

**Before the
Federal Communications Commission
Washington, DC 20554**

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| In the Matter of |) | |
| |) | |
| 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 |
| |) | |
| Restoring Internet Freedom |) | WC Docket No. 17-108 |
| |) | |
| To: The Commission |) | |

**COMMENTS OF NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE
AND COMMON CAUSE**

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I. Introduction

New America’s Open Technology Institute (“OTI”) and Common Cause submit these comments in response to the Commission’s Public Notice seeking comment on the issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit (“the Court”) in *Mozilla Corp. v. FCC*.¹ OTI and Common Cause supported the strong, enforceable protections outlined in the 2015 Open Internet Order and condemned the Commission’s 2017 Restoring Internet Freedom Order (“2017 Order”).² The Court’s remand order highlights the many serious issues that the Commission ignored in 2017, including public safety, broadband competition, and internet access for low-income Americans.

OTI and Common Cause urge the Commission to consider how the 2017 Order harms public safety and the Lifeline program, particularly as the nation grapples with a global pandemic that has moved much of society’s functions online. Finally, the Commission’s short, four-page public notice on this proceeding is insufficient. These important and complex issues demand a full Notice of Proposed Rulemaking.

II. The 2017 Order Severely Limited the Commission’s Ability to Protect Americans During Wildfires, Pandemics, and Other Public Safety Emergencies

The 2017 Order opened the door to harmful practices that jeopardize public safety. By repealing strong rules and largely deregulating the broadband industry, the Commission has created a dangerous environment in which life-saving services can be impeded when they are needed most. The Court recognized this danger in its decision: “The Commission’s disregard of

¹ *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 (Feb. 19, 2020) (“Public Notice”).

² Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28 (Rel. March 12, 2015) (“2015 Open Internet Order”).

its duty to analyze the impact of the 2018 Order on public safety renders its decision arbitrary and capricious in that part and warrants a remand with direction to address the issues raised.”³ OTI and Common Cause agree with the Court. The Commission’s statutory duty to “promot[e] safety of life and property through the use of wire and radio communications”⁴ is one of its core Congressional mandates. The Commission’s dereliction of this duty is deeply troubling.

Moreover, state and local officials have repeatedly warned that the deregulation of ISPs would significantly affect public safety services. For example, Santa Clara County, which has dealt with numerous wildfires in recent years, cautioned that its emergency response center relies on nondiscriminatory access to the internet.⁵ The California Public Utility Commission has argued that paid prioritization schemes could undermine state and local governments’ ability “to provide comprehensive, timely information to the public in a crisis.”⁶

The Commission’s public safety obligations also impact the private sector. ADT warned that the legalization of paid prioritization could harm its home safety and alarm business: “Absent protections, broadband providers would be free to block a particular alarm service provider’s messaging content and to discriminate amongst competing alarm service providers.”⁷ ADT provided the Commission with examples where ISPs had blocked ADT’s alarm data.⁸

These warnings were detailed in the 2017 docket and in the *Mozilla* case, but perhaps the starkest warning came just months after the 2017 Order’s enactment. In August 2018, first

³ *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) at 100 (“*Mozilla* Order”).

⁴ 47 U.S.C. § 151; *Mozilla* Order at 93.

⁵ *Mozilla* Order at 95.

⁶ *Id.* (“Pacific Gas and Electric, for example, implemented a “gas detection box that uses readily available [geographic information systems] platforms and tablets” in the wake of an earthquake to “quickly survey * * * damaged areas and identify and prioritize work to address gas leaks.” J.A. 2511. And the California Department of Forestry and Fire Protection “depends on broadband access, speed, and reliability” in order to “track fire threats, fires, and manage forests and vegetation” to prevent fires.”).

⁷ Comments of the ADT Corporation, WC Docket No. 17-108 (July 17, 2017).

⁸ Ex parte of the ADT Corporation, WC Docket No. 17-108 (Oct. 27, 2017).

responders battling the largest wildfire in California’s history experienced severely degraded wireless connectivity in an apparent throttling incident by their provider, Verizon.⁹ The throttling undermined the firefighters’ ability to coordinate their life-saving activities, but the Commission did nothing to help. Having just deregulated the service and repealed the rules against throttling, the Commission seems to have determined that it lacked authority to investigate the situation—let alone create an enforceable remedy to help the first responders. In the absence of federal authority, the firefighters had little recourse. Press reports finally brought some public attention to the incident, prompting ISPs to promise to better serve their first responder customers. But those promises lacked any meaningful mechanism to hold the ISPs accountable, and media scrutiny is no substitute for federal enforcement. Moreover, many first responder agencies lack the resources to identify connectivity problems or raise complaints; the California firefighters may have been an outlier in this respect.

