

**FACT SHEET\***

**Restoring Internet Freedom**

Order on Remand – WC Docket Nos. 17-108, 17-287, 11-42

**Background:** In the *Restoring Internet Freedom Order*, the Commission ended heavy-handed utility-style Title II regulation of the Internet and returned broadband Internet access service to its long-standing classification as an information service under Title I, the light-touch framework under which the Internet developed and flourished. On October 1, 2019, in *Mozilla Corp. v. FCC*, the D.C. Circuit upheld the vast majority of the *Restoring Internet Freedom Order*, remanding three discrete issues for further consideration—namely, the effect of that *Order* on: (1) public safety; (2) the regulation of pole attachments; and (3) universal service support for low-income consumers through the Lifeline program.

The Order on Remand would address the three issues the *Mozilla* court remanded and conclude that in each case there is no basis to alter the Commission’s conclusions in the *Restoring Internet Freedom Order*.

**What the Order Would Find:**

- The *Restoring Internet Freedom Order* promotes public safety, facilitates broadband infrastructure deployment, and allows the Commission to continue to provide Lifeline support for broadband Internet access service.
- The light-touch approach adopted by the Commission and the regulatory certainty provided by the *Restoring Internet Freedom Order* benefit public safety and further the Commission’s charge of promoting “safety of life and property” and the national defense through the use of wire and radio communications.
- Neither the Commission’s decision to return broadband Internet access service to its long-standing classification as an information service, nor its decision to eliminate the Internet conduct rules, is likely to adversely impact public safety.
- The benefits of returning to the light-touch information service classification adopted in the *Restoring Internet Freedom Order* far outweigh the limited potential negative effects resulting from the loss of section 224 pole attachment rights for broadband-only Internet Service Providers.
- The Commission has legal authority under section 254(e) of the Communications Act to provide Lifeline support to eligible telecommunications carriers that provide broadband service over broadband-capable networks that are also used for voice service.

---

\* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WC Docket Nos. 17-108, 17-287, 11-42 which may be accessed via the Electronic Comment Filing System (<http://www.fcc.gov/ecfs>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s Meeting. See 47 CFR § 1.1200 *et seq.*

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

ORDER ON REMAND\*

Adopted: []

Released: []

By the Commission:

TABLE OF CONTENTS

I. INTRODUCTION..... 1
II. BACKGROUND..... 3
III. DISCUSSION ..... 18
A. Public Safety ..... 19
1. The Commission’s Public Safety Responsibilities..... 21
2. Overview of Public Safety Communications Marketplace ..... 23
3. The Benefits of Increased Innovation, Investment, and Regulatory Certainty Provided by the Restoring Internet Freedom Order Will Enhance Public Safety..... 32
4. The Restoring Internet Freedom Order Is Unlikely to Harm Public Safety Communications, and Any Harm that It Could Cause Would Be Minimal ..... 37
5. The Public Safety Benefits and Overall Benefits of the Restoring Internet Freedom Order Outweigh Any Unlikely Harms to Public Safety..... 67
B. Pole Attachments ..... 68
1. Section 224 Authority ..... 69
2. The Benefits of Reclassification Outweigh Any Potential Drawbacks for Broadband-Only ISPs..... 71
C. Lifeline Broadband Services..... 82
1. The History of Funding Broadband Services Through the Universal Service Fund..... 83

\* This document has been circulated for tentative consideration by the Commission at its October 2020 open meeting. The issues referenced in this document and the Commission’s ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

2. The Commission Has Authority to Support Broadband Service in the Lifeline Program ..... 87

D. The Order on Remand Is Consistent with the Administrative Procedure Act ..... 103

1. The Commission’s Notice and Comment Procedures Comported with the Administrative Procedure Act ..... 103

2. The Commission Thoroughly Considered the Relevant Issues on Remand..... 109

E. The Order on Remand Is Consistent with the First Amendment ..... 112

IV. PROCEDURAL MATTERS ..... 113

V. ORDERING CLAUSES ..... 117

APPENDIX A – Final Rules

APPENDIX B – Supplemental Final Regulatory Flexibility Analysis

**I. INTRODUCTION**

1. In the *Restoring Internet Freedom Order*, we reversed the Commission’s misguided and short-lived utility-style regulation of the Internet and returned to the light-touch regulatory framework for broadband Internet access service that facilitated rapid and unprecedented growth for almost two decades.<sup>1</sup> In this Order on Remand, we maintain this well-established approach after further considering three discrete issues raised by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).

2. In *Mozilla Corp. v. FCC*,<sup>2</sup> the D.C. Circuit upheld the vast majority of our decision in the *Restoring Internet Freedom Order*, remanding three discrete issues for further consideration—namely, the effect of that *Order* on: (1) public safety; (2) the regulation of pole attachments; and (3) universal service support for low-income consumers through the Lifeline program.<sup>3</sup> Because the court concluded that “the Commission may well be able to address on remand” these three issues, it declined to vacate the *Restoring Internet Freedom Order*, pending our further analysis.<sup>4</sup> After considering the three issues identified by the court in light of the record developed thereafter, we see no grounds to depart from our determinations in the *Restoring Internet Freedom Order*.

**II. BACKGROUND**

3. Long before the commercialization of the Internet, federal law has drawn a line between the more heavily regulated common carrier services like traditional telephone service and lightly-regulated services that offer more than mere transmission. This distinction was codified in the 1996 Act when Congress drew a line between lightly-regulated “information services” and more heavily-regulated “telecommunications services”<sup>5</sup> with the intent to “promote competition and reduce regulation.”<sup>6</sup> Congress found that the “Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation”<sup>7</sup> and declared it the policy of the United States to “promote the continued development of the Internet and other interactive computer services and

<sup>1</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) (*Restoring Internet Freedom Order* or *Order*).

<sup>2</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (*Mozilla*).

<sup>3</sup> *Id.* at 18.

<sup>4</sup> *Id.* at 86.

<sup>5</sup> 47 U.S.C. § 153(24), (53).

