

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Restoring Internet Freedom)	WC Docket No. 17-108
)	
Bridging the Digital Divide for Low-Income Consumers)	WC Docket No. 17-287
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42

**COMMENTS OF
THE FREE STATE FOUNDATION***

I. Introduction and Summary

These comments are filed in response to the Commission’s Notice seeking to refresh the record in its *Restoring Internet Freedom* and Lifeline proceedings in light of the D.C. Circuit’s *Mozilla v. FCC* remand decision.¹ While the primary focus of these comments is on the public safety-related benefits of the Commission’s Title I classification decision and adoption of a light-touch regulatory framework for broadband Internet access services, it would be blinking reality to ignore the fact that the comments are being filed in the midst of the COVID-19 pandemic. So, without here relitigating the now proven public policy benefits of the *Restoring Internet Freedom Order’s (RIFO)* repeal of the public utility-like restrictions of the *Title II Order*, we would be remiss not to emphasize that broadband networks have been performing extremely well during the current crisis.

* These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Director of Policy Studies and Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

¹ Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit’s *Mozilla* Decision, WC Docket Nos. 17-108, 17-287, 11-42 (released February 19, 2020).

This is so even though traffic levels have increased substantially. Maintaining a high level of quality assurance in the face of the increased traffic burdens associated with the current crisis may be attributable in no small measure to the freedom and flexibility that the *RIFO* restored, and to the investment and innovation incentives it created.

In this *Mozilla* remand proceeding, the primary point is this: Public safety services are decidedly more likely to benefit from Title I reclassification than from the restrictive policy that existed under the now-repealed 2015 *Title II Order*. The now-repealed public utility-like regulation inhibited innovation and reduced incentives for investment by depriving broadband ISPs of full use of their property and ability to generate returns on their investment. The *Title II Order* thereby had the effect of deterring the advancement of reliable public safety communications services, along with other services.

Through its 2018 *Restoring Internet Freedom Order*, the Commission established a free market-oriented policy that will promote innovation and investment in broadband network infrastructure. In the *RIFO*, the Commission also determined that its decision was bolstered by the pro-innovation and pro-investment effects that were likely to result from its restoration of a light touch policy. Importantly, those same policy benefits extend to public safety communications offerings.

As explained in the Free State Foundation's comments filed prior to the *RIFO*'s adoption, "as emergency services evolve, governments may want to have paid prioritization available as an option for Amber alerts, severe weather alerts, Homeland Security warnings and other highly time-sensitive functions." A mandate that public safety and non-public safety users must share communications networks on a neutral non-preferential basis can risk disrupting public safety communications in times of emergency and high congestion. Of course, this has never been

brought home so vividly as during the present COVID-19 crisis. Paid prioritization arrangements offer an option, if needed, for government agencies responsible for public safety to use communications services featuring higher quality and improved reliability compared to traditional best-efforts networks. Again, while the availability of those options may be important to public safety-related organizations at all times, it should be self-evident that they are especially important now.

Even the *Title II Order* acknowledged that "in connection with an emergency, there may be federal, state, tribal, and local public safety entities, homeland security personnel, and other authorities that need guaranteed or prioritized access to the Internet in order to coordinate disaster relief and other emergency response efforts, or for other emergency communications." But, inevitably, questions would arise as to whether a particular entity fit within the public safety designation. The *RIFO's* repeal of the ban on paid prioritization clears up any confusion regarding the status of such arrangements involving public safety.

Public safety is not threatened by potential blocking or throttling by broadband Internet service providers (ISPs) under the Commission's Title I light-touch policy. As the *RIFO* found, there is no record evidence of broadband ISPs engaging in such conduct, and the public record since the *RIFO's* adoption is consistent with that finding. Also, as the *RIFO* correctly concluded, all major broadband ISPs pledge in their terms of service to not block or throttle lawful content, applications, and services. Under the *RIFO*, those terms are enforceable by the Federal Trade Commission (FTC).

Rather than block or throttle, broadband ISPs offer services that give priority and preemption options to public safety-related communications. ISPs such as AT&T and Verizon

now offer public safety communications capabilities that rely on dedicated network cores and traffic rather than share capacity with residential and other commercial customers.

Additionally, broadband ISPs lack market power, and therefore do not have the ability and incentive to reduce services as a way of increasing returns. ISPs that might engage in blocking or throttling risk losing good will and customers to competitors. And claims that the Title I light-touch policy framework will relegate public safety communications to Internet "slow lanes" are empty because such slow lanes do not exist. Prioritized traffic arrangements do not entail proactive blocking or throttling of non-prioritized traffic. But they do offer a way of allowing some users to pay more for better service – and such arrangements can benefit public safety communications.

