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
	)	

COMMENTS OF FREE PRESS

Dana J. Floberg
Carmen D. Scurato
Matthew F. Wood
Free Press
1025 Connecticut Avenue, NW
Suite 1110
Washington, DC 20036
202-265-1490

April 20, 2020

Executive Summary

In late 2017, the Commission repealed the agency's successful open internet rules set on solid legal ground just two and a half years earlier. In the process, the Commission uprooted and surrendered its congressionally-granted authority over broadband internet access services.[1] In *Mozilla Corp v. FCC*,[2] the U.S. Court of Appeals for the District of Columbia Circuit remanded significant portions of that repeal because of the agency's failure to address its implications.

Specifically, the remand tasked the Commission with examining how the repeal impacted the agency's authority in three key areas: (1) supporting broadband under the Lifeline program; (2) protecting public safety for users of broadband internet access service, along with first responders' ability to communicate with each other and with the public at large; and (3) regulating pole attachments by broadband providers, to ensure the deployment of competitive broadband offerings that require nondiscriminatory access to public rights of way.

When it came to these three topics, the *Mozilla* opinion concluded that the Commission arbitrarily and capriciously failed to address the serious cascading implications of scrapping its Title II classification of broadband internet access service, with the Commission committing "straightforward legal error"[3] by refusing to consider these questions properly in its headlong rush to get rid of strong Net Neutrality rules and the legal framework on which they stood. As our comments explain, the Commission has only itself to blame for these errors, and the best remedy for the harms they have caused would be a return to its proper authority in Title II.

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

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

[3] *Id.* at 68.

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Introduction

Free Press has long held that correctly classifying broadband as a Title II service provides a legal framework that offers broad public interest benefits, including but not limited to the legal foundation for the open internet rules. Our 2017 comments in the *RIFO* docket focused on those nondiscrimination rules, and particularly on disproving often-claimed but always-unfounded assertions about the supposed detrimental impact on broadband investment from the return to Title II classification of broadband in 2015. We also urged the Commission to consider the impacts that returning to classification of broadband as an "information service" would have on the Lifeline program, since (as we explained even then) stripping Title II authority "may undermine the program's foundation or its implementation in the digital age."[4]

Upon the disappointing adoption of the *RIFO* repeal, Free Press re-articulated its concerns for Lifeline and for numerous other areas where its improper reclassification resulted in the Commission weakening or abandoning its own authority to protect competition, public safety, universal service, and more.[5] Never has this impact been more clear than in recent months: the Commission's response to the COVID-19 pandemic, and the critical need to ensure that those impacted by it can get and stay connected to the internet, has been largely limited to the Chairman encouraging broadband providers to sign a voluntary pledge and essentially just hoping they stick to it.

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[4] Comments of Free Press, WC Docket No. 17-108, at 72 (filed July 17, 2017) ("Free Press 2017 Title II Comments").

[5] Dana Floberg, "Title II Is the Best Way to Protect the Internet, Period" (Feb. 14, 2019), https://www.freepress.net/our-response/expert-analysis/insights-opinions/title-ii-best-way-protect-internet-period.

The *Mozilla* Court upheld the Commission's reclassification decision, barely, as a permissible agency construction of a statute owed deference under the standards set forth by the Supreme Court in earlier stages of this long-running litigation. Yet in doing so, two of the judges voting to uphold this latest reclassification declared that the Commission's decision was "unhinged from the realities of modern broadband service"[6] because of drastic changes in "critical aspects of broadband Internet technology"[7] and the essential nature of broadband for modern communications.

The undeniable result of the *RIFO* is an utterly precarious legal framework, entirely of the current Commission's own flawed design, for critical communications services that we all need. This Commission's decision to abdicate Title II authority over broadband was tantamount to removing a foundational base piece in a game of Jenga, rendering the entire tower unnecessarily fragile and ultimately prone to collapse. This injury is not sufficiently remedied by "refreshing the record" to seek advice on how to extend this rickety legal fiction even longer and to continue building higher on an unstable base.