<sup>6</sup> Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>7</sup> 47 U.S.C. § 230(a)(4).

other interactive media” and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>8</sup>

4. Building on decades of precedent,<sup>9</sup> the Commission adopted the *Restoring Internet Freedom Order* to return to the successful light-touch bipartisan framework that promoted a free and open Internet and, for almost twenty years, saw it flourish.<sup>10</sup> This action in December 2017 ended the agency’s brief foray into utility-style regulation of the Internet and restored the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades.<sup>11</sup> The *Restoring Internet Freedom Order* ended Title II regulation of the Internet and returned broadband Internet access service to its long-standing classification as an information service under Title I, consistent with Supreme Court’s holding in *Brand X*.<sup>12</sup> Having determined that broadband Internet access service—regardless of whether offered using fixed or mobile technologies—is an information service under the Act, we also concluded that as an information service, mobile broadband Internet access service should not be classified as a commercial mobile service or its functional equivalent.<sup>13</sup> In returning the classification of broadband Internet access service to its Title I status, the Commission also restored the privacy and consumer protection authority of the Federal Trade Commission over ISPs.<sup>14</sup>

5. We found that this approach best comported with the text and structure of the Act, Commission precedent, and the Commission’s public policy objectives,<sup>15</sup> and also that economic theory, empirical data, and experience counseled in favor of ending utility-style regulation of ISPs. We

---

<sup>8</sup> 47 U.S.C. § 230(b)(1), (2). The 1996 Act went on to define “interactive computer service” to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . .” 47 U.S.C. § 230(f)(2).

<sup>9</sup> See, e.g., *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services*, Notice of Inquiry, 7 FCC 2d 11 (1966) (where the Commission first established a dichotomy between “basic” and “enhanced” services); *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 420, para. 97 (1980) (*Computer II Final Decision*); *U.S. v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 228-29 (D.D.C. 1982) (*Modified Final Judgement Initial Decision*), *aff’d sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983) (distinguishing between “telecommunications services” and “information services”); *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17972-80, 17981, paras. 124-35, 137, 635-42 (2010) (*Open Internet Order*) (while the Order was vacated, the D.C. Circuit upheld the transparency rule finding that the Commission had reasonably construed section 706 of the 1996 Act as a grant of authority to regulate broadband Internet access service providers).

<sup>10</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 311. The *Restoring Internet Freedom Order* took effect on June 11, 2018. *Wireline Competition Bureau Announces Effective Date of Restoring Internet Freedom Order*, WC Docket No. 17-108, Public Notice, 33 FCC Rcd 4639 (2018). The *Restoring Internet Freedom Order* reversed the *Title II Order*, adopted in March 2015, which reclassified broadband Internet access service from an information service to a telecommunications service and reclassified mobile broadband Internet access services as a commercial mobile service and adopted three bright-line rules—blocking, throttling, and paid prioritization—as well as a general Internet conduct standard and “enhancements” to the transparency rule. *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

<sup>11</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 318-52, paras. 20-64.

<sup>12</sup> *Id.* at 403-08, paras. 155-61; *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (*Brand X*). The *Restoring Internet Freedom Order* maintained the definition of “broadband Internet access service” from the *Title II Order*, which excludes enterprise services and non-broadband Internet access service data services. *Restoring Internet Freedom Order*, 33 FCC Rcd at 318-20, paras. 21-23.

<sup>13</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 352-62, paras. 65-85.

<sup>14</sup> *Id.* at 394-96, paras. 141-42.

<sup>15</sup> *Id.* at 403-08, paras. 155-61.

concluded that a return to Title I classification would facilitate critical broadband investment and innovation by removing regulatory uncertainty and lowering compliance costs.<sup>16</sup> We anticipated that the decision to restore the classification of broadband Internet access service as an information service would be particularly beneficial to rural and/or lower-income communities, removing excessive regulatory and compliance burdens and, as a result, giving smaller ISPs a stronger business case to expand into currently underserved areas.<sup>17</sup> The *Restoring Internet Freedom Order* examined broadband investment in the aggregate and found that it had decreased since the adoption of the *Title II Order*.<sup>18</sup> Further, we found that the regulatory uncertainty created by the *Title II Order* stifled network innovation as even large ISPs with significant resources postponed projects or approached with caution the development and launch of new products and service features.<sup>19</sup> The *Restoring Internet Freedom Order* also analyzed prior Commission regulatory decisions, and the impact of these decisions suggested that Title II not only discourages ISP investment, but also deployment and subscribership.<sup>20</sup>

6. The *Restoring Internet Freedom Order* also returned to the transparency rule that the Commission adopted in 2010<sup>21</sup> with certain limited modifications to promote additional transparency, and eliminated certain reporting requirements adopted in the *Title II Order* found to be unnecessary and unduly burdensome.<sup>22</sup> Specifically, we revised the transparency rule to require ISPs to disclose any blocking, throttling, paid prioritization, or affiliate prioritization.<sup>23</sup>

7. The *Restoring Internet Freedom Order* also eliminated the *Title II Order* conduct rules,<sup>24</sup> finding that the record evidence, including a cost-benefit analysis, demonstrated that the costs of these rules to innovation and investment outweigh any benefits they may have.<sup>25</sup> We found no sources of legal authority that could justify the comprehensive conduct rules identified in the *Title II Order*,<sup>26</sup> and also concluded that such Internet conduct rules were unnecessary because the modified transparency requirements, together with antitrust and consumer protection laws, would provide consumers and regulators the means to take remedial action if an ISP engaged in behavior inconsistent with an open Internet.<sup>27</sup>

8. *Mozilla Corp. v. FCC*. In *Mozilla Corp. v. FCC*, the D.C. Circuit largely affirmed the Commission's classification decision in the *Restoring Internet Freedom Order*.<sup>28</sup> The D.C. Circuit considered "a host of challenges" to the *Restoring Internet Freedom Order*, which the court found

---

<sup>16</sup> *Id.* at 408-13, paras. 162-69.

