

**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
	)	

**REPLY COMMENTS OF TECHFREEDOM**



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## SUMMARY

As we predicted, many of the comments in the “refresh” of this docket run far afield of the narrow issues remanded by the *Mozilla* court. The court affirmed that the FCC had legal authority to reclassify BIAS service as a Title I information service, as it was prior to 2015, and no amount of complaining from Title II backers can change what the *Mozilla* court said or the law of the case.

On the narrow issues of the impact of the RIFO on the Lifeline program and applicability of the Section 224, there is scant evidence in the record to show that Stand Alone Broadband Providers (SABPs), on balance, are harmed by the RIFO. The size of this subset of broadband providers has not been demonstrated, and many of those that might lose the benefits of Section 224 nonetheless agree that a Title I regime, overall, provides greater benefits than exclusion from a single statutory regime governing pole attachment negotiations.

As to public safety users, there is significant evidence to demonstrate that a light-touch regulatory regime better spurs private investment in broadband deployment overall, and to deploy broadband deeper into rural America in particular; these net effects bring the benefits of access to the Internet as a whole, and to public safety agencies that chose to make use of the Internet to communicate with their constituents. This meets the limited aspirational goal of the Communications Act to support public health and safety. For critical communications, including emergency alerts and notifications, the Communications Act creates specific mechanisms and networks that have never included BIAS. The “comprehensive end-to-end emergency communications infrastructure” is the country’s 911, EAS, and WEA systems. Public safety users cannot now force the FCC to convert BIAS into something Congress never intended it to be.

Finally, the specific concerns raised by public safety operators concerning blocking and throttling are red herrings: the service plans they discuss were never BIAS and thus not subject to the 2015 Order. More critically, in affirming the 2015 Order reclassifying BIAS as a Title II

service, the judges who wrote that opinion made clear that the First Amendment significantly limited what could be categorized as BIAS. Only services that were offered to the mass market *and* involved no “editorial intervention” (which would include clearly disclosed blocking, throttling and prioritization) could have been regulated under Title II. Any provider wishing to opt-out of Title II regulation as BIAS would have been able to by adequately informing the public that it was offering a curated or edited service. In its order following the remand, the FCC should explain why the RIFO did not affect public safety communications that were not subject to the 2015 Order in the first place because of the inherent constitutional limitations on the FCC’s authority.

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**REPLY 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 Reply Comments in response to the FCC’s request to refresh the record in the above-referenced proceedings. By Public Notice, issued February 19, 2020, the Commission sought comment on three narrow issues: public safety communications, pole attachments, and the Lifeline Program.<sup>1</sup> In support of these Comments, TechFreedom submits:

**I. The FCC Should Reject Comments that Seek to Exceed the Dictates of the *Mozilla* Court Remand.**

As we predicted,<sup>2</sup> a significant number of comments filed in this proceeding argue that the FCC must abandon its approach adopted in 2018 in the *Restoring Internet Freedom Order* (“*RIFO*” or the “2018 Order”),<sup>3</sup> which returned Broadband Interactive Access Service (BIAS) to

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<sup>1</sup> 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>.

<sup>2</sup> See Comments of TechFreedom at 3-4, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of TechFreedom*], <https://techfreedom.org/wp-content/uploads/2020/04/TechFreedom-Net-Neutrality-RIFO-Comments.pdf>.

<sup>3</sup> *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).

its regulatory status as a Title I information service, as it had been before the 2015 Order. Instead, these commenters urge the Commission again to reclassify BIAS as a Title II service,<sup>4</sup> governed by utility-style heavy-handed regulation that the FCC adopted in 2015, and rightfully rejected in 2018. Yet these commenters ignore the fact that the *Mozilla* court upheld the RIFO's Title I reclassification:

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.<sup>5</sup>

These commenters universally ignore the fact that the scope of remand in this case is narrow: the court ordered the FCC only to explain its decision-making on three specific, narrow issues. Furthermore, the court clearly recognized that the bar the FCC must clear in Further Order is low.<sup>6</sup> Indeed, virtually no commenter supporting a return to Title II regulation even

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<sup>4</sup> See Comments of the Broadband Institute of California (“BBIC”) at 43, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of BBIC*] (“The FCC should adopt enforceable net neutrality laws, which requires Title II classification per *Verizon v. FCC*”); Comments of the California Public Utilities Commission (“CPUC”) at 20, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of CPUC*] (“The CPUC urges the FCC to reverse course, reclassify broadband Internet access service as a “telecommunications service”); see also Comments of Public Knowledge at 8, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of Public Knowledge*]; Comments of Free Press at 4, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of Free Press*]; Comments of the Electronic Frontier Foundation (“EFF”) at 6, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of EFF*] (“Treating Broadband as a telecom service provides the clearest authority for Lifeline Support of Standalone broadband or any other broadband offering”).

<sup>5</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 18-19 (D.C. Cir. 2019) (emphasis added, internal citations omitted).

<sup>6</sup> *Id.* at 86 (“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, LCC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (remanding without vacatur where it was “plausible that FERC can redress its failure of explanation on remand while reaching the same result”).

addressed the legal standard applicable to a remand such as this, wherein a court upholds an order, does not vacate it, but merely remands certain portions of that order for further explanation from the Commission.<sup>7</sup> Instead, those commenters improperly argue that the bar is insurmountably high, and that the *only* recourse for the Commission is to abandon its reasoning in the *RIFO* and return to Title II regulation.<sup>8</sup> As our Comments demonstrate, however, this approach is neither mandated or even warranted given the narrow scope of the remand.<sup>9</sup>

## II. Confusing Services with Service Providers Muddles the Record, Not Enhance It.

Numerous commenters fall into the same trap the *Mozilla* court did in confusing what is a “service” for purposes of FCC regulation, and what is a “service provider.”<sup>10</sup> This error occurs in regard to the remand issue of Lifeline and pole attachments. These commenters argue that, under the *RIFO*, broadband service was eliminated from the Lifeline program,<sup>11</sup>

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<sup>7</sup> For instance, BBIC argues that the FCC cannot move forward on remand without “appris[ing] the public of the ‘terms or substance of the proposed rule or a description of the subjects and issues involved,’” Comments of BBIC at 2, quoting *Prometheus Radio Project v. FCC*, 373 F.3d 372, 412 (2004) (*Prometheus I*). Unlike its progeny, *Prometheus I* was not the product of a remand, but rather, was the first instance in which a court reviewed the FCC’s attempt to modernize particular aspects of its media ownership rules. Unlike *Prometheus I*, the *RIFO* was quite specific as to what rules were being changed. Similarly, Public Knowledge argues that on remand the FCC “must provide a rational explanation of how it struck the relevant policy balance – supported by evidence in the record,” Comments of Public Knowledge at 2-3 (citing *National Lifeline Ass’n v. FCC*, 915 F.3d 19 (D.C. Cir. 2019)). That case, again, dealt with newly promulgated rules, not the result of a court’s further review of the FCC’s decision post-remand on specific issues sent back by the court for further explanation.