The best way to keep the Jenga tower from tumbling down is to stop playing this game and restore Title II. That would be the best remedy by far to protect the public interest, and to fulfill the Commission's statutory mandates to promote public safety, universal service, and competition. Title II is the best foundation for not just the open internet rules the Pai Commission wrongly cast aside, but for the three distinct issues subject to this remand and the rest of the Commission's broadband oversight authority too.

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[6] *Mozilla Corp. v. FCC*, 940 F.3d at 87 (Millet, J., concurring).

[7] *Id.* at 95 (Wilkins, J., concurring).

I. Treating Broadband as a Telecom Service Provides the Clearest Authority for Lifeline Support of Standalone Broadband or Any Other Broadband Offering.

The *Public Notice* seeks to refresh the record on how the Commission might continue to modernize the Lifeline program to support broadband services in the wake of the *RIFO* repeal. Specifically, the *Public Notice* asks "whether there are other sources of authority that allow the Commission to provide Lifeline support for broadband services."[8]

The Commission should consider following the wisdom of the statute and plain logic rather than searching for theories it can tack onto its unjustified repeal and reclassification decision made in 2017. If the Commission,[9] Congress,[10] and an overwhelming proportion of commenters[11] in the proceeding that led to the *2016 Lifeline Modernization Order* believe that

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[8] *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*").

[9] Statement of FCC Chairman Ajit Pai, *On the Future of Broadband in the Lifeline Program*, DOC-344129 (rel. Mar. 29, 2017) ("I support including broadband in the Lifeline program to help provide affordable, high-speed Internet access for our nation's poorest families. . . . Going forward, I want to make it clear that broadband will remain in the Lifeline program so long as I have the privilege of serving as Chairman."); *Bridging the Digital Divide for Low-Income Consumers*, WC Dockets Nos. 17-287, 11-42, 09-197, Fourth Report & Order, Order on Reconsideration, Memorandum Opinion & Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd 10475, ¶ 1 (2017) ("*2017 Lifeline Order*") ("The actions and proposals in this item aim to facilitate the Lifeline program's goal of supporting affordable voice telephony and high-speed broadband for low-income households.").

[10] *See, e.g.*, Press Release, "Durbin, Maloney Introduce Bicameral Bill To Increase Access To Broadband Service For Low-Income Americans," Sept. 25, 2019, https://www.durbin.senate.gov/newsroom/press-releases/ durbin-maloney-introduce-bicameral-bill-to-increase-access-to-broadband-service-for-low-income-americans.

[11] *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, ¶ 30 (2016) ("*2016 Lifeline Modernization Order*") ("There is widespread consensus among commenters that the time has come for the Commission to modernize the Lifeline program to support broadband consistent with the national policy of promoting universal service.").

universal service should support broadband even though the statute says only telecommunications carriers are eligible for support, then there is no reason to avoid the most direct path between the two points and acknowledge that broadband internet access is a telecommunications service under Title II. This would provide the clearest and strongest authority for modernizing the Lifeline program as well as other universal service mechanisms to support next generation services.

When the *2015 Open Internet Order* noted that Title II authority gave the Commission "greater flexibility" in its pursuit of policies to modernize Lifeline,[12] the District of Columbia Court of Appeals did not object, and upheld the reclassification entirely.[13] The *2016 Lifeline Modernization Order* then successfully used Title II as the basis for its authority to expand Lifeline support to broadband-only services and carriers because there was no question that essential broadband services were "telecommunications services" eligible in their own right for support under the universal service statutes themselves ensconced in Title II.[14]

The after-effects of the Commission's improper return in 2017 to the Title I "information services" classification for broadband are felt even in recent congressional efforts to expand Lifeline in order to support emergency broadband connectivity during the COVID-19 pandemic. Rather than merely treating broadband as a telecom service eligible for support under existing universal service statutes and any emergency enactments, legislators have realized it is necessary

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[12] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report & Order On Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 486 (2015) ("*2015 Open Internet Order*").