<sup>17</sup> *Id.* at 371-74, paras. 103-06.

<sup>18</sup> *Id.* at 364, para. 93. We explained that public utility regulation can depress profits below the competitive rate of return for a variety of reasons, and this reduction in the expected return reduces the incentive to invest. *Id.* at 364, para. 89.

<sup>19</sup> *Id.* at 368-69, paras. 99-100.

<sup>20</sup> *Id.* at 366, para. 94. In addition, the Commission was unconvinced by claims of a correlation between nondiscriminatory access for edge providers and increased investment as a result of Title II. *Id.* at 374-75, paras. 107-08.

<sup>21</sup> See *Open Internet Order*, 25 FCC Rcd at 17972-89, 1981, paras. 124-35, 137.

<sup>22</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 313, 437-41, paras. 215-23

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 313, 450-56, paras. 239-252.

<sup>25</sup> *Id.* at 492-94, paras. 310-18.

<sup>26</sup> *Id.* at 470-80, paras. 268-83.

<sup>27</sup> *Id.* at 313, 450-456, paras. 4, 239-252.

<sup>28</sup> *Mozilla*, 940 F.3d 1. On February 6, 2020, the D.C. Circuit denied all pending petitions for rehearing, and the Court issued its mandate on February 18, 2020.

“unconvincing for the most part.”<sup>29</sup> In particular, the D.C. Circuit “h[e]ld that classifying broadband Internet access as an ‘information service’ based on the functionalities of [Domain Name Service] DNS and caching [was] ‘a reasonable policy choice for the [Commission] to make’ at *Chevron*’s second step.”<sup>30</sup> The *Mozilla* court found “unconvincing” the “objections aimed to show that the Commission’s reliance on DNS and caching for classifying broadband as an ‘information service’ [was] unreasonable.”<sup>31</sup> The D.C. Circuit likewise rejected challenges to the classification of mobile broadband Internet access service as a private mobile service,<sup>32</sup> concluding that the Commission’s decisions in that regard were reasonable and entitled to deference.<sup>33</sup>

9. The D.C. Circuit next considered—and largely rejected—claims that the *Restoring Internet Freedom Order* was arbitrary and capricious under the Administrative Procedure Act (APA), finding in general that “the agency ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,’” and that “‘the decision was based on a consideration of the relevant factors.’”<sup>34</sup> For example, the *Mozilla* court found that “the agency’s position as to the economic benefits of reclassification away from ‘public-utility style regulation,’ which the Commission sees as ‘particularly inapt for a dynamic industry built on technological development and disruption,’ is supported by substantial evidence.”<sup>35</sup> With respect to alleged harms to edge providers and consumers, “[t]he Commission reasonably concluded that the harms the Title II Order was designed to prevent did not require the prior Order’s regulatory measures but could

---

<sup>29</sup> *Mozilla*, 940 F.3d at 17. The *Restoring Internet Freedom Order* preempted state and local regulation of broadband Internet access service that is inconsistent with its reinstated federal deregulatory policy, while maintaining the states’ traditional role in enforcing generally-applicable fraud and commercial laws. *Restoring Internet Freedom Order*, 33 FCC Rcd at 426-32, paras. 194-204. In *Mozilla*, the D.C. Circuit “vacate[d] the portion of the [*Restoring Internet Freedom Order*] that expressly preempts ‘any state or local requirements that are inconsistent with [its] deregulatory approach.’” *Mozilla*, 940 F.3d 74. This Order does not address preemption.

<sup>30</sup> *Mozilla*, 940 F.3d at 20 (quoting *Brand X*, 545 U.S. at 997 (alteration in original) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984))).

<sup>31</sup> *Mozilla*, 940 F.3d at 23. In doing so, the *Mozilla* court rejected objections based on: (i) the Supreme Court’s *Brand X* decision; (ii) the telecommunications management exception to the statutory definition of an information service; (iii) Commission precedent regarding “adjunct-to-basic” services under its *Computer Inquiries* rules; and (iv) the functional integration of DNS and caching with transmission in broadband Internet access service. *See id.* at 23-35.

<sup>32</sup> For convenience, throughout this Order when we refer to restoring the information service classification of broadband Internet access service or to the *Restoring Internet Freedom Order*’s classification decision, we include the decision to restore the private mobile service classification of mobile wireless broadband Internet access service, unless the context indicates otherwise.

<sup>33</sup> *Mozilla*, 940 F.3d at 35-45. Addressing the elements of the Commission’s private mobile classification decision at issue, the *Mozilla* court concluded that: (i) “the Commission amply justified its return to the [Commercial Mobile Radio Services] CMRS definition of ‘public switched network;” (ii) “the Commission’s way of distinguishing among services and analyzing their regulatory implications” when concluding that mobile wireless broadband Internet access service is not “connected service” “meets *Fox Television*’s reasonableness requirement, and falls within the bounds of agency discretion under *Chevron*,” and (iii) “the agency’s interpretation of th[e] term [“functional equivalen[ce]” in section 332(d)(3) of the Act], and its application to mobile broadband, are reasonable and merit *Chevron* deference.” *Mozilla*, 940 F.3d at 39, 43, 45.

<sup>34</sup> *Mozilla*, 940 F.3d at 49 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*) (internal quotations marks omitted)). The D.C. Circuit also rejected challenges to the Commission’s interpretation of section 706 of the 1996 Act and its claimed legal authority for the transparency rule, as well as various procedural challenges to the *Restoring Internet Freedom Order*. *Mozilla*, 940 F.3d at 45-49, 73-74.