This is why it is so important to have an expert agency enforce ex ante rules that protect public safety before emergencies arise. The potential injuries in this context cannot be remedied with ex post enforcement. When first responder connectivity fails, communities can be reduced to ashes and people can die. No administrative action—at the Federal Communications Commission, the Federal Trade Commission, or any other agency—can restore these kinds of injuries.

The public safety consequences of the 2017 Order have become even more acute as the nation grapples with COVID-19. This pandemic has affected Americans’ way of life in innumerable ways. To flatten the curve and stem the spread of the virus, Americans are being

⁹ Jon Brodtkin, *Verizon throttled fire department’s ‘unlimited’ data during Calif. wildfire*, Ars Technica (Aug. 21, 2018), <https://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/>.

told to stay home and shift much of their daily life to online services. With this large migration to internet-based life, an open internet that facilitates a free market for all websites and consumers is more important than ever. In the current environment, internet throttling risks disconnecting Americans from essential services such as telework, remote learning, grocery shopping, health care, and bill payment. Without this essential connectivity, more Americans will leave their homes and undermine the government's core strategy to limit the spread of the virus.

The 2017 Order may have also undermined the Commission's ability to proactively respond to the pandemic. Chairman Pai recently announced promises from hundreds of ISPs to help keep Americans connected during the COVID-19 crisis, but did not announce any enforcement mechanism or even a modest offer that the Commission will actively work to ensure that ISPs keep these promises.¹⁰ The 2017 Order stripped the Commission of the strong authority that would have supported such enforcement. Without this authority, the Commission may be missing opportunities to help Americans get online and stay online during the pandemic. Had the Commission kept the 2015 rules in place, it would have strong rules in place today to keep Americans connected during the pandemic—not voluntary promises and press releases.

The shift to teleworking may also make it difficult, if not impossible, for ISPs to uphold past promises that first responders will not be throttled during emergencies. With thousands of public officials working from home, the line between an ISP's government and residential customers has blurred. For example, an ISP may not know that a residential customer is actually a city epidemiologist working from home on emergency efforts to contain the spread of COVID-19. The Commission would have tools to combat this type of concern if it hadn't repealed the ban on throttling and stripped itself of authority in the 2017 Order. Perhaps tellingly, the recent

¹⁰ Press Release, FCC, *Chairman Pai Launches the Keep Americans Connected Pledge* (March 13, 2020).

industry pledges announced by Chairman Pai did *not* include any commitments against throttling public health officials or other first responders during the pandemic.¹¹

The 2017 Order’s threat to public safety is manifestly clear, making the Commission’s failure to address the issue an unacceptable error. The 2015 Open Internet Order offers a model for how to fix this error and fulfill the Commission’s duty to protect public safety. That order carefully contemplated this duty and created strong rules that protect both the open internet and public safety. The rules included an explicit safety and security provision, and “... reiterate[d] that the purpose of the safety and security provision is first to ensure that open Internet rules do not restrict broadband providers in addressing the needs of law enforcement authorities, and second to ensure that broadband providers do not use the safety and security provision without the imprimatur of a law enforcement authority, as a loophole to the rules.”¹² The Commission should once again strive for the prudent balance and adherence to statutory duty that the 2015 Open Internet Order achieved.

III. The 2017 Order Undermined the Commission’s Ability to Fully Support Broadband Services For Low-Income Americans

Chairman Pai has repeatedly stated that closing the digital divide is his top priority¹³ and committed to maintaining support for broadband in the Lifeline program.¹⁴ Despite the

¹¹ Press Release, FCC, *Chairman Pai Launches the Keep Americans Connected Pledge* (March 13, 2020).

¹² 2015 Open Internet Order ¶ 301. *See also* ¶ 302 (“Likewise, in connection with an emergency, there may be federal, state, tribal, and local public safety entities, homeland security personnel, and other authorities that need guaranteed or prioritized access to the Internet in order to coordinate disaster relief and other emergency response efforts, or for other emergency communications. Most commenters recognize the benefits of clarifying that these obligations are not inconsistent with open Internet rules.”).