[13] *USTelecom et al. v. FCC*, 825 F. 3d 674 (D.C. Cir. 2016).

[14] *See, e.g.*, *2016 Lifeline Modernization Order* ¶¶ 8, 39 (citing 47 U.S.C. §§ 214, 254).

to route around the eligible telecommunications carrier ("ETC") definition, to avoid being caught in the Commission's definitional quagmire.[15]

But the present murkiness justly provoking the *Mozilla* Court's remand is even more of a problem for the Commission's solo attempts to justify continued Lifeline support for broadband, without the aid of new congressional enactments that could route around the problem in future COVID relief bills. The Commission's uncertain authority to modernize Lifeline and support broadband in any capacity, and especially to support broadband-only next generation services, is a direct result of the Commission's decision to perpetuate the legal fiction of broadband as a Title I service. Rather than continuing to search for new authority to shelter its illusory and improper reclassification, the Commission can and should obey the plain language of the statute and return to treating broadband providers as telecommunications carriers.

The current COVID-19 pandemic has resulted in nationwide school closures and employers urging employees to telework when possible. With the majority of our daily interactions and routines pushed to online spaces, the *2016 Lifeline Modernization Order*'s first paragraph is particularly poignant:

> The time has come to modernize Lifeline for the 21st Century to help low-income Americans afford access to today's vital communications network – the Internet, the most powerful and pervasive platform in our Nation's history. Accessing the Internet has become a prerequisite to full and meaningful participation in society. For those Americans with access, the Internet has the power to transform almost every aspect of their lives, including their ability to stay in contact with work, friends, and family; to stay abreast of news, to monitor important civic initiatives, to look for a new home, or to make essential financial decisions. Households with schoolchildren access the Internet to research issues,

[15] *See, e.g.*, "Take Responsibility for Workers and Families Act" H.R. 6379, 116th Cong., Division U, Sec. 301(c) (2020).

> check assignments, and complete homework, while people with critical or even routine health needs use the Internet to access information about their condition and stay in touch with health care providers.[16]

Modernizing Lifeline under Title II authority was a means of evolving the program to support the modern technological needs of millions of low-income Americans who remained offline. Yet in the wake of its decision to abandon its Title II authority, the Commission continued proposing changes to Lifeline intended to fundamentally alter the core purpose of the program, by improperly suggesting "reforms" that would transform Lifeline from a program that connects people in need into one somehow supposed to spur deployment of networks too.[17] It also sought draconian cuts to Lifeline, completely losing sight of the intent and purpose of the *2016 Lifeline Modernization Order*.

Now the Commission faces a dilemma: by stripping itself of authority over broadband as a telecommunications service it has severely hindered its ability to use Lifeline to get and keep people connected during this unprecedented health and economic crisis. As millions of people across the country are urged to stay home and practice "social distancing," an at-home broadband connection will be a critical tool to the outside world. A broadband connection is now more essential than ever to participate in the economy, connect with colleagues, complete school work, access healthcare services, and much more.

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[16] *2016 Lifeline Modernization Order* ¶ 1.

[17] *See generally 2017 Lifeline Order*.

However, at the beginning of 2017 Chairman Pai began the first of many attacks on the Lifeline program by revoking nine Lifeline Broadband Providers' designations.[18] Soon afterwards, the Commission began its *RIFO* proceeding predestined to surrender all of its congressionally-granted authority over broadband in Title II. Yet it paradoxically proposed to "maintain support for broadband in the Lifeline program after reclassification."[19] In our comments, we outlined the many benefits to Title II in addition to the legal foundation for Net Neutrality, explaining that "[a]bandoning Title II for broadband internet access service could undermine important programs that help connect poor people to the internet."[20] We warned of the cascading impacts that revoking Title II authority would have, noting that "the Commission should carefully study how its proposals . . . would affect standalone Lifeline broadband service, and ensure that it does not introduce further uncertainty in the implementation of the [*2016*] *Lifeline Modernization Order*."[21]

The Pai Commission relinquished its authority under Title II nevertheless, at best freezing the Lifeline program in time. The Commission jeopardized its ability to support standalone broadband services, a key component of bringing Lifeline into the digital age. That is because the only justification the Commission can offer for continuing to support broadband

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[18] *See Telecommunications Carriers Eligible for Universal Service Support, Lifeline and LinkUp Reform and Modernization*, WC Docket Nos. 09-197, 11-42, Order on Reconsideration, 32 FCC Rcd 1095 (2017).