Finally, the summer 2018 incident in which the Santa Clara County Fire District experienced slowed traffic does not support re-regulation of broadband services under Title II. It was a usage-based service issue, with a customer paying for the amount of service that it chose and an IPS's unfortunate mistake in not properly implementing its own policy to waive data allowances in public emergencies. Tellingly, the petitioners in *Mozilla* did *not* argue the incident involved a violation of the *Title II Order*. The *Title II Order* permitted usage-based plans featuring slower traffic that exceeded monthly data allowances. The *RIFO* reaffirmed the consumer choice benefits of usage-based services.

So, aside from the well-documented benefits to all consumers, reclassification of broadband Internet access services as Title I "information services" and the Commission's adoption of a light-touch regulatory policy framework for those services has important public safety-related benefits. In view of those benefits not only to the public at large but to public safety, the *Restoring Internet Freedom Order* was obviously necessary and proper.

II. Beneficial Effects of Title I Reclassification and the Commission's Light-Touch Policy Extend to Public Safety Communications

As explained in the Free State Foundation's comments in this proceeding – and as the *Restoring Internet Freedom Order* rightly concluded – the primary basis for the Commission's Title I classification decision is that broadband Internet access services meet the technological definition for information services under Title I of the Telecommunications Act of 1996.² The D.C. Circuit upheld this conclusion in *Mozilla*.³ The *RIFO* also concluded that its statutory conclusion was bolstered by policy justifications for a light touch policy – namely, promoting investment and innovation.⁴ Those general policy benefits extend to public safety communications offerings. Indeed, there is no good reason to think that public safety-related communications somehow would not share in the same pro-innovation and pro-investment effects that the Commission concluded residential and small business customers of retail mass market broadband Internet access services will realize under the *RIFO*'s Title I, light-touch framework.

The *Title II Order*'s heavy-handed regulation prohibited innovation in network management and service offerings.⁵ The now-repealed Title II restrictions also disincentivized infrastructure investment.⁶ That result accorded with economic theory and also with findings of actual sudden declines in broadband infrastructure investment following several uninterrupted

² See Comments of the Free State Foundation, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017)(FSF Comments), at: <https://ecfsapi.fcc.gov/file/1071782635741/FSF%20Initial%20Comments%20-%20Restoring%20Internet%20Freedom%20-%20071717.pdf> and <https://freestatefoundation.org/wp-content/uploads/2019/08/FSF-Initial-Comments-Restoring-Internet-Freedom-071717-1.pdf>

See also *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report, and Order (2017) (*Restoring Internet Freedom Order* or *RIFO*).

³ See *Mozilla Corp. v. FCC*, 940 F.3d 1, 18, 20 (D.C. Cir. 2019).

⁴ See *RIFO*, at ¶ 86, *et. seq.*

⁵ See, e.g., *RIFO*, at ¶ 149, ¶ 254.

⁶ See *RIFO*, at ¶ 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.")

years of annual increases in investment.⁷ For those reasons, the *Title II Order* constituted an undesirable policy for furthering quality, reliable public safety communications.

Importantly, evidence indicates that annual investment declines abruptly halted and investment increased following the *RIFO*'s repeal of Title II regulation in early 2017. According to USTelecom, broadband providers invested about \$75 billion in 2018, up from about \$72 billion the year before.⁸ This followed an overall broadband investment increase of \$1.5 billion, or 2%, in 2017 compared to 2016.⁹ The wireless industry also has reported capital expenditure increases since the Commission's repeal of Title II regulation, including investment of \$27,408,097 in 2018, a 6.5% increase over the year before.¹⁰

Additionally, evidence reveals positive trends in broadband speeds and network deployment since the *RIFO*'s adoption. According to one research report, for example, as of the third quarter of 2019, 94.4% of the U.S. population had access to wired broadband services offering download speeds of at least 25 Mbps.¹¹ Those figures do not include satellite broadband providers ViaSat and HughesNet, which offer advertised speeds of at least 25 Mbps/3 Mbps to nearly all Americans. Moreover, another report indicates that, with regard to wireless broadband services, in June 2019, the U.S. realized 130% LTE (4G) market penetration (or 1.3 LTE subscriptions per person).¹² And as of the second quarter of 2019, LTE total connections in

⁷ See FSF Comments, at 30-32, Appendix A (12-13). See also *RIFO*, at ¶¶ 88-98.

⁸ See USTelecom, "Preliminary Data Show Continued Upward Momentum for Broadband Investment," (Jun. 10, 2019), at: <https://www.ustelecom.org/preliminary-data-show-continued-upward-momentum-for-broadband-investment/>.