<sup>8</sup> See *supra*, note 4 .

<sup>9</sup> Comments of TechFreedom at 4.

<sup>10</sup> See, e.g., Comments of Public Knowledge at 11 (“Section 224 gives the FCC authority over telecommunications services and cable television service – not information services, which is broadband’s current classification.”).

<sup>11</sup> Next Century Cities and American Library Association go so far as to claim that broadband was not part of the Lifeline program prior to the FCC’s 2015 Order. “When broadband was added to the Lifeline Program in 2016 it was clear that the Commission intended to provide ‘telecommunications services to consumers.’” Comments of Next Century Cities and American Library Association at 3, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020). Of course, as we pointed out in our Comments, broadband was added to the Lifeline program in 2011, when BIAS was a Title I service, which was upheld in *Direct Communications Cedar Valley, LLC v. Federal Communications Commission (Direct Communications)*, 753 F.3d 1015, 1042 (10th Cir. 2014). See Comments of TechFreedom at 7-8.

and the protections afforded under Section 224 (regarding pole attachments) no longer apply to broadband.<sup>12</sup> As we pointed out in our comments, however, these arguments misinterpret the relevant statutory and regulatory provisions.<sup>13</sup> This misinterpretation stems, in large part, from the errors made by the *Mozilla* court in confusing what “services” are covered versus what “service providers” are covered. Section 224 is completely agnostic as to what services run over the wires attached to poles. Rather, the statute only speaks to what types of service *providers* may avail themselves of its protections. Similarly, as we noted in our comments,<sup>14</sup> broadband has been part of the Lifeline program since 2011, when BIAS was classified as a Title I service.

Once the FCC corrects this misperception by the *Mozilla* court (and now a number of commenters), the Commission need merely address the extremely rare instances where stand-alone broadband providers (“SABPs”) (those that offer zero telecommunications services) are no longer eligible to be deemed Eligible Telecommunications Carriers (ETCs) for purposes of providing broadband-only Lifeline service, and not otherwise qualified under Section 224’s definition of pole attachments, which is specific to that section. Commenters supporting a return to Title II regulation have failed to meet their burden to refresh the record with evidence of the actual impact on stand-alone broadband providers. What the Commission does have, however, are comments from several stand-alone providers that ultimately conclude that they much prefer living under a light-touch regulatory regime, even if they may miss out on some peripheral benefits afforded telecommunications service

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<sup>12</sup> See, e.g. Comments of Public Knowledge at 11.

<sup>13</sup> Comments of TechFreedom at 10.

<sup>14</sup> Comments of TechFreedom at 7-8.



providers under Title II.<sup>15</sup> The FCC easily can satisfy the mandate of the *Mozilla* court on remand on both Lifeline and pole attachments based on the record as refreshed.<sup>16</sup> We have long argued that broadband deployment should be made as easy as possible for all providers,<sup>17</sup> and would support legislation that would give SABPs the same pole attachment rights as other providers. But this is an issue for Congress to resolve, not the FCC. The amendment will require only a few words to be added to the Communications Act. In the interim, while this would make deployment easier for a very small number of providers, and perhaps enable the emergence of new SABPs, there is simply no evidence that this is a pressing problem today — and certainly no evidence that would require the FCC to completely rework its interpretation of which carriers are subject to Title II.

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<sup>15</sup> See, e.g., Comments of the Wireless Internet Service Providers Association (“WISPA”) at 1, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) (“Although the Restoring Internet Freedom Order removed wireless internet service providers (“WISPs”) from the category of service providers automatically protected under Section 224 of the Communications Act of 1934, as amended (“Act”), WISPs have continued to invest and deploy fixed broadband services to rural areas. **Relieved from the multiple burdens of utility-style regulation**, WISPs have converted the substantial savings from the reduced costs of regulatory compliance to providing service to new areas and customers through investment in upgraded facilities and deployment of new infrastructure, including fiber that requires access to utility poles or rights-of-way.” (emphasis added)).

<sup>16</sup> To the extent that the FCC determines that a sufficient number of broadband-only providers exist who would benefit from participation in the Lifeline program and protections afforded by Section 224, they can recommend to Congress very simple legislative fixes (literally a few words) that would include SABPs. For instance, Section 224(a)(4) could be amended to add “or broadband-only” so as to read: “The term ‘pole attachment’ means any attachment by a cable television system or provider of telecommunications **or broadband-only** service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”

<sup>17</sup> See, e.g., Reply Comments of TechFreedom, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126 (Apr. 6, 2015), [http://docs.techfreedom.org/TF-ICLE\\_Comments\\_Section\\_706\\_4.6.15.pdf](http://docs.techfreedom.org/TF-ICLE_Comments_Section_706_4.6.15.pdf); Letter of TechFreedom, Promoting Broadband Infrastructure Investment (July 22, 2015), [http://docs.techfreedom.org/techfreedom\\_letter\\_on\\_broadband\\_deployment\\_-\\_july\\_2015.pdf](http://docs.techfreedom.org/techfreedom_letter_on_broadband_deployment_-_july_2015.pdf); Letter of TechFreedom, Hearing on “Deploying America’s 21st Century Infrastructure” (Mar. 21, 2017), [http://docs.techfreedom.org/Letter\\_EC\\_Hearing\\_on\\_Dig\\_Once.pdf](http://docs.techfreedom.org/Letter_EC_Hearing_on_Dig_Once.pdf).

### III. The FCC Should Reject Attempts to Turn BIAS and the Entire Internet into The Country's Emergency Communications Network.

Having been thwarted at every turn, Title II supporters now resort to arguing that the *RIFO* must be reversed because BIAS and the Internet as a whole are vital conduits for public safety communications.<sup>18</sup> Some even argue that public safety communications must be broadly defined to include such things as alarm services,<sup>19</sup> and even all communications involving “civil society actors, non-profit associations, and citizen organizations engaged in public safety.”<sup>20</sup> Bolstered by language from the *Mozilla* court, Title II supporters now think they have identified the ultimate “gotcha”: once the 2015 Order reclassified BIAS as a Title II service, the door was slammed to returning BIAS to the non-Title II regulatory classification that preceded the 2015 Order because relaxing the regulatory grip on the Internet would somehow hamper public safety agencies in communicating with the public by depriving them of an always-on, always-available, zero-latency Internet for public safety communications.<sup>21</sup>

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<sup>18</sup> See Comments of BBIC at 7 (“The Internet supports public safety by facilitating communications from the public to a wide variety of institutions and to other members of the public.”); Comments of EFF at 2 (“The Internet is a critical means of communication during a crisis, more so every year.”); Comments of CPUC at 2 (“nondiscriminatory Internet access is necessary for a broad array of “public safety communications.”).

<sup>19</sup> Comments of ADT LLC d/b/a ADT Security Services at 1, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of ADT*] (“The Commission should thus include these enhanced alarm industry services in its assessment of the effects of the Restoring Internet Freedom Order on public safety.”).