[19] *See In the Matter of Restoring Internet Freedom,* WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd 4434, ¶ 68 (2017).

[20] *See* Free Press 2017 Title II Comments at 71.

[21] *See id.* at 72.

under any universal service mechanism is that the dollars will continue to flow to legacy telecom carriers that just happen to bundle broadband service together with switched voice service or other legacy telecom products.[22]

The Pai Commission's decision thus especially threatens support for broadband-only products, as evidenced by its early revocation of the Lifeline Broadband Provider designations, in a decision that misconstrued and discounted the Commission's authority to designate eligible telecommunications carriers not subject to state commission jurisdiction under Section 214(e)(6) of the Act.[23] If broadband were still classified as a telecom service, we could discuss whether carriers providing these services might be designated by the Commission alone or by state commissions as well under Section 214. But in any case, such standalone broadband offerings will be increasingly appealing to Lifeline recipients during and after the current crisis, even if presently less than 1 percent of Lifeline subscribers choose such broadband-only products.[24]

By dismantling the foundation for its authority over broadband the Commission created a complicated legal web, further tangled due to the *2016 Lifeline Modernization Order's* decision to ramp down support for voice service – which the prior Commission attempted to justify based on the program's transition to supporting broadband. Free Press opposed the end of subsidies for voice service at that time, in the belief that Lifeline subscribers should have maximum flexibility

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[22] *See, e.g.*, *Public Notice* at 3 (explaining that the Pai Commission's claimed "authority under Section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband service" is based on their use of "networks that support voice service" as well).

[23] *See, e.g.*, *2016 Lifeline Modernization Order* ¶¶ 222, 227.

[24] *See* Universal Service Administrative Co., *High Cost & Low Income Committee Briefing Book* at 62 (Jan. 27, 2020), https://www.usac.org/wp-content/uploads/about/documents/leadership/materials/hcli/2020/2020-01-HCLI-Briefing-Book.pdf.

to choose the (properly classified) telecommunications services they want: broadband data, voice, text messaging, or a combination of these.[25]

Yet the ultimate phase-out of support for voice jeopardizes more than just Lifeline users' choice, in the context of the Commission's all-in bet on continued provision of legacy voice as a telecom service anchor (of sorts) necessary for broadband providers to retain ETC status. This is yet another paradox of the Commission's own making: voice is disfavored, and in fact destined to be unsubsidized by the Lifeline program if not technically an entirely "unsupported" service. Yet legacy voice, or at least the use of networks capable of providing such voice service, will remain essential to retaining ETC status because of the legal fictions adopted by the Pai Commission. And while other appellate courts have accepted this hybrid rationale for supporting broadband service provided by ETCs, the *Mozilla* Court flatly rejected this authority argument.[26]

It would be cruel, irresponsible, and contrary to long-standing precedent for the Commission to use its pretzel-logic, simultaneously disfavoring voice service but essentially requiring its continuance as nothing more than an ETC jurisdictional hook, to entertain removing resellers from the Lifeline program.[27] Wireless resellers are a critical part of the Lifeline

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[25] *See* Comments of Free Press, WC Docket Nos. 17-287, 11-42, 09-197, at 19 (filed Feb. 21, 2018) ("Free Press 2018 Lifeline Comments") ("As we have explained in prior Lifeline proceedings, it is also paternalistic and inefficient to eliminate all support for traditional voice services, since some Lifeline users might find greater utility in retaining traditional wireless or wireline offerings. But supporting an offer of traditional voice services, and leaving the choice to the program's intended beneficiaries, is a very different proposition than requiring all Lifeline providers to offer traditional voice.").

