

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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 20-168

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**I. The Public Notice, as Issued, Cannot Satisfy the Commission’s Obligations on Remand.**

The Public Notice states multiple times that it “seeks to refresh the record” since the Commission issued its reclassification and repeal order in December 2017.<sup>1</sup> The Commission does not say what it ultimately intends to do when it has refreshed the record. Indeed, the Public Notice does not come from the Commission, but from the Wireline Competition Bureau. The questions asked do not begin to address the range of issues presented to the Commission on Remand, or alternative means to address the concerns that any reasonable analysis on remand may raise. Does the Commission plan to issue a Notice of Proposed Rulemaking once it has refreshed the Record? A Second Report and Order? It is impossible to tell from the short, Bureau-level Public Notice.

Public comment is a critical part of the rulemaking process, not an inconvenience for an agency to seek to avoid. 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.”<sup>2</sup> The Commission may not jump directly from a notice claiming on its own terms merely to “refresh the record” to a Second Report and Order claiming to resolve the issues on remand. At most, the information collected in response to this Public Notice could inform a second *Notice of Proposed Rulemaking* in which the Commission would set forth possible proposed modifications of *RIFO* it finds necessary to comply with its responsibilities under the statute and the information collected in the record. Alternatively,

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

<sup>2</sup> *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009) (“*Rural Cellular*”) (citations omitted).

the Commission could simply conclude that its actions in *RIFO* were inconsistent with the record evidence gathered on remand and with its responsibilities under the Communications Act, prompting the Commission to issue an *Order on Reconsideration*.

Out of an abundance of caution, commenters include additional arguments in the subsequent parts on the matters where the Commission seeks to refresh the record. But these arguments do not represent what commenters might argue if it had a clear idea of how the Commission intended to proceed. Commenters therefore take this opportunity to refresh the Commission on its obligations under the APA pursuant to this remand in the hopes that the Commission will avoid an attempted end-run around the APA and approach this remand with the necessary “open mind.” *Rural Cellular*, 588 F.3d at 1095.<sup>3</sup>

**A. The Responsibility of the Commission on Remand: To Determine If Its Policy Choice is Consistent with Its Obligations Under the Communications Act.**

The Commission has specific obligations on remand, consistent the instructions of the *Mozilla* Court and the general tenets of administrative law. As the Court explained, the agency must consider those factors over which Congress has given the agency express responsibility in its organic statute and explain the impact of its proposed decision.<sup>4</sup> The proposed action cannot violate an express statutory responsibility of the agency.<sup>5</sup> While an agency often must balance competing goals, the agency must provide a rational explanation

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<sup>3</sup> See also *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449-450 (3<sup>rd</sup> Cir. 2011) (“*Prometheus II*”).

<sup>4</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir. 2019) (“*Mozilla*”).

<sup>5</sup> See *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218 (1992).

for how it struck the relevant policy balance – supported by evidence in the record.<sup>6</sup> As noted by the PN, the *Mozilla* Court identified three specific statutory responsibilities the Commission failed to adequately consider the impact of reclassification, elimination of Section 706 authority, and repeal of net neutrality.

*First*, what potential danger to the public arises from the reclassification of broadband as Title I, elimination of Commission authority under Section 706 of the 1996 Telecommunications Act, and elimination of nearly any other source of ancillary authority? *Second*, what impact will the Commission’s actions likely have on pole attachments regulation – and by extension what impact will it have on deployment and adoption of broadband? Will this impact undermine the policy justifications offered by the Commission for reclassification of broadband, elimination of its substantive oversight authority, and repeal of net neutrality? *Third*, what impact will the Commission’s actions have on its obligations to ensure universal access to all Americans – either of POTS or broadband?