<sup>20</sup> Comments by the Digital Civil Society Lab (DCSL) Related to the Notice Seeking to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit’s *Mozilla* Decision at 3, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of Digital Civil Society Lab*].

<sup>21</sup> See Comments of CPUC at 6 (“Communications services, including the Internet, are embedded in many critical sector services, including the nation’s energy grid”); Comments of BBIC at 7 (“The Internet supports public safety by facilitating communications *from* the public to a wide variety of institutions and to other members of the public.” (Emphasis in original.)); Initial Comments of the County of Santa Clara, Santa Clara County Central Fire Protection District, and the City of Los Angeles in Response to the Commission’s February 19, 2020 Public Notice Comments at 4, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of Santa Clara*] (“A central point of the 12/6/17 Comment is that local

Of course, like so many of the arguments raised by Title II supporters, these commenters never explain how they survived, coped, or even existed prior to the 2015 Order's reclassification of BIAS as a Title II service. To read their comments, it would appear that the Internet sprang from the head of Zeus in July of 2015, with the primary purposes of supporting emergency communications and the desires of public safety officials to communicate, because, after all, under Section 615 of the Communications Act, the FCC has a duty to "encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs."<sup>22</sup>

**A. The "End-to-End Emergency Communications Infrastructure" Does Not Encompass BIAS or the Internet as a Whole.**

Several commenters argue that the FCC has a duty to protect public safety officials who rely on BIAS and the Internet as part of their "end-to-end emergency communications infrastructure," quoting Section 615 of the Communications Act.<sup>23</sup> An analysis of where the term "end-to-end emergency communications infrastructure," comes from, however, makes clear that Congress never intended to include BIAS, or the Internet as a whole, in this "end-to-end emergency communications infrastructure." The terms derives from the Wireless Communications and Public Safety Act of 1999.<sup>24</sup> The purpose of that Act was to: "promote and enhance public safety through use of 9-1-1 as the universal emergency assistance number, further deployment of wireless 9-1-1 service, support of States in

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governments rely on robust broadband internet access to communicate not only within their own offices, but also with members of the public who access the internet through mass-market broadband internet access service (BIAS) plans governed by the Order.").

<sup>22</sup> 47 U.S.C. § 615.

<sup>23</sup> See, *supra*, note 21.

<sup>24</sup> Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, available at <https://www.govinfo.gov/content/pkg/PLAW-106publ81/html/PLAW-106publ81.htm>.

upgrading 9-1-1 capabilities and related functions, encouragement of construction and operation of seamless, ubiquitous, and reliable networks for personal wireless services, and for other purposes.”<sup>25</sup>

The 1999 Act describes two types of services, “emergency services,” defined as the 911 system<sup>26</sup> and “emergency notification services,” defined as “services that notify the public of an emergency.”<sup>27</sup> The Internet never was mentioned in the 1999 Act.<sup>28</sup> Compare this to the 1996 Telecommunications Act, Public Law 104-104, which refers to the Internet eleven times.<sup>29</sup> In subsequent implementation of the 1999 Wireless Communications and Public Safety Act, both the FCC and other agencies have limited the term “emergency notification services” to systems such as the Emergency Alert System (EAS), regulated by 47 C.F.R. Part 11,<sup>30</sup> and the Wireless Emergency Alert (WEA) system, regulated under 47 C.F.R. Part 10,<sup>31</sup> both of which are accessed and administrated at the federal level by FEMA, the FCC, and the National Oceanic and Atmospheric Administration's National Weather Service.<sup>32</sup> The Department of Homeland Security defines “emergency notification system” as a type of “reverse 911.”<sup>33</sup> And, of course, BIAS is a service classification created by the FCC

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<sup>25</sup> *Id.*, purposes section.

<sup>26</sup> *Id.* Section 222(5).

<sup>27</sup> *Id.* Section 222(6).

<sup>28</sup> *See, supra*, note 24.

<sup>29</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, available at <https://www.govinfo.gov/content/pkg/STATUTE-110/pdf/STATUTE-110-Pg56.pdf>.

<sup>30</sup> For a fuller explanation of EAS, *see The Emergency Alert System (EAS)*, FCC (May 13, 2020), <https://www.fcc.gov/emergency-alert-system>.

<sup>31</sup> For a fuller explanation of WEA, *see Wireless Emergency Alerts*, FCC (Apr. 7, 2020), <https://www.fcc.gov/public-safety-and-homeland-security/policy-and-licensing-division/alerting/general/wireless>.

<sup>32</sup> *Id.*

<sup>33</sup> *See Best Practices in Wireless Emergency Alerts*, Department of Homeland Security First Responders Group (Sept. 2013),

only in 2010.<sup>34</sup> Thus, reliance on BIAS as a *necessary* component of the “end-to-end emergency communications infrastructure” was never contemplated by Congress, and never implemented by any federal agency. Any duty the FCC has toward public safety officials in Section 615 of the Communications Act does not include whether to regulate BIAS as a Title I or Title II service, or, indeed, how to address any impact such a classification might have on public safety communicators.<sup>35</sup>

As we demonstrated in our Comments,<sup>36</sup> the sole duty the FCC has on remand is to determine whether reclassification of BIAS as a Title I service, on balance, advances the Commission’s general mandate under Section 151 to “promot[e] safety of life and property through the use of wire and radio communications.”<sup>37</sup> The refreshed record has ample evidence that the increased investment seen since 2018 to drive broadband access deeper into rural America is consistent with the aspirational goal of Section 151.<sup>38</sup>

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[https://www.dhs.gov/sites/default/files/publications/Wireless%20Emergency%20Alerts%20Best%20Practices\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Wireless%20Emergency%20Alerts%20Best%20Practices_0.pdf)

<sup>34</sup> *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191; WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010).

<sup>35</sup> The fact that even *emergency* public safety communications do not always trump other uses of spectrum and technology is manifested in the current debate over the T-band (470 MHz to 512 MHz). In the Middle Class Tax Relief and Job Creation Act of 2012 (the Spectrum Act), Pub. L. No. 112-96, 126 Stat. 156, Congress ordered the FCC to reallocate this spectrum away from emergency responders and auction it for other uses. See “Chairman Pai Reiterates Call For Repeal of T-Band Auction Mandate,” available at <https://docs.fcc.gov/public/attachments/DOC-364389A1.pdf>. See also U.S. Gov’t Accountability Office, GAO-19-508, *Emergency Communications: Required Auction of Public Safety Spectrum Could Harm First Responder Capabilities*, Report to Subcommittee on Emergency Preparedness, Response, and Recovery, Committee on Homeland Security, House of Representatives (June 2019), <https://www.gao.gov/assets/700/699916.pdf>. If Section 151 is as powerful as the Public Safety Commenters submit, then Congress should not have been able to pass legislation taking away *emergency* public safety spectrum.

<sup>36</sup> Comments of TechFreedom at 12-18.

