using these very same assertions and its own now-stale “predictive judgment[s]” to justify its abdication on public safety, competition, and Lifeline.¹²

This abdication of authority over the nation’s essential broadband telecommunications networks would have been wrong under any circumstances. It lands especially poorly during a global pandemic that has highlighted the searing importance of universal, affordable and open internet connectivity. That backdrop is essential to understanding the depth of the failing in the Commission’s throwing up its hands here, all in favor of magical broadband investment and performance improvements that are either false or falsely credited to this repeal decision.

We focus in the remainder of this letter on the harms of the Commission’s Lifeline authority decision, after first commenting briefly on the two other crucial remand topics as well.

⁹ See, e.g., *Order on Remand* ¶ 20 (“We find that neither our decision to return broadband Internet access service to its longstanding classification as an information service, nor our subsequent decision to eliminate the Internet conduct rules, is likely to adversely impact public safety. . . . To the contrary, our analysis reinforces our determinations made in the *Restoring Internet Freedom Order*, and we find that on balance, the light-touch approach we adopted . . . benefit[s] public safetyWe also find that even if there were some adverse impacts on public safety applications in particular cases – which we do not anticipate – the overwhelming benefits of Title I classification would still outweigh any potential harms.”).

¹⁰ See *id.* ¶ 111.

¹¹ See Comments of Free Press, GN Docket No. 20-269, at 6, 48-52 (Sept. 18, 2020) (“Free Press Section 706 Comments”).

¹² See *Order on Remand* ¶ 111.

The Proposed Public Safety Remand Decision Takes on Intolerable Risk in Trade for Illusory Broadband Investment Benefits.

As the *Mozilla* court aptly judged, aspects of the *RIF Order* were “arbitrary and capricious . . . because of the Commission’s failure to address an important and statutorily mandated consideration”: the repeal’s impact on public safety.¹³

Given not just the chance at but the responsibility for a re-do, the Commission still rejects the public safety arguments raised by the emergency responders and public safety officials, instead prioritizing the plainly less-expert analysis of internet service providers, and pinning all hopes for resolution of ultimate harms on transparency and public relations pressure to make internet providers behave better.¹⁴

This notion that transparency and shaming will discipline carriers is a vain hope. It is severely undercut by the fact that internet and cable providers have long been ranked among the most-hated and least-trusted of U.S. industries,¹⁵ as well as another recent study indicating that over 20 million households have unresolved complaints against their internet providers.¹⁶ When facing such complaints and customer outrage, internet providers remain comfortably profitable – unmoved by any real competitive threat or any public pressure not backed by agency enforcement.

In dealing with the most infamous incident highlighting the harms of the Commission’s abdication, note the delicious double-speak in the *Order on Remand*: the draft argues that the repeal had no impact on Verizon’s throttling of Santa Clara County firefighters because the broadband service at issue there was (likely) an enterprise service not subject to the 2015 rules; yet – wouldn’t you know it? – “even these non mass-market offerings benefit from the [FCC’s] light-touch approach, regulatory certainty, and likely investment incentives.”¹⁷ How convenient for Chairman Pai: the repealed rules didn’t even apply to some public safety-specific services in his view, yet the repeal still benefits these same offerings. That’d be a nice trick if the *RIF Order* truly had spurred increased deployment, and the benefits truly trickled down to enterprise customers, but Pai’s fiction is no better on this convoluted retelling than in original form.

¹³ *Mozilla*, 940 F.3d at 49.

¹⁴ *Order on Remand* ¶¶ 38-40.

¹⁵ See Betsy Isaacson, “Internet Service Providers Are Now The Most Hated Companies In U.S.,” *Huffpost* (May 22, 2013) (“[T]he American Customer Satisfaction Index released its annual report on ‘key industries that provide data, voice and video services to U.S. households.’ For the first time, ISPs were included in the report, along with regulars like the wireless and fixed-line telephone industries. ISPs received the lowest customer satisfaction ranking of any industry in America.”), https://www.huffpost.com/entry/internet-service-providers-hated_n_3320473; “The Most Hated Internet Providers In Every U.S. State,” *FairShake* (Mar. 11, 2020) (“ACSI’s 2018-2019 Telecommunications Report shows ISPs are still the companies that rank lowest in customer satisfaction out of all the industries it studies.”), <https://fairshake.com/consumer-guides/mapped-the-most-hated-internet-service-providers-in-every-u-s-state/>.

