

**BEFORE THE**  
**Federal Communications Commission**  
**Washington, D.C.**

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
	)	

Reply Comments of  
Citizens Against Government Waste

May 19, 2020

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in government. On behalf of the more than 1.2 million members and supporters of CAGW, I offer the following reply comments in response to the matters under remand in the matter of the Restoring Internet Freedom Order (WC Docket No. 17-108).

Adopted on December 14, 2017, the Restoring Internet Freedom Order (the RIF Order) determined that broadband internet access services (BIAS) are considered information services under Title I of the Communications Act of 1934.<sup>1</sup> This determination was upheld on October 1, 2019 by the United States Court of Appeals for the Sixth Circuit (the Court), in the case of *Mozilla v. The Federal Communications Commission*.<sup>2</sup> In its decision, the Court ruled that the FCC had exercised appropriate regulatory authority in issuing the RIF Order which overturned

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<sup>1</sup> Federal Communications Commission, In the Matter of Restoring Internet Freedom Order, WC Docket No. 17-108, Adopted December 14, 2017, <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order>.

<sup>2</sup> United States Court of Appeals for the District of Columbia Circuit, *Mozilla Corporation, Petitioner v. The Federal Communications Commission and the United States of America*, Respondents, Docket No. 18-1051, October 1, 2019, [https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/\\$file/18-1051-1808766.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf).

the previous 2015 classification of the internet as a common carrier service under Title II of the Communications Act of 1934.<sup>3</sup>

However, the Court also remanded three specific issues back to the FCC for further review, asking the agency to determine what, if any, impact the RIF Order would have on them. These distinct issues related to 1) the FCC's authority to provision broadband benefits through the Universal Service Fund's Lifeline program since under Title I, BIAS is not be considered a common carrier subject to Title II restrictions; 2) the effect on pole attachment rates and requirements on BIAS providers that would have been regulated by Title II regulations under the Open Internet Order (OIO); and, 3) any potential effects the RIF Order may have on protecting public safety communications from activities that could hinder such communications.

The Court's determination that BIAS are information services precludes responses to this remand order that attempt to relitigate that issue. Comments should therefore be limited to the three narrow matters for which the Court has requested clarification.

### **Lifeline Program:**

The FCC's Lifeline program is part of the Universal Service Fund (USF) program instituted as part of the Telecommunications Act of 1996. On March 31, 2016, the FCC expanded the Lifeline program by adding BIAS to the products authorized for Lifeline subsidization for eligible households.<sup>4</sup> The Lifeline program currently provides discounted voice and/or broadband service at a rate of \$9.25 per month, or up to an additional \$25 per month for qualifying Tribal subscribers. It is supported through a USF fee or tax added to telecommunications subscribers' monthly bills.<sup>5</sup> While there has been a great deal of waste, fraud, and abuse within the program over the years, the FCC has developed the National Lifeline Verification program to ensure that only eligible individuals are qualified to obtain assistance.

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<sup>3</sup> Federal Communications Commission, In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, Adopted February 26, 2015, <https://www.fcc.gov/document/fcc-releases-open-internet-order>.

<sup>4</sup> Federal Communications Commission, Third Report and Order, Further Report and Order, and Order on Reconsideration, In the Matter of Lifeline and Link Up Reform and Modernization (WC Docket No. 11-42), Telecommunications Carriers Eligible for Universal Service Support (WC Docket No. 09-197), and Connect America Fund (WC Docket No. 10-90), Adopted March 31, 2016, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-38A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-38A1.pdf).

<sup>5</sup> Federal Communications Commission, Lifeline Program Update, August 14, 2019, <https://www.fcc.gov/lifeline-program-update>.

The question on remand is whether BIAS providers will continue to be permitted to offer discounted broadband internet to eligible individuals under the Lifeline program if Title II regulations no longer apply to the internet.

The Court’s ruling cited Section 254(c)(1) of the Communications Act, which states, in part, “The Act also declared that ‘[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically \*\*\*, taking into account advances in telecommunications and information technologies and services.’” Id § 254(c)(1).”<sup>6</sup>

As noted by the National Lifeline Association in its April 20, 2020 comments to the FCC, “Consistent with precedent from the Court of Appeals for the Tenth Circuit interpreting several provisions of Section 254 of the Communications Act and upholding universal service high cost program support for broadband when it was classified as an information service, the Commission does have the authority to support Lifeline broadband even though it is once again an information service.”<sup>7</sup> These comments reiterate the express authority provided to the FCC in Section 254 to provide Lifeline broadband support, as well as the FCC’s ancillary authority under Title I to support Lifeline broadband, as part of its “statutorily mandated responsibility to ensure that all consumers, including low-income consumers, have access to advanced telecommunications and information services.”<sup>8</sup>

Congress was clearly anticipating new communications technologies and services being developed when it codified the universal service program and Lifeline into the Communications Act in 1996, regardless of whether these would be considered a Title I information service or a Title II common carrier service. Internet services were considered information services under Title I of the Act, not subject to common carrier provisions of the law. Congress granted the FCC the flexibility to determine whether future technologies would qualify for the Lifeline program, allowing the agency to expand the program to wireless providers in 2005, as well as

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<sup>6</sup> Ibid, *Mozilla Corporation, Petitioner v. The Federal Communications Commission and the United States of America*, Respondents, Docket No. 18-1051.