<sup>37</sup> 47 U.S.C. § 151.

<sup>38</sup> See, generally, Comments of International Center for Law & Economics (“ICLE”) at 3, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020); Comments of Comcast Corporation at 3, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) [hereinafter *Comments of Comcast*] (“The restoration of the light-touch regime has eliminated the regulatory barriers to investment and innovation

## **B. BIAS and the Internet Were Never Designed to Be More than “Best-Efforts” Systems.**

A number of commenters argue that Title II regulation is required for BIAS and the Internet because public safety officials rely on the Internet for a myriad of systems related to public safety communications.<sup>39</sup> This reliance, they claim, means that Title II regulation is necessary to ensure that public safety communications never suffer from any loss of service, degradation, or even latency.<sup>40</sup> These commenters, unfortunately, miscomprehend the very nature of the Internet and ignore the fact that the Internet has always been, at its core, a “best efforts” network. The United States government has repeatedly stated such, for example:

In the past most internet traffic was delivered on what is known as a “best efforts” basis, a quality standard that does not guarantee that the traffic will be delivered by a certain time or speed. Under best efforts some data packets arriving at congestion points will be dropped and held until a future date while others will be forwarded in real time. Earlier common applications (e.g., email) are not time sensitive and the use of best efforts will not degrade the user experience. Newer applications (e.g., telemedicine) are sensitive to interruption and latency making

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created by the Title II Order”.); Comments of NCTA – the Internet & Television Association (“NCTA”) at 11, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) (“Moreover, since the Commission’s restoration of BIAS’s information service classification in January 2018, broadband investment has remained robust.”). *See also* Press Release, FCC, Chairman Pai Statement on Broadband Investment Increasing in 2017, Reversing Two-Year Decline (Oct. 18, 2018), <https://docs.fcc.gov/public/attachments/DOC-354639A1.pdf>; Press Release, FCC, Statement of Chairman Pai on Increased Broadband Investment for Second Year in a Row (June 10, 2019), <https://docs.fcc.gov/public/attachments/DOC-357892A1.pdf>.

<sup>39</sup> Indeed, the length and breadth of those now seeking special treatment (and free prioritization) is astounding. *See, e.g.*, Comments of ADT (arguing that home alarm systems relying on BIAS should be categorized as “public safety” and therefore be prioritized); Comments of Digital Civil Society Lab at 3 (the FCC should include in the category of “public safety,” “civil society actors, non-profit associations, and citizen organizations engaged in public safety, particularly their ability to effectively communicate, mobilize, and respond to public safety threats and crises”); Comments of CPUC at 2 (devices that provide information to or from the energy grid should be considered part of public safety).

<sup>40</sup> *See, e.g.*, Comments of BBIC at 35 (“Modern firefighters rely on real-time geographic information system (“GIS”) mapping to monitor fires and coordinate emergency response, track information, and save lives,” quoting Brief for Professors of Administrative, Communications, Energy, Antitrust, Contract Law, and Policy as *Amici Curiae* Supporting Petitioner at 11-12, *Mozilla, Corp. v. FCC*, No. 18-1051 (Aug. 27, 2018).

network management practices that affect how packets travel over the network of greater concern.<sup>41</sup>

Even if the FCC were to adopt rules requiring that all communications to and from public safety entities (not just the emergency services discussed above), such prioritization (against which these same commenters rail) could never assure the types of access and service guarantees these commenters now demand.<sup>42</sup> That is why Congress and the FCC have established the emergency communications services, including the 911 “emergency services” and EAS and WEA “emergency notification services” as discussed above. While the Internet and BIAS can serve as a platform for aiding public safety communications, it was never engineered to be always on, always available, always accessible, and always on-time, as the Public Safety Commentators demand. It is up to Congress, not the FCC, to decide whether it wants to craft a new statutory framework that specifically addresses the use of the Internet by public safety users or critical infrastructure providers or for communications with a clear nexus to public safety, outside of the previously established emergency services and emergency notification services.

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<sup>41</sup> Congressional Research Service, *Access to Broadband Networks: Net Neutrality at 2* (Apr. 10, 2019), available at <https://crsreports.congress.gov/product/pdf/IF/IF10955>. See also *Special Access Data Collection -- Glossary of Terms*, FCC (June 3, 2014), <https://www.fcc.gov/general/special-access-data-collection-glossary-terms> (“Best Efforts Business Broadband Internet Access Service means a best efforts Internet access data service with a minimum advertised bandwidth connection of at least 1.5 megabits per second (Mbps) in both directions (upstream/downstream) that is marketed to enterprise customers (including small, medium, and large businesses).”); *Explanation of Broadband Deployment Data*, FCC (Mar. 12, 2020), <https://www.fcc.gov/general/explanation-broadband-deployment-data> (explanation of FCC Form 477 data: “MaxCIRDown: Maximum contractual downstream bandwidth offered by the provider in the block for Business service (filer directed to report 0 if the contracted service is sold on a ‘best efforts’ basis without a guaranteed data-throughput rate)”).

<sup>42</sup> See, e.g., Comments of Free Press at 18 (“The entire public must have access to open communications during a crisis, both to ensure those impacted can find and receive potentially life-saving information during an emergency, and to allow public health officials to build on-the-ground situational awareness with information they gather from residential broadband internet access service users.”). But see Comments of AARP at 8, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) (“While the Record Refresh asks whether broadband providers have policies in place to facilitate public safety communications, just how broadband providers would track all communications that have public safety implications is not at all clear.”).

What the FCC should focus on in remand, therefore, is not the regulatory structure that provides the greatest priority to all uses of the Internet by public safety officials, but rather, the regulatory structure that overall provides the most access to BIAS connections to the greatest number of people, most affordably. The comments in this proceeding, as in the 2017 *RIFO* docket, clearly demonstrate that the less restrictive regulatory regime which preceded the 2015 Order provides the best regulatory environment to drive broadband deeper into rural America through a combination of private carrier investment and government investment through the Universal Service Fund to bring broadband to areas where it is not commercially viable to build. The National Organization of Black Law Enforcement Executives (NOBLE) puts it best:

NOBLE believes that the Commission's RIF Order will have beneficial overall impacts to public safety for two reasons. The first reason can be found, ironically, in the same Court of Appeals decision. As noted, NOBLE believes that greater public access to broadband communication is crucial for improving and maintaining public safety. As the Court of Appeals decision stated:

"We find that the agency's position as to the economic benefits of reclassification away from 'public-utility style regulation,' *id.* ¶ 90, which the Commission sees as 'particularly inapt for a dynamic industry built on technological development and disruption,' *id.* ¶ 100, is supported by substantial evidence...."

The first step toward faster, more accessible broadband networks involves, of course, building them in the first place. If a community needs better broadband and there is not enough money to build out its Internet access (either wireline or wireless), people in that community and its law enforcement officials both lose a way to improve public safety. As a law enforcement agency, NOBLE members have firsthand experience with this dynamic. Therefore, we urge the Commission to appreciate that federal policies encouraging broadband deployment also help promote greater public access, communication with law enforcement and, from that, better public safety.