<sup>35</sup> *Mozilla*, 940 F.3d at 49-50 (citations omitted).

instead be mitigated—at a lower cost—with transparency requirements, consumer protection, and antitrust enforcement measures.”<sup>36</sup>

10. Although largely affirming the Commission’s decision, the *Mozilla* court “remand[ed] for further proceedings on three discrete points.”<sup>37</sup> The first is the effect of the “changed regulatory posture” in the *Restoring Internet Freedom Order* on public safety.<sup>38</sup> The D.C. Circuit observed that “Congress created the Commission for the purpose of, among other things, ‘promoting safety of life and property through the use of wire and radio communications’” in section 1 of the Act,<sup>39</sup> and concluded that public safety is “an important aspect of the problem” that the agency must consider and address.<sup>40</sup> The *Mozilla* court also noted that “[a] number of commenters voiced concerns about the threat to public safety that would arise under the proposed (and ultimately adopted)” *Restoring Internet Freedom Order*, including “how allowing broadband providers to prioritize Internet traffic as they see fit, or to demand payment for top-rate speed, could imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crisis.”<sup>41</sup>

11. The second discrete issue that the D.C. Circuit remanded is how the reclassification of broadband Internet access service affects the regulation of pole attachments.<sup>42</sup> The D.C. Circuit noted petitioners’ “substantial concern that, in reclassifying broadband Internet as an information service, the Commission, without reasoned consideration, took broadband outside the current statutory scheme governing pole attachments.”<sup>43</sup> Our authority over pole attachments pursuant to section 224 of the Act extends to attachments made by a cable television system or provider of telecommunications service.<sup>44</sup> The *Mozilla* court acknowledged our observation that facilities remain subject to pole attachment regulation when deployed by entities commingling broadband Internet access service with a service covered by section 224 of the Act.<sup>45</sup> The D.C. Circuit found that our conclusion was sound with respect to “providers who ‘commingl[e]’ telecommunication and broadband services” but incomplete given the court’s view that post-reclassification, “the statute textually forecloses any pole-attachment protection for standalone broadband providers.”<sup>46</sup> The *Mozilla* court concluded that “[t]he Commission was required to

---

<sup>36</sup> *Mozilla*, 940 F.3d at 55-56. The D.C. Circuit also rejected challenges to the *Restoring Internet Freedom Order* based on the Commission’s treatment of reliance interests, the agency’s cost-benefit analysis, and the Commission’s consideration of data roaming. *See id.* at 63-65, 69-73.

<sup>37</sup> *Id.* at 17.

<sup>38</sup> *Id.* at 59; *see generally id.* at 59-63 (discussing public safety).

<sup>39</sup> For convenience in this Order, we often use the terminology “public safety” to refer collectively to the safety of life and property, as well as national security, unless the context indicates otherwise.

<sup>40</sup> *Mozilla*, 940 F.3d at 59-60 (quoting 147 U.S.C. § 151 and *State Farm*, 463 U.S. at 43).

<sup>41</sup> *Mozilla*, 940 F.3d at 60. The court declined to consider petitioners’ arguments based on “an incident involving the (apparently accidental) decision by Verizon to throttle the broadband Internet of Santa Clara firefighters while they were battling a devastating California wildfire,” which occurred after the *Restoring Internet Freedom Order*. *Id.* at 61. Likewise, the court declined to consider the responses to those arguments in the Commission’s brief because they had not been set forth in the *Restoring Internet Freedom Order*. *Id.* at 62.

<sup>42</sup> *Id.* at 65-67.

<sup>43</sup> *Id.* at 65.

<sup>44</sup> 47 U.S.C. §§ 224(b)(1)-(2). States may “reverse preempt” our pole attachment rules and adopt their own rules governing pole attachments in place of ours. 47 U.S.C. § 224(c).

<sup>45</sup> *Mozilla*, 940 F.3d at 67.

<sup>46</sup> *Mozilla*, 940 F.3d at 67 (citing *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901, 5922 (2007) (*Wireless Broadband Internet Access Order*)).

grapple with” the matter of pole-attachment regulation for broadband-only providers and remanded the issue for further consideration.<sup>47</sup>

12. The third discrete issue that the court remanded is the statutory basis for broadband Internet access service’s inclusion in the Lifeline program.<sup>48</sup> The D.C. Circuit described petitioners’ concern “that reclassification would eliminate the statutory basis for broadband’s inclusion in the [Lifeline] Program” and pointed out that “Congress [] tethered Lifeline eligibility to common-carrier status,” citing statutory language limiting the designation of eligible telecommunications carriers (ETCs) and receipt of universal service support to common carriers.<sup>49</sup> Similarly, citing the U.S. Court of Appeals for the Tenth Circuit’s “observ[ation], before broadband was classified as a telecommunications service, that ‘broadband-only providers . . . cannot be designated as ‘eligible telecommunications carriers’ because ‘under the existing statutory framework, only ‘common carriers’ . . . are eligible to be designated as ‘eligible telecommunications carriers,’” the D.C. Circuit concluded that the *Restoring Internet Freedom Order*’s reclassification of broadband Internet access service would appear to preclude broadband’s inclusion in the Lifeline Program.<sup>50</sup> Consequently, the *Mozilla* court “remand[ed] this portion of the [*Restoring Internet Freedom Order*] for the Commission to address.”<sup>51</sup>

13. The D.C. Circuit ultimately declined to vacate the *Restoring Internet Freedom Order* as a result of the three discrete remanded issues, determining that “the Commission may well be able to address on remand the issues it failed to adequately consider in the” *Restoring Internet Freedom Order* and that “the burdens of vacatur on both the regulated parties (or non-regulated parties as it may be) and the Commission counsel in favor of providing the Commission with an opportunity to rectify its errors.”<sup>52</sup>

14. *Restoring Internet Freedom Remand Public Notice*. In February 2020, the Wireline Competition Bureau (Bureau) released a Public Notice to refresh the record regarding the issues remanded to the Commission by the *Mozilla* court.<sup>53</sup> First, the Bureau sought to refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect public safety, and how any potential public safety considerations bear on the Commission’s underlying decision to classify broadband Internet access service as a Title I service.<sup>54</sup> The Bureau sought comment, for example, on whether network improvements made possible by prioritization arrangements benefit public safety applications; whether ISPs have policies in place that facilitate or prioritize public safety communications; to what extent public safety officials rely on mass-market retail broadband services covered by the *Restoring Internet Freedom Order*, rather than dedicated networks with quality-of-service

---

<sup>47</sup> *Mozilla*, 940 F.3d at 67.