¹⁶ “Survey: Americans Don’t Feel Like They Can Get Justice When Wronged By Their ISP,” *FairShake* (Sept. 21, 2020), <https://fairshake.com/consumer-news/survey-americans-no-justice-against-isps/>.

¹⁷ *Order on Remand* ¶ 33.

In the end, other commenters including first responders themselves are better-placed than we are to explain the harms stemming from the Commission’s cavalier approach. Yet from a legal standpoint, the Commission cannot satisfy the remand by merely doubling-down on its original arguments rejected in *Mozilla*, relying solely on evidence-free speculation and self-serving industry comments about the improved broadband deployment and performance allegedly (but not actually) attributable to the repeal.

The *Order on Remand* Sacrifices Broadband Competition and Protects Incumbents Offering Legacy Services All to Serve Empty Ideology and Definitional Games.

As the draft *Order on Remand* explains, the court directed the Commission to “grapple with the lapse in legal safeguards” from reclassification, and specifically the elimination of Section 224 pole attachment rights for broadband providers that don’t offer a legacy telephone or cable TV service.¹⁸

Yet with regard to the loss of protections for such competitive broadband providers’ pole attachments and other facilities placed in rights-of-way, the Commission refuses to grapple at all and simply taps out of the ring. The circulated draft basically gives up, and admits that the court was right about this loss of safeguards for competitive service providers’ deployment plans (in another rich irony for a Commission so falsely and foolishly proud of its supposed pro-deployment stance). The *Order on Remand* acknowledges that its legal theory precludes broadband-only providers from such protections, which in reality will have serious and harmful implications for the future of broadband provision and competition, but which the Commission brushes off without sufficient analysis.¹⁹

Perhaps the most glib and condescending conclusion here, in a draft order rife with them, is the Commission’s smug proclamation that the loss of protections is actually good for competitive providers facing bottlenecks and stalling by the incumbent phone and cable companies against whom they hope to compete. That’s because, in the absence of applicable law, broadband-only providers “have the regulatory flexibility to enter into innovative and solution-oriented pole attachment agreements with pole owners.”²⁰ It may be easy for this Commission to conclude that stripping away parties’ rights and legal recourse is good, with a warped, tough-love and “necessity is the mother of invention” kind of mindset, but notably the competitive providers who’ve lost these rights tend to take a different view than the Commission that took them away.

Unfortunately, however, the Commission’s gambling with other people’s rights doesn’t stop with this surrender on competition, and extends to its proposed Lifeline decision as well.

¹⁸ *Id.* ¶ 68 (quoting *Mozilla*, 940 F.3d at 67).

¹⁹ *Id.* ¶ 71.

²⁰ *Id.* ¶ 74.

Tying Lifeline Support for Broadband to Carriers' Continued Provision of Voice Service is Legally Unsound, Backwards Looking, and Detrimental to Closing the Digital Divide.

The Commission's decision to maintain its tortured legal framework, relying on the provision of voice service to support broadband service in the Lifeline program, is particularly egregious. And it amounts to an outright attack on a modernized Lifeline.

Even if the Commission's legal reasoning for Title I classification were sound, and it isn't; and even if the Commission's arguments about the investment benefits from that classification were true, and they aren't; even then, the choice to condition Lifeline support for broadband service on an ETC designation that excludes broadband-only providers would be a significant drawback.