Second, we urge the Commission to appreciate the benefits that new broadband technologies will have for law enforcement. The most obvious of these involves 5G mobile broadband and a Commission policy encouraging faster 5G deployment benefits law enforcement officials by giving officers better tools to protect the



public. For example, if armed, dangerous persons have barricaded themselves inside a home, a SWAT team mission into the house can be exceptionally dangerous. This is true even if all persons are incapacitated due to booby traps and other potentially lethal situations. Faster, more accessible broadband such as 5G will allow law enforcement to deploy new types of unmanned robotic vehicles that send and receive high-definition video and other data instantly and with a minimum of latency. This can give law enforcement better “eyes and ears” in dangerous situations without additional personal risk to officers.<sup>43</sup>

NOBLE undertook the same balancing test that the FCC should employ on remand, and came out the same way the FCC did in the *RIFO* and should do so again on remand — that public safety is better overall served by a light touch Title I regime that encourages continued investment (both private and governmental) in broadband infrastructure, over heavy-handed utility-style regulation that breeds regulatory uncertainty and stifles future investment.

#### **IV. A Return to Title II Regulation Would Not Protect Public Safety Users from Their Own Fears: The First Amendment Sharply Limited Which Services Could Have Been Subject to the 2015 Order.**

Those commenters complaining about the *RIFO* repeatedly insist that the Order opened the door to blocking and throttling, and that allowing the prioritization of some traffic harms public safety communications.<sup>44</sup> In our comments, we explained why most of these fears are nothing but red herrings: the very service plans alleged to be throttled would not have been regulated under the 2015 Order as they were not BIAS services.<sup>45</sup> But there is a far more fundamental reason that Title II couldn’t have done what the public safety commenters want:

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<sup>43</sup> Letter of the National Organization of Black Law Enforcement Executives (NOBLE) at 2, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 *et al.* (Apr. 20, 2020), <https://ecfsapi.fcc.gov/file/10420242078791/Letter%20FCC%20NOBLE%20Comments.pdf>.

<sup>44</sup> See, e.g., Comments of Public Knowledge at 7; Comments of BBIC at 14; Comments of Santa Clara at 6; Comments of CPUC at 2; Comments of Free Press at 18-19; Comments of EFF at 2-3.

<sup>45</sup> Comments of TechFreedom at 21-36.

the First Amendment would have barred the FCC from applying the 2015 Order to any provider that stepped out of a traditional common carrier mode and instead offered a service subject to editorial intervention (which would include clearly disclosed blocking, throttling and prioritization). This “outer boundary,” so to speak, of Title II regulation of BIAS was clearly articulated by the court which reviewed, and affirmed, the 2015 Order. In a critically important opinion (albeit one in a somewhat unusual posture) responding to the denial of the *en banc* petition for rehearing, the same judges who penned the original panel decision issued a concurrence, in large part expanding on the brief First Amendment analysis in their panel opinion. They were responding to the dissent of then-judge Kavanaugh, which argued that the 2015 Order was unconstitutional because it impinged the First Amendment rights of carriers. Judges Srinivasan and Tatel reiterated that the First Amendment was not implicated by the 2015 Order, but only so long as what the FCC was regulating were services that involved no editorial discretion on the part of providers:

“[b]roadband providers” subject to the rule “represent that their services allow Internet end users to access all or substantially all content on the Internet, without alteration, blocking, or editorial intervention.” *Id.* ¶ 549 (emphasis added). Customers, “in turn, expect that they can obtain access to all content available on the Internet, without the editorial intervention of their broadband provider.” *Id.* (emphasis added). Therefore, as the panel decision held and the agency has confirmed, the net neutrality rule applies only to “those broadband providers that hold themselves out as neutral, indiscriminate conduits” to any internet content of a subscriber's own choosing. *U.S. Telecom Ass'n*, 825 F.3d at 743; see *FCC Opp'n Pets. Reh'g* 28-29.<sup>46</sup>

Srinivasan and Tatel went on to state that the Title II regulations could not apply, consistent with the First Amendment, to any provider which exercised its editorial discretion to curate services. “The key to understanding why lies in perceiving when a broadband provider

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<sup>46</sup> *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 388-89 (D.C. Cir. 2017) (upholding *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016)).

falls within the rule's coverage.”<sup>47</sup> The 2015 Order itself noted that it would “apply only to broadband providers’ conduct with regard to [BIAS]. Providers remain free to engage in the full panoply of protected speech afforded to any other speaker. They are free to offer ‘edited’ services and engage in expressive conduct through the provision of other data services, as well.”<sup>48</sup> Srinivasan and Tatel added, citing the 2015 Order:

That would be true of an ISP that offers subscribers a curated experience by blocking websites lying beyond a specified field of content (*e.g.*, family friendly websites). It would also be true of an ISP that engages in other forms of editorial intervention, such as throttling of certain applications chosen by the ISP, or filtering of content into fast (and slow) lanes based on the ISP's commercial interests. An ISP would need to make adequately clear its intention to provide “edited services” of that kind, *id.* ¶ 556, so as to avoid giving consumers a mistaken impression that they would enjoy indiscriminate “access to all content available on the Internet, without the editorial intervention of their broadband provider,” *id.* ¶ 549. It would not be enough under the Order, for instance, for “consumer permission” to be “buried in a service plan—the threats of consumer deception and confusion are simply too great.” *Id.* ¶ 19; *see id.* ¶ 129.<sup>49</sup>

Thus, a broadband provider that clearly disclosed its intention to block, throttle, or prioritize content or applications simply would not have been subject to the 2015 Order. The FCC could not have enforced its “bright-line” rules against these practices, or applied the Order’s “general conduct standard,” or any other portion of the Order, to such services. Srinivasan and Tatel made clear that broadband providers could opt-out of having the service they provided designated as BIAS, and thus opt-out of being subject to the 2015 Order:

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<sup>47</sup> 855 F.3d at 388 (quoting *Protecting and Promoting the Open Internet* ¶ 27, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015); *see id.* ¶¶ 15, 350.) This argument is consistent with the 2015 Order’s conclusion that the Order’s “no-unreasonable interference/disadvantage standard does not unconstitutionally burden any of the First Amendment rights held by broadband providers because broadband providers are conduits, not speakers, with respect to [BIAS].” *Id.* 5663 n.343.

<sup>48</sup> *Protecting and Promoting the Open Internet* ¶ 556, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) [hereinafter *2015 Order*]; *see also* 855 F.3d at 389.

<sup>49</sup> 855 F.3d at 389-90.

