

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 Linkup Reform and Modernization)	WC Docket No. 11-42
)	

PETITION FOR RECONSIDERATION OF COMMON CAUSE, THE BENTON INSTITUTE FOR BROADBAND & SOCIETY, UNITED CHURCH OF CHRIST, OC INC., NATIONAL HISPANIC MEDIA COALITION, NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE, AND FREE PRESS

I. INTRODUCTION

Common Cause, the Benton Institute for Broadband & Society,¹ United Church of Christ, OC Inc., National Hispanic Media Coalition, New America’s Open Technology Institute, and Free Press respectfully seek reconsideration of the Federal Communications Commission’s (“FCC” or “Commission”) Order on Remand (“*Remand Order*”) adopted in the above-captioned proceedings.²

¹ Benton, a non-profit, operating foundation, believes that communication policy - rooted in the values of access, equity, and diversity - has the power to deliver new opportunities and strengthen communities to bridge our divides. Our goal is to bring open, affordable, high-capacity and competitive broadband to all people in the U.S. to ensure a thriving democracy. This reflects the institutional view of the Benton Institute for Broadband & Society, and unless obvious from the text, is not intended to reflect the views of its individual officers, directors, or advisors.

² *Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, Order on Remand, WC Docket Nos. 17-108, 17-287, 35 FCC Rcd 12328 (2020) (“*Remand Order*”).

This petition relies in part upon facts and circumstances pertaining to the COVID-19 pandemic that continue to present unprecedented public health and economic challenges throughout the nation. This petition meets the requirements of Section 1.429 of the Commission's rules.³ Pursuant to Section 1.429(b)(1), the last opportunity to present comments to the Commission was in May in the reply comment phase that ended on May 20, 2020.

In its haste to respond to the issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit in *Mozilla Corp. v. FCC*,⁴ the Commission failed to adequately consider the harms of classifying broadband as a Title I service to public safety,⁵ pole attachment rights for competitive broadband providers,⁶ and affordable broadband for low-income households through the Lifeline program.⁷ Because the Commission failed to open the record to consider the lessons learned from, and the facts established by, the COVID-19 pandemic, its findings "entirely fail to consider an important aspect of the problem."⁸

Specifically, the Commission's *Remand Order* weakened the Lifeline program's ability to provide low-income households with affordable broadband options at a time when the COVID-19 pandemic has made the need for connectivity greater than ever. As the pandemic continues to force nearly everyone to work, learn, and meet daily needs while staying at home, low-income households who cannot afford broadband face significant harms. Although the

³ 47 C.F.R. § 1.429.

⁴ *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

⁵ *Remand Order*, 35 FCC Rcd at 12368, para 67 ("Our analysis leads us to conclude that that the likely benefits of the *Restoring Internet Freedom Order* for public safety clearly outweigh any harms.").

⁶ *Id.* at 12370, para 70 ("[W]e find that the benefits of returning broadband internet access service to its historical information service classification outweigh any potential adverse effects resulting from the loss of pole attachment rights under Section 224 for broadband-only ISPs.").

⁷ *Id.* at 12388, para 103 ("[W]e believe that the benefits of reclassification would outweigh the removal of broadband Internet access service from the Lifeline program, were the sound statutory authority relied on today be found insufficient.").

⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Commission adopted its *Remand Order* in the midst of the pandemic, the circumstances on the ground have not improved and in some cases have worsened, particularly for low-income and other marginalized communities. The extent to which the *Remand Order* limits the use of Lifeline funds to certain providers and concludes that the benefits of deregulation outweigh the potential loss of broadband support in the Lifeline program undermines the Commission's core universal service mission and the purpose of the Lifeline program itself.

The clear and present harms low-income households struggling to afford connectivity face, and the significant shortcomings in the Commission's Title I analysis to maintain broadband support in Lifeline require the Commission to vacate the *Remand Order* and open a proceeding to reinstate broadband as a Title II service - the Commission's strongest legal authority for Lifeline support of broadband.

II. THE COVID-19 PANDEMIC HAS MADE LIFELINE SUPPORT FOR ROBUST BROADBAND SERVICES URGENTLY NEEDED

The COVID-19 pandemic highlights the importance of ensuring the availability of robust Lifeline broadband service offerings for low-income households. Since the Commission adopted its *Remand Order*, millions of Americans remain unemployed and analysts project employment numbers will not return to pre-pandemic levels for years to come.⁹ According to recent studies, job losses from the pandemic have disproportionately affected low-wage workers and communities of color.¹⁰ Black Americans have only recovered about a third of jobs lost during

⁹ Jonathan Ponciano, *10.9 Million Americans Are Still Unemployed -- Rate Ticks Down To 6.7%, But Job Market Could Take Years to Recover*, Forbes (Dec. 4, 2020), <https://www.forbes.com/sites/jonathanponciano/2020/12/04/unemployment-november-11-million-rate-ticks-down-to-67/?sh=26173cd2a616>.