<sup>48</sup> *Id.* at 68-70. The Lifeline program helps low-income Americans gain access to affordable communications services, and is part of the Commission’s universal service efforts to close the digital divide. First created by the Commission in 1985, Congress codified this commitment to low-income consumers in the 1996 Telecommunications Act. *See* 47 U.S.C. § 254(b). Currently, the Lifeline program offers qualifying low-income consumers a discount of up to \$9.25 per month on voice, broadband Internet access service, or bundled services that meet the program’s minimum service standards. Consumers who reside on Tribal lands can receive a discount of up to \$34.25 on Lifeline service that satisfies the minimum service standards. *See* 47 CFR §§ 54.403, 54.408.

<sup>49</sup> *Mozilla*, 940 F.3d at 68-69 (citing 47 U.S.C. §§ 214(e), 254(e)).

<sup>50</sup> *Id.* at 69 (quoting *In re FCC 11-161*, 753 F.3d 1015, 1048–1049 (10th Cir. 2014)).

<sup>51</sup> *Mozilla*, 940 F.3d at 69-70.

<sup>52</sup> *Id.* at 86.

<sup>53</sup> *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, Public Notice, 35 FCC Rcd 1446 (2020) (*Restoring Internet Freedom Remand PN*); FCC, Telecommunications; Common Carriers; Internet, 85 Fed. Reg. 12555 (Mar. 3, 2020). All comments and replies cited in this Order on Remand are in response to the *Restoring Internet Freedom Remand PN* unless otherwise noted.

<sup>54</sup> *Restoring Internet Freedom Remand PN*, 35 FCC Rcd at 1446-47.



guarantees, for public safety applications; whether concerns about ISPs' theoretical actions differ for public safety-to-public safety communications, versus public safety communications made to or from the public; and whether there are other tools that are better suited to addressing potential public safety concerns than classification of broadband Internet access service as a Title II service.<sup>55</sup>

15. Second, the Bureau sought to refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect the regulation of pole attachments in states subject to federal regulation, and how any potential considerations about pole attachments bear on the Commission's underlying decision to classify broadband Internet access service as a Title I service.<sup>56</sup> Specifically, the Public Notice asked the extent to which ISPs' pole attachments in states in which pole attachments are subject to the Commission's rules are subject to Commission authority by virtue of the ISPs' provision of cable or telecommunications services covered by section 224; the impact of the inapplicability of section 224 to broadband-only providers on their access to poles; and if pole owners have increased pole attachment rates or inhibited ISPs from attaching equipment since the adoption of the *Restoring Internet Freedom Order*.<sup>57</sup>

16. Finally, the Bureau sought to refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect the Lifeline program, and how any potential considerations about the Lifeline program bear on the Commission's underlying decision to classify broadband Internet access service as a Title I information service.<sup>58</sup> In particular, the Public Notice sought to refresh the record on the Commission's authority to direct Lifeline support to ETCs providing broadband Internet access service to qualifying low-income consumers, as well as other related issues.<sup>59</sup>

17. The Public Notice, released on February 19, 2020, set a comment deadline of March 30, 2020, and a reply deadline of April 29, 2020.<sup>60</sup> In response to a motion to extend those deadlines, on March 25, 2020, the Bureau granted a 21-day extension of time for filing comments and reply comments.<sup>61</sup> The Bureau found that an extension of three weeks was warranted as staff, officials, and first responders, who possess knowledge relevant to public safety-related questions raised in the Public Notice, were occupied with preparing for and conducting emergency responses to the COVID-19 pandemic.<sup>62</sup>

---

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1447.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1447-48.

<sup>59</sup> *Id.* at 1448.

<sup>60</sup> *Id.* at 1446.

<sup>61</sup> The Benton Institute for Broadband & Society, California Public Utilities Commission, County of Santa Clara, City of Los Angeles, Access Now, Center for Democracy and Technology, Common Cause, Electronic Frontier Foundation, INCOMPAS, National Hispanic Media Coalition, Next Century Cities, Open Technology Institute, and Public Knowledge filed a motion to extend the comment deadlines by 30 days. *Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 17-108, 17-287, 11-42, Order, 35 FCC Rcd 2893, 2893-94, para. 3 (WCB 2020) (*Restoring Internet Freedom Remand Comment Extension Order*). NASUCA expressed support for the extension request. *Id.*

<sup>62</sup> *Restoring Internet Freedom Remand Comment Extension Order*, 35 FCC Rcd at 2894, para. 4. The Bureau declined to grant the full 30-day request because it concluded that the Commission's duty to conduct its remand proceedings in an expeditious manner "counsel[ed] for a shorter extension than the full 30 days requested." *Id.* The Bureau denied a subsequent request by the City of Los Angeles, the County of Santa Clara, the Santa Clara County Central Fire Protection District, and the City of New York to further extend the comment and reply comment deadlines by an additional 60 days. *Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 17-108, 17-287, 11-42, Order, 35

(continued....)

### III. DISCUSSION

18. We address in turn each of the three issues the *Mozilla* court remanded and conclude that, in each case, there is no basis to alter our conclusions in the *Restoring Internet Freedom Order*. Specifically, we examine the effects that the *Restoring Internet Freedom Order* might have on public safety communications, pole attachment rights for broadband-only providers, and the universal service Lifeline program, as well as how such possible effects bear on the Commission's underlying decisions to classify broadband Internet access service as an information service and eliminate the Internet rules. Our analysis below shows that the *Restoring Internet Freedom Order* promotes public safety, facilitates broadband infrastructure deployment for ISPs, and allows us to continue to provide Lifeline support for broadband Internet access service. Further, we conclude that any potential negative effects that the reclassification may have on public safety, pole attachment rights for broadband-only providers, and the Lifeline program are limited and would not change our classification decision in the *Restoring Internet Freedom Order* even if such negative effects were substantiated. Rather, we find that that overwhelming benefits of Title I classification and restoration of light-touch regulation outweigh any adverse effects.

