

**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

PETITION FOR RECONSIDERATION OF PUBLIC KNOWLEDGE

Pursuant to Section 1.429¹ of the Federal Communications Commission’s (“Commission” or “FCC”) rules, Public Knowledge (“PK”) submits this Petition for Reconsideration of the Commission’s Order on Remand In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, and Lifeline and Link Up Reform and Modernization (“Remand Order”).² As PK and other petitioners have previously asserted, the Commission failed to follow proper procedure when it issued the Remand Order. After the *Mozilla* Court remanded the Commission’s Restoring Internet Freedom Order, the Commission issued a Public Notice that sought to “refresh” the record, instead of engaging in a formal Notice of Proposed Rulemaking (NPRM). By refusing to adopt an NPRM, the Commission failed to provide the public with the proper notice and comment opportunity necessary to address the *Mozilla* Court’s concerns. PK requests that the Commission withdraw

¹ 47 C.F.R. § 1.429.

² *In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, Order on Remand, WC Docket Nos. 17-108, 17-287, 11-42 (rel. Oct. 29, 2020) [hereinafter Remand Order].

its Remand Order and issue a proper NPRM to address the concerns remanded by the *Mozilla* Court.

ARGUMENT

On remand, the Commission failed to conduct a suitable rulemaking as required by the Administrative Procedures Act (“APA”). Contrary to the Commission’s own assertions, the *Mozilla* Court’s remand required more than simply “refreshing the record.” By failing to engage in proper rulemaking on remand, the Commission demonstrated that it did not have the “open mind”³ necessary to properly consider its statutory obligations as directed by the *Mozilla* Court. Additionally, by not engaging in proper rulemaking, the FCC can only offer post-hoc rationalization for the RIFO, which violates the Supreme Court’s mandate in *DHS v. Regents*.

I. THE REMAND ORDER DEMONSTRATES THAT THE FCC VIOLATED ITS OBLIGATION TO KEEP A SUFFICIENT OPEN MIND.

Throughout the remand process, the Commission failed to keep the open mind necessary to properly consider the impact of the RIFO on its statutory duties regarding public safety, pole attachments, and the Lifeline Program. As the DC Circuit held, “The opportunity for public comment must be a meaningful opportunity, and we have held an agency *must remain sufficiently open minded*.”⁴ Additionally, an “agency’s action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result.”⁵ Yet, despite the obligation to remain open minded, the FCC only sought to “refresh the record,” demonstrating that the Commission never intended to properly consider the issues remanded by the *Mozilla* Court.

³ See *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009) [hereinafter *Rural Cellular*].

⁴ *Id.* (citations omitted) (emphasis added).

⁵ *Food Marketing Institute v. ICC*, 587 F.2d 1285, 1290, 190 U.S. App. D.C. 388 (D.C. Cir. 1978).

The Commission’s intent to merely support a pre-ordained result is further evidenced in the Remand Order itself. In addressing PK, et al’s⁶ concerns regarding the public notice procedure adopted by the FCC, the Commission demonstrates that it did not approach the remand process with an open mind. The Commission claims that it was not required to offer a proper notice and comment rulemaking procedure because it does “not reconsider or alter any aspect of the regulatory approach adopted in the *Restoring Internet Freedom Order*”⁷. This justification only works if the FCC knew before it adopted the public notice process that it was not going to alter its course. The Commission’s logic demonstrates that it was not open at all, let alone sufficiently, to the possibility that properly considering its statutory obligations could lead to altering the rules it adopted in the RIFO.

The Commission’s failure to remain open-minded is also demonstrated by its own contradictory attempt to avoid the obligation. The Commission claims that the case law cited by PK et al regarding the Commission’s obligation to remain open-minded is irrelevant because the cases do not involve remand orders.⁸ At the same time, the Commission itself quotes a D.C. Circuit case that specifically applied the standard of needing to remain open to a remand order.⁹

⁶ Comments of Public Knowledge, Access Humboldt, Access Now, and National Hispanic Media Coalition, *In the matter of 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, DA Docket No. 20-168 (April 20, 2020). [hereinafter PK Comments].

⁷ Remand Order, *supra* note 2, at ¶ 105.

⁸ *Id.* at ¶ 111 (“For one, the cases cited by commenters expressing concern in this regard involved scenarios where the court was evaluating the adequacy of the original notice or opportunity for comment rather than where, as here, the agency is responding to a court’s remand to consider certain specific issues in evaluating whether they warrant a change in its prior decision.”).

⁹ The Commission quotes a footnote from *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, n.8 (D.C. Cir. 2013) that directly quotes *Food Marketing Institute v. ICC*, 587 F.2d 1285, 1290, 190 U.S. App. D.C. 388 (D.C. Cir. 1978). Remand Order, *supra* note 2 at n. 429.