¹⁰ Heather Long, Andrew Van Dam, Alyssa Fowers, & Leslie Shapiro, *The covid-19 recession is the most unequal in modern U.S. history*, Washington Post (Sept. 30, 2020), https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/?itid=lk_inline_manual_5.

the pandemic while the Latinx community still has the most ground to make up to reach pre-pandemic levels.¹¹ Studies also show that the less workers earned, the more likely they have been to lose their jobs.¹² These households are facing dire financial prospects and are often finding themselves in circumstances where they have to choose whether to pay for broadband or another essential service instead.¹³

The vaccine rollout for COVID-19 has also exposed the broadband affordability gap for low-income households and other marginalized communities. State and local governments are primarily relying on online tools to register people for vaccination appointments. But households that cannot afford connectivity are being left behind in the process to sign up for vaccination.¹⁴ Moreover, public health authorities are developing digital systems for contact tracing and vaccine documentation—which may be required to enter public spaces, attend large gatherings, or travel on public transportation—that require devices and connectivity that millions of people lack.¹⁵ The Commission should be supporting these public health efforts—many of which seem

¹¹ *See id.*

¹² *See id.*

¹³ Andrew Wyrich, *Read the heartbreaking complaints Americans sent the FCC after their internet was shut off*, Daily Dot (June 5, 2020), <https://www.dailydot.com/debug/fcc-coronavirus-pledge-complaints/> (“I am a mother of four boys whom who all are in school and need the internet to do their online school work, so I paid my bill of \$221.00 to turn my services on, in which was the last money I had and now do not have money to buy groceries for the week to provide to my family.”).

¹⁴ *See, e.g.*, Sara Ashley O’Brien, *COVID-19 vaccine rollout puts a spotlight on unequal access to the internet*, CBS46 (Feb. 4, 2021), https://www.cbs46.com/covid-19-vaccine-rollout-puts-a-spotlight-on-unequal-internet-access/article_e049c29d-74e3-5fc8-a781-f1fe631a3052.html

¹⁵ *See, e.g.*, Ranit Mishori, *To Vaccinate America, Close the Digital Divide*, The Hill (Jan. 28, 2021), <https://thehill.com/opinion/healthcare/536085-to-vaccinate-america-close-the-digital-divide>; Natasha Singer, *Vaccinated? Show Us Your App*, New York Times (Dec. 13, 2020), <https://www.nytimes.com/2020/12/13/technology/coronavirus-vaccine-apps.html>; Koustubh “K.J.” Bagchi et al, *Digital Tools for COVID-19 Contact Tracing: Identifying and Mitigating the Equity, Privacy, and Civil Liberties Concerns*, New America’s Open Technology Institute and Harvard University’s Safra Center for Ethics (July 2020), <https://ethics.harvard.edu/files/center-for-ethics/files/22civilliberties.pdf>.

to wrongly assume universal connectivity—with a robust Lifeline program. This is a time to *strengthen* Lifeline’s legal authority, not weaken it.

The public health crisis and ongoing economic fallout demands that the Lifeline program be able to meet the moment to fully support broadband services in order to provide affordable connectivity options. The existing infrastructure of the Lifeline program is one of the government’s most effective pathways for providing affordable connectivity to the millions of low-income people who need it now. However, as explained in the subsequent sections, the Commission’s *Remand Order* weakens the Lifeline program’s ability to achieve this outcome.

III. THE COMMISSION MUST VACATE THE REMAND ORDER BECAUSE IT LIMITS THE LIFELINE PROGRAM’S ABILITY TO FULLY SUPPORT BROADBAND SERVICES

In responding to the *Mozilla* court’s question about whether the FCC can still provide Lifeline support for broadband services without Title II authority, the *Remand Order* limits Lifeline support to facilities-based broadband capable networks that support voice service.¹⁶ Indeed, the Commission rests its legal theory on Section 254(e) and looks to its prior universal service fund (“USF”) decisions to find that the agency can provide USF support for common carrier voice services and the facilities over which they are offered.¹⁷ To comply with this Title I framework, the *Remand Order* states that “broadband-only providers that do not offer any voice service cannot participate in the program because they are not common carriers.”¹⁸ But the Commission fails to make any consideration as to what impact this has on the program’s ability

¹⁶ *Remand Order*, 35 FCC Rcd at 12378-79, paras 83-85. The *Remand Order* later suggests that resellers may still receive support under the prior Commission’s logic, but then only because “[r]esellers . . . likewise incur costs associated with the network used to offer the supported voice service by directly compensating the underlying facilities-based providers.” *See id.* at 12383, para 94.

¹⁷ *Id.* at 12379, para 85.

¹⁸ *Id.* at 12387, para 101.

to provide robust broadband services during the ongoing pandemic. The Commission ignored evidence in the record explaining that new providers were seeking to enter the Lifeline market with standalone broadband products.¹⁹ Further, new evidence from the ongoing public health crisis and economic fallout caused by the pandemic shows that low-income households are in desperate need of affordable connectivity. Limiting Lifeline support to facilities-based broadband capable networks that support voice service undermines the program’s ability to provide more robust connectivity options for low-income households.

