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
Federal-State Joint Board on Universal Service Lifeline and Link Up Reform and Modernization.	)	WC Docket No. 11-42

Comments of ITIF

The Information Technology and Innovation Foundation (ITIF) welcomes the opportunity to provide input on the Wireline Competition Bureau's notice seeking to refresh the record of the Restoring Internet Freedom and Lifeline proceedings considering the D.C. Circuit's *Mozilla* Decision.[1]

INTRODUCTION AND SUMMARY

In *Mozilla Corp. v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit upheld the most important parts of the Commission's Restoring Internet Freedom Order.[2] In the *Restoring Internet Freedom Order* (*RIFO*) the Commission interpreted the Communications Act as treating Broadband Internet Access Service (BIAS) as an information service not subject to either Title II regulations or ancillary authority of section 706 of the Communications Act. The *RIFO* effectively repealed the earlier, Obama-FCC net neutrality rules grounded in Title II of the Communications Act.

[1] Founded in 2006, ITIF is a 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank—focusing on a host of critical issues at the intersection of technological innovation and public policy. Its mission is to formulate and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress; Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit's Mozilla Decision, DA 20-168 (February 2020) https://www.fcc.gov/document/wcb-seeks-comment-discrete-issues-arising-mozilla-decision.

[2] *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019); In the Matter of Restoring Internet Freedom, FCC 17-166, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (January 2018).

This interpretation illuminated certain frictions within the statute. For years the FCC has been forced to improvise with a statute that when written did not fully anticipate the centrality of broadband communications to 21st century life, and did not provide clear tools to oversee facilities-based competition in broadband while simultaneously promoting the public interest by re-orienting various historically telecom-centric programs and policies to apply to broadband. Ideally these challenges would be addressed by Congress through a comprehensive update to the Act. However, in the meantime, the Commission should continue to prioritize good policy through reasonable interpretations of the statute. The FCC should continue its light-touch oversight of BIAS while also promoting a robust Lifeline program, fair and non-discriminatory pole attachments, and reliable public safety communications.

ITIF supported the Commission's efforts to roll back the application of Title II to broadband communications, sharing the concern that Title II classification represented a large step toward utility-style regulation that would likely undermine investment and long-term dynamic innovation in BIAS. We directly supported the FCC in the *Mozilla* case through an amicus brief.[3] There we explored the good reason to believe Title II depressed investment in broadband infrastructure, and the overly restrictive conduct rules would have unnecessarily limited innovation in real-time applications.[4] We are proud that our analysis of investment data was an important factor in the court's reasoning upholding the order.[5]

However, ITIF disagreed with the *RIFO* on a few points, most importantly that the Commission should not have taken such an extreme step as to abdicate authority over BIAS altogether, rather than maintain ancillary authority through section 706. Such a path would allow continued investment and innovation around BIAS business models, but the Commission would be empowered to step in if any market behavior was not "commercially reasonable." It could proscribe genuinely problematic behavior, but not go so far as to enact investment stifling common carrier-style regulation, consistent with the authority made clear in the *Verizon* case.[6] ITIF would prefer light-touch oversight by an independent, non-political, expert agency with specialized tools to promote the deployment and use of BIAS. The predominant communications platform of the day deserves the expertise of a specialized regulator.

This Commission is no doubt sincere in its belief that the public interest is better served with BIAS overseen by the FTC rather than the FCC. Public choice theory and the strong levels of dynamic competition between

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[3] Brief of the Information Technology and Innovation Foundation as A*micus Curiae* in Support of Respondents, Mozilla Corporation, et al., v. Federal Communications Commission (October 2018), *available at* http://www2.itif.org/2018-amicus-brief-mozilla-fcc.pdf?_ga=2.59041445.966766456.1586877907-971513944.1580652754.

[4] Ibid; *see also* Doug Brake "Broadband Myth Series, Part 1: What Financial Data Shows About the Impact of Title II on ISP Investment," *ITIF* (June 2017), https://itif.org/publications/2017/06/02/broadband-myth-series-part-1-what-financial-data-shows-about-impact-title-ii.

[5] *See Mozilla* at 77.

[6] *Verizon v. FCC,* 740 F.3d 623 (D.C. Cir. 2014).

broadband operators are admittedly good reasons to prefer a generalist regulatory body.[7] However, as a practical matter, the extreme step of forgoing even ancillary authority over BIAS increases the likelihood that the next time a Democratic administration is in power, common carrier regulation will return, perhaps even stronger than before. Rather than galvanize net neutrality proponents and inflame already misguided public sentiment, the FCC should seek a middle ground compromise through the path laid out by the *Verizon* court.

