

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

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
)	

COMMENTS OF TECHFREEDOM



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EXECUTIVE SUMMARY

TechFreedom files these Comments in response to the FCC's request to refresh the record in the above-referenced proceedings following the U.S. Court of Appeals for the District of Columbia Circuit's remand of *Mozilla Corp. v. FCC*. The court upheld the FCC's decision, in the 2018 *Restoring Internet Freedom* Order, to (a) return Broadband Internet Access Service (BIAS) to its pre-2015 prior status as a lightly regulated information service subject to Title I rather than Title II of the Communications Act, and (b) return to the Commission's pre-2010 interpretation of Section 706 as conferring no regulatory authority upon the Commission independent of any other provision of the Communications Act. The *Mozilla* court did *not* invite, let alone require, the Commission to reconsider those decisions.

The *Mozilla* court required only that the FCC better explain how these decisions would impact three discrete issues: the FCC's Lifeline Program, pole attachments, and public safety communications. On all three, the FCC can easily expand on its explanation of why the 2018 Order's statutory re-interpretations had only marginal costs, and why the benefits of the Order outweighed these costs.

On both pole attachments and Lifeline, the Commission need only explain the same legal point: so long as eligible telecommunications carriers continue to provide *some* telecommunications service (*e.g.*, telephony), they will remain "telecommunications providers" eligible to receive Lifeline support, and will also be covered by the pole attachment rules. Thus, few BIAS providers will be affected by the 2018 Order.

Likewise, the FCC can easily explain why the comments about threats to public safety were misplaced: public safety communication has always been outside of the core net neutrality debate, which applies only to mass market services offered to the public at large, and able to access substantially all Internet endpoints (BIAS service). Attempts to elevate the largely

hypothetical concerns of some public safety operators constitute an attempt to read a specific statutory mandate into a largely aspirational purpose of the Communications Act.

Further, the 2018 Order had no effect on emergency responders (including the Santa Clara Fire Prevention Department) and critical infrastructure providers, both public and private, insofar as the Internet access services they rely on simply would not have qualified as BIAS under either the 2010 or 2015 Orders. Those orders explicitly excluded enterprise offerings and the Communications Act requires that telecommunications services be provided “directly to the public,” not to government agencies. Regardless, these plans not only existed under the 2015 Order’s rules, they were expressly *permitted* under those rules.

In addition, 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.

Provided the FCC addresses argument comments raised in the original *Restoring Internet Freedom* proceeding, the FCC’s Further Report and Order will be upheld under the deferential standard of review followed by the courts. The FCC will not be required to address new arguments raised for the first time in this proceeding.

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COMMENTS OF TECHFREEDOM

TechFreedom, pursuant to Sections 1.415 and 1.419 of the Commission’s rules (47 C.F.R. §§ 1.415 & 1.419), hereby files these Comments in response to the FCC’s request to refresh the record in the above-referenced proceedings following the U.S. Court of Appeals for the District of Columbia Circuit’s remand of *Mozilla Corp. v. FCC*.¹ By Public Notice, issued February 19, 2020, the Commission sought comment on three narrow issues: public safety communications, pole attachments, and the Lifeline Program.² In support of these Comments, TechFreedom submits:

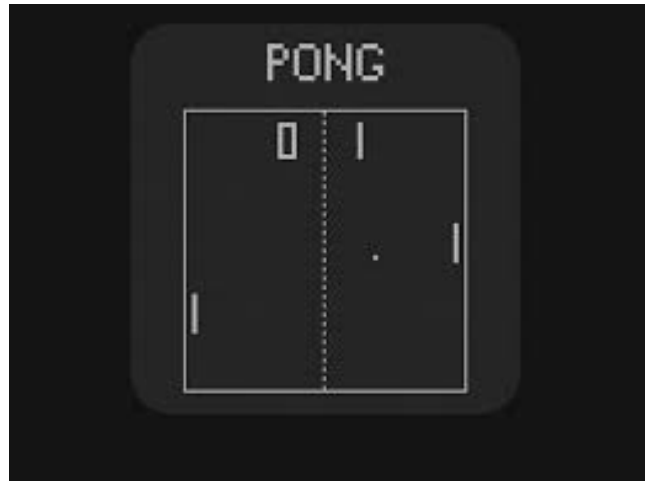
I. TechFreedom Has Been Engaged On this Subject Since 2010.

TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

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

² Public Notice, DA 20-168 (Feb. 19, 2020), <https://docs.fcc.gov/public/attachments/DA-20-168A1.pdf>. Public Notice, DA 20-331 extended the deadline for comments to April 20, 2020, and the deadline for reply comments to May 20, 2020. These Comments are timely filed. Public Notice, DA 20-331 (March 25, 2020), <https://docs.fcc.gov/public/attachments/DA-20-331A1.pdf>.

TechFreedom has participated in all aspects of the net neutrality debate over the last decade with a major unifying theme: there is ample common ground on core principles of net neutrality, and only by enacting those principles in legislation can Congress end the game of Pong the FCC has played, switching between Title I and Title II regulation of Broadband Internet Access Service (“BIAS”).



This back-and-forth serves neither the telecommunications industry nor the American consumer.³ In the *Restoring Internet Freedom Order* (“RIFO” or the “2018 Order”), the Commission cited our work 29 times.⁴ We led a group of interveners in the subsequent appeal of that decision that resulted in the *Mozilla* opinion.⁵

II. This Remand’s Scope Is Narrow and the FCC Need Only Better Explain Its Decision-Making.

The *Mozilla* court upheld the Commission’s fundamental finding, that BIAS has the properties of an information service subject to Title I, rather than a telecommunications service subject to Title II:

³ See generally, Comments of TechFreedom, Notice of Proposed Rulemaking – Restoring Internet Freedom, WC Docket No. 17-108 (Aug. 30, 2017), <http://docs.techfreedom.org/TechFreedom Reply Comments on Open Internet Order.pdf>.

⁴ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) [hereinafter *RIFO* or *2018 Order*]. While the *RIFO* was voted on in December of 2017, it was not released until January 4, 2018, and became effective on June 11, 2018. See Public Notice DA 18-485 (rel. May 11, 2018).

⁵ Mot. of TechFreedom for Leave to Intervene, *United States Telecom Ass’n v. FCC*, 855 F.3d 381 (2017) (No. 15-1063), <http://docs.techfreedom.org/TF FCC OIO Motion to Intervene 6.8.15.pdf>; Brief for Intervenors for Petitioners TechFreedom, *United States Telecom Ass’n v. FCC*, 855 F.3d 381 (2017) (No. 15-1063), <http://docs.techfreedom.org/TF Intervenor Brief 8.6.15.pdf>; Reply Brief for Intervenors for Petitioners TechFreedom, *United States Telecom Ass’n v. FCC*, 855 F.3d 381 (2017) (No. 15-1063), https://apps.fcc.gov/edocs_public/attachmatch/DOC-335733A1.pdf.

The *central issue before us* is whether the Commission lawfully applied the statute in classifying broadband Internet access service as an “information service.” We approach the issue through the lens of the Supreme Court’s decision in *Brand X*, which upheld the Commission’s 2002 refusal to classify cable broadband as a “telecommunications service.” The Commission’s classification of cable modem as an “information service” was not challenged in *Brand X*, but, given that “telecommunications service” and “information service” have been treated as mutually exclusive by the Commission since the late 1990s, a premise Petitioners do not challenge, we view *Brand X* as binding precedent in this case.⁶

The court did not require, or invite, the FCC to reconsider that aspect of the 2018 Order, instead concluding only that the FCC had not adequately explained its decision-making in three discrete areas:

We remand the Order to the agency on three discrete issues: (1) The Order failed to examine the implications of its decisions for public safety; (2) the Order does not sufficiently explain what reclassification will mean for regulation of pole attachments; and (3) the agency did not adequately address Petitioners’ concerns about the effects of broadband reclassification on the Lifeline Program.⁷

In each case, the standard of review for the Further Report and Order will may differ slightly, but in all three, the Commission should have little difficulty satisfying the D.C. Circuit that its decision-making is neither arbitrary nor capricious.

A. The *Mozilla* Court’s Remand Is Not an Invitation to Revisit the Core Findings of the 2018 Order.

Despite the narrow scope of the *Mozilla* court’s remand, the FCC has faced strong pressure to reconsider entirely the conclusions underlying the 2018 Order. In her statement accompanying the Public Notice, FCC Commissioner Rosenworcel made clear that she wants the entire *RIFO* reconsidered. “The FCC got it wrong when it repealed net neutrality. The decision

⁶ *Mozilla*, 940 F.3d at 18-19 (emphasis added, internal citations omitted).

⁷ *Id.* at 18 (internal citations omitted).

put the agency on the wrong side of history, the American public, and the law.”⁸ She advocated for yet another inundation of the docket with comments calling for a total repeal of the 2018 Order.⁹ As of the time of this filing, the docket, which already had 24 million comments has been bloated by 11,673 new comments, most calling for the repeal of the *RIFO*, and by implication, the reinstatement of Title II common carrier regulation.¹⁰

That is not what the court mandated in its remand, however. While the FCC always is free to undertake a wider review of net neutrality (and no doubt, the next Democrat-controlled FCC will start another round of Pong by returning to a Title II regime), the *Mozilla* remand neither requires, nor warrants, a broad reassessment of net neutrality. The FCC should limit its inquiry to the three specific issues remanded: Lifeline, pole attachments, and public safety.

B. The FCC Can Easily Re-Explain Its Decision-Making with Respect to Lifeline and Pole Attachments.

As the *Mozilla* court noted, when an “agency shifts course, ‘it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.’”¹¹ In providing additional explanation of that change of course, the Further Report and Order will be subject to a deferential standard of review, as the *Mozilla* court said:

the Commission may well be able to address on remand the issues it failed to adequately consider in the 2018 Order. *See Susquehanna Int’l Grp., LLC v. SEC*, 866 F.3d 442, 451 (D.C. Cir. 2017) (“[T]he SEC may be able to approve the Plan once again, after conducting a proper analysis on remand.”); *see also Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (remanding without vacatur where

⁸ Statement of Commissioner Jessica Rosenworcel on FCC Seeking Public Comment on Net Neutrality Remand, issued Feb. 19, 2020, <https://docs.fcc.gov/public/attachments/DOC-362558A1.pdf>.

⁹ *Id.* (“The American public should raise their voices and let Washington know how important an open internet is for every piece of our civic and commercial lives.”).

¹⁰ *Restoring Internet Freedom*, Docket 17-108, date range from February 20, 2020 to April 20, 2020.

¹¹ *Mozilla*, 940 F.3d at 50 (citing *FCC v. Fox TV Stations*, 556 U.S. 502, 515 (2009)).

it was “plausible that FERC can redress its failure of explanation on remand while reaching the same result”).¹²

Just as the *RIFO* turned on questions of statutory interpretation, so, too, will it suffice for the Commission to better explain two legal points:

1. Reclassification of BIAS providers as Title I information services will not affect the Commission’s ability to award Lifeline subsidies for broadband service: so long as eligible telecommunications carriers continue to provide *some* telecommunications service (*e.g.*, telephony), they will remain “telecommunications providers;”
2. Likewise, the BIAS providers will remain covered by the FCC’s pole attachment rules so long as they provide *some* telecommunications service.