The case cited by the Commission actually demonstrates that the Commission has a higher obligation to ensure that it genuinely reconsidered the issues remanded by the *Mozilla* Court. In *Food Marketing Institute v. ICC*, the D.C. Circuit held that an Interstate Commerce Commission (“ICC”) remand order was subject to a greater degree of scrutiny because (1) the original order “departed drastically” from an earlier ICC order, and (2) upon remand, the ICC “came to precisely the same conclusion.”¹⁰ The D.C. Circuit held that “we must recognize the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues.” This case is particularly applicable here, because the RIFO was a drastic change from the FCC’s previous position, and upon remand, the FCC came to the same conclusion. Therefore, the Commission actually has a higher obligation to ensure that it engages in a genuine reconsideration of the issues.

To meet this obligation, PK urges the Commission to withdraw the Remand Order and adopt a neutral NPRM to address the issues remanded to it by the *Mozilla* Court.

II. THE REMAND ORDER IS INSUFFICIENT BECAUSE AT BEST IT ONLY OFFERS A POST-HOC RATIONALIZATION FOR THE FCC’S RESTORING INTERNET FREEDOM ORDER.

By adopting a public notice instead of a formal NPRM, the Commission limited itself to only elaborating on reasons that the *Mozilla* court explicitly rejected. Any reasoning that the Commission offers outside of the original RIFO is post-hoc and impermissible without a proper rulemaking procedure under current Supreme Court precedence. In *DHS v. Regents*,¹¹ The Supreme Court found that DHS failed to adequately address significant relevant aspects of its decision to rescind the Deferred Action for Childhood Arrivals (“DACA”). Of relevance here,

¹⁰ *Food Marketing Institute*, 587 F.2d at 1290.

¹¹ *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

the federal district court for the District of Columbia initially found that the explanation for the Order offered by the Acting Secretary of DHS was arbitrary and capricious, and remanded the matter back to DHS for 90 days to provide a more reasoned explanation. Two months later, the new Secretary of DHS responded to the remand with a statement that she “declined to disturb” the rescission of the program, and instead offered several new policy arguments in justification of the previously issued decision.¹² The district court found the new reasons offered insufficient to support the rescission.¹³

On appeal, the Supreme Court refused to consider the justifications offered by DHS following the remand. The Court found that because the DHS had failed to conduct a suitable rulemaking as required by the APA, but merely chose to elaborate and expand the reasoning of the initial Order rescinding DACA, the new memorandum proffered after the remand was a “post hoc rationalization” which “cannot serve as a sufficient predicate for agency action.”¹⁴

This does not mean that an agency is constrained by the reasons initially given to reach the same result. The agency may provide new reasons and justifications for the same result, but to do so the agency must “deal with the problem afresh by taking *new* agency action.”¹⁵ This new action must “comply with the procedural requirements for new agency action.”¹⁶ To wit, a Notice of Proposed Rulemaking that complies with the requirement of giving members of the public adequate notice of the Commission’s intent to allow for meaningful comment, which actively considers reasonable alternatives that bear on the central questions posed by the Mozilla court on remand.

¹² *Id.* at 1904.

¹³ *Id.* at 1904-05.

¹⁴ *Id.* at 1909.

¹⁵ *Id.* at 1908 (emphasis in original, citation omitted.)

¹⁶ *Id.*

If the Commission declines to “begin afresh” with a new NPRM, it must content itself with “elaborating on its prior reasoning.”¹⁷ However, as the Mozilla court made clear, no mere “elaboration” can hope to save the Commission’s “prior reasoning.” The Mozilla court found the Commission’s reasoning with regard to the impact of reclassification and repeal of net neutrality “facially inadequate” and a “Rorschachian speculation.”¹⁸ It characterized the Order’s analysis of the pole attachment issue as “at best, scattered and unreasoned observations,”¹⁹ and stated bluntly: “The Commission’s response makes no sense.”²⁰ As for the analysis of the impact on Lifeline, the Mozilla court was even more scathing. “That response does not work . . . For whatever it’s worth, the Commission has been unable to explain itself in this litigation,” and labeled the Commission’s response to comments in the record “a non-sequitur.”²¹

In other words, the only means the Commission has to achieve the same policy result it obtained in RIFO is to “begin afresh” and “comply with the procedural requirements for new agency action.” There is no amount of mere “elaboration” that would allow the Commission to transform “facially inadequate” “scattered and unreasoned observations” and “non-sequitur[s]” into a viable rationale for reclassification and elimination of net neutrality. Only by introducing new arguments and policy considerations can the Commission meet the requirement of addressing all “relevant aspects of the problem,” and the only mechanism for introducing new arguments and policy considerations is a NPRM. Thus, we request that the FCC withdraw the Remand Order and issue an NPRM to address the *Mozilla* Court’s concerns.

¹⁷ *Id.*

¹⁸ *Mozilla Corp. v. FCC*, 940 F.3d 1, 62 (D.C. Cir. 2019).

¹⁹ *Id.* at 65

²⁰ *Id.* at 66.

²¹ *Id.* at 69.

CONCLUSION

The Commission did not follow proper procedure when it addressed the concern of the *Mozilla* Court on remand. The Commission failed to keep an open mind throughout the remand process. And, by choosing not to engage in formal rulemaking, the Commission was limited to only offering up the same reasoning that the *Mozilla* Court rejected in the first place. Thus, PK requests that the Commission withdraw its Remand Order and engage in proper rulemaking in order to cure these procedural issues.

Respectfully Submitted,

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