The Commission is obligated to carefully consider for each of these three the likely impact of its decisions in *RIFO*. This includes not merely the impact of repeal of the net neutrality rules, but the results of reclassification and the consequences of elimination of Section 706 as a potential source of authority. For example, as the *Mozilla* Court warned

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<sup>6</sup> See *National Lifeline Ass’n v. FCC*, 915 F.3d 19 (D.C. Cir. 2019) (“*NLA*”) (failure of Commission to explain how promoting infrastructure deployment outweighed other statutory concerns and reliance interests).

<sup>7</sup> While the Commission has adopted a policy of phasing out legacy telephone services in favor of more advanced services, the FCC cannot ignore the fact that tens of millions of Americans remain dependent on traditional telephone networks sustained by the existing USF. As discussed in greater detail below, classification of broadband as a Title I service impacts the sustainability of legacy networks by removing broadband providers from the potential pool of contributors. In light of the ongoing crisis of the contribution factor, the Commission is obligated to consider how its actions impact the overall financial stability of the fund. See 47 U.S.C. §254(b)(5).

with regard to public safety, “the harms to blocking and throttling during a public safety emergency are irreparable. People could be injured or die.”<sup>8</sup> Unless the Commission finds some way to mitigate this harm, it must conclude that its policy choice of reclassification is prohibited under the Communications Act. But to mitigate the harm, the Commission must find some authority to, at the least, prohibit the blocking or throttling of traffic necessary to protect safety of life and property. This requires not merely refreshing the record, but active consideration and public comment on whether any proposed mitigation would sufficiently address the risks.

None of this can be accomplished at the Bureau level. Nor can the Commission come close to satisfying its notice and comment obligations on the basis of this highly limited Public Notice.

**B. The Public Notice States It Intends Solely to “Refresh the Record,” Making It Impossible to Fulfill the Responsibility on Remand.**

The Public Notice proposes no new action on the part of the Commission. It simply seeks to “refresh the record.” While the PN does seek comment on specific factual questions, it does not propose what it will do in response to any of them. Additionally, the notice issues from the Bureau. It therefore provides no insight into what the full Commission may choose to do with the information gathered in response to the PN.

Under the Administrative Procedure Act (APA), the Commission must provide the opportunity for notice and comment before adopting any rule. As the Supreme Court recently emphasized, “[n]otice and comment gives affected parties fair warning of potential

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<sup>8</sup> *Mozilla*, 940 F.3d at 62.

changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision.”<sup>9</sup> Additionally, the Commission must provide clear notice of its intent so that a reasonably interest party can discern what issues will logically arise from the proceeding.<sup>10</sup> The Commission may not seek to “lull” parties into complacency by camouflaging proposals for major rule revisions as a mere effort to refresh the record. *Id. See also Azar*, 139 S. Ct. at 1812 (“courts have long looked to the *contents* of the agency’s action, not the agency’s self-serving *label*, when deciding whether statutory notice-and-comment demands apply”)(emphasis in original).

Indeed, everything about the PN indicates that the agency lacks the “open mind” required by the APA.<sup>11</sup> Nowhere does the PN suggest that the FCC will find it impossible to reconcile its statutory responsibilities with any of its policy determinations in *RIFO*, no matter what the evidence may reveal. This is acceptable if the goal of the PN is indeed merely to refresh the factual record as a prelude to formulating a suitable *Notice of Proposed Rulemaking* which would actually consider such possibilities. But if the Commission seeks to move directly from this inadequate PN to a pre-ordained *Second Report and Order*, the Commission will once again have failed in its responsibility to engaged in reasoned decision making.

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<sup>9</sup> *Azar v. Allina Health Serv.*, 139 S. Ct. 1804, 1816 (2019).

<sup>10</sup> *NLA*, 915 F.3d at 32-33.

<sup>11</sup> *Prometheus II*, 449-450.