For both matters of statutory interpretation, the FCC should explain two corresponding matters of predictive judgment: (1) why most BIAS providers will continue to provide a telecommunications service, specifically telephony, and (2) why the edge case of BIAS providers who do not provide a telecommunications service (*e.g.*, telephony), and who will thus be ineligible for both Lifeline support and the FCC’s pole attachment rules, is marginal.

On all these points, the Commission will properly receive broad deference. As the *Mozilla* court noted (in upholding the *RIFO*’s reclassification of BIAS), the court “reiterate[d] that our posture in arbitrary and capricious review is deferential. To withstand scrutiny, ‘the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’”¹³ The *Mozilla* court also emphasized that it would defer to the FCC’s predictive judgments on questions of policy:

¹² *Id.* at 86.

¹³ *Id.* at 50 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. at 43).

“Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.”¹⁴

Because we believe the key issues the FCC needs to explain turn on statutory interpretation, it bears emphasis that the *Mozilla* court said nothing to suggest the Further Report and Order’s re-explanation of the 2018 Order’s decision-making need go beyond better explaining the Commission’s interpretation of the Communications Act. Indeed, the court was careful to distinguish between statutory interpretation, where the court upheld the 2018 Order as “a reasonable interpretation of the statute for purposes of *Chevron*,” and the explanation of its decision-making: “aspects of the Commission’s decision are still arbitrary and capricious under the Administrative Procedure Act because of the Commission’s failure to address an important and statutorily mandated consideration—the impact of the 2018 Order on public safety—and the Commission’s inadequate consideration of the 2018 Order’s impact on pole-attachment regulation and the Lifeline Program.”¹⁵ Thus, while the court rejected the FCC’s “claims that we can uphold its entire rulemaking on the weight of its statutory interpretation alone” and that “the reasonableness of its interpretation necessarily insulates the 2018 Order from arbitrary and capricious challenge,”¹⁶ the court did *not* say that the FCC could not provide reasoned decision-making by better explaining this statutory analysis upon remand. To the contrary, the *Mozilla*

¹⁴ *Id.* (quoting *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 374 F.3d 1251, 1260–1261 (D.C. Cir. 2004) (quoting *Public Utils. Comm’n v. FERC*, 24 F.3d 275, 281 (D.C. Cir. 1994))).

¹⁵ *Id.* at 49 (“To be sure, the analysis of an agency’s statutory interpretation at *Chevron* Step Two has some overlap with arbitrary and capricious review. The former asks whether the agency’s interpretation ‘is based on a permissible construction of the statute.’ *Chevron*, 467 U.S. at 843. And the latter asks whether the agency ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,’ and ‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’ *State Farm*, 463 U.S. 29, 43 (1983) (internal quotations marks omitted) (*State Farm*). Nevertheless, “the Venn diagram of the two inquiries is not a circle.” *Humane Soc’y of United States v. Zinke*, 865 F.3d 585, 605 (D.C. Cir. 2017). Each test must be independently satisfied.”).

¹⁶ *Id.* (citing Brief for Respondents at 58, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051) (Commission Br.) (expressing its view that its legal interpretation “alone suffices to justify the repeal”).

court made clear that (1) it will apply the deferential standards of *Chevron* review to the FCC's statutory interpretations, and (2) both the FCC's explanation of those statutory interpretations and its predictive judgments about the practical effects of those interpretations will be upheld.

C. Lifeline: the FCC Can Easily Explain Why the *RIFO* Did not Affect the Eligibility of BIAS for Lifeline Support.

The *Mozilla* court remanded the *RIFO*'s impact on the Lifeline Program: “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.”¹⁷ The court rejected the Commission’s argument that “it has ‘broad discretion’ to ‘defer consideration of particular issues to future proceedings,’ and it ‘need not address all problems in one fell swoop.’”¹⁸

Reading that portion of the *Mozilla* decision, the reader might conclude that, prior to the 2015 Order, broadband services were not eligible for any support under the Universal Service Fund (USF), either the High Cost Fund (providing support to carriers), or the Lifeline Program (providing support to individuals). To meet its charge under the *Mozilla* remand, the FCC need only point to the fact that (and explain the legal basis for why) broadband support under USF dates back to 2011, when the FCC adopted its *USF Transformational Order*, wherein it undertook to overhaul—indeed, transform—Universal Service Fund support¹⁹ Key to this transformation, led by Chairman Julius Genachowski (a Democrat), was expanding USF support to broadband services:

¹⁷ *Id.* at 69 (quoting the FCC’s brief from *Direct Communs. Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1049 (10th Cir. 2014)).

¹⁸ *Id.* (quoting Commission Br. 110 (quoting *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004))).

¹⁹ *Connect America Fund et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 4554 (2011) [hereinafter *USF/ICC Transformation Order*], *aff’d Direct Communications Cedar Valley, LLC v. Federal Communications Commission*, 753 F.3d 1015 (10th Cir. 2014).

Under these circumstances, modernizing USF and ICC from supporting just voice service to supporting voice and broadband, both fixed and mobile, through IP networks is required by statute. The Communications Act directs the Commission to preserve and advance universal service: “Access to advanced telecommunications and information services should be provided in all regions of the Nation.” It is the Commission’s statutory obligation to maintain the USF consistent with that mandate and to continue to support the nation’s telecommunications infrastructure in rural, insular, and high-cost areas. The statute also requires the Commission to update our mechanisms to reflect changes in the telecommunications market. Indeed, Congress explicitly defined universal service as “an evolving level of telecommunications services . . . taking into account advances in telecommunications and information technologies and services.”²⁰

Multiple parties appealed the *USF Transformational Order*, arguing that the FCC lacked statutory jurisdiction to expand USF support to broadband because broadband was, at that time, classified as an information service, not a telecommunications service.²¹ The Tenth Circuit rejected that claim, concluding that the FCC had authority to expand the scope and purposes of USF to include supporting information services:

[N]othing in subsection (c)(1) expressly or implicitly deprives the FCC of authority to direct that a USF recipient, which necessarily provides some form of “universal service” and has been deemed by a state commission or the FCC to be an eligible telecommunications carrier under 47 U.S.C. § 214(e), use some of its USF funds to provide services or build facilities related to services that fall outside of the FCC’s current definition of “universal service.” In other words, nothing in the statute limits the FCC’s authority to place conditions, such as the broadband requirement, on the use of USF funds.²²

Thus, the Tenth Circuit concluded that the FCC had properly exercised its discretionary authority under Section 254 to expand the *services* covered by USF to including some information services (broadband) as well as telecommunications services (voice). The *Direct Communications* court

²⁰ *Id.* ¶ 10 (footnotes and internal citations omitted).

²¹ *Direct Communications Cedar Valley, LLC v. Federal Communications Commission (Direct Communications)*, 753 F.3d 1015, 1042 (10th Cir. 2014).

²² *Id.* at 1046.

went on to conclude that only telecommunications carriers could receive USF support for providing all services (both telecommunications and information services).²³

On remand, the FCC can correct this misunderstanding, and reaffirm the 2011 FCC's decision to extend USF support to information services. We are confident that a future court, faced with a fuller explanation on this issue, and recitation to applicable judicial precedent, will agree with the court in *Direct Communications*: that the FCC retains authority to specify which services may be supported by USF, and that such services may include both telecommunications services and information services, as was the case between 2011 and 2014 (and upheld in *Direct Communications*), and from 2018 onward upon the adoption of the *RIFO*.

D. Pole Attachments: the FCC Can Easily Explain Why the *RIFO* Had No Effect on Nearly All BIAS Providers.

The *Mozilla* court also remanded to the FCC the issue of the impact of the *RIFO* on pole attachments.²⁴ Its framing of the issue, and certainly the magnitude of any problems created by

²³ *Id.* at 1048-49. Somehow, however, the *Mozilla* court confused “services” with “service providers” when it held:

The Commission completely fails to explain how its “authority under Section 254(e)” could extend to broadband, even “over facilities-based broadband-capable networks that support voice service,” 2018 Order ¶ 193, now that broadband is no longer considered to be a common carrier. After all, Section 254(e) provides that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(e) (emphasis added). And the statute expressly defines an “eligible telecommunications carrier” as a “common carrier” under Title II. *Id.* § 214(e)(1).

Mozilla, 940 F.3d at 69. This error was compounded by the court's citation to *Direct Communications* to support its conclusion that “broadband's eligibility for Lifeline subsidies turns on its common-carrier status.” *Id.* at 69. Yet the portion of *Direct Communications* quoted by the *Mozilla* court relates to the question of which service **providers** may receive USF support, not which **services** are eligible for support under the USF regime.

²⁴ “The Commission was required to grapple with the lapse in legal safeguards that its reversal of policy triggered. But it failed to do so. Because the 2018 Order was arbitrary and capricious in this respect, we remand for the Commission to confront the problem in a reasoned manner.” 940 F.3d at 67 (citing *Fogo De Chao (Holdings) Inc. v. United States Dep't of Homeland Sec.*, 769 F.3d 1127, 1141 (D.C. Cir. 2014) (an agency's judgment “fails the requirement of reasoned decisionmaking under arbitrary and capricious review” where it “was neither adequately explained ... nor supported by agency precedent”); see also *Hawaiian Dredging Constr. Co. v. NLRB*, 857 F.3d 877, 881 (D.C. Cir. 2017) (citing *State Farm*, 463 U.S. at 52))).

the *RIFO*, is hugely overstated—and rests on the same conflation of services and service providers explained above. The *Mozilla* court states:

But this whole regulatory scheme applies only to cable television systems and “telecommunications service[s]”—categories to which, under the 2018 Order, broadband no longer belongs. See 47 U.S.C. § 224(a)(4) (defining “pole attachment” as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility”) (emphasis added); *id.* § 224(f)(1) (“A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”) (emphasis added). Section 224’s regulation of pole attachments simply does not speak to information services. Which means that Section 224 no longer speaks to broadband.²⁵

In fact, Section 224 defines pole attachments not in reference to any “telecommunications service” but by referencing *providers* of such services. In other words, the entire pole attachment regime is agnostic as to the types of services provided and addresses only the relationship between pole owners (usually utility companies) and other carriers seeking access to those poles. Thus, the FCC can satisfy the requirements of the remand by explaining that Section 224 never did “speak to broadband”—but rather only to two types of service providers: cable television providers and telecommunications carriers. The statute applies to pole attachments made by carriers that are capable of providing *some* telecommunications service (or cable television service).

Moreover, the practical impact of the pole attachment issue is negligible. Since (i) Section 224 continues to apply to the relationship between pole owners and cable television providers or telecommunication service providers, (ii) all 4G mobile operators provide telephony service, and (iii) satellite broadband providers do not need access to utility poles, nearly all broadband

²⁵ *Id.* at 66. The *Mozilla* decision’s addition of “[s]” at the beginning of the paragraph subtly transformed the subject (*i.e.*, who or what was eligible) of Section 244(a)(4) from a “provider of telecommunication service” (**a carrier**) into “telecommunications service[s]” (**a service**).

traffic will be covered under Section 224. The only service providers that might even arguably be left not covered by Section 224 would be wired broadband providers that are neither cable television providers nor providers of any telecommunications service (so-called “standalone broadband providers”).²⁶ The FCC’s most recent report indicate that 97% of Americans receive BIAS service from either a cable provider (62%) or company offering DSL or FTTP (35%), with “[s]atellite, fixed wireless, and other technologies” accounting for the remaining 3%.²⁷ Unfortunately, this summary does not make it possible to estimate just how small the percentage of customers served by standalone broadband providers is because (a) the FCC’s report does not distinguish between those FTTP providers who are telecommunications carriers (*e.g.*, because they offer voice service)²⁸ and those who are not and (b) the FCC does not separate satellite providers from providers using other technologies. Fortunately, the FCC’s Form 477 codes BIAS providers by their network technology,²⁹ and the FCC requires all telecommunications carriers to identify themselves, so the FCC should be able to group the two to estimate how few standalone broadband providers (and affected subscribers) might be ineligible for the pole attachment provisions of the Communications Act. While the FCC is not *required* to make such an estimate, it would clearly satisfy the deferential standard of review to which the Report and Order’s judgment regarding the effects of the 2018 Order on pole attachments will be subject.³⁰

²⁶ For example, Google Fiber did not provide an Interconnected VoIP Service until 2016, several years after it began offering BIAS in certain cities. *See Introducing Fiber Phone*, Google Fiber (Mar. 29, 2016), <https://fiber.google.com/blog/2016/introducing-fiber-phone/>.