¹³ Statement of Chairman Ajit Pai before the U.S. Senate Subcommittee on Financial Services and General Government, *Hearing on the FCC’s Fiscal Year 2021 Budget Request*, (March 10, 2010), <https://www.appropriations.senate.gov/imo/media/doc/03.10.20%20--%20Pai%20Testimony.pdf>.

¹⁴ Press Release, FCC, *Statement of FCC Chairman Ajit Pai on the Future of Broadband in the Lifeline Program* (March 29, 2017) (“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.”).

Chairman’s claims, the 2017 Order’s reclassification of broadband as a Title I service created legal uncertainty around the agency’s ability to fully support broadband services for Lifeline. The Commission’s 2015 framework under Title II provides the most legal certainty to fully support broadband services in Lifeline. The Commission specifically modernized the Lifeline program under Title II to meet the needs of low-income people who cannot afford broadband services—to help close the affordability gap that keeps so many Americans offline.¹⁵ Limiting support to facilities-based broadband networks that also support voice service would weaken consumer choice, ignore market realities, and undermine the Lifeline program itself. The Commission’s proposal to limit support to facilities-based services must also not jeopardize the ability of wireless resellers to participate in Lifeline. The COVID-19 pandemic has further emphasized the need for Lifeline to be a broadband-inclusive program. The Commission must adapt the program to meet the communications needs of low-income households during the health crisis.

A. Title II is the Strongest Legal Authority for Broadband Support in the Lifeline Program

The Commission seeks to refresh the record on its authority to direct Lifeline support to eligible telecommunications carriers (ETCs) providing broadband service to qualifying low-income households.¹⁶ The record from prior Lifeline proceedings demonstrates that Title II provides the Commission with the most legal certainty to fully support broadband services in Lifeline—for both voice-bundled and standalone broadband services. The Commission has historically interpreted its authority under section 254 to provide Universal Service Fund (USF)

¹⁵ Lifeline and Link Up Reform and Modernization et al, *Third report and Order, Further Report and Order, and Order on Reconsideration*, WC Docket Nos. 11-42, 09-197, 10-90, 31 FCC Rcd. 3962 (2016) (“Lifeline Modernization Order”).

¹⁶ Public Notice at 3.

support to both voice telephony services and the facilities over which they are offered.¹⁷ However, even with this interpretation, a carrier must be designated as an ETC to receive support.¹⁸ Further, only common carriers under Title II can be designated as ETCs.¹⁹ This is precisely why, in 2015, the Commission applied section 254 to broadband as part of its Title II classification order: to provide “both more legal certainty for the Commission’s prior decisions to offer universal service subsidies for the deployment of broadband networks and adoption of broadband services and more flexibility going forward.”²⁰ In 2016, the FCC relied on section 254 and Title II authority to modernize the Lifeline program and provide low-income consumers access to affordable broadband services.²¹ This framework allowed the Commission to provide Lifeline support for broadband on a bundled and standalone basis.²²

The *Mozilla* decision questioned whether the Commission can still provide Lifeline support for broadband services without Title II.²³ The Commission attempts to sidestep this question by proposing to limit Lifeline support to facilities-based broadband capable networks that support voice service.²⁴ Indeed, the Commission has long established that section 254(e) grants the agency the authority to provide USF support for voice services *and* the facilities over which they are offered.²⁵ Further, the Tenth Circuit has upheld the Commission’s ability to

¹⁷ Connect America Fund et al, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 et al, 26 FCC Rcd 17663 (2011) (“*Universal Service Transformation Order*”).

¹⁸ See 47 U.S.C. § 254(e) (“only an eligible telecommunications carrier designated under Section 214(e) shall be eligible to receive Federal universal service support”).

¹⁹ See 47 U.S.C. § 214(e)(1) (“A common carrier designated as an eligible telecommunications carrier ... shall be eligible to receive universal service support in accordance with section 254....”).

²⁰ See 2015 Open Internet Order.

²¹ Lifeline and Link Up Reform and Modernization et al, *Third report and Order, Further Report and Order, and Order on Reconsideration*, WC Docket Nos. 11-42, 09-197, 10-90, 31 FCC Rcd. 3962 (2016) (“*Lifeline Modernization Order*”).

²² *Id.* at 3975.

²³ *Mozilla* Order at 68-70.

²⁴ Public Notice at 3.