## II. The FCC Must Cure Its Failure to Consider the Public Safety Concerns Raised by Santa Clara County

In the *Restoring Internet Freedom* Order (RIFO) the FCC did not address the public safety implications of changing broadband services from a Title II service to a Title I service.<sup>12</sup> As the court in *Mozilla* held, the FCC was obligated by statute to consider the public safety consequences of reclassifying broadband as an information service.<sup>13</sup> The court also pointed to The Wireless Communication and Public Safety Act of 1999, which directs the FCC to “consult and cooperate with State and local officials responsible for emergency services and public safety,”<sup>14</sup> and highlighted comments in the record that said if broadband providers were able to prioritize traffic as they see fit this would “imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crisis.”<sup>15</sup>

The comments submitted by Santa Clara County (the County), mentioned by the court in *Mozilla*, laid out some of these same concerns. The County noted that services it relied on were based on nondiscriminatory access to broadband.<sup>16</sup> These services included public health, social services, law enforcement and safety programs that were adopted by the County to provide “more efficient methods of providing service” to their citizens.<sup>17</sup> The concerns of the County, and of the California Public Utilities Commission (CPUC), were found to be prescient as later reporting indicated that Verizon essentially cut off first

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<sup>12</sup> *RIFO*, 33 FCC Rcd 311 at (2017) (“*RIFO*”).

<sup>13</sup> *Mozilla*, 940 F.3d at 94-95.

<sup>14</sup> *Mozilla*, 940 F.3d at 93 (citing PL No. 106-81 Sec. 3, 113 Stat. 1286, 1287).

<sup>15</sup> *Mozilla*, 940 F.3d at 95.

<sup>16</sup> Reply Comments from Santa Clara County, WC Docket No. 17-108 (December 6, 2017) (*Santa Clara County Comments*).

<sup>17</sup> *Santa Clara County Comments*.

responders as they were fighting a wildfire.<sup>18</sup> Even more disturbing was that CPUC predicted the exact scenario reported by Ars Technica, that the County would have to purchase an even more expensive plan than they had before with no guarantee that their service would not be throttled again under similar circumstances.<sup>19</sup> According to the reporting the original “unlimited” plan that the County purchased was \$39.99 and the plan that Verizon offered was another “unlimited” plan that cost \$99.99 for the first 20GB and \$8 for every gigabyte thereafter.<sup>20</sup>

These practices undermine public safety during times of crisis. If counties like Santa Clara adopt tools that require nondiscriminatory broadband access, especially during an emergency, the FCC should do as the statute requires and “consult and cooperate” with state and local officials to prevent public safety officials from having their services throttled during an emergency. This kind of discriminatory conduct undermines public safety and increases the significant barriers to adopting Internet-based applications such as those highlighted by the County.

By designating broadband as an information service, the FCC does not have the ability to prevent discriminatory conduct such as what the County dealt with during the

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<sup>18</sup> Jon Brodtkin, *Verizon throttled fire department’s “unlimited” data during Calif. Wildfire*, Ars Technica (August 21, 2018) <https://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/>. (Jon Brodtkin, *Verizon throttled fire department’s “unlimited” data during Calif. Wildfire*, Ars Technica (August 21, 2018))

<sup>19</sup> Comments of the California Public Utilities Commission, WC Docket No. 17-108 (July 17, 2017) “For example, without non-discriminatory rules, providers of emergency services or public safety agencies might have to pay extra for their traffic to have priority. If states, cities, and counties were required to pay for priority access, their ability to provide comprehensive, timely information to the public in a crisis could be profoundly impaired.” (See, 2015 Open Internet Order, at ¶ 126) (*CPUC Comments*).