[26] In *Mozilla,* the Court observed that "broadband's eligibility for Lifeline subsidies turns on its common-carrier status…. As a matter of plain statutory text, the 2018 Order's reclassification of broadband – the decision to strip it of Title II common-carrier status – facially disqualifies broadband from inclusion in the Lifeline Program." *Mozilla Corp. v. FCC*, 940 F.3d at 69.

[27] *See generally* Free Press 2018 Lifeline Comments at 20-28.

program, and have been since before Title II reclassification in 2015 and this Commission's improper reversal of that decision in 2017. In 2005, the Commission granted Tracfone a Lifeline-Only ETC waiver[28] from the Section 214(e)(1)(A) requirements that an ETC must offer supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services."[29] Then in the *2012 Lifeline Reform Order*, the Commission granted a blanket conditional forbearance from that facilities-based requirement for all Lifeline-only carriers.[30]Nowhere has the Commission provided legal or factual evidence to justify the reversal of this conditional forbearance, and the *Mozilla* Court's remand does not fill this massive void that the Commission left in its proposal to ban resellers. The Commission "does not refute prior findings of resellers' importance to the Lifeline program's core goal of making telecommunications services more affordable to low-income households, because attempting to disprove resellers' positive impacts is an absurd proposition in direct conflict with years of Commission precedent."[31]

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[28] *See Petition of Tracfone Wireless, Inc. for Forbearance from 47 U.S.C. Section 214(e)(1)(A) and 47 C.F.R. Section 54.201(i), Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Order, 20 FCC Rcd 15095 (2005) ("*2005 Tracfone Conditional Waiver*"). As Free Press has noted, "The Commission's decision to forbear from Section 214's facilities-based requirements specifically for Lifeline participations (and not receipt of other USF support) was made in part because of the agency determined 'that a facilities requirement for ETC designation is not necessary to ensure that a pure wireless reseller's charges, practices, classifications or regulations are just and reasonable when that carrier seeks such status solely for the purpose of providing Lifeline-supported services.'" Free Press 2018 Lifeline Comments at 24 (quoting *2005 Tracfone Conditional Waiver* ¶ 9).

[29] 47 U.S.C. § 214(e)(1)(A).

[30] *See Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 11-42, 03-109, 12-23, CC Docket No. 96-45, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, ¶ 368 (2012) ("*2012 Lifeline Reform Order*").

[31] Free Press 2018 Lifeline Comments at 26-27.

Indeed, the Commission's misguided and inexplicable attempt to ban resellers from the Tribal Lifeline program in 2017 were struck down in a different D.C. Circuit opinion as arbitrary and capricious.[32] The court ruled that the Commission had failed to justify its "fundamental policy reversal,"[33] "pointed to no record evidence"[34] that directing the subsidy solely to facilities based providers would incentivize them to provide Lifeline service, and failed to "meaningfully address comments and evidence that undercut its conclusion."[35]

If the Commission nonetheless tries to use the remand as an excuse to direct Lifeline support only to "facilities-based" broadband providers, attempting yet another end-run around the program's adoption support goals in a misguided attempt to make Lifeline into an ersatz deployment program, it would represent a massive failure to achieve the goals of program modernization. By tying support for broadband to carriers' continued provision of traditional voice telephony over their own facilities, this Commission would leave broadband-only providers in the cold where they've been since the Lifeline Broadband Provider revocation decision: unable to participate in the program and compete for Lifeline subscribers. This would limit choices for the wave of new entrants the *2016 Lifeline Modernization Order* anticipated,[36] and deny Lifeline subscribers the benefits of choosing between competitive broadband offerings.

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[32] *See generally, Nat'l Lifeline Ass'n, et al. v. FCC*, 921 F.3d 1102 (D.C. Cir. 2019).

[33] *Id*. at 1112.

[34] *Id*. at 1113.

[35] *Id*. at 1113-14.