²⁷ Communications Marketplace Report *et al.*, GN Docket No. 18-231 *et al.*, 33 FCC Rcd 12558, ¶ 180 (2018), <https://docs.fcc.gov/public/attachments/FCC-18-181A1.pdf>.

²⁸ *Id.* (“Companies offering DSL or FTTP (*generally telephone companies*) have 35% of the overall residential fixed broadband market...”) (emphasis added).

²⁹ *Explanation of Broadband Deployment Data*, FCC (Mar. 12, 2020) (“TechCode: 2-digit code indicating the Technology of Transmission used to offer broadband service”), <https://www.fcc.gov/general/explanation-broadband-deployment-data>.

³⁰ *See supra* note 14.

E. The FCC’s Directive to Promote Public Safety Communications Is a General Mandate, not a Specific Requirement When Analyzing BIAS.

The *Mozilla* court remanded the *RIFO* to the FCC because it concluded that the Commission had “failed to examine the implications of its decisions for public safety”³¹ in ending the three-year Title II regime for regulating BIAS and returning the service to its prior classification as a Title I information service.³² The *Mozilla* court cited the FCC’s broad mandate to promote “safety of life and property through the use of wire and radio communications” under Section 151, but never discussed exactly what such an analysis should have entailed, concluding only that the FCC must “consider the implications for public safety of its changed regulatory posture in the 2018 Order.”³³

1. Nuvio Is Readily Distinguishable, as It Involved 911 Services, which Are Covered by a Separate, Clear Statutory Mandate.

The sole case cited by the *Mozilla* court for the proposition that the FCC must, on remand, address the impact of its decision on public safety operations is *Nuvio Corp. v. FCC*.³⁴ That case, however, dealt with the requirement of VoIP providers to implement comprehensive 911 calling as part of their voice offerings as required by the Wireless Communications and Public Safety Act of 1999.³⁵ Specifically, Congress required the FCC to implement (what was then) Section 251(e)(3).³⁶ In its 2005 Order applying that specific statutory mandate to VoIP providers, the Commission stated:

³¹ *Mozilla*, 940 F.3d at 18.

³² The effective date of the 2015 Order was June 12, 2015, and that of the 2018 Order was June 11, 2018.

³³ 940 F.3d at 59.

³⁴ *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006).

³⁵ Pub. L. No. 106–81, § 3, 113 Stat. 1286, 1287.

³⁶ 47 U.S.C. § 251(e)(3). Prior to 2008, that provision read as follows:

(3) UNIVERSAL EMERGENCY TELEPHONE NUMBER.—The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9–1–1 as the universal emergency telephone number within the United States for reporting

Congress adopted the 911 Act to promote and enhance public safety through the use of wireless communications services. More broadly, the 911 Act directed the Commission to designate 911 as the universal emergency assistance number for wireless and wireline calls, which the Commission accomplished in August 1999. The 911 Act further requires the Commission to “consult and cooperate with state and local officials” in its role of encouraging and supporting the deployment of “comprehensive end-to-end emergency communications infrastructure and programs.” The Commission continues to meet Congress’ mandate, and states and localities continue to make progress towards meeting Congress’ goal.³⁷

The “end-to-end emergency communications infrastructure and programs” referred to in the 1999 law, and referenced by the FCC in 2005 and in *Mozilla*,³⁸ is the nationwide enhanced 911 (E-911) system, not BIAS or any other part of the wired or wireless networks that serve as the backbone of our communication system in the United States. The only issue in *Nuvio* was whether, in adopting a 120-day period for VoIP providers to implement 911, the FCC properly balanced the specific statutory commandment to establish a ubiquitous 911 system in exercising its discretion to decide how best to “encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs.”³⁹ The

an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on the date of enactment of the Wireless Communications and Public Safety Act of 1999.

Congress amended Section 251 in 2008 to specifically include VoIP carriers as part of the 911 system and recodified the section to become Section 615-a1 as part of the New and Emerging Technologies 911 Improvement Act of 2008.

(a) It shall be the duty of each IP-enabled voice service provider to provide 9-1-1 service and enhanced 9-1-1 service to its subscribers in accordance with the requirements of the Federal Communications Commission.

(c)(1) within 90 days after the date of enactment of the New and Emerging Technologies 911 Improvement Act of 2008, shall issue regulations implementing such Act. . .

For simplicity, that section will be referred to in the remainder of these comments as Section 615-a1.

³⁷ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 04-36; WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 9 (2005) [hereinafter *2005 Order*] (internal footnotes and citations omitted).

³⁸ *Mozilla*, 940 F.3d at 60.

³⁹ 47 U.S.C. § 615.

Nuvio court ruled that the FCC was justified in imposing such a tight window for VoIP providers to implement 911, despite the compliance burdens for providers, given the specific congressional mandate under Section 615-a1 for the FCC to advance public safety through establishment of a 911 emergency calling system.⁴⁰ Because *Nuvio* involved the Commission's invocation of its statutory duty to implement a fully functional 911 system despite the "economic cost of compliance,"⁴¹ the court did not have to decide the issue for which *Mozilla* cites the decision: how much weight Section 151 requires the FCC to give to public safety interests versus all other factors.⁴²

BIAS has never been considered part of Section 615's "end-to-end emergency communications infrastructure"—and for good reason. Although we've come to expect BIAS to provide always-on, always-available connectivity, BIAS—and the Internet as a whole—was never designed to a sufficiently rigorous standard that BIAS could be ensured to function in an emergency. BIAS can go down in power outages, whereas we expect to be able to dial 911 on our landline or wireless phones in an emergency.⁴³

⁴⁰ *Nuvio Corp. v. FCC*, 473 F.3d 302, 303 (D.C. Cir. 2006) ("Petitioners, providers of the newly-emerging technology of Internet telephone service, challenge an order of the [FCC] that gave them only 120 days to do what is already required of providers of traditional telephone service: transmit 911 calls to a local emergency authority. We deny their consolidated petition for review because we conclude that the Commission adequately considered not only the technical and economic feasibility of the deadline, inquiries made necessary by the bar against arbitrary and capricious decision-making, but also the public safety objectives the Commission is required to achieve.").

⁴¹ *Id.* at 307.

⁴² It is true that the *Nuvio* court cited both Section 615 specific mandate (to promote E-911 deployment) and Section 151's broad statement (that one of the purposes of the FCC was to promote public "safety of life and property." 47 U.S.C. § 151. But since Section 615 clearly applied to the facts of that case, the only question under Section 151 was whether the FCC's short window of 120 days for VoIP carriers to implement E911 would further or hinder public safety, and the court deferred to the FCC's conclusion that such a timeline would, indeed, further public safety. The *Nuvio* court made no separate, independent finding of the Commission's compliance with Section 151.

⁴³ See *Preserving the Open Internet et al.*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 56 (2009) ("The Internet has traditionally relied on an end-to-end, open architecture, in which network operators use their 'best effort' to deliver packets to their intended destinations without quality-of-service guarantees"). See also Andrea Seabrook, *System that Made Internet*

So while having the ability to pass public safety information on to citizens is a laudable use of the Internet, state and local governments cannot reasonably rely on the Internet and BIAS offerings⁴⁴ as a primary system to disseminate public safety information.⁴⁵ There is no regulatory “fix” to assure “unimpeded access to the broadband Internet” under the *RIFO*, Title II, or any other regulatory regime when the network itself was only designed and engineered based on a “best efforts” approach.

Section 151, has never been cited, by itself, as the basis to overturn an FCC decision. Even when such a decision involves spectrum allocations, which is where Congress *has* specifically directed the FCC to carefully consider the impact on public safety operations,⁴⁶ state and local governments have never been able to convince a court that Section 151’s general mandate overrides an FCC determination of the manner in which to regulate entities under its jurisdiction.

Possible Turns 25, NPR (Jan. 5, 2008),

<https://www.npr.org/transcripts/17872707?storyId=17872707&ft=nprml&f=17872707?storyId=17872707&ft=nprml&f=17872707> (NPR interview with TCP/IP co-creator Vint Cerf describing the “best efforts” nature of the Internet). Compare this “best efforts” system design with FCC rules requiring telecommunications carriers to ensure that 911 calls go through, even during power outages. Ensuring Continuity of 911 Communications, 30 FCC Rcd 8677 ¶ 1 (2015) (“In this Report and Order, the Federal Communications Commission (FCC or Commission) takes important steps to ensure continued public confidence in the availability of 911 service by providers of facilities-based fixed, residential voice services in the event of power outages”).

⁴⁴ *But see infra* at 21.

⁴⁵ *See Mozilla*, 940 F.3d at 60 (Santa Clara County “and its fire department have implemented new, Internet-based services that depend on community members’ speedy and unimpeded access to broadband Internet”). But there is no such thing as “unimpeded access to broadband Internet,” because the Internet itself was not built with those capabilities. The very robustness of the Internet as a whole is based on protocols that **assume** impediments to getting data from one point to another, thus the packet switched network design that breaks data down to multiple packets and sends them over multiple routes and reintegrates them back at the destination, with the hope that all the data comes through. *See supra* note 43.

⁴⁶ *See, e.g.*, Communications Amendments Act of 1982, Pub.L. No. 97-259, 96 Stat. 1096 (“[i]n taking actions to manage the spectrum to be made available for use by the private land mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will (1) promote the safety of life and property . . .” 47 U.S.C. § 332(a) (Supp. 1983); the Senate Committee Report on this legislation states that “radio services which are necessary for the safety of life and property deserve more consideration in allocating spectrum than those services which are more in the nature of convenience or luxury.” S.Rep. No. 191, 97th Cong., 2d Sess. 14 (1981), reprinted in U.S. Code Cong. Ad. News 2237, 2250. *See also*, House Rep. No. 98-356, 98th Cong., 1st Sess. 27 (1983), reprinted in 1983 U.S. Code Cong. News 2219, 2237 (“The Committee believes, as it has stated on prior occasions, that public safety consideration should be a top priority **when frequency allocation decisions are made.**”)(emphasis added).