<sup>20</sup> Jon Brodtkin, *Verizon throttled fire department’s “unlimited” data during Calif. Wildfire*, Ars Technica (August 21, 2018).

wildfires.<sup>21</sup> The FCC’s reclassification leaves the FCC no corrective tools to prevent carriers from throttling emergency services. Citing the Open Internet order, CPUC noted that “the absence of strong anti-discriminatory rules could undermine critical infrastructure and public safety.”<sup>22</sup> Public Knowledge in previous comments highlighted this lack of flexibility stating, “[t]he FCC has already tried, and failed, to protect net neutrality without Title II, and Title II opponents have singularly failed to explain how even ‘light-touch’ rules would work in the absence of clear legal authority.”<sup>23</sup>

Without the legal authority to hold ISPs and service providers to account for endangering the public by throttling the traffic of emergency personnel, as far as the FCC is concerned, ISPs and service providers are free to do as they wish. While the FCC in *Mozilla* had argued that the County’s issue with Verizon should be treated as a success, the court was correct in finding that the FCC’s response was wanting and not in keeping with the Administrative Procedures Act. The FCC must go through a thorough analysis of what making broadband an information service means for public safety. This would mean demonstrating how a “light” regulatory touch through Title I would impact the FCC’s ability to enact antidiscrimination rules and other matters designed to promote public safety.

The FCC has a statutory obligation to consider the public safety ramifications of making broadband an information I service. It must face the facts about the consequences of its decision—or reverse it. If the FCC continues with its decision to classify broadband as an information service, then it should acknowledge that states must have a way to enforce

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<sup>21</sup> Jon Brodtkin, *Verizon throttled fire department’s “unlimited” data during Calif. Wildfire*, Ars Technica (August 21, 2018).

<sup>22</sup> *CPUC Comments*, citing 2015 Open Internet Order, at ¶¶ 114, 126, 150.

<sup>23</sup> Reply Comments of Public Knowledge Re: Restoring Internet Freedom Order, WC Docket No. 17- 108 (August 30, 2017).

nondiscrimination rules themselves for public safety services and other matters,<sup>24</sup> and why it feels that ignoring its public safety mandates is consistent with the law. But thus far, the FCC simply has not dealt with the “multifaceted public safety concerns associated with subjecting emergency services providers, other public health providers, and the members of the public who depend on those services to paid prioritization and blocking and throttling.”<sup>25</sup>

### **III. The FCC Must Consider the Public Safety Consequences of Its Abandonment of Broadband Authority More Broadly**

Public safety concerns are a matter of life and death and, as the court emphasized, “lives are at stake[.]”<sup>26</sup> It is more clear than ever that the Commission’s obligations go beyond those issues raised by Santa Clara County. The FCC’s recent request for comment comes during a time when millions of Americans are doing their best to self-quarantine during a pandemic, and need reliable, nondiscriminatory broadband access to do work, participate in remote classes, follow the news, and stay in touch with friends and family. These are public safety matters, because as we have learned, staying home and staying connected is a matter of public health (as well as necessary to keep the economy functioning). 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

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<sup>24</sup> “Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253

<sup>25</sup> *Mozilla*, 940 F.3d at 100.

<sup>26</sup> *Mozilla*, 940 F.3d at 98.

guaranteed to work when they need to. Everyone needs to access public safety information, and might need to call for first responders.

Internet access is essential in this crisis and is a critical part of public safety. Without internet access it is virtually impossible for adults to telework, children to keep up with their classes via e-learning, and for people to try and stay healthy with telehealth. Even if not traditionally thought of as a matter of public safety, one of the best things the FCC can do in regard to public safety right now is help maintain and provide internet service to those staying home. Without the tools afforded to the FCC via Title II, the FCC lacks the ability to respond to unexpected contingencies, ensure continuous service to users, gather the data it needs about network performance, or even to ensure that smaller ISPs can continue to interconnect with the broader network despite temporary liquidity problems. The broad authority given to the FCC under Title II, even if sometimes held in reserve, could be an important part of dealing with the current crisis or even ones to follow.

#### **IV. The FCC Cannot Adequately Promote Broadband Build-Out Via Pole Attachment Rules Without Title II**

The FCC adopted an ambitious pole attachment framework in August, 2018. The Commission's *Pole Attachment Order*<sup>27</sup> removes obstacles to carriers getting access to the physical infrastructure they need to offer service.