#### A. Public Safety

19. The *Mozilla* court directed us to address the effect on public safety of the “changed regulatory posture” in the *Restoring Internet Freedom Order*.<sup>63</sup> The *Mozilla* court focused in particular on claims in the record concerning dangers that might arise from “allowing broadband providers to prioritize Internet traffic as they see fit, or to demand payment for top-rate speed,” and how such actions “could imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crisis.”<sup>64</sup> Among other things, the D.C. Circuit rejected our argument that “the public safety issues . . . were redundant of the arguments made by edge providers,” finding instead that “unlike most harms to edge providers incurred because of discriminatory practices by broadband providers, the harms from blocking and throttling during a public safety emergency are irreparable.”<sup>65</sup>

20. We find that neither our decision to return broadband Internet access service to its long-standing classification as an information service, nor our subsequent decision to eliminate the Internet conduct rules, is likely to adversely impact public safety. To the contrary, our analysis reinforces our determinations made in the *Restoring Internet Freedom Order*, and we find that on balance, the light-touch approach we adopted and the regulatory certainty provided by the *Restoring Internet Freedom Order* benefit public safety and further our charge of promoting “safety of life and property” and the national defense through the use of wire and radio communications.<sup>66</sup> We also find that even if there were some adverse impacts on public safety applications in particular cases—which we do not anticipate—the overwhelming benefits of Title I classification would still outweigh any potential harms.

#### 1. The Commission's Public Safety Responsibilities

21. Advancing public safety is one of our fundamental obligations. The Title I approach spurs investment in a robust network and innovative services, which enhances the effectiveness of our

---

FCC Rcd 3672 (WCB 2020) (*Further Extension Denial Order*). The Bureau found that these parties, which filed their motion only four days—rather than the required seven—before comments were due did not establish that the pandemic affected their ability to file a timely motion for extension of time. *Id.* at 3673, para. 4. The Bureau also concluded that a further extension of time was not warranted as a number of commenters had already filed timely comments in anticipation of the deadline, and the public interest required prompt Commission resolution of the pending judicial remand. *Id.* at 3673, paras. 5-6.

<sup>63</sup> *Mozilla*, 940 F.3d at 59; *see generally id.* at 59-63 (discussing public safety).

<sup>64</sup> *Id.* at 60.

<sup>65</sup> *Id.* at 62.

<sup>66</sup> 47 U.S.C. § 151.

work to promote public safety consistent with our statutory responsibilities. Indeed, this has been the case over the almost 20 years during which broadband Internet access service (and, as appropriate, mobile broadband Internet access service) was classified as a Title I service.

22. As the D.C. Circuit explained, when “‘Congress has given an agency the responsibility to regulate a market such as the telecommunications industry that it has repeatedly deemed important to protecting public safety,’ then the agency’s decisions ‘must take into account its duty to protect the public.’”<sup>67</sup> We take seriously our public safety responsibilities, as demonstrated by a number of our recent actions. In 2019, for example, pursuant to Kari’s Law Act of 2017<sup>68</sup> the Commission required newly manufactured, imported, sold, or leased multi-line telephone systems—such as those used by hotels and campuses—to allow users to dial 911 directly, without having to dial a prefix such as a “9” to reach an outside line.<sup>69</sup> We also adopted rules pursuant to section 506 of the RAY BAUM’S ACT<sup>70</sup> to ensure that “dispatchable location” information, such as the street address, floor level, and room number of a 911 caller, is conveyed with 911 calls so that first responders can more quickly locate the caller.<sup>71</sup> More recently, we proposed taking action to modernize the Commission’s rules to facilitate the priority treatment of voice, data, and video services for public safety personnel and first responders, including removing outdated requirements that may impede the use of IP-based technologies.<sup>72</sup> The Commission has taken important measures to increase the effectiveness of Wireless Emergency Alerts (WEAs) by requiring Participating Commercial Mobile Service Providers to support longer WEA messages;<sup>73</sup> support Spanish-language messages;<sup>74</sup> create a new message category (“State/Local WEA Tests”);<sup>75</sup> and further implement enhanced geotargeting capabilities.<sup>76</sup> We have also urged wireless service providers and electric power providers to coordinate their response and restoration efforts more closely following

<sup>67</sup> *Mozilla*, 940 F.3d at 60 (quoting *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006)).

<sup>68</sup> Kari’s Law Act of 2017, Pub. L. No. 115-127, 132 Stat. 326 (2018) (codified at 47 U.S.C. § 623) (requiring implementation of direct 911 dialing and on-site notification capabilities in multi-line telephone systems).

<sup>69</sup> *Implementing Kari’s Law and Section 506 of RAY BAUM’S Act; Inquiry Concerning 911 Access, Routing, and Location in Enterprise Communications System; Amending the Definition of Interconnected VoIP Service in Section 9.3 of the Commission’s Rules*, PS Docket Nos. 18-261 and 17-239 and GN Docket No. 11-117, Report and Order, 34 FCC Rcd 6607, 6612-13, paras. 14-16 (2019).

<sup>70</sup> Section 506 of the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018 (RAY BAUM’S ACT), Pub. L. No. 115-141, 132 Stat. 348, 1095 (codified at 47 U.S.C. § 615 note) (requiring the Commission to “consider adopting rules to ensure that the dispatchable location is conveyed with a 9-1-1 call”).

<sup>71</sup> *Implementing Kari’s Law and Section 506 of RAY BAUM’S Act et al.*, 34 FCC Rcd at 6655-91, paras. 137-220; see also *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, Fifth Report and Order and First Further Notice of Proposed Rulemaking, 34 FCC Rcd 11592 (2019) (adopted metrics to more accurately identify the floor level of wireless 911 callers in multi-story buildings); *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, Sixth Report and Order and Order on Reconsideration, FCC 20-98 (rel. July 17, 2020) (adopting additional requirements building on the framework for improving the delivery and accuracy of vertical location requirements).