For example, in 1982, the FCC reallocated a portion of the 12 GHz band to provide a contiguous block of spectrum to allow for Direct Broadcast Satellite (DBS) service.⁴⁷ Several entities challenged these rules, including public safety licensees who operated in that band. In *NAB v. FCC*, the D.C. Circuit dismissed those claims, finding that the Commission's promise to address the needs of public safety licensees in a future proceeding was sufficient to meet the FCC's general mandate under Section 151.⁴⁸ Similarly, public safety licensees challenged the FCC's decision to allocate television channels for a new low power television service, citing Section 151, and the fact that they operated private land mobile radio stations on the frequencies including TV Channels 14-20. In *Neighborhood TV Co. v. Federal Communications Commission*,⁴⁹ the D.C. Circuit court again rejected this attack, concluding that the Commission's promise to protect public safety users from interference by allocating frequencies for LPTV stations on a secondary basis fulfilled the agency's mandate under Section 151.

The *RIFO* does not involve any spectrum allocation, and certainly does not involve removing spectrum from public safety use, as was the case in both *NAB v. FCC* and *Neighborhood TV*. The connection between the *RIFO* and public safety operations thus is far more attenuated, and the duty of the FCC under Section 151 is far more limited. We submit that, since the FCC has demonstrated that a light-touch regime has led, and will continue to lead, to more investment in infrastructure, and, as such, will make BIAS available to more individual at more competitive prices, that light touch will enhance public safety communications by making it possible to reach

⁴⁷ *Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference*, GN Docket No. 80-60390, Report and Order, F.C.C. 2d 676 (1982).

⁴⁸ *National Ass'n of Broadcasters v. F.C.C.*, 740 F.2d 1190, 1214 (D.C. Cir. 1984) ("The order further indicated that specific relief would be forthcoming to protect public safety broadcasters once the specific relocation problems they faced — technical, financial or other — were known; such relief is to include acceptance of interference to DBS services in specific locations, compensation from DBS operators for relocation costs, and/or extension of the transition period.").

⁴⁹ 742 F.2d 629 (D.C. Cir. 1984).

more people, more affordably, with public safety information.⁵⁰ That finding, if rearticulated by the FCC specifically within the context of public safety, is sufficient to meet generally applicable standard of Section 151—the only standard applicable to BIAS.

It simply cannot be the case that Section 151’s reference to public safety means that public safety is a “statutorily mandated factor”⁵¹ that the FCC must consider in every decision it makes as “an important aspect of [every] problem” the Commission faces.⁵² If *State Farm* required the FCC to specifically address the impact of its decision-making on users of BIAS who just happen to use BIAS for purposes that arguably perform a public safety function, the Commission would face enormous burden it had never faced before. Would *every* FCC order have to contain a separate analysis of the impact on public safety? Would a new radio station broadcast allocation in Whynot, North Carolina, for example, require the FCC to review the impact on public safety because such an allocation renders that spectrum unavailable to First Responders? Such an interpretation of Section 151 would, by requiring the FCC to conduct a detailed assessment of the public safety implications of its every decision, grind the work of the Commission to a halt.

⁵⁰ 2018 Order ¶ 86 (“We find that reinstating the information service classification for broadband Internet access service is more likely to encourage broadband investment and innovation, furthering our goal of making broadband available to all Americans and benefitting the entire Internet ecosystem. For almost 20 years, there was a bipartisan consensus that broadband should remain under Title I, 321 and ISPs cumulatively invested \$1.5 trillion in broadband networks between 1996 and 2015.”). *See also* ¶ 88 (“The balance of the evidence in the record suggests that Title II classification has reduced ISP investment in broadband networks, as well as hampered innovation, because of regulatory uncertainty. The record also demonstrates that small ISPs, many of which serve rural consumers, have been particularly harmed by Title II. And there is no convincing evidence of increased investment in the edge that would compensate for the reduction in network investment.”).

⁵¹ *Mozilla*, 940 F.3d at 60 (quoting *Public Citizen*, 374 F.3d at 1216).

⁵² *Id.* at 60 (quoting *State Farm*, 463 U.S. at 43).

2. Interpreting Section 151 to Impose a Duty to Consider Public Safety in All Decision-Making Would Upset the Structure of the Communications Act.

Ultimately, the goal of the public safety entities involved in the *Mozilla* litigation is clear: they believe that the FCC should regulate BIAS (and probably a lot more of the Internet) under a Title II regime. Yet to give state and local governments effectively a veto over federal policymaking in this arena would violate the most fundamental tenets of the Communications Act of 1934. For nearly a century, Congress has made clear that some aspects of the vast American communication system are to be governed at the federal level (interstate communications), some at the state level (intrastate communications), and some at the local level (zoning issues). To allow state and local government officials to stop the FCC from regulating interstate communications (which BIAS clearly is) merely by crying “public safety!” would turn this carefully crafted regulatory system on its head. Section 151 does not invest state and local governments with such power. The FCC should reject attempts by public safety advocates to have the aspirational “purpose” of making “available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . for the purpose of promoting safety of life and property” become the ultimate trump card against federal regulatory policies state and local governments don’t like.

III. Public Safety: the FCC Can Easily Explain Why Public Safety Users Were Not Affected by the *RIFO*.

The *Mozilla* court noted that “a number of commenters voiced concerns about the threat to public safety that would arise under the proposed (and ultimately adopted) 2018 Order,”⁵³

⁵³ 940 F.3d at 60.

and held the 2018 Order failed to adequately respond to their comments.⁵⁴ The D.C. Circuit requires agencies to respond only to “significant points raised by the public”:

Thus only comments which, if true, raise points relevant to the agency's decision and which, if adopted, would ***require a change in an agency's proposed rule*** cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.⁵⁵

The FCC can easily explain why the comments about threats to public safety were misplaced: the 2018 Order had no effect on emergency responders (including the Santa Clara Fire Prevention Department) and critical infrastructure providers, both public and private, insofar as the Internet access services they rely on simply would not have qualified as BIAS under either the 2010 or 2015 Orders. Those orders explicitly excluded enterprise offerings and the Communications Act requires that telecommunications services be provided “directly to the public,” not to government agencies. Regardless, these plans not only existed under the 2015 Order’s rules, they were expressly *permitted* under those rules.

In addition, the Commission should explain that:

- 1) 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.

⁵⁴ *Id.* at 62-63.

⁵⁵ *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 36 n. 58 (D.C. Cir. 1977) (citing *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393-394 (1973)).

2) 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.

By offering a clear explanation of such legal analysis and clear predictive judgments about its effects, the Further Report and Order will be upheld under *State Farm's* deferential standard of review.⁵⁶

A. The FCC Has Consistently Disclaimed Any Effect on Public Safety.

In many respects, the *Mozilla* court's focus on the arguments of public safety operators took the FCC by surprise. Hence, it is understandable that the Commission failed fully to respond to these arguments, either in the *RIFO*, or in its briefs or oral argument before the court. The reason for this is simple: for over a decade, the FCC has recognized that the core arguments surrounding so-called net neutrality have dealt only with BIAS service, defined as "mass market" services offered broadly to consumers. Broadband plans tailored for specialized users, such as public safety users, have never been subject to net neutrality rules.

The 2010 Order, for instance, said: "Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so."⁵⁷

⁵⁶ See *supra* note 14.

⁵⁷ *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191; WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, n.107 (2010) [hereinafter *2010 Order*]; 2018 Order ¶ 300.

Similarly, the 2015 Order, which the public safety operators so desperately wish to have reinstated, specifically disclaimed any effect upon public safety considerations:

In the *2014 Open Internet NPRM*, the Commission tentatively concluded that it should retain provisions which make clear that the open Internet rules do not alter broadband providers' rights or obligations with respect to other laws, safety and security considerations, or the ability of broadband providers to make reasonable efforts to address transfers of unlawful content and unlawful transfers of content." We affirm this tentative conclusion and reiterate today that our rules are not intended to expand or contract broadband providers' rights or obligations with respect to other laws or safety and security considerations—including the needs of emergency communications and law enforcement, public safety, and national security authorities.⁵⁸

This disclaimer makes sense only because the Order did not apply to plans offered to public safety operators.

B. Because the 2010 and 2015 Orders Explicitly Excluded Enterprise Services, the 2018 Order Had Little, if Any, Effect on Most Public Safety Users and Critical Infrastructure Providers.

The *Mozilla* court noted public safety officials' concern that "allowing broadband providers to prioritize Internet traffic as they see fit, or to demand payment for top-rate speed, could imperil the ability of first responders [and] providers of critical infrastructure ... to communicate during a crisis."⁵⁹ In fact, the Internet access service marketed to first responders and critical infrastructure providers was completely unaffected by the 2018 Order because such service is not offered to a "mass market," and thus was not covered by 2015 or 2010 Orders.

⁵⁸ 2018 Order ¶ 299 (citing *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 160 (2014) [hereinafter *2014 Open Internet NPRM*]).

⁵⁹ *Id.* at 60.

The 2015 Order notes that the Communications Act defines “telecommunications service” as “offering of telecommunications for a fee *directly to the public*...”⁶⁰ This is why the 2015 Order specified that “‘public safety services’ as defined in section 337 of the Act, are excluded from the definition of mobile [BIAS].”⁶¹ Most notably, this included AT&T’s FirstNet network, which provides prioritization and preemption to more than 11,000 public safety agencies and organizations (and serves more than 1.2 million devices)⁶² in a band of spectrum dedicated for that purpose.⁶³ Because Section 337 specifies that “‘such services are not made commercially available to the public by the provider,’”⁶⁴ FirstNet’s offerings were not covered by the 2010, 2015 or 2018 Orders,⁶⁵ nor could they have been.

While the 2010 Order did not attempt to impose common carrier status on BIAS providers, and thus did not directly implicate the statutory definition of “telecommunications service,” the Order nonetheless effectively included the same requirement in defining BIAS as being provided to a “mass market.” As the 2015 Order noted, the term “mass market” “does not include enterprise service offerings, far from being offered “directly to the public” are negotiated with organizations through customized or individually negotiated arrangements, or special access services.”⁶⁶ This includes offerings to government agencies as well as businesses and other organizations.

⁶⁰ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 363 (2015) [hereinafter *2015 Order*]; 47 U.S.C. § 153(53) (defining “Telecommunications service”).

⁶¹ 2015 Order n.461 (citing 47 U.S.C. § 337(f)(1)).

⁶² *COVID-19: Our Response*, AT&T (April 17, 2020), <https://about.att.com/pages/COVID-19.html#responders>.

⁶³ 47 U.S.C. § 337.

⁶⁴ 47 U.S.C. § 337(f)(1).

⁶⁵ 2018 Order n.461; 2015 Order; 2010 Order n.154.

⁶⁶ 2015 Order ¶ 189 (citing 2010 Order ¶ 45).

While, theoretically, it is possible that some smaller first responders or critical infrastructure providers might have purchased a BIAS service marketed to the public, this would be the exception and they all had the *option* of buying enterprise services that offered them features specifically suited to their needs, such as prioritization of service, truly unlimited (pay-as-you-go) data allowances, and, in some cases, the ability to have speed restrictions beyond an initial data allowance waived in emergencies.