Unfortunately, just a few months earlier, in the *Restoring Internet Freedom Order* (RIFO), the FCC had already taken away one of the key legal tools it needs to promote

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<sup>27</sup>Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report & Order & Declaratory Ruling, WC Docket No. 17-84; WT Docket No. 17-79, 32 F.C.C. Rcd. 3266 (F.C.C., Apr. 21, 2017)

broadband deployment—Title II of the Communications Act.<sup>28</sup> As the *Pole Attachment Order* states, “we rely solely on section 224 for legal authority.”<sup>29</sup> But under RIFO, Section 224, part of Title II, no longer gives the FCC any direct authority with respect to broadband pole attachments. Rather Section 224 gives the FCC authority over telecommunications services and cable television service—not information services, which is broadband’s current classification. As the *Mozilla* court observed, “Section 224’s regulation of pole attachments simply does not speak to information services. Which means that Section 224 no longer speaks to broadband.”<sup>30</sup>

It is the case today that the wires that offer those services typically also provide broadband, and the Commission’s rules and the statute apply when broadband is comingled, or offered on the same wire, as telecommunications or cable television.<sup>31</sup> Broadband hitches a ride with the regulated services, so to speak. But the legal tools that the Commission has at its disposal today simply do not address broadband-only service providers, WISPS, or even facilities-based VOIP providers—and there are an increasing number of providers in these categories.<sup>32</sup> Given technological and market trends, this is simply irresponsible, and creates an incentive for providers to continue offering services not for their utility, not to satisfy customer demand, but merely to qualify for a regulatory

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<sup>28</sup> Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018)

<sup>29</sup> Pole Attachment Order 96, n.26.

<sup>30</sup> *Mozilla*, 940 F.3d at 106.

<sup>31</sup> National Cable and Telecommunications Ass’n v. Gulf Power Co., 534 U.S. 327 (2002)

<sup>32</sup> As an example of this trend, Google Fiber recently accounted that it was no longer offering its TV service, choosing instead to partner with virtual MVPDs. See Google Fiber, *Great Internet = Great TV*, Feb. 4, 2020, <https://fiber.google.com/blog/2020/great-internet-great-tv>. Other broadband providers are doing the same, losing their status as “cable” (television) providers and thus having no access to poles under the FCC’s current framework.

framework whose primary purpose and direction should be to promote broadband, including from broadband-only providers.

One of the reasons this issue was remanded to the FCC was the incoherence of citing Section 224 in the context of broadband at all, particularly in the context of state authority. It is true that Section 224 allows states to “reverse preempt” and to take over all regulation of pole attachments themselves. But even for the 20 states (plus the District of Columbia) that currently regulate telecommunications and cable television pole attachments under this provision, it makes no sense to cite it as a source of their authority to regulate broadband pole attachments, for the same reason it cannot be a source of authority for the FCC: Section 224 is no longer about broadband at all.

It could be the case that the FCC’s failure to provide a proper framework for broadband pole attachments has taken away power from the states. With respect to broadband pole attachments, states lack power under Section 224, but nevertheless retain the power to regulate broadband in general by under their police powers. But while states have clear authority to enact net neutrality and other broadband policies because no federal statutes or FCC regulations to preempt them, the FCC’s pole attachment rules—though sorely lacking with respect to broadband—are still detailed and comprehensive as to those areas they do cover. One could see a non-trivial argument that the FCC’s framework “so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>33</sup> While commenters do not endorse this

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<sup>33</sup> *Cipollone v. Liggett Group, Inc.*, 505 US 504, 516 (1992) (citing *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 153 (1982), internal quotation marks omitted.)

position it is certainly one that states considering regulating broadband regulation must analyze carefully.