⁹ See Patrick Brogan, Vice President for Industry Analysis, USTelecom, U.S. Broadband Investment Rebounded in 2017 (2018), <https://www.ustelecom.org/ustelecom-broadband-capital-expenditures-once-again-on-upward-trajectory>.

¹⁰ See CTIA, 2019 Annual Survey Highlights.

¹¹ See Julia Tanberk, "The State of Broadband in America, Q3 2019" BroadbandNow (Oct. 2019), at: <https://broadbandnow.com/research/q3-broadband-report-2019>.

¹² See 5G Americas, "5G Network Rollouts Accelerate as LTE's Long Tail Extends" (Sept. 19, 2019), at: <https://www.5gamericas.org/5g-network-rollouts-accelerate-as-ltes-long-tail-extends/>.

North America totaled 459 million, representing 88% of all mobile connections in North America. That figure was up from 82% a year before.

III. Paid Prioritization Arrangements Can Enable More Reliable and Higher Quality Broadband Internet Services Offerings for Public Safety

As explained in the Free State Foundation's comments filed prior to the *RIFO*'s adoption, "as emergency services evolve, governments may want to have paid prioritization available as an option for Amber alerts, severe weather alerts, Homeland Security warnings and other highly time-sensitive functions."¹³ Those comments pointed to the desirability of ISPs offering first responders priority access over other traffic.¹⁴

Sharing commercial cores and network traffic on an undifferentiated basis with non-public safety users can pose serious risk to the integrity of public safety communications in times of emergency and other peak congestion situations. When networks are congested or at risk of becoming so, providing network preferences for public safety-related data traffic can prevent disruptions of calls and other timely information being sent to and from first responders and other responsible agencies.

Paid prioritization arrangements offer a valuable option for government agencies responsible for public safety to use communications services that feature higher quality and improved reliability compared to traditional best-efforts broadband networks. As pointed out in the Free State Foundation's comments in this proceeding, paid prioritization arrangements are ubiquitous throughout our economy.¹⁵ Both market participants and economists have recognized that such arrangements can benefit customers who choose to pay more for enhanced services while making other customers no worse off. In the broadband communications context, paid

¹³ FSF Comments, at 52-53.

¹⁴ See FSF Comments, at 52-53.

¹⁵ See FSF Comments, at 50-52.

priority arrangements between broadband ISPs and edge providers can benefit consumers by offering them novel services supported by Quality-of-Service guarantees. Edge service providers, including new entrants, potentially can improve their competitiveness by obtaining fast and extra-reliable broadband connections. Prioritized access may be necessary for some future Internet-based innovative services to function and attract customers. And public safety agencies already stand to benefit from these pro-innovation and pro-investment effects of paid prioritization arrangements and to thereby better fulfill their duties to the public.

To a significant degree, the *Title II Order* acknowledged that public safety-related communications merited and could receive differential and prioritized treatment over other communications. The *Title II Order* recodified a rule providing: "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."¹⁶ And the *Title II Order* added that "in connection with an emergency, there may be federal, state, tribal, and local public safety entities, homeland security personnel, and other authorities that need guaranteed or prioritized access to the Internet in order to coordinate disaster relief and other emergency response efforts, or for other emergency communications."¹⁷ The *RIFO*'s repeal of the ban on paid prioritization arrangements clears up any confusion regarding the status of such arrangements involving public safety. Under the *RIFO*, paid prioritization arrangements are permissible not only for public safety purposes that

¹⁶ *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order (2015) (*Title II Order*), at ¶ 300.

¹⁷ *Title II Order*, at ¶ 302.

unquestionably fit neatly within some pre-designated rule definitions, but other public safety-related functions not so pre-designated.

IV. Title I Reclassification and Light-Touch Regulatory Policy Toward Broadband Do Not Pose Harms to Public Safety as Critics Allege

In *Mozilla*, the D.C. Circuit appeared to suggest that blocking and throttling of Internet traffic by broadband ISPs during public emergency crises could cause irreparable harms – or the Court at least appeared to suggest such a claim ought to be addressed by the Commission as part of a required analysis of the public safety implications of its Title I reclassification decision.¹⁸ The D.C. Circuit also cited a June 2018 incident in which a broadband ISP apparently slowed the data communications of a fire district in California apparently over a short but critical period.¹⁹ Although the court was presented supplementary evidence and arguments that responded to such claims and concerns, it declined to consider them. But there are good reasons, including matters of public record, why public safety communications are not threatened by potential blocking or throttling by broadband ISPs under the Commission's Title I light-touch policy.