[36] *2016 Lifeline Modernization Order* ¶ 217 ("We expect that our actions today will encourage market entry and increase competition among Lifeline providers, which will result in better services for eligible consumers to choose from and more efficient usage of universal service funds.").

Moreover, as even the largest communications providers transition away from offering switched telephony or any service this Commission includes in its overly narrow definition of a telecommunications service, existing Lifeline providers also stand to be forced out of the program over time. Unless the Commission intends to forever mandate the provision of switched voice service, this argument will not be sufficient to keep any broadband offerings at all in the program in the long run.

Lifeline was designed to promote the affordability and consequent adoption of basic communications services, including broadband access. Blocking new entrants to the program and eventually forcing existing Lifeline providers to abandon low-income customers betrays these goals, and belies even the current Commission's pretense that it supports retooling Lifeline to promote broadband deployment. The only purpose and effect of such decisions would be to limit competition and innovation by arbitrarily restricting the number and nature of Lifeline-eligible broadband providers and products, and the choices of low-income subscribers.

This is not what the public was promised. The *2016 Lifeline Modernization Order* envisioned a complete program transition towards supporting broadband and next-generation services, made possible with a boom in competition from new broadband-only providers and resellers. Yet this Commission has insisted upon adding numerous qualifying asterisks to that promise, undercutting a truly modern vision of the Lifeline program and robust support for its beneficiaries in order to maintain the legal fiction that broadband is not a Title II service.

II. *Mozilla v. FCC* Recognized that the Commission's Repeal Order Jeopardized Public Safety Communications Between First Responders and the People They Serve.

The Commission has sacrificed a critical tool for promoting public safety by scrapping its Title II authority over broadband. Its questions in the *Public Notice* further a false understanding

of both the impacts of the *2015 Open Internet Order* and the nature of communication needs during a crisis, missing the point of the court's remand entirely.

In particular, the *Public Notice* posits that by allowing paid prioritization arrangements, its improper Title I reclassification may spur innovation leading to more reliable networks. The Commission's circular arguments on this point reverberate from a particularly empty echo chamber, bouncing back nothing but the vapid public safety excuses in the *RIFO* repeal that the *Mozilla* Court summarily rejected and remanded. But beyond the legal infirmity of this return to its already-rejected claims, there are practical problems for the Commission's approach too.

As Free Press research has repeatedly shown, the *RIFO* repeal did nothing to boost broadband investment, just as the *2015 Open Internet Order* did nothing to reduce it.[37] Broadband investment has continued its cyclical march, driven by market forces and deployment plans that broadband internet access service provider executives across the board have acknowledged were unaffected by the adoption and subsequent removal of the Title II framework.[38] While Chairman Pai may wish to envision his agency's actions as the sun at the center of the broadband investment solar system, there are no facts to support this self-indulgent conclusion. The Commission cannot reasonably argue that its deregulation has somehow spurred more investment in faster or more resilient networks, especially in light of the fact that several

[37] *See* S. Derek Turner, "Raw Data Reveal Reality: Title II and Net Neutrality Edition," (Mar. 27, 2019), https://www.freepress.net/our-response/expert-analysis/insights-opinions/raw-data-reveal-reality-title-ii-and-neutrality.

[38] *See* S. Derek Turner, "It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era" (May 2017), https://www.freepress.net/sites/default/files/legacy-policy/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf.

broadband providers have announced decreases in investment and job cuts in 2019 and 2020 – even with twin windfalls of massive tax cuts and the Commission's repeal.[39]

Immediately after suggesting, implausibly, that first responders might benefit from all of this supposed innovation the Commission imagines stemming from Title I classification, the *Public Notice* changes tack, asking, "To what extent do public safety officials (at both the state and local level) even rely on mass-market retail broadband services . . . ?"[40] The implication seems to be that if public safety organizations and first responders are not using broadband networks subject to the *RIFO* repeal for their own internal communications, then reclassification must have no substantial effect on public safety.