But assume that field preemption is not an issue, and states can go forward in this area. They still may have a hard road ahead of them. Perhaps the reverse-preemption states have the resources and expertise to handle broadband pole attachment issues. But the other states have to actually enact laws, and create mechanisms for enforcing those laws, and they may simply lack the capacity to do so. The detailed enforcement and compliance regime for issues such as pole attachments is in many ways a higher lift than for more consumer-oriented matters like net neutrality and protection from deceptive billing, and can involve minute, technical disputes between rival companies with little interest in cooperating with each other. Relatively few state legislators may even be aware of the regulatory gap concerning broadband-only ISPs, or they may simply expect that a new law or a change in FCC policy regarding broadband classification might render their efforts moot.

Further, state broadband pole attachment rules might give rise to tricky conflict preemption questions, concerning whether it is practicable to have a split regulatory regime concerning different wires on the same pole, which might be right next to or even touch each other. Pole attachment rules may concern matters such as when it is acceptable from one provider to handle and reposition another's wires. Due to these unique issues of physical proximity, it is easy to see how state rules concerning broadband-only services and federal rules on telecommunications and cable television on technical issues like this might be said to come into conflict, or be difficult or impossible to comply with simultaneously. One way to avoid this situation would seem to be for more states to avail

themselves of reverse preemption and to take over all pole attachment regulation. But this runs into the same problems mentioned above—many states likely lack the capacity or expertise to do this, and they may not wish to make investments if they expect a change in federal policy.

The Court remanded this issue to the Commission because its legal arguments were incoherent and contradictory and its policy arguments were “scattered and unreasoned.”<sup>34</sup> As the court stated, “The Commission was required to grapple with the lapse in legal safeguards that its reversal of policy triggered.”<sup>35</sup> It did not.

Confronting this problem “in a reasoned manner,”<sup>36</sup> as the FCC is required to do, requires the FCC to forthrightly explain its thinking, and acknowledge the obvious tradeoffs that were highlighted for it again and again in the record. One option before the Commission is to acknowledge the consequences of its policy choice not to regulate broadband, and explain why, in this context, it has concluded that lack of a clear framework for broadband pole attachments is nevertheless worthwhile. To the extent that this position contradicts positions it has taken in other matters such as the Pole Attachment Order, the Commission must explain its change of heart. To be clear commenters do not think it is possible for the Commission to explain why the negative consequences of its voluntary abdication of authority are somehow outweighed by other considerations in a legally viable way, and it seems reasonable to suppose that a forthright explanation of this Commission’s deregulatory impulse may have political and oversight implications. But the APA requires agencies to acknowledge and grapple with tradeoffs, not pretend they don’t

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<sup>34</sup> *Mozilla*, 940 F.3d at 104.

<sup>35</sup> *Mozilla*, 940 F.3d at 108.

<sup>36</sup> *Mozilla*, 940 F.3d at 109.

exist. This is what the Commission, with respect to pole attachments and other matters, has simply failed to do.

A better option is for the Commission to reverse course on its unwise abdication of clear federal authority over broadband. It should reclassify broadband as a Title II service, which would automatically bring broadband-only services within the ambit of its existing rules. Among its other benefits such a reclassification would speed broadband buildout by providing certainty in infrastructure buildout issues.

#### **V. Broadband Is a Vital Service That Should Receive Lifeline Support**

According to the court in *Mozilla* the FCC has failed to prove that it has the authority to continue to support broadband-only providers with Lifeline funds. The FCC's choice to abandon its court-approved authority over broadband has left a policy gap where funding cannot be targeted to this vital communications service, except indirectly. As discussed above in relation to public safety, broadband is an essential component of modern life necessary for learning, working, and getting medical care. In light of the recent health crisis, this is more clear than ever, as schools begin to hold all of their classes online, workers are required to telework, and people rely on the internet for entertainment and stay connected with their family and friends. The Lifeline broadband program helps to make this essential service more attainable for low-income Americans, so that they can continue to participate in modern life.