While the net neutrality rule applies to those ISPs that hold themselves out as neutral, indiscriminate conduits to internet content, the converse is also true: the ***rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway***—*i.e.*, an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of “editorial intervention.” *Id.* ¶ 549. For instance, Alamo Broadband, the lone broadband provider that raises a First Amendment challenge to the rule, posits the example of an ISP wishing to provide access solely to “family friendly websites.” Such an ISP, as long as it represents itself as engaging in editorial intervention of that kind, would fall outside the rule.<sup>50</sup>

Now suppose the 2015 Order had remained in effect and that a broadband provider clearly declared a new policy, applicable only to new customers or existing customers upon renewal of their contracts, of blocking websites that traffic in fake prescription drugs — a clear risk to public health and safety. If anything, this example is far more realistic than the fears expressed by commenters that broadband providers will publicly announce their intention to begin blocking any other form of content — related to public safety or otherwise. The legal point is the same in either case: as Judges Srinivasan and Tatel noted, the 2015 Order would have “applie[d] only to ISPs that represent themselves as neutral, indiscriminate conduits to internet content.”<sup>51</sup> Only given such a representation, “that their services allow Internet end users to access all or substantially all content on the Internet, *without alteration, blocking, or editorial intervention,*” would end users be justified in “expect[ing] that they can obtain access to all content available on the Internet, without the editorial intervention of their broadband provider.”<sup>52</sup>

At most, the 2015 Order guarded against only how and when non-neutral practices can be instituted, not against such practices themselves. For that, we hardly needed the 2015 Order’s

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 392.

<sup>52</sup> *Id.* at 388 (added emphasis original) (quoting 2015 Order ¶ 549).

elaborate Title II regime (and incomplete forbearance<sup>53</sup>), as the Federal Trade Commission has always had broad power to police practices to ensure that they are consistent with representations to consumers.<sup>54</sup> The FTC can proscribe as deceptive not only surreptitious practices, but also proscribe as unfair changing material terms of a service plan.<sup>55</sup>

It is the FTC's power to vindicate the reasonable expectations of buyers of broadband service, not the 2015 Order, that has guarded against abuse across the board, including with respect to public safety-related communications. Given the restrictions of the First Amendment, whether the 2015 Order applies amounts to something roughly similar to what the FTC could do (although the 2015 Order, once it applied, necessarily created a cloud of uncertainty because of the powers inherent in Sections 201(b) and 202(a) are far more amorphous than those of the FTC<sup>56</sup>). In important ways, however, the FTC's authority to protect consumers is greater than the FCC's was: while the Srinivasan-Tatel opinion makes clear that the FCC would have lost jurisdiction *completely* over broadband providers that clearly disclosed their intention to offer

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<sup>53</sup> As we have noted, the 2015 Order did not forbear from the core provisions of Title II: Sections 201(b) and 202(a). *2015 Order* ¶ 441 (“The Commission has found that sections 201 and 202 ‘lie at the heart of consumer protection under the Act.’”). *See also 2015 Order*, 30 FCC Rcd 5601, 5996 (O’Rielly, Comm’r, dissenting) (“the majority seems to be comfortable with suggesting that they can forbear from parts of Title II because section 201 does it all anyway.”); Comments of TechFreedom at 52-53, [http://docs.techfreedom.org/TechFreedom\\_Reply\\_Comments\\_on\\_Open\\_Internet\\_Order.pdf](http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf).

<sup>54</sup> FTC, FTC Policy Statement on Deception (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

<sup>55</sup> For example, in 2011, in order to manage worsening congestion on its still-new 4G network, AT&T instituted a new policy of reducing the speeds of users who exceeded a basic data allowance. The 2015 Order recognized that such policies can benefit users overall, both by reducing congestion and by allowing users to avoid being charged per-GB usage charges. *2015 Order* ¶ 153. But AT&T applied this policy change to all users, including those still on the “unlimited data” plans offered when AT&T first launched its 4G network years earlier. Because AT&T had not waited until the expiration of those service plans, the FTC sued, arguing both that the new policy was insufficiently disclosed to users and that changing material terms of service mid-contract was unfair. After prevailing in court on jurisdictional grounds, *FTC v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018), the FTC persuaded AT&T to settle the case. *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>.

<sup>56</sup> *See supra* note 53.

an “edited service,” the FTC’s jurisdiction is plenary, leaving the agency free to make a holistic assessment of the representations made to consumers under its deception authority and, in addition, to protect consumers against unfair practices (*e.g.*, changes to terms of service). In addition, the FTC has remedial powers to make consumers whole the FCC lacks.<sup>57</sup> Finally, the FTC can do all this *without* the baggage of imposing common carrier status on broadband providers, and thus undermining investment in broadband service.<sup>58</sup>

**A. Prioritized Public Safety Services Could Not Have Been Subject to the 2015 Order Because They Were “Edited Services” Protected by the First Amendment, and Thus Were Unaffected by the 2015 Order’s Repeal.**

Now consider a different, very non-hypothetical example how non-neutrality can benefit public safety — and why such offerings would necessarily have fallen outside the scope of the 2015 Order. A number of providers currently offer prioritization as special feature of its public safety offerings, which do not qualify as BIAS because they are enterprise, not mass-market retail, services.<sup>59</sup> These services also do not qualify as BIAS for a second reason: the prioritization of certain communications clearly qualifies as an exercise of editorial discretion under the Srinivasan-Tatel opinion.<sup>60</sup> Thus, the most vital public safety services were not affected by the 2015 Order, or its repeal, whether or not these “edited services” were “enterprise” offerings.

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<sup>57</sup> FTC, Prepared Statement of Commissioner Joshua D. Wright Federal Trade Commission on Wrecking the Internet to Save It? The FCC’s Net Neutrality Rule at 17 (Mar. 25, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/632771/150325wreckinginternet.pdf](https://www.ftc.gov/system/files/documents/public_statements/632771/150325wreckinginternet.pdf).

<sup>58</sup> *RIFO* ¶¶ 88-108.

<sup>59</sup> *See, e.g.*, Verizon Wireless, Public Safety Pricing, <https://www.state.nj.us/treasury/purchase/pricelists/T216a/UpdatedPublicSafetyPricing.pdf> (“This service plan includes Mobile Broadband Priority and Preemption. Mobile Broadband Priority allows customers to connect to the network with priority by leveraging a pool of radio resources dedicated to enable their connection. Mobile Broadband Priority identifies the user with an Access Priority setting, giving them higher priority for network access than lower Access Class users. Preemption automatically activates to provide approved personnel uninterrupted access to the network in those uncommon times when the network is fully utilized. 911 calls are never preempted.”).

<sup>60</sup> 855 F.3d at 389-90; *see also supra* note 47.