Yet that is the choice the Commission makes. It sticks with a classification decision that wrongly labels broadband as something other than a "telecommunications service" eligible for support, and thus suggests that Lifeline subscribers may be able to get a standalone broadband service if they like, but only if the carrier providing it also provides more traditional telephony services too. The draft thus gleefully ties broadband support to any still-eligible carriers' continuance of legacy voice and other older services that the Commission now disfavors. This type of convoluted nonsense is exactly as ridiculous as it sounds, and whether or not it might convince some court other than the *Mozilla* panel, it is completely unnecessary too. It is designed solely to avoid supposed broadband investment harms that simply do not exist at all, much less result from a straightforward statutory interpretation properly treating broadband as an essential telecommunications service.

In the nearly four-decade history of the Lifeline program, participants have benefited tremendously from moves to increase competition by expanding the number of eligible Lifeline providers and services.²¹ The *2016 Lifeline Modernization Order* sought to continue this positive trend by directly supporting broadband and inviting broadband-only providers into the program.²² Landing on a legal theory that locks any such providers out of the Lifeline program severely limits its potential for expansion, competition, and modernization.

²¹ Expanding the Lifeline program to wireless beginning in 2008 led to significant increases in Lifeline enrollment – far greater even than the increases seen when the Commission expanded Lifeline to all states in 1998. Between 2008 and 2014, program participation rates increased from just 21 percent to 34 percent. The lesson here is that the Lifeline program can only maximize its utility to users, and thus its effectiveness, if it is designed to be flexible and if it enables users to decide what telecommunications services are best suited to their individual needs. Even among one type of service, households will perceive different utilities for different plans and providers. Consequently, allowing the Lifeline subsidy to be applied to as many communications services and providers as possible increases the utility for all participants. *See generally* Comments of Free Press, WC Docket Nos. 11-42, 09-197, 10-90, 06-122 (Aug. 31, 2015).

²² *See Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3926, ¶ 220 (2016) ("*2016 Lifeline Modernization Order*") ("We expect that these reforms will unleash increased competition in the Lifeline marketplace, providing more choice and better service for the consumers benefitting from the program.").

More importantly, however, the legal Jenga tower this Commission has constructed to continue offering Lifeline support for broadband service while explicitly removing broadband as a supported service simply is not workable for a subsidy-only policy. The Commission’s logic is that it can continue to support Lifeline broadband offerings over voice-capable networks, because that “compensates providers for some of their costs so they can offer discounted service to low-income Americans, thus incentivizing ETCs to provision, maintain, and upgrade facilities and services where low-income consumers live.”²³ But unlike the High Cost Fund program at issue in the Tenth Circuit decision on which the Commission relies so heavily, Lifeline is not designed to incentivize the provision of service. It is explicitly designed to support affordability for low-income households. While supporting deployment and network expansion may be an ancillary positive outcome of Lifeline, it is not and should not be a primary goal of the program.

To predicate the support of a consumer subsidy on infrastructure support perverts the purpose of the program – in a way made particularly unsustainable by the planned phasedown of voice support. The Commission denies this looming problem by insisting that Lifeline voice support will not be completely eradicated, but will simply be severely diminished. Yet this misses the point that tying broadband support to voice at all is wrong and counter-productive

The purpose of the *2016 Lifeline Modernization Order* was to equip the Lifeline program for a future in which the need and desire for broadband service is likely to outpace the need and desire for traditional voice telephony.²⁴ Indeed, the universal service statute makes plain that Congress anticipated this need to support a world beyond voice service, where multiple facilities such as cable and wireless infrastructure would compete with LEC facilities to carry an “evolving level” of communications services.²⁵ What Congress didn’t anticipate was a Commission intent on playing word games that would render the entire regulatory authority useless for any consumer service beyond voice telephony, shackling a modernized broadband subsidy to support for a service the Commission has decided to transition away from.

To direct broadband subsidies to users through the Lifeline program, which aims to make critical communications services more affordable for low-income households, the Commission cannot rely on a legal fiction that repositions Lifeline as a program to promote network deployment, particularly not for the provision of a service (legacy voice) that the Commission characterizes as of declining importance. Making broadband support the centerpiece of a modernized Lifeline program, as the Commission has suggested it wants to do, requires including broadband internet access as a supported service under section 254(c), and that in turn requires correctly reclassifying broadband as a Title II telecommunications service.