Because broadband is so essential, ensuring everyone across the nation has access to it is a priority across the federal government. FCC Chairman Pai lists closing the digital divide

as his “top priority.”<sup>37</sup> Congress too, has made continual efforts to ensure that all Americans have access to the internet.<sup>38</sup> In fact, promoting broadband adoption is required in order to carry out core Congressional mandates including “preserv[ing] and advance[ing] universal service” and ensuring that service is available at affordable rates.<sup>39</sup>

Lack of affordability is one of the main reasons that people do not subscribe to broadband service,<sup>40</sup> and Lifeline is the only federal program that directly addresses the affordability of broadband. Without it, many Americans may not be able to afford broadband connectivity, and the digital divide could widen rather than narrow.

Because of the importance of affordability for adoption, there was widespread support for using Lifeline funds to subsidize broadband in the record for the 2015 Lifeline Modernization proposal.<sup>41</sup> Support came from a broad range of stakeholders such as carriers, corporations, public interest organizations, schools, and local governments. This

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<sup>37</sup> "FCC Initiatives," FCC.gov, <https://www.fcc.gov/about-fcc/fcc-initiatives>.

<sup>38</sup> See "Draft Broadband Deployment Report Shows Significant Progress in Closing 'Digital Divide'," Energy and Commerce Republicans, February 22, 2019, available at <https://republicans-energycommerce.house.gov/news/draft-broadband-deployment-report-shows-significant-progress-in-closing-digital-divide>; Emily Tate, "Digital Equity Act Would Provide \$250M Annually to Address Digital Divide," EdSurge, April 12, 2019, <https://www.edsurge.com/news/2019-04-12-digital-equity-act-would-provide-250m-annually-to-address-digital-divide>.

<sup>39</sup> 47 U.S.C. §254(b)(1), §254(b)(5).

<sup>40</sup> Last year, the Pew Research Center found that access to internet at home depended on whether one could afford it. 44% of adults with household incomes below \$30,000 a year had no home broadband service, compared with 81% of households with incomes between \$30,000 and \$99,000. "Mobile Technology and Home Broadband 2019," Pew Research Center, June 13, 2019, available at <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019>.

<sup>41</sup> "Reply Comments of Public Knowledge and Appalshop," WC Docket No. 11-42, 09-197, 10-90, September 30, 2015, <https://www.publicknowledge.org/documents/public-knowledge-and-appalshop-lifeline-reply-comments>.

makes it all the more vital for the Commission to use available legal authority to directly subsidize broadband.

Unfortunately, despite the importance of broadband, the FCC's *Restoring Internet Freedom Order* jeopardized the FCC's authority to support standalone broadband services with Lifeline subsidies. Initially, Lifeline only subsidized phone service. However, in 2016, the FCC expanded Lifeline to also subsidize bundled and standalone broadband internet access. The FCC was able to offer Lifeline subsidies to standalone broadband service in 2016 because section 254(c) allows the universal service definition to take into account advances in technology, and "much like telephone service a generation ago, broadband has evolved into the essential communications medium of the digital economy."<sup>42</sup> However, when the FCC expanded Lifeline to include carriers offering standalone internet access, it stated that it did so on the basis of broadband being a Title II Telecommunications service. According to the FCC at the time, broadband "is a telecommunications service that warrants inclusion in the definition of universal service in this context."<sup>43</sup>

Once the FCC reclassified broadband as an information service, its authority to offer Lifeline support to standalone broadband providers was called into question. According to the *Mozilla* court, "as a matter of plain statutory text, the 2018 Order's reclassification of broadband... facially disqualifies broadband from inclusion in the Lifeline program."<sup>44</sup> However, the FCC "backhanded the issue," and cited Section 254(e) as its authority to

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<sup>42</sup> 2016 Lifeline Modernization Order, WC Docket No. 11-42, 09-197, 10-90 at 5, April 31, 2016, <https://www.usac.org/lifeline/additional-requirements/rules-orders/2016-lifeline-order>.