**B. The First Amendment Would Have Sharply Constrained the FCC’s Discretion to Regulate Purported Non-BIAS Services as Functionally Equivalent to BIAS.**

The 2015 Order claimed broad authority to regulate as BIAS “any service that the Commission finds to be providing a functional equivalent of [BIAS], or that is used to evade the protections set forth in this Part.”<sup>61</sup> Yet such a claim is clearly inconsistent with the Srinivasan-Tatel opinion, which barred the FCC from applying 2015 Order to “edited services.” Multiple commenters expressed concern that “over-the-top” services (*e.g.*, VoIP, video conferencing, and streaming), because they are sensitive to latency, could be disrupted if a broadband provider were to allow prioritization of other traffic that providers claimed were non-BIAS services.<sup>62</sup> The 2015 Order claimed authority to regulate such services — so that “over-the-top services offered over the Internet are not impeded in their ability to compete with other data services,”<sup>63</sup> and, in particular, to ensure that “consumers of competing over-the-top services will not be disadvantaged in their ability to access 911 service.”<sup>64</sup> In fact, the FCC would not have been able to extend the 2015 Order to any “edited service,” whatever the effects of that service might be on over-the-top services providers, consumers, or public safety.

More generally, the Srinivasan-Tatel opinion clearly rejected the 2015 Order’s expansive definition of “non-BIAS service.” None of the three prongs of that definition<sup>65</sup> are relevant to

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<sup>61</sup> 2015 Order, 30 FCC Rcd 5601, 5883 (§ 8.2(a) Definitions).

<sup>62</sup> *Comments of BBIC* at 39 (“Paid prioritization will likely push those not on the fast lanes closer to the point of signal degradation. Under these circumstances, other issues such as congestion or network damage (all things that would be very common in a disaster situation) would have a much higher chance of causing signal loss. For systems that need to be robust and reliable, critical infrastructure and the distributed systems, workers, and supply chains on which they rely, ISP paid prioritization would be a serious harm to the reliability and robustness.”).

<sup>63</sup> *Id.* ¶ 210.

<sup>64</sup> 2015 Order note 542.

<sup>65</sup> 2015 Order ¶ 209 (“First, these services are not used to reach large parts of the Internet. Second, these services are not a generic platform—but rather a specific ‘application level’ service. And third, these services use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services”).

Srinivasan and Tatel’s analysis of whether a service is a BIAS service or an “edited service” whose nature had been made “adequately clear ... so as to avoid giving consumers a mistaken impression that they would enjoy indiscriminate ‘access to all content available on the Internet, without the editorial intervention of their broadband provider...’”<sup>66</sup> The first prong of that definition (“these services are not used to reach large parts of the Internet”) may seem to come close to the Srinivasan-Tatel opinion, but blocking even a “small part” of the Internet would suffice to make a broadband offering an “edited service” rather than BIAS, as would engaging in throttling or prioritization even *without* blocking.<sup>67</sup>

Finally, Srinivasan and Tatel also implicitly invalidated the 2015 Order’s claim that the Commission could “take appropriate action” (presumably under Section 706) over services that would otherwise not qualify as BIAS because the Commission “determines that these types of service offerings are undermining investment, innovation, competition, and end-user benefits...”<sup>68</sup> These downstream effects simply have no bearing on whether these services are “edited” or not, and thus whether the First Amendment would be implicated by the FCC’s attempt to subject such a provider to the Order.

### **C. What the Commission Should Say in Its Order on Remand.**

The FCC’s Order on Remand should explain the implications of the Srinivasan-Tatel opinion — specifically, that (a) if the 2015 Order had remained in place, it would have applied *only* to a “broadband service that promises access to all of the lawful Internet’ without editorial

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<sup>66</sup> *Id.*

<sup>67</sup> 855 F.3d at 389-90 (“The Order thus specifies that an ISP remains “free to offer ‘edited’ services” without becoming subject to the rule’s requirements. Order ¶ 556. That would be true of ... an ISP that engages in other forms of editorial intervention, such as throttling of certain applications chosen by the ISP, or filtering of content into fast (and slow) lanes based on the ISP’s commercial interests.”).

<sup>68</sup> 2015 Order ¶ 210.



intervention,”<sup>69</sup> and (b) thus, the hypothetical practices of blocking, throttling or prioritization that some commenters fear might interfere with public safety communications would have been the product “editorial intervention” and thus such services would not have fallen under the scope of the 2015 Order unless such providers had “[held] themselves out as neutral, indiscriminate conduits.”<sup>70</sup> The same is true for the very real *prioritized* service offered to public safety users (which clearly benefits them). Any such “edited” service has *always* been the responsibility of the Federal Trade Commission, and it is there that anyone concerned about blocking, throttling or prioritization — real or conjectural — must direct their attention.

## V. The COVID-19 Pandemic Demonstrates the Resiliency of the Internet, Not the Need for Heavy-Handed Regulation.

Many commenters on both sides point to the current COVID-19 pandemic to argue for their preferred regulatory status for BIAS.<sup>71</sup> We submit that the COVID-19 pandemic really has taught us three things about BIAS and the Internet: (1) The architecture and

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<sup>69</sup> 855 F.3d at 389 (quoting 2015 Order ¶¶ 17, 549).

<sup>70</sup> *Id.* at 388 (quoting *U.S. Telecom*, 825 F.3d at 743).

<sup>71</sup> *Compare* Comments of the Competitive Enterprise Institute at 7, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) (“In addition to the recent historical comparison, the public health crisis presented by the Covid-19 pandemic has provided a real-time contrast between the RIFO approach and ‘utility-style regulation’ such as that of the preceding OIO”), *and* Comments of Comcast at 2 (“Indeed, the substantial investments Comcast has made in its broadband network – investments that have thrived under the RIF Order’s approach which had previously been in place for nearly two decades under both Democratic and Republican administrations – have laid the groundwork for Comcast’s robust network performance and reliability during the COVID-19 pandemic, for both consumers generally and the public safety community.”), *and* Comments of the Committee For Justice at 2, *Restoring Internet Freedom et al.*, WC Docket No. 17-108 et al. (Apr. 20, 2020) (“During the current crisis surrounding the COVID-19 pandemic, Internet Service Providers (ISPs) have been able to handle the increased broadband load resulting from an exponential increase in traffic, emergency services have been able to respond at a high speed, service providers have acted in the best interest of consumers by offering flexible payment options and waiving fees, and the recent increased investment in broadband infrastructure spurred by the repeal of Title II has enabled millions of Americans to telework and to use telehealth services.”) (arguing the COVID-19 pandemic supports Title I classification), *with* Comments of BBIC *passim*, *and* Comments of EFF at 4 (“The COVID-19 pandemic has illustrated ways in which unfettered Internet access is essential during an emergency”), *and* Comments of Digital Civil Society Lab at 6 (“Civil society’s reliance on broadband services covered by the Restoring Internet Freedom Order is heightened during public safety crises and has come into stark view during the current public safety crisis of the COVID-19 Pandemic”) (arguing the COVID-19 pandemic shows that only Title II regulation can ensure the Internet continues to function during the crisis).