²³ See *Order on Remand* ¶ 93.

²⁴ See *2016 Lifeline Modernization Order* ¶ 52 (“To be sustainable and achieve our goals of providing low-income consumers with robust, affordable, and modern service offerings, a forward-looking Lifeline program must focus on broadband services. Therefore, based on the record before us, we conclude that it is necessary that going forward the Lifeline discount will no longer apply to a voice-only offering following an extended transition period, except as provided below in Census blocks with only one Lifeline provider.”).

²⁵ 47 U.S. Code § 254(c)(1).

The mess that results from taking a contrary tack is another example of the Commission utterly failing to prioritize the Lifeline program and fully support its universal service and affordability obligations more generally. The Commission argues in the public safety portion of its draft remand order that “[g]etting broadband to more Americans sooner and at lower prices can and will likely save lives.”²⁶ Yet when that draft order reaches this Lifeline section, it openly admits that should the item’s strained legal contortions on maintaining Lifeline support for broadband fail to convince the courts, this Commission would rather see broadband removed from the Lifeline program entirely than consider properly reclassifying.²⁷

These are not the words of an agency that believes it has found a workable legal framework to support critical modernization of a universal service program, but rather an agency trying to cover its tracks and retcon its justification for an ideological rather than evidentiary decision to scrap the legal authority Congress gave it.

There is no reason for the Commission to back itself into this corner. It could have simply followed Congress’s clearly articulated policy for supporting an evolving level of broadband telecommunications services, pursuing light-touch regulation not by misclassification but under the law in Title II and the Section 10 forbearance it offers. On that path, the Commission would have been able to achieve its oft-stated goals of promoting multimodal, facilities-based competition in all aspects of the communications market, including the Lifeline program. Instead, by cynically defining away its authority in an effort to gift internet service providers with supposed “regulatory relief,” the Commission has boxed itself into a position where it is prohibiting not promoting competition in the Lifeline program from innovative providers. Worse, it is shrugging its shoulders at the possibility of cutting broadband support entirely while miring Lifeline in the past instead of modernizing it.

This flagrant indifference fits with this Commission’s history of attacks on the Lifeline program; and during a global pandemic when families are more reliant on broadband connectivity than ever, this is even more despicably cruel. More than 77 million people in the U.S. lack an adequate home broadband connection.²⁸ Economic and racial gaps in broadband adoption persist, with only 48 percent of low-income households having a fixed broadband connection, while 13 million Black people, 18 million Latinx people, and 13 million Native Americans lack the adequate home connectivity they need to fully participate in today’s economy and education systems.²⁹

²⁶ See *Order on Remand* ¶ 67.

²⁷ See *id.* ¶ 102 (“[W]e would still reach the same conclusion on the classification of broadband Internet access service that we did in the *Restoring Internet Freedom Order* even if a court were to conclude that the Lifeline program could not support broadband Internet access service.”).

²⁸ See Free Press Section 706 Comments at 4.

²⁹ *Id.*

Study after study indicates that these layered digital divides are primarily driven by the lack of affordable broadband services³⁰ – and still, this Commission openly admits it would rather completely eliminate its universal service support mechanism for low-income families’ broadband options than reconsider its ideologically driven (but legally and technologically suspect) decision to strip broadband of its classification as a telecommunications service.