<sup>7</sup> Comments of the National Lifeline Association, 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 Link Up Reform and Modernization (WC Docket No. 11-42), April 20, 2020, <https://ecfsapi.fcc.gov/file/10420273226392/NaLA%20Comments%20on%20Mozilla%20Remand%20Public%20Notice.4.20.20.pdf>.

<sup>8</sup> Ibid.

BIAS providers in 2016. Therefore, the FCC’s reversal of the OIO does not affect this program, and BIAS providers should be allowed to continue to offer discounted broadband internet to eligible individuals under the Lifeline program if Title II regulations no longer apply to the internet.

### **Pole Attachments:**

In its remand, the Court maintained that the FCC did not adequately address the issue of whether reclassifying BIAS as an information service would affect pole attachment rates and requirements for broadband services. Pole attachment regulation is provided for under Title II and Title VI of the Communications Act of 1996, respectively, for telecommunications services and cable systems. In the Court’s opinion, under the RIF Order, stand-alone BIAS providers, like Google Fiber, are not subject to any pole attachment regulation following the reclassification of BIAS as an information service.

In his April 13, 2020 commentary on this issue, Larry Spiwak of the Phoenix Center for Law and Economics noted that the Court, “held that because Title I is not an affirmative grant of regulatory authority, reclassification meant that the Commission similarly abdicated any ability to exercise its ancillary jurisdiction over information services because there is no longer any specific statutory regulatory authority under Title II (along with Titles III and VI) to which the Commission could attach.”<sup>9</sup> Mr. Spiwak further notes that the Court in its ruling missed an “important fact that prior to the *2015 Open Internet Rules* carriers that provided broadband-only services were similarly foreclosed from taking advantage of the statutory regime under Section 224. It was only by the Commission’s classification of broadband Internet access as a Title II telecommunications service in 2015 that broadband-only providers could avail themselves of Section 224 – a statutory ‘right’ that was created by the stroke of the agency’s pen that lasted barely two years.”<sup>10</sup>

Because broadband-only service providers made the business decision to only exclusively provide broadband service, and were not previous to the OIO subject to such rate regulations

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<sup>9</sup> Larry Spiwak, “Stepping Back onto the Escalator: Answering the D.C. Circuit’s Remand of the Pole Attachment Question,” Perspectives, April 13, 2020, <https://www.phoenix-center.org/perspectives/Perspective20-02Final.pdf>.

<sup>10</sup> Ibid.

under Title II, returning the internet to its prior status as an information service should not have any adverse effects on pole attachment regulation for these services by state and local regulators.

### **Public Safety Communications:**

The third item the Court asked the FCC to evaluate was the impact of rescinding the OIO on public safety communications. This issue was included in the case due to an incident during the Mendocino Complex fires in Santa Clara County, California in June 2018. The Santa Clara Fire Department had purchased a communications package from Verizon that was not specifically designed for public safety purposes.<sup>11</sup> Verizon maintains that it had a company policy that if a public safety agency requested a suspension of speed restrictions, the company would allow for a waiver and it had granted such suspensions to the fire department in the past. However, during the Mendocino Complex fire, a Verizon customer service representative, who was unaware of the company's policies, declined to waive the speed restrictions to the fire department at a critical time.

On April 20, 2020, the County of Santa Clara, California and the City of Los Angeles, California filed joint comments which suggest that public safety communications were harmed by the RIF order because it removed the “mandatory open internet principles the Commission had set out in its 2015 Report and Order...”<sup>12</sup> The filing further notes that public safety officials are increasingly relying on non-governmental communications to reach their residents, making it technologically difficult to segregate these types of communication from that of the general public. The officials further implied that it adversely impacted the ability to access broadband internet by public officials working remotely due to the current pandemic crisis.<sup>13</sup>

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<sup>11</sup> Bob Redell, Kiki Intarasuwan, “Verizon Admits It Throttled Firefighters Internet Connection During Mendocino Complex Fire,” NBC Bay Area, August 28, 2018, <https://www.nbcbayarea.com/news/local/verizon-reportedly-throttled-santa-clara-co-firefighters-internet-connection/210433/>.

<sup>12</sup> Initial Comments of the County of Santa Clara, Santa Clara County Central Fire Protection District, and the City of Los Angeles in Response to the Commission's February 19, 2020 Public Notice, Restoring Internet Freedom, WC Docket Nos. 17-108, 17-287, 11-42, April 20, 2020, <https://ecfsapi.fcc.gov/file/10421077992221/2020-04-20%20Santa%20Clara%2C%20SC%20Fire%2C%20%26%20LA%20Initial%20Refresh%20Comment%20re%20RIF%20Order.pdf>.