<sup>43</sup> 2016 Lifeline Modernization Order, WC Docket No. 11-42, 09-197, 10-90 at 15, April 31, 2016, available at <https://www.usac.org/lifeline/additional-requirements/rules-orders/2016-lifeline-order>.

<sup>44</sup> *Mozilla*, 940 F.3d at 111.

continue to support broadband with Lifeline funds.<sup>45</sup> Unfortunately, according to the *Mozilla* court, the FCC has not been able to adequately explain how that section provides it with the authority to provide funding for standalone broadband service.

The *Mozilla* court's analysis is correct. Nothing in Section 254(e) clearly gives the FCC authority to ensure that broadband as a standalone service is included within Lifeline. That section merely states that only eligible "*telecommunications carrier[s]*" are eligible to receive universal service funds.<sup>46</sup> Telecommunications carriers are defined by that same statute as common carriers regulated by Title II.<sup>47</sup> Thus, section 254(e) would not apply to broadband, which is a Title I information service.

It should be noted that Lifeline funds may still be able to subsidize broadband services offered alongside eligible telecommunications services under current FCC rules. Nothing in the Communications Act prevents the FCC from allowing telecommunications carriers who are *already* receiving USF funds for other services from also utilizing those funds to provide services that fall outside the FCC's current definition of universal service, or from requiring such offerings. However, this "loophole" is insufficient to ensure that Lifeline fulfills its purpose in offering affordable communications services and narrowing the digital divide. While standalone telephone service and bundled services are important, they might not be the best option for all consumers or providers. Given the importance of broadband connectivity, the American public should not be forced to rely upon only carriers that provide both phone and broadband service. Particularly with the limited nature of Lifeline funding, we should respect the wishes of consumers who want to opt-out of voice service

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<sup>45</sup> *Mozilla*, 940 F.3d at 112.

<sup>46</sup> 47 USC § 254(e)

<sup>47</sup> 47 U.S.C § 214(e)(1).

entirely. According to AT&T, “we ought to trust eligible consumers to choose which benefit, voice, or data, or a combination of both, best meets their needs.”<sup>48</sup> Moreover, by allowing more providers to access Lifeline funding, we can promote competition, leading to higher quality service and lower prices for consumers. For this reason, the FCC must take action to ensure that it has the authority to subsidize standalone broadband.

## **VI. The Best Way to Direct Lifeline Funds to Broadband is By Reclassifying Broadband as a Telecommunications Service**

As the *Mozilla* court makes clear, that the FCC’s assertion that it has the authority to use Lifeline funds for broadband providers has not been proven. Moreover, the FCC has yet to assert additional sources of authority. The clearest authority to support standalone broadband subsidies through lifeline is a reclassification of broadband as a telecommunications service regulated by Title II. By reversing course on the ill-advised decision to abdicate clear federal authority over broadband, the FCC could automatically ensure authority to offer Lifeline support for standalone broadband.

In lieu of doing that, according to the Administrative Procedure Act, agencies must justify their actions in lieu of their consequences.<sup>49</sup> However, the FCC has not, and could not, prove why it is worthwhile to get rid of the clearest authority for subsidizing standalone broadband with Lifeline funds when it has repeatedly discussed the value of broadband to society, and the importance of closing the digital divide.

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<sup>48</sup> AT&T Blog Team, *A 21st Century Safety Net*, AT&T Public Policy, June 1, 2015, available at <https://www.attpublicpolicy.com/fcc/a-21st-century-safety-net>.

<sup>49</sup> 5 USC § 706.

## **VII. Conclusion**

The FCC's approach to the remands is severely lacking from an administrative law perspective. Nevertheless it is clear that the best way for the FCC to fulfill its statutory mandates and stated goals is to classify broadband as a telecommunications service, which gives it clear authority to carry out its duties. In any event the APA requires the FCC to actually confront the tradeoffs of its policy choices and explain why it has chosen not to fulfill its public interest duties to promote public safety, broadband buildout, and affordability, using all the tools at its disposal.

Respectfully submitted,

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