What deregulatory boon could be so valuable as to be worth leaving millions of poor families and people of color disconnected in the midst of a global health and economic crisis? According to this Commission, “a return to Title I classification better facilitates critical broadband investment through the removal of regulatory uncertainty and lower compliance burdens,” which “would outweigh the removal of broadband Internet access service from the Lifeline program.”³¹ But as Free Press has articulated to this Commission over and over again, there is zero evidence to support the nonsensical claim that improperly classifying broadband as a Title I service in any way promotes broadband investment. The reality is, broadband investment has declined since the *RIF Order*. Gains in basic broadband deployment have slowed since the removal of Title II, and 92 percent of the fiber deployments made since Pai became Chairman came from projects announced during the period of supposedly “burdensome” regulatory “uncertainty” under the prior Commission’s Title II framework.³²

Aggregate broadband investment increased under Title II, and has been in decline since its repeal.³³ Unlike Chairman Pai (and the mistaken draft *Order on Remand* that mischaracterizes our position on this question), we decline to assign causality for investment changes to this regulatory change. That’s in part because industry investment is inherently cyclical and driven by many more impactful factors than regulatory classification, and in part because aggregate investment numbers are a poor metric by which to assess industry health. Nonetheless, when we look at much more meaningful publicly-available investment and deployment data for individual firms, we continue to find zero evidence of any investment or deployment declines resulting from Title II, or any increases resulting from the Commission’s subsequent repeal.³⁴ These facts fly in the face of internet service providers’ frequent laments to the Commission, but track perfectly with ISPs’ legally-binding statements to investors, which repeatedly admit that the Commission’s classification decisions are not a factor in these firms’ investment decisions.

³⁰ John B. Horrigan, National Digital Inclusion Alliance, *Measuring the Gap* (Feb. 2020) (“Cost is the chief reason for not having broadband: Research that rests on the notion that reasons for non-adoption are multiple uniformly finds that cost is the most important reason that people do not have broadband. At least half of non-broadband subscribers cite cost (either monthly fee or access devices) as a reason they do not subscribe when offered multiple choices, with a plurality citing cost in follow-up questions about the most important reason for non-adoption.”), <https://www.digitalinclusion.org/measuring-the-gap/>.

³¹ See *Order on Remand* ¶ 102.

³² Free Press Section 706 Comments at 4-5.

³³ *Id.* at 6.

³⁴ See generally S. Derek Turner, Free Press, *It’s Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era* (May 2017); *id.* at 4 (“As we document in Part III, any increases or decreases in capital spending at each individual firm were clearly explained by each company before, during and after the FCC’s Open Internet vote. None of the firms that saw declines attributed them to any FCC action.”).

Additionally, the Commission persists in applying its biased and demonstrably flawed investment analysis to a single aspect of the overall communications ecosystem, ignoring the impact on markets that rely on access to an open internet. Demand for the content broadband carries begets demand for broadband, and strong protections for open internet access gives edge providers and content companies confidence to invest in their businesses. This is the “virtuous cycle” argument articulated by prior Commissions and upheld by the D.C. Circuit³⁵ – yet the current Commission never once attempts to investigate the impacts of its improper reclassification decision on investment by edge providers, and in turn how that will potentially impact future broadband demand and investment. In other words, the Pai Commission’s entire approach represents an inappropriate hyperfocus on a selective aspect of the communications marketplace – all under the guise of a disinterested authoritative regulatory analysis which it gets entirely wrong – and which becomes the tail wagging the entire communications policy dog.

As noted above, the Commission acknowledges that its investment claims are disputed. Yet, the remand order relies in almost every particular on a calculus that prioritizes these disputed investment claims over every other concern raised by public interest commenters, public safety officials, and even the court itself. Perhaps if the Commission had found some actual legal or evidentiary support for its conclusions, then the correction of its faulty investment claims would not be germane on remand – but it did not, and they are. Among its many missteps, this Commission admits it would trade away a program that provides critical life-and-death support for poor people trying to afford a broadband connection all for no concrete benefit, and all to further its baseless fever-dreams and fabrications on how deregulation dictates investment.

These grave errors represent a mishandling of the court’s remand and an abandonment of the Commission’s public interest obligations to promote competition, public safety, and universal service. To right these wrongs, we strongly urge the Commission to change course and return broadband to its proper classification under Title II.

Respectfully Submitted,

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³⁵ See *USTA v. FCC*, 825 F.3d 674, 694, 734 (D.C. Cir. 2016); *Verizon v. FCC*, 740 F.3d 623, 634, 644 (D.C. Cir. 2014).