<sup>72</sup> See *Review of Rules and Requirements For Priority Services; National Security Emergency Preparedness Telecommunications Service Priority System; NTIA Petition for Rulemaking to Revise the Rules for Wireless Priority Services; NTIA Petition for Rulemaking to Revise the Rules for the Telecommunications Service Priority System*, PS Docket No. 20-187, Notice of Proposed Rulemaking, 35 FCC Rcd 7685 (2020) (*Priority Services Notice*).

<sup>73</sup> 47 CFR § 10.430.

<sup>74</sup> 47 CFR § 10.480.

<sup>75</sup> 47 CFR § 10.350(c).

<sup>76</sup> See 47 CFR § 10.450(a); *Wireless Emergency Alerts; Amendments to Part 11 of the Commission’s Rules Regarding the Emergency Alert System*, Second Report and Order and Second Order on Reconsideration, 33 FCC Rcd 1320, 1324-25, 1327-29, paras. 6, 9, 12 (2018).

disasters, resulting in the establishment of the Cross Sector Resiliency Forum in February 2020.<sup>77</sup> Further, to safeguard America’s critical communications infrastructure from potential security threats, we prohibited the use of public funds from the Commission’s Universal Service Fund (USF) to purchase or obtain any equipment or services produced or provided by companies posing a national security threat to the integrity of communications networks or the communications supply chain, and proposed to require certain USF recipients to remove and replace such equipment and services from their networks and reimburse them for doing so.<sup>78</sup> We also recently proposed, pursuant to the Secure and Trusted Communications Networks Act, to (1) create a list of covered communications equipment and services that pose an unacceptable risk to the national security of the United States or the security and safety of United States persons; (2) ban the use of federal subsidies for any equipment or services on the list of covered communications equipment and services; (3) require that all providers of advanced communications service report whether they use any covered communications equipment and services; and (4) establish regulations to prevent waste, fraud, and abuse in the proposed reimbursement program to remove, replace, and dispose of insecure equipment.<sup>79</sup> In furtherance of our duties to protect life, we also recently designated 988 as the 3-digit number to reach the National Suicide Prevention Lifeline and required all service providers to complete the transition by July 16, 2022.<sup>80</sup>

## 2. Overview of Public Safety Communications Marketplace

23. Public safety communications fall into two broad categories: (1) communications within and between public safety entities, and (2) communications between public safety entities and the public. We review each in turn.<sup>81</sup>

24. *Communications Among Public Safety Entities.* The record reflects that many public safety entities have access to and make use of dedicated public safety-specific and/or prioritized, specialized enterprise-level broadband services for data communications between public safety officials.<sup>82</sup>

---

<sup>77</sup> Strengthening Communications Networks to Help Americans in Crisis before the H. Committee on Energy and Commerce, Subcomm. on Communications and Technology, 116th Cong. 3 (2020) (statement of Allen Bell, Distribution Support Manager, Georgia Power); Press Release, CTIA, CTIA Statement on Collaboration with Edison Electric Institute (Feb. 27, 2020), <https://www.ctia.org/news/statement-on-collaboration-with-edison-electric-institute>.

<sup>78</sup> See *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Report and Order, Further Notice of Proposed Rulemaking, and Order, 34 FCC Rcd 11423, 11433, para. 26 (2019) (*2019 Supply Chain Order*). We also initially designated Huawei Technologies Company (Huawei) and ZTE Corporation (ZTE) as covered companies for purposes of this rule, and we established a process for designating additional covered companies in the future. *Id.* at 11438-48, paras. 43–63. Additionally, the Commission’s Public Safety and Homeland Security Bureau issued final designations of Huawei and ZTE as covered companies, thereby prohibiting the use of USF funds on equipment or services produced or provided by these two suppliers. See generally *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs – Huawei Designation*, PS Docket No. 19-351, Order, DA 20-690 (PSHSB June 30, 2020); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs – ZTE Designation*, PS Docket No. 19-352, Order, DA 20-691 (PSHSB June 30, 2020).

<sup>79</sup> See *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Declaratory Ruling and Further Notice of Proposed Rulemaking, FCC 20-99, para. 23 (rel. July 17, 2020).

<sup>80</sup> See *Implementation of the National Suicide Hotline Improvement Act of 2018*, WC Docket No. 13-336, Report and Order, 35 FCC Rcd 7373, 7375-76, para. 4 (2020).

<sup>81</sup> There was no record comment opposing the high-level description of these issues that we offer here.

<sup>82</sup> See, e.g., Free State Comments at 3-4; Comcast Comments at 8 (explaining that its public safety customers often opt for service agreements with quality-of-service guarantees); Charter Comments at 3; CTIA Comments at 18; NCTA Reply at 9-10 (detailing some of its members’ data connectivity solutions that include service level agreements with quality-of-service guarantees for “thousands of public safety entities, including police and fire

(continued....)

Perhaps the most important example of a dedicated network is the Congressionally-created First Responder Network Authority (FirstNet). In 2012, Congress passed the Middle Class Tax Relief and Job Creation Act, which in part directed “the establishment of a nationwide, interoperable public safety network”<sup>83</sup> to “ensure the deployment and operation of a nationwide, broadband network for public safety communications”<sup>84</sup>—a resilient network capable of supporting both data and voice communications. The law granted 20 megahertz of spectrum to be used for the network and allocated \$7 billion of funding.<sup>85</sup> FirstNet is “explicitly designed for fast, prioritized public safety communications.”<sup>86</sup> FirstNet offers service priority and preemption, which allow first responders to communicate over an “always-on” network.<sup>87</sup> Public safety entities using FirstNet can boost their priority levels during emergency situations “to ensure first responder teams stay connected” even when networks are congested.<sup>88</sup> AT&T<sup>89</sup> describes preemption as an “enhanced” form of priority service because it “shifts non-emergency traffic to another line,” which ensures national security and emergency preparedness users’ communications are successfully completed.<sup>90</sup> According to AT&T, priority and preemption support voice calls, “text messages, images, videos, location information, [and] data from apps . . . in real time.”<sup>91</sup> In the first half of 2019, the monthly numbers of device connections to FirstNet “outperformed expectations at approximately 196% of projected targets.”<sup>92</sup> In May 2019, “a majority of agencies and nearly 50% of FirstNet’s total connections were new subscribers (not AT&T migrations).”<sup>93</sup> As of August 2019, FirstNet was deployed in all 50 states,<sup>94</sup> and nearly 9,000 public safety agencies and organizations were