ITIF would support the Commission should it choose to recalibrate its efforts and reclaim ancillary authority over BIAS, but in any event, it is right to eschew Title II authority. The complete lack of problematic behavior since the *RIFO*, and likely positive impacts on innovation and investment indicates there is no reason to reconsider that decision.

The remand gives little reason to worry about the ultimate impact of the Commission's regulatory classification. The court specifically asked the Commission to examine the effects of the *RIFO* on three areas: public safety related communications, broadband-only pole attachments, and the Lifeline program. There is little reason to worry about the effects of the *RIFO* on these three areas; the Commission has flexibility within the statute to execute good policy in each. We offer brief comments on each below, but first note the evidence that supports the Commission's decision to remove BIAS from Title II classification.

THE LACK OF PROBLEMATIC BEHAVIOR SINCE *RIFO* SHOWS TITLE II IS NOT NEEDED FOR BROADBAND

For virtually the entire history of the Internet, there were no federal or state net neutrality rules and yet the Internet was open, with consumers able to get all legal content easily. It has been over two years since FCC Chairman Pai rescinded the Obama administration's rules that were grounded in a telephone-era framework, but none of the doom and gloom that activists predicted has come to pass. The longer we go without any up-front rules around net neutrality, and without any harm from network providers, the sillier these arguments look.

Take for example predictions made by Consumer Reports in the *Open Internet Order* (*OIO*) rescission: They expected tighter caps on mobile data plans and more zero-rating plans that would allow some streaming services to pay for an unfair leg up against their competitors.[8] However, in reality, competition continues to drive down the price of ever-larger mobile data plans. Consumer Reports feared Verizon would unfairly favor its Go90 video service to lure users away from Amazon or Netflix. However, in reality, Go90 was unable to gain much of a foothold and later exited the market (while other new streaming services such as Apple TV+ and Disney+ continue to fuel competition for online video). Other predictions like "some content might get blocked" or "broadband pricing will become more like airline pricing—you start paying more fees for the

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[7] *For discussion of broadband competition, see* Doug Brake and Robert D. Atkinson, "A Policymaker's Guide to Broadband Competition" *ITIF* (September 2019), https://itif.org/publications/2019/09/03/policymakers-guide-broadband-competition.

[8] James Wilcox, "How You'll Know Net Neutrality Is Really Gone" *Consumer Reports* (June 2018), https://www.consumerreports.org/net-neutrality/end-of-net-neutrality-what-to-watch-for/.

different parts of the [I]nternet," as net neutrality pioneer Tim Wu put it—are even more tenuous today than they were when the FCC first removed the regulations.[9]

These worst-case-scenario nightmares of outright blocking or throttling of Internet services as a shakedown for fees were never realistic, but today, with relatively abundant broadband compared to ten years ago, they are less realistic than ever. It is conceivable that there could be prioritization offerings or business practices that push the boundary from fair competition into unfair practices, and then the government should be empowered to step in. But years of evidence show that this is highly unlikely to be a problem. BIAS providers have a significant amount of goodwill tied to the performance of applications on their networks. Unreasonable interference with any application, or even interference that would provoke a public response from a competitor, would do a great deal of harm to their brand image and likely see a political response. Even if the economics of broadband infrastructure mean we don't see the same number of competitors in a given market compared to other sectors, there are still significant checks on behavior that diminish the need for extensive regulation, as the *RIFO* rightly recognized.

RIFO HAS A NEGLIGABLE OR POSITIVE EFFECT ON PUBLIC SAFETY

As the Commission is well aware, there is a popular misconception about the scope of both the *OIO* and the *RIFO*. Regulation of BIAS only touches those mass-market, undifferentiated broadband offerings made to the public. These regulations do not have much to do with public safety communications, as first responders generally (or at least should) use specialized connectivity plans rather than rely on mass-market retail broadband services. One of the instances misconstrued by net neutrality advocates that received considerable attention by the court was related to the California wildfires of 2018.[10] There a BIAS provider slowed the data communications of fire fighters in California who exceeded a pre-set threshold on their "unlimited" mobile plan. This was unfortunate, but unrelated to net neutrality or the *RIFO* and would not have been prevented had the *OIO* been in place.

As the Commission indicated in the public notice, non-neutral prioritization arrangements actually benefit public safety applications. As a general matter, prioritization is able to make tradeoffs in the timing needs of different data flows to unlock performance levels necessary for very high-bandwidth and low-latency applications, without negatively impacting other traffic that is not sensitive to minor delay.[11] It is not clear there is commercial interest in these sorts of arraignments for services provided over BIAS connections. However, prioritization is beneficially used in the public safety context today. The FirstNet network relies on priority and preemption to ensure that first responders to stay connected even when operating on a highly

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[9] Ibid.