The Internet access plans Verizon offered to the Santa Clara Fire Prevention Department—both the one the SCFPD was on at the time and the one Verizon encouraged the department to switch to—may *appear* to have been standardized, off-the-shelf offerings, but in fact, both were clearly offerings limited to government buyers. Verizon explained the “enterprise” nature of such offerings in a September 2018 letter to lawmakers:

Government customers like the Santa Clara Fire Department typically purchase mobile broadband service via negotiated contracts between providers and the state. These are sophisticated contracts similar to other large agreements that government entities use to buy most goods and services on favorable terms for a fair price. Some states use master agreements negotiated by providers with nationwide purchasing organizations such as National Association of State Procurement Officials (NASPO). Others [sic] states – like California – enter into their own contracts that incorporate and supplement the terms of those master agreements. And sometimes, as is the case here, counties or smaller government entities also enter into contracts that incorporate the NASPO or state agreements. In all these cases, these agreements outline the plans, terms, rates, and conditions under which state agencies and organizations may purchase service.⁶⁷

While offerings to government actors are, by definition, not available to the public, the line between enterprise offerings and BIAS is slightly more complicated — but only slightly. The 2010 Order noted that “[t]he Commission [had previously] defined mass market customers as residential and small business customers that purchase standardized offerings of

⁶⁷ Addendum to Joint Brief for Intervenor of Respondents, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051) at ADD1-3.

communications services.”⁶⁸ As discussed below, such individualization allows public safety users and critical infrastructure providers to bargain for service level agreements, prioritization, and other features they need.⁶⁹ Despite mentioning the sophistication of some enterprise customers,⁷⁰ the 2015 Order made clear that the key distinguishing feature of enterprise service is not the size or sophistication of the customer but whether the terms of the contract were standardized or individualized through negotiation, as reflected in long-standing FCC decisions and clear D.C. Circuit precedent.⁷¹ For example, the 2015 Order noted that, the *Verizon* court struck down the 2010 Order’s no-blocking and antidiscrimination rules because the 2010 Order had failed to establish that its rules did not impose common carrier regulation on services not properly classified as such. The *Verizon* court relied heavily on the D.C. Circuit’s 2012 decision in *Cellco*, which explained: “[C]ommon carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage per se.”⁷² The 2015 Order noted: “The *Verizon* court emphasized that,

⁶⁸ 2010 Order n.146 (quoting SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order ¶ 82 n.243 (2005)). This definition was developed in the course of the Commission’s analysis of the competitive effects of a series of telecommunications mergers, where it was essentially equivalent to market definition analysis in antitrust enforcement. *See, e.g., id.* at ¶ 173 (“medium and large enterprise customers are sophisticated purchasers of telecommunications services likely to make informed choices based on expert advice about service offerings and prices. As we concluded above, so long as no structural barriers prevent carriers from offering services to such customers, they will seek out best-priced alternatives.”).

⁶⁹ *See infra* at 27 *et seq.*

⁷⁰ 2015 Order, n.466 (“[E]nterprise customers tend to be sophisticated and knowledgeable (often with the assistance of consultants), . . . contracts are typically the result of RFPs and are individually-negotiated (and frequently subject to non-disclosure clauses), . . . contracts are generally for customized service packages, and . . . the contracts usually remain in effect for a number of years.”) (quoting 2010 Order ¶ 45; *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 85 (2007)).

⁷¹ 2015 Order ¶ 189. Neither the FCC’s 2010 Order nor its 2015 Order analyzed the definition of “mass market” under the long-standing framework followed by the FCC for assessing when a service qualifies as a common carrier. This is not surprising, since the 2010 Order did *not* reclassify broadband as a Title II service and the 2015 Order merely repeated, and cited back to, the 2010 Order’s brief discussion of this issue. 2015 Order ¶¶ 189, 336, nn. 463, 879.

⁷² *Cellco P'ship v. FCC*, 700 F.3d 534, 547 (2012).

unlike the data roaming rules at issue in *Cellco*, which explicitly left room for individualized negotiations, the *Open Internet Order* did not attempt to ‘ensure that [the] reasonableness standard remains flexible.’”⁷³ The 2015 Order discussed “individualized” negotiation, bargaining or decisions no fewer than 25 times—making clear how deeply *Cellco*’s framework shaped how the Order acknowledged the line between common and private carriage.

The 2015 Order also cited one of a pair of bedrock decision on the meaning of common carriage under the Communications Act, *NARUC I*: “a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve.”⁷⁴ Elsewhere, the Order cited the first sentence of a longer passage from *NARUC II*⁷⁵ that bears repeating in full:

the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking “to carry for all people indifferently. . . .” This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users. Nor is it essential that there be a statutory or other legal commandment to serve indiscriminately; it is the practice of such indifferent service that confers common carrier status.⁷⁶

NARUC I and *NARUC II* have guided the FCC’s distinction between private carriage and common carriage ever since. It is not surprising that the 2010 Order, even though it did not purport to treat BIAS providers as common carriers, relied on a definition of BIAS that, by excluding enterprise service providers (as private carriers) reflected the body of Commission decisions grounded in *NARUC I* and *NARUC II*. In writing “mass market” into the definition of BIAS in the

⁷³ 2015 Order n.96 (citing *Verizon v. FCC*, 740 F.3d 623, 657 (2014); *Cellco*, 700 F.3d at 548).

⁷⁴ *NARUC National Ass’n of Reg. Util. Com’rs v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. den.* 425 U.S. 992 (1976).

⁷⁵ 2015 Order n.1742.

⁷⁶ *NARUC*, 525 F.2d at 608.

2010 Order, and in retaining that definition in the 2015 Order, the Commission was not merely making a policy decision, it was reflecting long-standing precedent on the meaning of common carriage, as the 2015 Order notes:

We note further that, of course, our reclassification of broadband Internet access service as a “telecommunications service” subject to Title II below likewise does not rely on such a test or any measure of market power. Indeed, our reclassification decision is based on whether BIAS meets the statutory definition of a “telecommunications service,” and not any additional economic circumstances.⁷⁷

Three years after *NARUC II*, the Supreme Court ruled that, absent Congressional authority, the FCC could not “compel cable operators to provide common carriage.”⁷⁸ The D.C. Circuit provided a concise summary of the law when, in 1994, it blocked the FCC’s attempt to impose common carrier status on a local exchange carrier’s private dark-fiber service:

Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case “whether and on what terms to serve” and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier. *NARUC II*, 533 F.2d at 608-09; *NARUC I*, 525 F.2d at 643. While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.⁷⁹

The 2015 Order cited specific examples of non-BIAS data services as distinct from Internet access service: “virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services (to the extent those services are separate from broadband Internet access service).”⁸⁰ The 2015 Order noted that

⁷⁷ 2015 Order n.151.

⁷⁸ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 (1979).

⁷⁹ *Southwestern Bell Telephone Co. v. F.C.C.*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

⁸⁰ 2015 Order ¶ 190, *see also id.* ¶ 340.

these would be non-BIAS services because they do not satisfy a second prong of the definition of BIAS: they “do not provide the capability to receive data from all or substantially all Internet endpoints”⁸¹—an issue discussed immediately below. The Commission also noted that such services fail to satisfy the first prong of the definition of BIAS: “[t]he Commission has historically distinguished these services from ‘mass market’ services.”⁸² While CDNs and Internet backbone services are typically only purchased by medium to large enterprises, VPNs, hosting and data storage services are commonly purchased by enterprises of all sizes and even individuals. The fact that the Commission nonetheless considered these *not* to be “mass market” services underscores that what has been truly essential in the FCC’s definition of “mass market” service is not the size of the user but that the offerings are made on standardized terms without negotiation with users.

As a legal matter, it does not matter whether a county or other government agency negotiates its own agreement with a broadband provider or uses a master agreement offered by a state or an organization like NASPO. What matters in determining whether the service is common carriage or private carriage, under clear precedent from NARUC through the 2015 Order and to the *RIFO*, is whether offering has been negotiated by *someone* and the provider.

C. Specialized Services Were Excluded from BIAS and the Title II Regime Under the 2015 Order.

Many of the data services most critical for public safety for first responders and critical infrastructure operators were not covered by the 2015 Order not only because they were not provided to a “mass market,” under the first prong of the definition of BIAS, but also because, under the second key prong of that definition, they do not “provide[] the capability to transmit

⁸¹ *Id.*

⁸² 2015 Order ¶¶ 190, 340.

data to and receive data from all or substantially all Internet endpoints.”⁸³ Because these non-BIAS services were not within the scope of the 2015 Order or the 2010 Order, neither were they affected by the 2018 Order.⁸⁴

For example, many Internet of things devices and sensors (*e.g.*, to detect leaks in water mains or for telemedicine) require extremely low latency to provide real-time situational awareness for critical infrastructure or public safety users. The data service used for such devices would clearly be a non-BIAS service. The 2015 Order cited several specific examples: “connectivity bundled with e-readers, heart monitors, energy consumption sensors, limited-purpose devices such as automobile telematics, and services that provide schools with curriculum-approved applications and content.”⁸⁵ The 2015 Order specifically noted that, while “several commenters argue that paid prioritization arrangements could improve the provision of telemedicine services,” such “services might alternatively be structured as ‘non-BIAS data services,’ which are beyond the reach of the open Internet rules.”⁸⁶ Most importantly, the Order noted that “IP-services that do not travel over broadband Internet access service, like the facilities-based VoIP services used by many cable customers, are not within the scope of the open Internet rules, which protect access or use of broadband Internet access service.”⁸⁷ Thus, for

⁸³ 2015 Order ¶ 204; see generally *id.* ¶¶ 207-213; *id.* ¶ 207 (“While the 2010 Open Internet Order and the 2014 Open Internet NPRM used the term ‘specialized services’ to refer to these types of services, the term ‘non-BIAS data services’ is a more accurate description for this class of services.”); 2010 Order ¶¶ 44, 46; 2018 Order ¶¶ 24, 176.

⁸⁴ As the 2015 Order makes clear, the FCC always has retained jurisdiction to review the practices of providers of such services to ensure that they are offered in a manner which does not undermine the Commission’s general mandate under Section 151. 2015 Order ¶ 210.

⁸⁵ *Id.* ¶ 208.

⁸⁶ *Id.* ¶ 315.

⁸⁷ *Id.* ¶ 35. Facilities-based VoIP providers, “including certain cable VoIP providers,” are providers that “own and control the last mile facility” and “may own or lease the switching and transmission networks that are used to carry VoIP calls.” *Connect America Fund Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 10-90, Declaratory Ruling, 30 FCC Rcd 1587, note 35 (2015) (quoting *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 87 (2005) (*Verizon/MCI Order*)).

example, the 2015 Order did not affect the 66 million interconnected VoIP subscriptions in the U.S. recorded by the FCC in 2018,⁸⁸ which might be used to make 911 calls.

D. The False Alarm over Alleged “Throttling” of Santa Clara Firefighters Had Nothing to Do with the 2015 or 2018 Orders.

The *Mozilla* court focused on one particular example of allegations that the 2018 Order jeopardized public safety: allegations made by the Santa Clara Fire Prevention Department (SCFPD) that Verizon “throttled” data service on a mobile command and control center deployed to coordinate response to two major forest fires in the summer of 2018, roughly six months after the 2018 Order was finalized.

In August 2018, Government Petitioners (including Santa Clara County) in the *Mozilla* case sought to supplement the record with a sworn declaration by SCFPD Fire Chief Anthony Bowden (plus correspondence between the SCFPD and Verizon).⁸⁹ The D.C. Circuit denied the request.⁹⁰ Nonetheless, this incident is squarely before the Commission now and will, no doubt, play a large role in the comments. TechFreedom published a detailed analysis of this incident in August 2018, a week after initial media reports of Verizon’s alleged throttling.⁹¹ We adapt and update that analysis here.