²⁵ *Universal Service Transformation Order* at 17685.

provide USF support for facilities-based broadband networks that also support voice.²⁶

Nevertheless, the Tenth Circuit conditioned the Commission's ability to provide USF support for broadband on a carrier's ETC designation.

Even if the Commission can provide Lifeline support for bundled voice and broadband services, it fails to consider how it can provide support for standalone broadband without Title II. In its *Lifeline Modernization Order*, the Commission recognized that the rapid change in communications technology has led to more consumers relying on broadband-only services.²⁷ Further, prior to the Commission's elimination of the Lifeline Broadband Provider designation, carriers were starting to shift their Lifeline products to offer more standalone broadband services. For example, Commissioner Starks noted there were "approximately 40 companies with pending LBP designations, many of which have applied to provide service in several states with high rates of poverty."²⁸ Support for standalone broadband becomes even more critical as the Commission continues to phase-out support for voice-only Lifeline service. In November, the Commission adopted an Order to decrease Lifeline support for voice-only service to \$7.25 per month.²⁹ Support for voice-only service is scheduled to be completely phased out by December 2021.³⁰ Without the underlying facilities-based voice service, the Commission has not addressed how it would continue to provide Lifeline support for broadband outside of Title II.

²⁶ See *In Re FCC 753 F.3d 1015, 1045-46* (10th Cir. 2014).

²⁷ *Lifeline Modernization Order* at 3980.

²⁸ See Bridging the Digital Divide for Low-Income Consumers et al, WC Docket No. 17-287 et al, *Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking*, Statement of Commissioner Geoffrey Starks Concurring in Part and Dissenting in Part, 34 FCC Rcd 10886 (2019); see also FCC, Lifeline Broadband Provider Petitions & Public Comment Periods, <https://www.fcc.gov/lifeline-broadband-provider-petitions-public-comment-periods>

²⁹ Lifeline and Link Up Reform and Modernization et al, *Order*, 34 FCC Rcd 11020, 11021 (2019).

³⁰ *Id.* at 1049.

B. Lifeline Should Continue to Support Wireless Resellers

The Commission asks how the *Mozilla* decision weighs on its previous proposal to limit Lifeline support to facilities-based broadband providers and discontinue support for non-facilities-based service providers. The Commission should not revisit this proposal, which would effectively kick wireless resellers out of the program and abandon the many Lifeline subscribers who rely on reseller-based services. Instead, the Commission should continue to support wireless resellers for both voice-only and bundled services.

The record from prior Lifeline proceedings overwhelmingly opposes removing wireless resellers from the program.³¹ Firstly, limiting the number of potential Lifeline providers runs counter to the Commission's Congressional directive to ensure affordable communications services for all, regardless of where they live or their means. Opening the program to as many providers as possible encourages competition, allows for greater diversity of options, and better ensures all those eligible for the program have access.

Secondly, the argument that resellers do not meet the requirements set forth by section 254(e) is specious. Resellers typically re-invest their Lifeline revenues back into their own services, such as tech support, equipment support, and staff training to ensure that resellers work smoothly with the Lifeline program.³² Under the Commission's narrow interpretation of the statute, a reseller simply could not exist, despite Congress allowing support for resale services. All revenues would have to be sent back to the owner of the facilities, with little or nothing leftover for the reseller to support the service.³³

³¹ See, e.g., Comments of New America's Open Technology Institute, WC Docket No. 17-287 (Feb. 21, 2018); Opening Comments On the Notice of Proposed Rulemaking and Notice of Inquiry By Low-Income Consumer Advocates, WC Docket Nos. 17-287, 11-42, 09-197 (Feb. 21, 2018).

³² TracFone Wireless Ex Parte, WC Docket No. 17-287 (Nov. 9, 2017).

³³ 47 USC § 214(e)(1)(A); 2017 Lifeline Item ¶ 70 (Congress expected "some amount of resale should be permissible.")

The proposal also runs counter to the increasing importance of wireless resellers for the Lifeline program. In recent years, wireless competitive ETC distributions have increased while ILEC distributions have decreased.³⁴ According to the Commission's most recent reporting, almost 60 percent of Lifeline subscribers receive service through a non-facilities-based carrier.³⁵ Withdrawing support for these providers would eliminate service for many Lifeline subscribers, forcing them to search for a new provider. In some markets, there may be no alternative provider, leaving Lifeline subscribers disconnected and abandoned.³⁶ This proposal would clearly harm low-income Americans and jeopardize the viability of the Lifeline program. It also runs counter to the Commission's statutory duty to expand service. The Commission should abandon this proposal and close the proceeding.