<sup>13</sup> Ibid.

It is easy to blame the Santa Clara incident on the lack of net neutrality mandates, but it is important to note that their particular situation did not relate to the lifting of the restrictions put in place by the OIO. As noted by Tech Freedom in its April 20, 2020 comments, “the Commission should explain that, rather than the neutrality of a “best-efforts” network with zero quality-of-service guarantees, critical services require service level agreements (*e.g.*, ultra-low latency to ensure near-real-time updates through Internet of things devices), prioritization of their traffic in general, preemption of other users in emergencies, etc. Negotiation of enterprise-grade agreements, whether for Internet access or for other data services, allows these users to bargain for the services they need. In the marketplace for enterprise services tailored to meet the particular needs of public safety users, *as in any marketplace*, mistakes will happen, but the issues relating to the complaints raised by the Santa Clara Fire Department (a) were quickly remedied, (b) clearly were not within the scope of the 2015 Order, and (c) would not have violated the 2015 Order’s throttling rule anyway.”<sup>14</sup>

The private sector has been proactive in ensuring that emergency services, fire departments, health care workers, police departments and other first responders have all the access they need to telecommunications services, often at no cost, during the coronavirus pandemic. And the FCC has also been active in taking regulatory action to increase access and lower costs.

As a result of the Middle-Class Tax Relief and Jobs Act of 2012, funding to build the first nationwide first responder network was achieved during the AWS-3 auction, and the deployment of FirstNet is well underway. AT&T, which won the bid to build the network, is providing a dedicated network to enable improved communications for these critical response teams.<sup>15</sup>

Verizon has improved first responder communications by preempting other communications to make way for public safety communications needs in the event of an emergency; provisioning mobile broadband and wireless services for first responders; and

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<sup>14</sup> In the Matter of Restoring Internet Freedom (Docket WC No. 17-108); Bridging the Digital Divide for Low-Income Consumers (Docket WC No. 17-287); Lifeline and Link Up Reform and Modernization (Docket WC No. 11.42), Tech Freedom, Federal Communications Commission, April 20, 2020, <https://ecfsapi.fcc.gov/file/10420177798132/TechFreedom%20Net%20Neutrality%20RIFO%20Comments.pdf>.

<sup>15</sup> FirstNet, <https://www.firstnet.com>.

offering private virtual networks.<sup>16</sup> T-Mobile will be offering additional public sector solutions once its new network is fully operational, including free 5G access to first responders.<sup>17</sup> U.S. Cellular, now the fourth largest wireless company in the nation, has made a commitment to prioritize first responder communications.<sup>18</sup>

Cable companies are also making similar build out commitments to improve public safety networks. As noted in the American Cable Association's April 20, 2020 comments, the impact of the RIF Order on public safety agencies shows the potential for improved services due to the increased investment in new networks that have expanded across the country.<sup>19</sup> Without the Title II restrictions, cable operators and mobile broadband providers have been able to increase their network capacity, as evidenced by the resiliency of the networks in the face of the coronavirus pandemic.<sup>20</sup>

The Santa Clara Fire Department matter is irrelevant and immaterial to the matter of whether the RIF Order improved or impaired public safety communications. It should not be used as an excuse or justification to make any exceptions or changes to the Court's decision upholding the RIF Order. The evidence is clear that the RIF Order improved the ability for first responders and others to communicate during a crisis.

## **Conclusion:**

In reviewing the three distinct issues presented by the Court for remand to the FCC on the RIF Order, provisioning Lifeline benefits for BIAS services is permissible under the current framework for the program granted by Congress, and therefore is unaffected by the FCC's RIF Order; returning BIAS and broadband-only providers to their prior status as information services

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<sup>16</sup> "Response Connectivity," Verizon, <https://enterprise.verizon.com/solutions/public-sector/public-safety/response-solutions/response-connectivity/>.

<sup>17</sup> "T-Mobile for Government," T-Mobile, <https://www.t-mobile.com/business/public-safety>.

<sup>18</sup> "Data Priority for First Responders puts emergency response teams first," U.S. Cellular, <https://business.uscellular.com/solutions/public-safety/>.

<sup>19</sup> In the Matter of Wireline Competition Bureau Seeks to Refresh the Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit's Mozilla Decision, American Cable Association, April 20, 2020, <https://ecfsapi.fcc.gov/file/10421077992221/2020-04-20%20Santa%20Clara%2C%20SC%20Fire%2C%20%26%20LA%20Initial%20Refresh%20Comment%20re%20RIF%20Order.pdf>.

<sup>20</sup> Deborah Collier, "Net neutrality repeal is helping technology companies manage coronavirus boom," *Washington Examiner*, April 27, 2020, <https://www.washingtonexaminer.com/opinion/net-neutrality-repeal-is-helping-technology-companies-manage-coronavirus-boom>.

does not have adverse effects on pole attachment rate regulation by state and local regulators; and, public safety communications have benefited from increased investments by BIAS providers as a result of the RIF order.