This could not be further from the truth. Nondiscrimination is especially critical during a crisis. Paid prioritization arrangements would not be beneficial for first responders that do rely on mass-market broadband connections, many of which would not be able to afford prioritization and would be more likely degraded by prioritization arrangements that benefit other entities.

Moreover, even if some first-responders' internal and inter-agency communications rely on dedicated enterprise services – which, incidentally, could still be classified as Title II telecom services if the *RIFO* repeal and reclassification do not extend to such offerings – public safety is

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[39] *See, e.g.*, Karl Bode, "Shocker: ISPs Cut Back 2020 Investment Despite Tax Breaks, Death Of Net Neutrality," TechDirt (Nov. 5, 2019), https://www.techdirt.com/articles/20191030/14275843294/shocker-isps-cut-back-2020-investment-despite-tax-breaks-death-net-neutrality.shtml; Jon Brodkin, "AT&T slashed billions from network spending, cut tens of thousands of jobs," ArsTechnica (Jan. 30, 2020), https://arstechnica.com/information-technology/2020/01/att-slashed-billions-from-network-spending-cut-tens-of-thousands-of-jobs/ (noting that "[d]espite government favors, AT&T capital spending and employment keep declining").

[40] *Public Notice* at 2.

not just about ensuring that first responders are able to communicate with each other reliably. The entire public must have access to open communications during a crisis, both to ensure those impacted can find and receive potentially life-saving information during an emergency, and to allow public health officials to build on-the-ground situational awareness with information they gather from residential broadband internet access service users.[41]

Without Title II, the Commission has abandoned its clear authority to prevent broadband internet access service providers' blocking, throttling, or de-prioritizing the only connection people in impacted communities may have for information in the aftermath of a disaster. Furthermore, the repeal also means the Commission has abdicated its authority to affirmatively and proactively protect communities from any other unjust or unreasonable behavior by broadband internet access service providers that could threaten public safety.

This dereliction of regulatory duty and abandonment of statutory mandate is particularly egregious in the context of emergency communications, where post-hoc remedies are grossly insufficient. Despite the Commission's insistence otherwise, the Federal Trade Commission's supposed ability to resolve any abuses by broadband internet access service providers has always been insufficient – not least because the FTC can only enforce voluntary commitments that internet service providers offer in their terms of service – but it is particularly toothless with regard to public safety. In life and death situations, the potential harm of communication system failures is irreparable.

[41] *See, e.g.*, Brief for Government Petitioners, *Mozilla Corp. v. FCC*, No. 18-1051, at 22-23 (D.C. Cir. Aug. 20, 2018).

As we have seen, such harms are more than theoretical. When Verizon throttled Santa Clara County firefighters responding to historically devastating wildfires, the Commission found itself powerless to do more than complain that this was not a "real" Net Neutrality violation – an overly academic and utterly senseless response to those battling the blaze.[42] Since the harm was caused by a data cap issue rather than discriminatory throttling of a particular source or sender, the *2015 Open Internet Order*'s "bright-line" Net Neutrality rules might not apply. But this is not the end of the conversation, because Title II allowed the Commission to do more than just enforce those Net Neutrality rules. It also empowered the Commission to assess and prevent other forms of unjust or unreasonable behavior – which may well have included Verizon's decision to cap and throttle firefighters during an emergency – as well as the other potential public safety pitfalls and disasters for residential customers consistently raised by state, county, and municipal officials in the *Mozilla* case and the Commission's *RIFO* docket.

III. The Commission's Pretense of Continued Authority to Regulate Competitive Broadband Network Pole Attachments Suffers from the Same Flaws.

The *Public Notice*'s threadbare attempt to address the third and final remand issue, regulation of pole attachments and broadband providers' access to right-of-way, fares no better than its efforts on Lifeline and public safety. As in the first two instances, the *RIFO* repeal left the Commission with little fodder to craft rational arguments for continued authority over this important subject, as the repeal glibly jettisoned the comprehensive authority afforded by Section 224 and proper treatment of broadband as a telecom service.