infrastructure associated with the Internet has held up incredibly well under the strain of tele-working, home schooling, and unprecedented binge-watching of streaming services while most Americans are shuttered-in-place;<sup>72</sup> (2) the marketplace for edge services has never been more competitive and consumers are taking full advantage of that competition to cord-cut, shift plans, and otherwise adjust to the “new normal,”<sup>73</sup> whereas broadband providers themselves are seeing a lower than normal customer “churn;”<sup>74</sup> and (3) the FCC possesses ample jurisdiction to move swiftly and efficiently to allocate spectrum,<sup>75</sup> spin-up

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<sup>72</sup> See, e.g., Michael Cooney, *Why didn't COVID-19 break the Internet*, Network World (Apr. 30, 2020), <https://www.networkworld.com/article/3541357/why-didnt-covid-19-break-the-internet.html> (“The short answer to why the internet has survived a huge surge in traffic during the global coronavirus pandemic is that the infrastructure that makes up its backbone was designed to survive just such an emergency.”); Will Douglas Heaven, *Why the coronavirus lockdown is making the internet stronger than ever*, MIT Technology Review (Apr. 7, 2020), <https://www.technologyreview.com/2020/04/07/998552/why-the-coronavirus-lockdown-is-making-the-internet-better-than-ever/>; Emily Bary, *Comcast's internet service should withstand coronavirus, but everything else is worrisome*, Market Watch (Apr. 20, 2020), <https://www.marketwatch.com/story/comcast-in-the-age-of-covid-19-internet-service-is-holding-up-but-everything-else-is-worrisome-2020-04-08> (“The rest of the Comcast conglomerate consists of movie, television and theme-park businesses, all of which are suffering far more as the new coronavirus outbreak disrupts regular operations.”).

<sup>73</sup> Aaron Pressman, *Cord cutting is speeding up as the coronavirus pandemic squeezes consumers*, Fortune (May 5, 2020), <https://fortune.com/2020/05/05/cord-cutting-coronavirus-cable-satellite-tv-comcast-verizon-charter-altice-att-dish/>; Georg Szalai, *Pay TV Could Face Even Bigger Subscriber Losses Amid Virus Crisis*, The Hollywood Reporter (April 10, 2020), <https://www.hollywoodreporter.com/news/pay-tv-fears-bigger-subscriber-losses-virus-crisis-1288159>.

<sup>74</sup> Mike Dano, *Behind the numbers: How COVID-19 could change the US telecom industry*, LightReading (Mar. 30, 2020), <https://www.lightreading.com/services/behind-the-numbers-how-covid-19-could-change-the-us-telecom-industry/d/d-id/758555> (customer churn is down 27% during the pandemic).

<sup>75</sup> See, e.g., *FCC Grants Navajo Nation Temporary Spectrum Access During Pandemic*, FCC (Apr. 17, 2020), <https://www.fcc.gov/document/fcc-grants-navajo-nation-temporary-spectrum-access-during-pandemic> (for use of the 2.5 GHz spectrum); Email from Keith Harper, FCC, to Clare Liedquist, Comcell (May 12, 2020), <https://docs.fcc.gov/public/attachments/DOC-364398A1.pdf> (FCC granting temporary spectrum access to Comcell, Inc.) (5840-5895 MHz spectrum); Email from Elizabeth Fishel, FCC, to Blaise Scinto, T-Mobile (May 11, 2020), <https://docs.fcc.gov/public/attachments/DOC-364396A1.pdf> (FCC granting temporary spectrum access to T-Mobile) (600 MHz spectrum).

new programs,<sup>76</sup> waive overly restrictive rules during the pandemic,<sup>77</sup> and enlist carriers to work together to provide the best services possible in this environment.<sup>78</sup> The FCC is being lauded as amongst the most nimble government agencies during the pandemic.<sup>79</sup> That the sky has not fallen, the Internet has not broken, and the ability of the American economy to function as well as it has during this crisis, is in large part thanks to the decades of infrastructure investment made by private companies and strategic government programs, which has shown a significant increase since adoption of the RIFO.

## VI. Conclusion

The record in this proceeding is now “refreshed.” Those that wish the *Mozilla* court had ruled otherwise and not affirmed the reclassification of BIAS as a Title I information service have had their say (again), irrelevant as that issue is on remand. There is ample evidence in the record for the Commission to issue a new order explaining the impact of the RIFO on the categories

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<sup>76</sup> See, e.g., *COVID-19 Telehealth Program*, FCC (May 13, 2020), <https://www.fcc.gov/covid-19-telehealth-program> (making available \$200 million in funding for telehealth programs); *FCC Approves Sixth Set of COVID-19 Telehealth Program Applications*, FCC (May 13, 2020), <https://www.fcc.gov/document/fcc-approves-sixth-set-covid-19-telehealth-program-applications>.

<sup>77</sup> See, e.g., *FCC Extends Temporary Waivers For Relay Services Rules During Pandemic*, FCC (May 14, 2020), <https://www.fcc.gov/document/fcc-extends-temporary-waivers-relay-services-rules-during-pandemic-0>; *FCC Grants GE Healthcare Waiver to Expedite Medical Equipment*, FCC (May 11, 2020), <https://www.fcc.gov/document/fcc-grants-ge-healthcare-waiver-expedite-medical-equipment>; *Waiver of the Red Light Rule for the COVID-19 Telehealth Program*, FCC (Apr. 21, 2020), <https://www.fcc.gov/document/waiver-red-light-rule-covid-19-telehealth-program>.

<sup>78</sup> See *Broadband, Telephone Providers Extend Keep Americans Connected Pledge*, FCC (May 14, 2020), <https://www.fcc.gov/document/broadband-telephone-providers-extend-keep-americans-connected-pledge>.

<sup>79</sup> See, e.g., Nathan Eddy, *FCC doles out \$3.7 million more to aid COVID-19 telehealth deployment*, Health IT News (Apr. 23, 2020), <https://www.healthcareitnews.com/news/fcc-doles-out-37-million-more-aid-covid-19-telehealth-deployment>; Eric Wicklund, *FCC Rewards 5 More Health Systems With COVID-19 Telehealth Program Funding*, mHealth Intelligence (Apr. 21, 2020), <https://mhealthintelligence.com/news/fcc-awards-5-more-health-systems-with-covid-19-telehealth-program-grants>; *Lifeline Service Extended by FCC, Providing Critical Connections During COVID-19 Crisis*, MyChesCo (May 18, 2020), <https://www.mychesco.com/a/news/lifeline-service-extended-by-fcc-providing-critical-connections-during-covid-19-crisis/> (“The National Lifeline Association applauds a recent announcement by the FCC that it will continue to suspend involuntary disconnections from the Lifeline program and that it will accept unemployment insurance as proof of income eligibility through June 30, 2020.”).

required by the remand: public safety users, Lifeline, and pole attachments. In each case, the FCC’s explanation will receive *Chevron* deference on a further appeal, and to paraphrase the *Mozilla* court, the D.C. Circuit will conclude: “the Commission [has] address[ed] on remand the issues it failed to adequately consider in the 2018 Order.”<sup>80</sup>

Respectfully submitted,

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<sup>80</sup> *Mozilla*, 940 F.3d at 86.