First, as the *RIFO* found, there is no record evidence of broadband ISPs engaging in blocking or throttling of broadband customers Internet traffic,²⁰ and the public record since the *RIFO*'s adoption is consistent with that finding.²¹

Second, as the *RIFO* correctly concluded, all major broadband ISPs pledge not to engage in such conduct as part of their standard terms of service.²² Under the *RIFO*, those terms of

¹⁸ See *Mozilla*, 940 F.3d at 60-61.

¹⁹ See *Mozilla*, 940 F.3d at 60-63.

²⁰ See *RIFO*, at ¶¶ 109-116. See also *id.* at ¶ 87, ¶ 140.

²¹ See Tim Brennan, "Are There Harms the Net Neutrality Order Would Have Prevented? A Look at Public Knowledge's Recent Claims," *Perspectives from FSF Scholars*, Vol. 14, No. 43 (December 18, 2019), at: <https://freestatefoundation.org/wp-content/uploads/2019/12/Are-There-Harms-the-Net-Neutrality-Order-Would-Have-Prevented-121819.pdf>.

²² See *RIFO*, at ¶ 142.

services are enforceable by the FTC.²³ Thus, any broadband ISP that violated those terms by blocking or throttling public safety communications faces enforcement actions brought by the FTC. Broadband ISPs that block or throttle public safety communications also would face potential tort actions by any persons who allege harm as a result of or in connection with such conduct, as such tort claims are not preempted by the *RIFO*.

Third, broadband ISPs such as AT&T and Verizon now offer public safety communications capabilities that rely on dedicated network cores and traffic rather than share capacity with residential and other commercial customers.²⁴

Fourth, for economic reasons, broadband ISPs are unlikely to block or throttle public safety users for the same reasons they are unlikely to engage in such conduct regarding residential and small business broadband customers' communications traffic. Broadband ISPs lack market power and therefore lack the ability and incentive to increase returns by reducing service and potentially harming customers.²⁵ Service providers who engage in such conduct risk damage to their public reputation and loss of business through customers migrating to competing providers.

Fifth, claims that the Title I light-touch policy framework will relegate public safety communications to Internet "slow lanes" are misguided because such slow lanes do not exist. Prioritized traffic arrangements do not entail proactive blocking or slowing of non-prioritized traffic. Rather, when networks are congested, broadband ISPs are sometimes faced with scenarios that necessitate data packets being dropped either randomly or intelligently.

²³ See *RIFO*, at ¶ 141-142.

²⁴ See, e.g., Theo Douglas, "FirstNet, Verizon Launch Dedicated Public Safety Networks," *Government Technology* (Mar. 27, 2018), at: <https://www.govtech.com/public-safety/FirstNet-Verizon-Launch-Dedicated-Public-Safety-Networks.html>

²⁵ See, e.g., *RIFO*, at ¶ 117, ¶ 123.

Prioritization involves a customer paying additional amounts to broadband ISP for a higher quality service offering. It does not involve a broadband ISP taking deliberate steps to block or throttle non-prioritized packets.

Sixth, claims made on appeal in *Mozilla* about an incident in the summer of 2018 involving the Santa Clara County Fire Protection District do not support the idea that Title I classification is insufficiently protective of public safety or requires Title II regulation. The Fire District apparently subscribed to a broadband Internet service plan that featured a monthly data allotment. Such usage-based plans are more typical for low-volume use subscribers. A Verizon customer service mistake resulted in the provider not executing, at the Fire District's request, a Verizon policy of making exceptions to data allowances in emergency situations. As an unfortunate result, the Fire District apparently experienced slow data communications over a weekend in which it was combatting wildfires.

Importantly, the incident involving the Fire District did *not* involve any blocking or throttling of Internet communications or enablement of such by the Commission's Title I reclassification decision. Indeed, the petitioners in *Mozilla* acknowledged they were *not* arguing the incident involved a violation of the *Title II Order* restrictions. Rather, the incident involved a usage-based service issue, with a customer paying for the amount of service it chose (albeit a service plan that was likely not ideal given the customer's operations) and a provider's unfortunate mistake in that situation.

Moreover, the *Title II Order* expressly affirmed the permissibility of usage-based plans whereby the slowing of data traffic that exceeded data allowances was based on the choice of the user.²⁶ The *RIFO* expressly reaffirmed the benefits of usage-based services in offering

²⁶ See *Title II Order*, at ¶ 122.

consumers "more choices over a greater range of service options," and it referred to usage allowances as "the industry norm today" for mobile broadband networks, due in part to mobile network capacities.²⁷

V. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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²⁷ *RIFO*, at ¶ 153.