1. SCFPD Alleges That Verizon “Throttled” Its Internet Access During Two Emergencies.

Bowden noted that SCFPD had recently deployed a device labeled OES 5262 (for the California Office of Emergency Services (OES)) to fight the largest fire in state history:

⁸⁸ *Voice Telephone Services: Status as of June 30, 2018* at 4, FCC (Mar. 2020), <https://docs.fcc.gov/public/attachments/DOC-362881A1.pdf>.

⁸⁹ Brief for Government Petitioners, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051(L)), 2018 WL 6192423.

⁹⁰ *Mozilla*, 940 F.3d at 61.

⁹¹ Berin Szóka, *False Alarm: Verizon’s Fire Department Customer Service Fail Has Nothing to Do with Net Neutrality*, Medium (Aug. 28, 2018), <https://medium.com/@BerinSzoka/false-alarm-verizons-fire-department-customer-service-fail-has-nothing-to-do-with-net-neutrality-3b9a2d770e5b>.

OES 5262 is deployed to large incidents as a command and control resource. Its primary function is to track, organize, and prioritize routing of resources from around the state and country to the sites where they are most needed. OES 5262 relies heavily on the use of specialized software and Google Sheets to do near-real-time resource tracking through the use of cloud computing over the Internet.

...

OES 5262 also coordinates all local government resources deployed to the Mendocino Complex Fire. That is, the unit facilitates resource check-in and routing for local government resources. In doing so, the unit typically exchanges 5-10 gigabytes of data per day via the Internet using a mobile router and wireless connection. Near-real-time information exchange is vital to proper function. In large and complex fires, resource allocation requires immediate information....

In the midst of our response to the Mendocino Complex Fire, County Fire discovered the data connection for OES 5262 was being throttled by Verizon, and data rates had been reduced to 1/200, or less, than the previous speeds. These reduced speeds severely interfered with the OES 5262's ability to function effectively. My Information Technology staff communicated directly with Verizon via email about the throttling, requesting it be immediately lifted for public safety purposes... We explained the importance of OES 5262 and its role in providing for public and first-responder safety and requested immediate removal of the throttling. Verizon representatives confirmed the throttling, but, rather than restoring us to an essential data transfer speed, they indicated that County Fire would have to switch to a new data plan at more than twice the cost, and they would only remove throttling after we contacted the Department that handles billing and switched to the new data plan.⁹²

OES 5262 had previously been deployed to play a similar coordination role among multiple agencies in California's 2017 wildfires.⁹³

2. The Data Plan at Issue Was not a Form of BIAS, and therefore Not Subject to the 2015 Order.

Bowden's account omits a crucial legal detail: the \$37.99/month plan unlimited data plan purchased for use by OES 5262⁹⁴ was an enterprise grade plan typically used for a mobile

⁹² Declaration of Anthony Bowden, Addendum to Brief for Government Petitioners, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051) [hereinafter *Bowden Declaration*] at ADD2-4.

⁹³ *Id.* at ADD11.

⁹⁴ *Id.* at ADD8.

cellphone or employee device. The plan provided for a pre-set amount of LTE data each month for each line (25 GB), and, for users who exceeded that amount, additional, unlimited data provided at a slower speed. In a July 9, 2018 email, Verizon's customer service manager for government accounts explained that "[a]ll unlimited data plans offered by Verizon have some sort of data throttling built-in, including the \$39.99 plan [he had proposed that SCFPD switch to]." ⁹⁵ He added:

Attached is the list of public sector plans, see pgs. 10-18 for data plans. ***Also attached is the State of CA plans which offers the \$37.99 unlimited data plan*** (pg. 1). We can talk about these plans to find the solution that best fits the needs of your department. ⁹⁶

The "list of public sector plans" apparently refers to plans Verizon had negotiated with NASPO, ⁹⁷ while the "\$37.99 unlimited plan" is what SCFPD then using for the OES 5262. Because neither was a "mass market retail service," neither was a form of BIAS, and thus neither was covered by the 2015 Order. ⁹⁸

3. Disruption of SCFPD's Service Resulted from a Series of Honest Mistakes on Both Sides.

Bowden accuses Verizon of jeopardizing public safety by extorting firefighters. In fact, a careful reading of the materials Bowden himself supplied to the *Mozilla* court makes clear that what happened was the result of a series of errors and misunderstandings on both sides.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See supra* at n.77.

⁹⁸ *See supra* Section B at 21.

a) Mistake #1: SCFPD Selected a Plan with a Restriction on Speed After a 25 GB Basic Data Allowance when It Clearly Needed Full Speed for Far More than 25 GB.

The plan the SCFPD had selected for the OES 5262 included “unlimited data” but offered only that data at reduced speeds after a basic data allowance of 25 GB. This plan was likely not what SCFPD should have selected for this device: When deployed to coordinate multiple agencies in fighting forest fires, the SCFPD’s command and control center “typically exchanges 5-10 gigabytes of data per day.”⁹⁹ If deployed for an entire month, this could mean consuming 150-300 GB of data. By comparison, a typical mobile broadband consumer at that time consumed an estimated 4 GB/month.¹⁰⁰

Daniel Farrelly, SCFPD’s “Acting IT officer,” explained what the SCFPD wanted in an email sent to Verizon nearly a week after first complaining of “throttling” on the device:

none of our devices should have any sort of data caps or throttling. Also, speed is essential for the services we utilize. Moving OES 5262 to a \$34.99 plan offering 600Kbps is not an adequate solution for devices that require 4G access to data.

With that said, please provide a list of all applicable public safety plans that provide 4G data without any caps or data throttling limitations. Our goal is to have all our devices on one plan that offers both unlimited use and unlimited bandwidth and no data throughput limitations.¹⁰¹

Four days later, Verizon’s “Major Accounts Manager” for government clients (and based in San Francisco) explained that, even for public sector users:

Verizon has always reserved the right to limit data throughput on unlimited plans. All unlimited data plans offered by Verizon have some sort of data throttling built-in, including the \$39.99 plan. Verizon does offer plans with no data throughput

⁹⁹ *Bowden Declaration*, *supra* note 92, at ADD3.

¹⁰⁰ Berin Szóka, *False Alarm: Verizon’s Fire Department Customer Service Fail Has Nothing to Do with Net Neutrality*, Medium (Aug. 28, 2018), <https://medium.com/@BerinSzoka/false-alarm-verizons-fire-department-customer-service-fail-has-nothing-to-do-with-net-neutrality-3b9a2d770e5b>.

¹⁰¹ *Bowden Declaration* at ADD8.

limitations; these plans require that the customer pay by the GB for use beyond a certain set allotment.¹⁰²

He encouraged Farrelly to have the SCFPD switch to a pay-as-you go plan for government subscribers, such as this:

Public Sector Mobile Broadband Share Plans: Government Subscribers Only			
The calling plans below reflect the monthly access fee discount. No additional discounts apply.			
Public Sector Mobile Broadband	5 Gigabytes	10 Gigabytes	20 Gigabytes
Monthly Access Fee	\$39.99 (90239)	\$59.99 (90240)	\$99.99 (90241)
Shared Domestic Data Allowance	5GB	10GB	20GB
Overage Per Gigabyte	\$8.00 Per Gigabyte		
<small>Note: This plan is available for domestic data only devices, on the Verizon Wireless network only. Data Sharing: At the end of each bill cycle, any unused data allowances for lines sharing on the same account will be applied to the overages of the other lines on the same account beginning with the line with the lowest overage need. Plan changes may not take effect until the billing cycle following the change request. Current NationalAccess and Mobile Broadband coverage details can be found at www.verizonwireless.com. New activations on these service plans require 4G LTE devices. Existing customers transitioning to one of these service plans are able to utilize existing 3G devices. The 5GB, 10GB, and 20GB Public Sector Mobile Broadband Plans are able to share with each other.</small>			

Farrelly replied: “Please work with us. All we need is a plan that does not offer throttling or caps of any kind.”¹⁰³ Farrelly’s frustration was understandable: In theory, even with a \$99.99/month 20GB plan, if the command and control device actually used 300 GB in one month, the SCFPD could have faced a very large bill. (In practice, the SCFPD would not actually have had to face such fees during serious emergencies, as Verizon’s revised plans now make clear.¹⁰⁴) But Farrelly’s summary of SCFPD’s needs should make clear that the department had chosen a plan manifestly unsuited for the needs of this particular device.

b) Mistake #2: Both Sides Were Confused Over Getting the Speed Restriction Dropped.

Ironically, Farrelly’s confusion may have resulted from Verizon’s generosity the previous year. Prior to this incident, Verizon had voluntarily adopted a general policy of suspending the speed restriction that would normally kick in on “unlimited” plans beyond the initial allowance of high speed data whenever a government says the device is necessary for an emergency. As

¹⁰² *Id.*

¹⁰³ *Id.* at ADD6.

¹⁰⁴ *See infra* at 39 & note 119.

Verizon explained in a public statement issued shortly after the Governmental Petitioners filed their addendum in August 2018¹⁰⁵ (before rolling out new plans):

We made a mistake in how we communicated with our customer about the terms of its plan. Like all customers, fire departments choose service plans that are best for them. This customer purchased a government contract plan for a high-speed wireless data allotment at a set monthly cost. Under this plan, users get an unlimited amount of data but speeds are reduced when they exceed their allotment until the next billing cycle. ***Regardless of the plan emergency responders choose, we have a practice to remove data speed restrictions when contacted in emergency situations.*** We have done that many times, including for emergency personnel responding to these tragic fires. In this situation, we should have lifted the speed restriction when our customer reached out to us. This was a customer support mistake. We are reviewing the situation and will fix any issues going forward.¹⁰⁶

It remains unclear exactly how long such suspension worked—whether they would be made on the basis of a month, renewable upon request, or for several months if the government user said the emergency would last longer—but it *is* clear that these suspensions would be of limited duration and specific to an emergency, not a device—and for good reason, as discussed below.¹⁰⁷ SCFPD employees appear legitimately to have been confused about how this worked—and rather than correcting their confusion Verizon’s customer service representative added to it. In a June 29 email to SCFPD Deputy Chief Steve Prziborowski, Fire Captain Justin Stockman first reported the disruption to the data service needed for the command and control device:

Verizon is currently throttling OES 5262 so severely that it's hampering operations for the assigned crew. This is not the first time we have had this issue. In December of 2017 while deployed to the Prado Mobilization Center supporting a series of large wildfires we had the same device with the same sim card also throttled. I was able to work through Eric Prosser at the time to have service to

¹⁰⁵ See *supra* note 89.

¹⁰⁶ Rich Young, *Verizon statement on California fire allegations*, Verizon (Aug. 21, 2018) (emphasis added), <https://www.verizon.com/about/news/verizon-statement-california-fire-allegations>.

¹⁰⁷ See *infra* at 38.

the device restored and ***Eric communicated that Verizon had properly re-categorized the device as truly “unlimited”***.¹⁰⁸

Prziborowski immediately forwarded Stockman’s email to Verizon’s customer service representative, adding:

Before I give you my approval to do the \$2.00 a month upgrade, the bigger question is why our public safety data usage is getting throttled down? Our understanding from Eric Prosser, our former Information Technology Officer, was ***that he had received approval from Verizon that public safety should never be gated down because of our critical infrastructure need for these devices***.¹⁰⁹

It’s impossible to tell, from the limited email correspondence provided by the Government Petitioners in their Addendum to their *RIFO* Brief, whether Stockman misunderstood or misremembered what had happened the previous December, or whether Prosser had, in 2017, misunderstood, what Verizon’s representative had told him. But it *is* clear that *both* of these highlighted statements would have been impossible under Verizon’s voluntary policy of suspending speed restrictions (after the initial data allowance) *on a temporary basis*.