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[42] Matthew F. Wood, Free Press and Free Press Action, "Legislating to Safeguard the Free and Open Internet," before Committee on Energy & Commerce, Subcommittee on Communications & Technology, at 18 (Mar. 12, 2019), https://www.freepress.net/sites/default/files/2019-03/free_press_action_testimony_on_save_the_internet_act.pdf.

The *Public Notice* attempts to distract from the obvious jurisdictional issue here, which mirrors the Lifeline dilemma explained in Part I above: the Commission's authority over attachments used to provide broadband internet access service, if indeed it has any good authority after the repeal, rests on the theory that "commingled" attachments are subject to its jurisdiction so long as the broadband provider happens to provide legacy cable or telephone services too.[43] The finger-wagging tone the Commission takes here is remarkable, as the agency tosses away its statutory authority while proclaiming that it "will not hesitate to take action" if problems arise, because the Commission is "resolute" that its abandonment of clear authority "not be misinterpreted or used as an excuse to create barriers to infrastructure investment and broadband deployment."[44]

The *Mozilla* opinion's remand on pole attachment issues was duly unimpressed with these excuses of the Commission's own making. The *RIFO* repeal identified no source of authority whatsoever for the Commission to prevent any such misinterpretations or to address any such barriers to deployment by broadband providers that don't happen to be incumbent cable or phone companies. The court rightly found that the Commission's "at best, scattered and unreasoned observations"[45] on this topic were no answer to commenters' objections. Even the Commission's claim of jurisdiction over commingled attachments was somewhat confused, as

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[43] *See RIFO* ¶ 185 ("Because the same networks are often used to provide broadband and either telecommunications or cable service, we will take further action as is necessary to promote broadband deployment and infrastructure investment.").

[44] *Id.* ¶ 186 ("Because the same networks are often used to provide broadband and either telecommunications or cable service, we will take further action as is necessary to promote broadband deployment and infrastructure investment.").

[45] *Mozilla Corp. v. FCC*, 940 F.3d at 65.

the *Mozilla* Court noted; but at least its assertion of authority over attachments used to offer broadband and some other communication service that is still clearly covered by Section 224 after the *RIFO* repeal finds scraps of support in the statutory text and earlier appellate decisions.

All of that does nothing, however, for "standalone broadband, which Americans have come to increasingly favor."[46] And it is not just newer entrants like Google Fiber[47] that have tried to enter the market and trended towards standalone broadband offerings, but legacy cable operators too like Cable One that grew up as pay-TV providers and now see all of their growth from broadband-only services and subscribers.[48]

The *Public Notice* attempts to patch together some questions about developments in the marketplace with poorly designed prescriptions to overcome its shortcomings, like using broadband deployment metrics to gauge the success or failure of the agency's abdication of authority over competitive broadband providers' pole attachments. But none of these proposals speak to the fundamental failure of the Commission's *RIFO* repeal to retain clear authority over attachments used to provide so-called broadband "information services" alongside telephone or cable service, let alone attachments used solely to provide standalone broadband service.

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[46] *Id.* at 67 (internal quotations omitted).

[47] *See id.*.

[48] *See, e.g.*, Free Press 2017 Title II Comments at 234-36.

Conclusion

The D.C. Circuit Court's remand demonstrates what Free Press and others have said all along: Title II classification is critically important, and not just for Net Neutrality. The Commission's lackluster response to protecting and promoting broadband connectivity during the COVID-19 pandemic casts this problem into sharp focus. In the long run, the public will be harmed by any Commission efforts to stack even more weight atop its insubstantial and counter-factual legal classification of broadband as a Title I service. Returning to the Title II framework remains the best, clearest, and easiest way to protect the public interest generally, and specifically to support the Lifeline program, public safety, and pole attachment rules that spur competition.

Respectfully Submitted,

Dana J. Floberg
Policy Manager
Carmen D. Scurato
Senior Policy Counsel
Matthew F. Wood
Vice President of Policy & General Counsel

Free Press
1025 Connecticut Avenue, NW
Suite 1110
Washington, DC 20036
202-265-1490

April 20, 2020