IV. THE COMMISSION MUST VACATE THE REMAND ORDER BECAUSE ITS CONCLUSION THAT THE BENEFITS OF BROADBAND DEREGULATION OUTWEIGH THE POTENTIAL LOSS OF LIFELINE SUPPORT FOR BROADBAND RUNS CONTRARY TO THE COMMISSION’S UNIVERSAL SERVICE MISSION AND THE PURPOSE OF THE LIFELINE PROGRAM

While the *Remand Order* suggests that Lifeline can maintain support for broadband under a Title I framework, it concludes that the benefits of deregulation outweigh the potential loss of broadband in the program should a court overturn the Commission’s legal analysis.²⁰ This conclusion runs contrary to the Commission’s universal service mission to ensure all Americans have access to communications services. The Commission has long prioritized the importance of advancing universal service. Prior to the 1996 Act, the Commission based its universal service policy on Section 1 of the Communications Act of 1934.²¹ In the 1996 Act, Congress specifically codified universal service principles on which the Commission must base policies, including

¹⁹ Comments of New America’s Open Technology Institute and Common Cause, WC Docket Nos. 17-287, 11-42, 17-108, at 9 (filed April 20, 2020).

²⁰ *Remand Order*, 35 FCC Rcd at 12388, para 103.

²¹ *See* Federal-State Joint Board on Separations, CC Docket No. 96-45, Notice of Proposed Rulemaking, 11 FCC Rcd 18092, 18096, para 3 (1996); 47 U.S.C. § 151 (mandating that the Commission “make[s] available, so far as possible, to all the people of the United States without discrimination on the basis of race, color, religion, national origin, or sex a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”).

access to services at affordable rates.²² The *Remand Order* fails to show how broadband deregulation advances the Commission’s policy goal of ensuring affordable communications services. In fact, since the Commission classified broadband as a Title I service and abdicated its oversight, the largest broadband providers have increased their prices²³ and announced plans to impose data caps.²⁴ Further, millions of households who are facing economic challenges caused by the pandemic continue to struggle to afford connectivity.

The Commission’s conclusion to prioritize broadband deregulation also runs contrary to the purpose of the Lifeline program. Lifeline was created in 1985 because the marketplace failed to meet the basic communications needs of low-income households.²⁵ Throughout the years, the program has been updated to keep pace with new technologies and the changing communications needs of low-income communities. The Commission specifically modernized the Lifeline program in 2016 under Title II to meet the needs of low-income people who cannot afford broadband service.²⁶ Under this *Lifeline Modernization Order*, the Commission envisioned a

²² 47 U.S.C. § 254 (b)(1) (“Quality services should be available at just, reasonable, and affordable rates[.]”).

²³ See, e.g., Jon Brodtkin, *Comcast raising TV and Internet Prices, including a big hike to hidden fees*, Ars Technica (Nov. 25, 2020), <https://arstechnica.com/information-technology/2020/11/comcast-raising-tv-and-internet-prices-including-a-big-hike-to-hidden-fees/>; Jon Brodtkin, *AT&T raises prices 7% by making its customers pay AT&T’s property taxes*, Ars Technica (Oct. 11, 2019), <https://arstechnica.com/tech-policy/2019/10/att-raises-prices-7-by-making-its-customers-pay-atts-property-taxes/>; see also Becky Chao & Claire Park, *The Cost of Connectivity 2020*, New America (July 15, 2020), <https://www.newamerica.org/oti/reports/cost-connectivity-2020/>.

²⁴ See, Tony Romm, *Comcast suspends Internet data limits, fees for Northeast customers*, Washington Post (February 11, 2021), <https://www.washingtonpost.com/technology/2021/02/03/comcast-suspends-data-caps/>.

Comcast has “suspended,” this price increase for several months, but has not rescinded it.

²⁵ See *MTS and WATS Market Structure, and Amendment of Parts 67 & 69 of the Commission’s Rules and Establishment of a Joint Board*, Report and Order, 50 Fed. Reg. 939 (1985).

²⁶ *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*”).

competitive marketplace that provided households with meaningful choices for broadband service.²⁷ At its best, the Commission’s current Title I framework constrains Lifeline support for broadband through legacy telecom carriers who are offering voice service. This is not only bad policy, but bad law, and is quite unlikely to withstand judicial review.²⁸ And if, as is quite possible, a court will find that the Commission lacked the legal authority to support broadband services through Lifeline under this framework, it would render the program largely ineffective to meet the 21st Century connectivity needs of low-income households.

V. CONCLUSION

The Commission’s *Remand Order* has placed serious constraints on the Lifeline program’s ability to connect low-income households. 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. For the foregoing reasons, the Commission should vacate the *Remand Order* and open a proceeding to reinstate broadband as a Title II service.

Respectfully submitted,

/s

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²⁷ *Lifeline Modernization Order*, 31 FCC Rcd at 3964, para 5 (“We also take important steps to improve the management and design of the program by streamlining program rules and eliminating outdated program obligations with the goal of providing incentives for broadband providers to participate and increasing competition and meaningful broadband offerings to Lifeline subscribers.”).

²⁸ *See Remand Order*, 35 FCC Rcd at 12418 (Dissenting Statement of then-Commissioner Rosenworcel.)

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