Verizon appears to have made at least one, if not two, mistakes in its customer service:

- 1) December 2017: Verizon personnel may have left Eric Prosser confused as to whether the suspension granted during the December 2017 wildfire was temporary or permanent—or Stockman may simply have misremembered.
- 2) June 2018: When the SCFPD first contacted Verizon on June 29, 2018 to complain about disruption in service, Verizon’s customer service representative should have immediately offered to suspend the speed restriction instead of offering to switch

¹⁰⁸ *Bowden Declaration, supra* note 92, at ADD11 (emphasis added).

¹⁰⁹ *Id.* at ADD10 (emphasis added).

them to a plan that would have allowed SCFPD to pay per-GB for additional usage *at full speed* beyond the 25 Gb allowance.¹¹⁰

Verizon has acknowledged that it “made a mistake in how we communicated with our customer about the terms of its plan” and that “we should have lifted the speed restriction when [SCFPD] reached out to us.”¹¹¹ In the case of the second mistake, from the available email exchange, Verizon’s customer service representative seemed to be aware of the corporate policy of suspending speed restrictions upon requests, suggesting that Verizon had failed to train its employees consistently.

At the same time, it’s also important to note that, when SCFPD complained to their Verizon customer service representative, they did not request another suspension of the speed restriction; rather, they insisted the device had simply been exempted from the speed restriction—which was impossible under the policy at the time (but would be possible now).

4. Verizon Resolved this Matter with Extraordinary Speed.

Verizon resolved this matter with remarkable speed. On August 24, 2018, just three days after the filing of Bowden’s affidavit as an addendum to the governmental petitioners’ *Mozilla* brief,¹¹² Verizon issued a press release announcing that:

As of yesterday, we removed all speed cap restrictions for first responders on the west coast and in Hawaii to support current firefighting and Hurricane Lane efforts. Further, in the event of another disaster, Verizon will lift restrictions on public safety customers, providing full network access.

We’ve been working closely with mission critical first responders to refine our service plan to better meet their unique needs. As a result, we’re introducing a new plan that will feature unlimited data, with no caps on mobile solutions and

¹¹⁰ *Id.* at ADD11 (“To get the data speeds restored on this device, will you please reply that you approve moving the plan on line 408-438-4844 from the \$37.99 (84356) plan to the \$39.99 (84357) plan?”).

¹¹¹ Ina Fried, *Verizon admits error in throttling California firefighters’ service*, Axios (Aug. 21, 2018), <https://www.axios.com/verizon-responds-to-allagations-it-throttled-fire-departments-wireless-connection-1534890751-04a282b1-e369-40c9-b8bf-779d8c7999b7.html>.

¹¹² *See supra* note 92.

automatically includes priority access. We'll provide full details when we introduce the plan next week, and we will make it easy to upgrade service at no additional cost.¹¹³

Verizon's new plan, described below, would have avoided the confusion that led to the disruption of SCFPD's service.

5. Common Carriage Regulation, Even with Forbearance, Would Have Made It Impossible for Verizon to Resolve this Matter Quickly.

There is no way Verizon could have moved so quickly to prevent repetitions of incidents like this by rolling out new service plans offerings if those offerings had been subject to Title II—even the 2015 Order's slimmed down version of Title II, including forbearance from tariffing requirements¹¹⁴—rather than enterprise offerings subject to easy renegotiation between the parties. Verizon rolled out new plans within a matter of days that were a direct result of market demand from customers.¹¹⁵ Had the Title II regime been in force, and the services provided deemed to be “telecommunications services,” Verizon's new offerings would have had to undergo lengthy internal regulatory review to determine whether they might run afoul of some aspect of the 2015 Order (which ran 313 pages, not counting the separate statements of Commissioners). Given the public controversy around this topic, Verizon may have felt compelled to file a request for an Advisory Opinion, as the 2015 Order invited companies to do, “to seek guidance on the propriety of certain open Internet practices before implementing them, enabling them to be proactive about compliance and avoid enforcement actions later.”¹¹⁶ Such a process could have taken months at best.

¹¹³ Rich Young, *Verizon statement on California wildfires and Hurricane Lane in Hawaii*, Verizon (Aug. 24, 2018), <https://www.verizon.com/about/news/verizon-statement-california-wildfires-and-hurricane-lane-hawaii>.

¹¹⁴ 2015 Order ¶ 497.

¹¹⁵ See *supra* note 113.

¹¹⁶ 2015 Order ¶ 229.

6. Why Verizon Structured Its Emergency Waiver Policy as It Did, and How the Company Has Since Changed that Policy.

It is understandable why, prior to the 2018 incident with SCFPD, Verizon had structured its waiver practice as it did. Verizon has to ensure its networks work for *all* of its users, and to ensure that no one user crowds out all of the rest, and it can do that by monitoring a line or account's total usage. In that light, it makes sense to offer plans that set limits on the amount of high-speed data any one user can take advantage of (instead of raising prices for all), waivable in emergencies upon request. Requiring government users to request temporary suspensions of the speed restriction does impose some cost on those users, but it also allowed Verizon to minimize abuse of the policy without imposing additional burdens on public safety agencies to verify (a) that there was, indeed, an ongoing emergency or, (b) that the device was used for that purpose.

Consider the problem from Verizon's perspective: without a limit on the full-speed data allowance, the line attached to the OES 5262 could be used as a hotspot for dozens of other nearby devices, consuming massive amounts of data. In other words, SCFPD might be able to buy a single plan for dozens of devices, which could make it very difficult for Verizon to manage its network for the good of all users. While this possibility might sound advantageous for SCFPD, the practical result would not be: if Verizon could not manage and fairly price data usage, it would have to substantially increase the price of *all* such service plans to account for such usage. Again, these enterprise services are subject to negotiation between the parties. In effect, users that bought a single plan per device would have to subsidize users who attempted to game the system. Likewise, that device could be used to stream Netflix all day in the break room in a fire station (or on multiple personal devices) during quiet periods. This could result not in 300 GB of use but *terabytes*: "Watching TV shows or movies on Netflix uses about 1 GB of data per hour for each stream of standard definition video, and up to 3 GB per hour for each stream of HD video..."

and 7 GB per hour per device for Ultra HD.”¹¹⁷ So just eight hours of streaming a day could mean 240 GB/month for SD, 720 GB/month for HD, and 1.68 TB/month for Ultra HD (a/k/a “4K”). If the streams were left on all day, the total data consumption could be three times those numbers. And, again, a single mobile router could be used to support *multiple* simultaneous streams by creating a local network.

Given the inherent capacity constraints of mobile networks, operators cannot be expected to allow truly unlimited use of its service at full speed at the same price it offers to users for a plan that offers for high-speed use up to 25 Gb/month. (By comparison, the median residential cable modem broadband consumer uses about 200 GB/month.¹¹⁸ The ratio between the two basic data allowances offers a rough approximation of the significant technical differences between mobile and wireline networks.)

Verizon’s new offerings for national security, public safety and first responders would avoid what happened to SCFPD: “Data usage for actively engaged and deployed fire, police, emergency medical technicians, emergency management agency [sic], and assigned federal law enforcement users on this plan will not be subject to speed restrictions regardless of data usage during any billing cycle.”¹¹⁹ In other words, such users on the new plan need no longer request a waiver of the speed restriction; their plans would be hard-coded as exempt in advance. This is exactly what SCFPD *thought* had happened with their plan in December 2017. Any users remaining on old plans requiring a waiver will be protected because Verizon will automatically

¹¹⁷ *How can I control how much data Netflix uses?*, Netflix Help Center, <https://help.netflix.com/en/node/87>.

¹¹⁸ Daniel Frankel, *Charter: Broadband-Only Users Average 400GB of Monthly Data Usage*, Multichannel News (May 2, 2019), <https://www.multichannel.com/news/charter-says-average-cord-cutter-uses-400gb-of-data-per-month>.

¹¹⁹ *See, e.g., Verizon Wireless Pricing Sheet*, Verizon Wireless, <https://www.dfa.arkansas.gov/images/uploads/stateContracts/1907Pricing.pdf>.

lift any such limitations during a declared emergency, much as it lifts data limits or calling limits when there are hurricanes or fires or other disasters for all users.¹²⁰

Other users eligible for this plan, who are not included in the category eligible to have the speed restriction removed entirely, will benefit from other new provisions in this plan: (1) users may exceed the 25 GB data allowance for up to three months without having to make a request for a waiver and (2) it is now clearly specified that, once the user informs Verizon that there is an emergency, the company will waive the limit.¹²¹

7. SCFPD's Lawyers Appear to Have Been Aware that SCFPD Was Relying on a Plan with Speed Restrictions for a Critical Device in December 2017

From the email record attached to Bowden's declaration, SCFPD personnel appear to have been both (a) genuinely surprised when, in June 2018, the speed restriction kicked in after the OES 5262 used more than its 25 Gb of full-speed allowance, and (b) genuinely confused as to why this happened, apparently thinking that the speed restriction had been waived permanently—even though it is also clear that this is simply not how Verizon's policy worked. But one cannot help but wonder why Santa Clara County's lawyers did not help to avoid this confusion, given that they were apparently well-aware of this device and its need for huge amounts of data at full 4G speed.

In December 2017, Santa Clara's top lawyer, James Williams, filed 15-page comments urging the FCC to maintain the Title II classification of broadband at the last possible minute

¹²⁰ "Further, in the event of another disaster, Verizon will lift restrictions on public safety customers, providing full network access." Rich Young, *Verizon statement on California wildfires and Hurricane Lane in Hawaii*, Verizon (Aug. 24, 2018), <https://www.verizon.com/about/news/verizon-statement-california-wildfires-and-hurricane-lane-hawaii>.

¹²¹ See *supra* note 119 ("Data usage on this rate plan is not subject to speed reductions ("throttling") within a given billing cycle. However, in the event data usage exceeds 25GB each billing cycle for three (3) consecutive billing cycles, data throughput speeds will automatically be reduced to 600 kbps for data usage exceeding 25GB per billing cycle on a go-forward basis.").

before the FCC voted to issue the *RIFO*. Those comments describe the WebEOC system in considerable detail¹²² and appear to correspond exactly to the WebEOC Bowden described in his August 2018 declaration.¹²³ Indeed, Williams raised essentially the same concern in his December 2017 FCC comments that Bowden raised in his August 2018 declaration to the D.C. Circuit:

WebEOC is designed to aggregate data from diverse sources, and to be used by emergency personnel over any connection, without regard to ISP or network. The County cannot predict where those who must respond in an emergency will be located; critical personnel are likely to be accessing the system from their personal devices, from home, or from the field. The system is designed to provide a virtual emergency operations center. As a result, discrimination in provision of broadband service could fundamentally disrupt the operation of this system.¹²⁴

Given the attention this issue has raised, we think Williams has a duty to inform the Commission what he knew and when he knew it — specifically:

¹²² “OES has invested heavily in internet-based systems that are critical to public safety. For example, since 2011-2012, OES has used Intermedix’s WebEOC solution as the lynchpin of its emergency coordination and management efforts. WebEOC aggregates information regarding active emergency situations, permitting the County’s situational awareness during emergencies and response and recovery coordination. Before implementation of WebEOC, the County had no technology-based system for situational awareness.