C. The Commission Needs Strong Lifeline Authority to Combat the COVID-19 Pandemic

The COVID-19 pandemic highlights the importance of ensuring the availability of robust Lifeline broadband service offerings for low-income consumers. With millions of Americans required to work, learn, and meet everyday needs while staying at home, the need for affordable broadband connectivity has never been greater. Moreover, the pandemic's economic fallout will likely increase the number of Americans who are eligible for Lifeline, as millions of people continue to lose their jobs. The Commission must act to ensure that everyone in the United States has access to home broadband. That is why OTI, Common Cause, and over 250 organizations have called on the Commission to expand the Lifeline program during the pandemic and to, specifically, create an Emergency Lifeline Benefit that covers the cost of adequate broadband

³⁴ See Universal Service Administrative Company, Historical Support Distribution, <http://www.usac.org/li/about/process-overview/stats/historical-support-distribution.aspx>.

³⁵ FCC, Universal Service Monitoring Report, 33 (2019).

³⁶ *Id.*

service for low-income households.³⁷ The existing infrastructure of the Lifeline program is one of the government's most effective pathways for providing immediate, emergency connectivity to the millions of low-income people who need it now. But the extent to which the 2017 Order calls into question Lifeline's legal authority is not helpful. At such a critical time in the nation's history, the Commission should have the strongest possible legal authority to help people get online and stay online.

IV. To Fully Comply with the Court's Remand Order, the Commission Should Issue an NPRM and Ensure Robust Participation by First Responder Commenters

The Court's remand order addresses complex issues that strike at the heart of the Commission's core Congressional mandates—universal service, broadband competition, and public safety. These critical issues demand more than a simple, four-page Public Notice. The Commission should give this remand the seriousness it deserves and issue a Notice of Proposed Rulemaking. An NPRM would give due time and attention to these issues and demonstrate that the Commission understands the serious errors identified by the Court and is genuinely committed to fixing them. The Court admonished the Commission for largely ignoring these issues once before, so rushing through an abbreviated proceeding does not inspire confidence that the Commission has learned any lessons from the remand.

An NPRM would also give state and local officials adequate time to properly address the important issues raised in the remand, which they are unable to do at present given their urgent duties on the front lines of the coronavirus pandemic. Some of the nation's leading voices on public safety—the City of New York, the City of Los Angeles, and firefighters in Santa Clara

³⁷ *Id.*

County—asked the Commission to extend the comment deadline by 60 days because “local jurisdictions will be fully occupied in responding to the current emergency for at least the next 30 days.”³⁸ OTI and Common Cause support this reasonable request, and we urge the Commission to respect the needs of first responders and city officials who are grappling with one of the gravest public health crises in our nation’s history. The Commission has an obligation to ensure robust participation of public safety voices in this proceeding. The Court admonished the Commission for ignoring public safety and specifically cited the Commission’s disregard of concerns raised by Santa Clara County, one of the parties that now seeks an extension.³⁹ The record would be incomplete without their full participation.

V. Conclusion

The Commission’s 2017 Order ignored critical issues and ushered in a range of problems related to public safety and the Lifeline program. While these problems exemplify the flawed route that the Commission took in repealing its Title II authority, the Commission now has an opportunity to correct its course. The Commission must prioritize its duty to protect public safety, particularly at this critical time in our nation’s history, and ensure that it has strong legal authority to help low-income households access the internet.

³⁸ See Letter from Elina Druker, New York City Law Department, Danielle L. Goldstein, City of Los Angeles, James R. Williams, Raphael Rajendra, County of Santa Clara, to Annick Banoun, FCC, WC Docket Nos. 17-108, 17-287, 11-42 (April 16, 2020).

³⁹ *Mozilla Corp. v. FCC*, 940 F.3d (D.C. Cir. 2019) at 94, 98 (“Santa Clara County, for example, explained that the 2018 Order would have a ‘profound negative impact on public welfare, health, and safety’ communications ... As noted by Santa Clara County, unlike most harms to edge providers incurred because of discriminatory practices by broadband providers, the harms from blocking and throttling during a public safety emergency are irreparable. People could be injured or die.”).

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