[10] *See* Doug Brake, "Throttling Firestorm Overblown," *ITIF* (August, 2018), https://itif.org/publications/2018/08/24/throttling-firestorm-overblown.

[11] *See* Doug Brake, "Paid Prioritization: Why We Should Stop Worrying and Enjoy the 'Fast Lane'" *ITIF* (July 2018), https://itif.org/publications/2018/07/30/paid-prioritization-why-we-should-stop-worrying-and-enjoy-fast-lane.

congested network.[12] This means that even if prioritization arrangements were to gain traction in the marketplace, they would be unlikely to impact non-prioritized communications with public safety actors, and, if public safety communications were themselves prioritized it would only be beneficial.

If anything, the *RIFO* likely has had a positive impact on public safety communications. By setting the conditions for relatively more intensive infrastructure investment, the *RIFO* encourages greater investment in the same facilities that can be shared for public safety communications—both among first responders and from the public to emergency answering services. The FirstNet system shares the same spectrum and infrastructure between public safety and commercial operations. Verizon's public safety offering does the same. When the regulatory regime generally tends to stimulate investment overall, like that under *RIFO*, we should expect more robust connectivity, benefiting public safety.

THE COMMISISON SHOULD PROMOTE NON-DISCRIMINATORY POLE ATTACHEMENTS REGARDLESS OF BIAS CLASSIFICATION

Regulation of access to conduit, rights-of-way, and pole attachments are some of the best tools the Commission has to promote beneficial facilities-based competition without undermining the dynamism of the market. It is important the Commission have effective tools to promote reasonable pole attachment rates for all operators, even if they offer broadband-only services. The Commission should seek to ensure a broad interpretation of its pole attachment rules under *RIFO*.

Here is yet another area where ideally Congress would step in. Of course, at very least extend the section 224 pole attachment regime should be extended to broadband-only providers to ensure companies focused on providing converged, all-IP broadband service are able to attach on similar terms as telecommunications or cable providers. There are broader reforms to section 224 that should be addressed at the same time. For example, section 224 requirements should also apply to municipal utilities and electrical cooperatives such that these entities cannot leverage their monopoly on poles to forestall competition.

It is not clear that there are examples of broadband-only providers being denied attachments, so hopefully this issue is more theoretical than practical. The Commission should seek to promote pole attachments on non-discriminatory terms to the extent possible under Title I BIAS classification. The Commission should also look to forebear from unnecessary telecommunications regulations, to make it easier and cost-effective for companies contemplating broadband-only deployments to offer a VoIP-based voice service and avail themselves of the federal pole attachment regime.

THE COMMISSION CAN AND SHOULD PRESERVE OR EXPAND THE LIFELINE PROGRAM

During the COVID-19 crises it is critical that the Commission seek to preserve or expand the Lifeline program. It is important that government programs help counter economic downturns like the one we find ourselves in today. Broadband is one of the best tools we have to enable economic activity, education, and overcome the isolation of social distancing. The positive externalities of having as many people connected as

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[12] *See* Tracey Murdock, "Priority Makes the Difference – FirstNet in Action" *FirstNet Blog* (Feb. 2019), https://firstnet.gov/newsroom/blog/priority-makes-difference-%E2%80%93-firstnet-action.

possible are stronger now than ever. Affordability of both broadband connections and devices is a legitimate impediment for some, and the Lifeline program plays a critical role in helping make communications affordable for some communities.

Thankfully the *RIFO* order does not impact the Commission's ability to promote affordable access for low-income Americans. When the Lifeline program was expanded in 2016, the Commission relied authority under section 254(e) of the Act as it applies to the voice services provided by eligible telecommunications carriers, and as such, should not change depending on the legal classification of BIAS service.[13] While we do believe the FCC has the room under existing law to continue promoting Lifeline, various imperfections and inefficiencies in the program resulting from the original voice-centric design of the Lifeline system also call out for Congressional attention.

CONCLUSION

Nothing in the way the *RIFO* impacts public safety, pole attachments, or the Lifeline program indicates the Commission needs to revisit its decision to rescind the Title II *OIO* rules. While ITIF urges the Commission to consider revisiting its abdication of ancillary authority under section 706, it should be encouraged that the *RIFO* appears to have had a beneficial impact on the BIAS market.

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[13] In the Matter of Lifeline and Link Up Reform and Modernization, "Third Report and Order, Further Report and Order, and Order on Reconsideration," WC Docket 11-42 (April 2016).