WebEOC is activated in connection with both large and small events threatening public safety, and is used by responders across Santa Clara County. For example, it was used to coordinate response to the 2017 San José winter storms and flooding; it has also been used during planned hospital outages. In an emergency, personnel for the County, cities within the County, regional hospitals, and others log in through a web interface and populate, monitor, and act on situational data in the system. City and other on-the-ground personnel enter data on local conditions—for example, reporting fire boundaries, flooding, or injured individuals. Entities with relevant resources, such as hospital personnel, enter their status information—for example, number of available beds. County personnel allocate, obtain, and dispatch resources based on this information.” Comment of County of Santa Clara and Santa Clara County Central Fire Protection District at 6-7, <https://www.sccgov.org/sites/cco/overview/Documents/2017.12.06%20-%20Comment%20of%20County%20of%20Santa%20Clara%20and%20Santa%20Clara%20County%20Central%20Fire%20Protection%20District.pdf>.

¹²³ *Bowden Declaration*, *supra* note 92, at ADD3 (“OES 5262 relies heavily on the use of specialized software and Google Sheets to do near-real-time resource tracking through the use of cloud computing over the Internet.”).

¹²⁴ *Id.* at ADD7.

- 1) Were SCFPD’s lawyers aware of the speed restriction aspect of the plan for the OES 5262 when they filed their comments in December 2017, describing the use of the WebEOC system?
- 2) In particular, were they aware—either when they filed their comments, or after they filed—that SCFPD had experienced “throttling” on the OES5262 at some point that December?¹²⁵
- 3) Did they, at any point between December 2017 and June 2018, assess whether this data plan was appropriate given the very large volumes of data consumed by the OES5262 when deployed to the field?

8. The 2015 Order Recognized that Unlimited Plans Involving Speed Restrictions Benefit Consumers and that they Did Not Violate the Throttling Rule.

The 2015 Open Internet Order was *explicit* that plans like SCFPD’s—“unlimited” plans in which speed restrictions apply after an initial monthly data allowance has been reached—would not violate the Order’s throttling rule, so long as a BIAS provider clearly disclosed how the plan would work.¹²⁶ Thus, even if the SCFPD’s plan had been BIAS, rather than an enterprise plan, it would have been legal under the 2015 Order. At most, the FCC could have policed how BIAS providers communicate to their mass market customers about how speed reductions work. But this is not a net neutrality issue requiring special FCC rules; it is the kind of standard consumer protection issue the FTC is well equipped to handle. Indeed, the FTC has already sued AT&T over

¹²⁵ *Id.* at ADD11 (“In December of 2017 while deployed to the Prado Mobilization Center supporting a series of large wildfires we had the same device with the same sim card also throttled.”); *See supra* at note 108 and associated text.

¹²⁶ 2015 Order ¶ 122.

how it marketed its own “unlimited” plans, and after the Ninth Circuit ruled that the lawsuit could proceed, the company settled.¹²⁷

a) Even If the Data Plan at Issue Had Been a Form of BIAS, the 2015 Rules Recognized that the Kind of Speed Restriction Inherent in the SCFPD’s Plan Did Not Constitute Throttling.

The 2015 Order recognized the benefits of giving customers (1) unlimited data plans with speed restrictions beyond the basic data allowance or (2) pay-as-you-go plans with no speed restriction: “Usage allowances may benefit consumers by offering them more choices over a greater range of service options, and, for mobile broadband networks, such plans are the industry norm today, in part reflecting the different capacity issues on mobile networks.”¹²⁸ In mentioning “greater range of choice,” the Commission acknowledged what should be obvious: if companies could only offer data plans that include unlimited usage at top speeds, that one-gigantic-size-fits-all-plan would be considerably more expensive than plans for smaller data allowances. The Order made clear that it was presumptively lawful to offer plans that worked the way SCFPD’s plan for the OES5262 did:

Because our no-throttling rule addresses instances in which a broadband provider targets particular content, applications, services, or non-harmful devices, it does not address a practice of slowing down an end user’s connection to the Internet based on a choice made by the end user. For instance, a broadband provider may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier.¹²⁹

¹²⁷ *AT&T to Pay \$60 Million to Resolve FTC Allegations It Misled Consumers with ‘Unlimited Data’ Promises*, FTC (Nov. 5, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/att-pay-60-million-resolve-ftc-allegations-it-misled-consumers>.

¹²⁸ 2015 Order ¶ 153.

¹²⁹ *Id.* ¶ 122.

b) How the 2015 Order Would Have Governed Such Concerns.

Instead of banning speed restrictions in “unlimited” plans as a form of throttling, the 2015 Order proposed two ways to deal with potential concerns:

If the Commission were concerned about the particulars of a data plan, it could review it under the no-unreasonable interference/disadvantage standard.... We note that user-selected data plans with reduced speeds must comply with our transparency rule, such that the limitations of the plan are clearly and accurately communicated to the subscriber.¹³⁰

The 2018 Order maintained, and enhanced, the 2015 Order’s transparency rule,¹³¹ so in that respect, it did nothing to undermine the FCC’s ability to police “unlimited” plans with speed restrictions. Nonetheless, some have suggested that the 2018 Order undermined public safety by denying the FCC the ability to police plans such as SCFPD’s (but BIAS rather than enterprise service) through the first option, the so-called “general conduct standard.”¹³² But a close reading of the 2015 Order’s discussion of this issue would have provided no reason for any BIAS provider to think unlimited data BIAS plans with speed restrictions would, if clearly disclosed, be declared unlawful under the general conduct standard.

The general conduct standard specifically declared that “Reasonable network management shall not be considered a violation of this rule.”¹³³ Thus, the Commission promised to “recognize[] that evaluation of network management practices will take into account the additional challenges involved in the management of mobile networks, including the dynamic

¹³⁰ *Id.*

¹³¹ 2018 Order ¶¶ 154-185.

¹³² “Had the FCC maintained its oversight over broadband, the FPD could have filed a complaint alleging that Verizon’s throttling of its emergency services and doubling of its broadband costs were unjust and unreasonable charges and practices prohibited by Title II. But the repeal made that option impossible.” Gigi Sohn, *Verizon couldn’t have restricted Santa Clara County’s internet service during the fires under net neutrality*, NBC (Aug. 24, 2018), <https://www.nbcnews.com/think/opinion/verizon-couldn-t-have-restricted-santa-clara-county-s-phone-ncna903531>.

¹³³ 2015 Order ¶ 136.

conditions under which they operate.”¹³⁴ The 2015 Order discussed “unlimited” data plans with speed limits in two places. First, the Commission notes:

Recently, significant concern has arisen when mobile providers’ have attempted to justify certain practices as reasonable network management practices, such as applying speed reductions to customers using “unlimited data plans” in ways that effectively force them to switch to price plans with less generous data allowances. For example, in the summer of 2014, Verizon announced a change to its “unlimited” data plan for LTE customers, which would have limited the speeds of LTE customers using grandfathered “unlimited” plans once they reached a certain level of usage each month. Verizon briefly described this change as within the scope of “reasonable network management,” before changing course and withdrawing the change.¹³⁵

While the 2015 Order did not express an opinion on this case (because Verizon dropped the change), the implication is clear: what was potentially actionable in this case under the general conduct standard was the imposition of speed restrictions on customers who were on unlimited data plans and wanted to keep them—not, in principle, the offering of unlimited data plans subject to speed restriction. In other words, the 2015 Order framed the general conduct standard as covering only abusive business practices that could not be justified as reasonable network management, defined liberally to ensure that the rule did not interfere with the operation of mobile networks.

Second, after noting the benefits of “usage allowances,” the 2015 Order noted:

Conversely, some commenters have expressed concern that such practices can potentially be used by broadband providers to **disadvantage competing over-the-top providers**. Given the unresolved debate concerning the benefits and drawbacks of data allowances and usage-based pricing plans, we decline to make blanket findings about these practices and will address concerns under the no-unreasonable interference/disadvantage on a case-by-case basis.¹³⁶

¹³⁴ *Id.* ¶ 34.

¹³⁵ *Id.* ¶ 33.

¹³⁶ *Id.* ¶ 153.

The Commission’s focus here on competing over-the-top providers makes sense, given the clear purpose of the general conduct standard:

Any person engaged in the provision of [BIAS], insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users.¹³⁷

In short, the 2015 Order framed the general conduct standard as protecting the *openness* of the Internet—not micromanaging the business practices of BIAS providers or setting their prices. Yet that is precisely what is proposed by those who insist the FCC could have enforced the “general conduct standard” against Verizon in the case of the SCFPD plan (if it had been a BIAS plan rather than an enterprise offering). This is not at all what FCC Chairman Tom Wheeler promised in his separate statement accompanying the 2015 Order:

Let me be clear, the FCC will not impose “utility style” regulation. We forbear from sections of Title II that pose a meaningful threat to network investment, and over 700 provisions of the FCC’s rules. That means *no rate regulation*, no filing of tariffs, and no network unbundling. During the 22 years that wireless voice has been regulated under a light-touch Title II like we propose today, there has never been concern about the ability of wireless companies to price competitively, flexibly, or quickly, or their ability to achieve a return on their investment.¹³⁸

If Chairman Wheeler’s description of the 2015 Order was accurate, neither the speed restrictions on the plan for the OES5262 nor Verizon’s mistakes in handling its voluntary policy of waiving those restrictions, would have been actionable under the 2015 Order, even if that service plan had been BIAS, rather than an enterprise service (as it clearly was).

¹³⁷ *Id.* ¶ 21.

¹³⁸ *Id.*, 30 FCC Rcd at 5915.

E. The FCC Should Bolster Its Legal Analysis of Why Services Marketed to Public Safety Users Did Not Qualify as BIAS with a Summary of the Enterprise Market for Such Services.

The FCC could explain just how limited the 2018 Order's effects on public safety and critical infrastructure users were by estimating how many of those users both (a) actually buy and (b) are eligible to buy services that would not have qualified as BIAS service under the 2015 Order, either because they are enterprise offerings or because they offer connectivity to less than substantially all Internet endpoints or otherwise involve the exercise of editorial discretion by service providers (*e.g.*, to prioritize public safety users or public-safety-related content).

The market for enterprise-grade Internet access offerings is more difficult to assess than the market for BIAS for two reasons. First, by definition, enterprise service offerings are individualized and thus widely variable while BIAS offerings are, likewise by definition, standardized for particular categories of users. Second, the details of enterprise service offerings are generally private, because they are determined through individualized contracts negotiated with particular customers, or groups of customers. (Of course, some of the government agencies that buy enterprise offerings may choose, or be required by law, to make their procurement contracts public.)

Nonetheless, the Commission should make such estimates, and will properly receive the deference generally accorded to agencies in making such predictive judgments.¹³⁹

IV. Conclusion

Very little further explanation of the decision-making behind the 2018 Order will be required to ensure that a Further Report and Order will be upheld upon review. Nonetheless, to avoid confusion about the Commission's authority and to create a clear record for any future

¹³⁹ See *supra* note 14.

Commission that may wish to return to some variant of the 2015 Order, we urge the Commission to go above and beyond the limited explanation required on remand—not to expand the scope of issues remanded, but to explain, in the terms outlined above, why the 2018 Order did not, in fact, substantially affect public safety or the eligibility of BIAS providers for Lifeline support or pole attachments.

Respectfully submitted,

_____/s/_____

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