---

departments, hospitals, ambulance services, public safety dispatchers, medical dispatch centers, and 911 providers throughout the country”); American Principles Project Comments at 1; NCTA Comments at 8; USTelecom Comments at 8; Public Safety Broadband Technology Association Comments at 3 (“[T]he Commission is correct that public safety increasingly uses a ‘dedicated network[ ] with quality of service guarantees’ that offers better and faster performance compared with commercial networks.”); Ed Davis Company Comments at 2 (“More and more, public safety is relying on the FirstNet core and public safety’s own dedicated network for critical public safety communications – one that offers faster performance than commercial networks.”); Competitive Enterprise Institute Comments at 4; TechFreedom Reply at 18.

<sup>83</sup> See Pub. L. 112-96, Title VI, codified at 47 USC 1422(a).

<sup>84</sup> Congressional Research Service, *The First Responder Network (FirstNet) and Next-Generation Communications for Public Safety: Issues for Congress* at 1 (2017), <https://fas.org/sgp/crs/homesecc/R42543.pdf>.

<sup>85</sup> First Responder Network Authority, *FirstNet: The History of our Nation’s Public Safety Network*, at <https://www.firstnet.gov/about/history>.

<sup>86</sup> Public Safety Broadband Technology Association Comments at 2.

<sup>87</sup> FirstNet, *Early Benefits of FirstNet: Priority and Preemption* (Aug. 2, 2018), <https://firstnet.gov/newsroom/blog/early-benefits-firstnet-priority-and-preemption>.

<sup>88</sup> *Id.*

<sup>89</sup> In 2017, AT&T won a competitive bidding process to build the network for FirstNet. See AT&T Reply at 9.

<sup>90</sup> AT&T, *FirstNet Launches Ruthless Preemption for First Responders* (Dec. 12, 2017), [https://about.att.com/story/preemption\\_for\\_first\\_responders.html](https://about.att.com/story/preemption_for_first_responders.html).

<sup>91</sup> *Id.*

<sup>92</sup> TheBigRedGuide, *FirstNet’s First Responder Network: Deployment and Subscribers Exceed Expectations*, <https://www.thebigredguide.com/insights/firstnet-first-responder-fire-network-deployment-subscribers.1587043740.html> (last visited May 28, 2020).

<sup>93</sup> *Id.*

<sup>94</sup> First Responder Network Authority, *First Responder Network Goes Nationwide As All 50 States, 2 Territories and District of Columbia Join FirstNet*, <https://www.firstnet.gov/newsroom/press-releases/first-responder-network-goes-nationwide-all-50-states-2-territories-and>.

subscribers of the network.<sup>95</sup> These trends suggest that first responders recognize the benefits of prioritization, preemption, and other innovative features that enhance public safety communications.<sup>96</sup> The record reflects that “[m]ore and more, public safety is relying on the FirstNet core and public safety’s own dedicated network for critical public safety communications – one that offers faster performance than commercial networks.”<sup>97</sup> The Spectrum Act requires FirstNet to apply for renewal of its license after 10 years (i.e., in 2022).<sup>98</sup> The Act states that to obtain renewal, FirstNet must demonstrate that “during the preceding license term, the First Responder Network Authority has met the duties and obligations set forth under [the Spectrum] Act.”<sup>99</sup>

25. As we observed previously, other service providers have recently begun offering or enhanced their public safety services to compete with FirstNet.<sup>100</sup> For example, Verizon offers services designed for first responders and public safety entities through its public safety private core that include the ability to prioritize public safety communications to ensure that they stay connected during emergencies.<sup>101</sup> Such services also provide an extra layer of assurance that public safety communications will continue to operate during peak times.<sup>102</sup> In addition, public safety users “have access to several . . . enhanced services” from Verizon, including Mobile Broadband Priority Service and data preemption.<sup>103</sup> These services “provide public safety users priority service for data transmissions” by giving users priority over commercial users during periods of heavy network congestion<sup>104</sup> and “reallot[ing] network resources from commercial data/Internet users to first responders” if networks reach full capacity.<sup>105</sup>

---

<sup>95</sup> First Responder Network Authority; FirstNet Momentum: Platform Passes 750,000 Connections, Performs Faster Than Any Commercial Network for Second Consecutive Quarter, at <https://firstnet.gov/newsroom/press-releases/firstnet-momentum-platform-passes-750000-connections-performs-faster-any>. The number of public safety agencies subscribing to FirstNet services continues to increase. Recent data suggests that more than 12,000 public safety agencies and organizations—accounting for over 1.3 million connections nationwide—subscribe to FirstNet services. See, e.g., First Responder Network Authority, at <https://firstnet.gov/newsroom/press-releases/firstnet-connects-tens-thousands-new-england-subscribers-supports-public>.

<sup>96</sup> *Priority Services Notice*, 35 FCC Rcd at 7705, para. 63.

<sup>97</sup> Edward Davis Company Comments at 3.

<sup>98</sup> 47 U.S.C. § 1421(b)(2).

<sup>99</sup> *Id.*

<sup>100</sup> *Priority Services Notice*, 35 FCC Rcd at 7706, para. 66.

<sup>101</sup> CTIA Reply at 10; Verizon Reply at 12.

<sup>102</sup> Verizon, Verizon Unveils Public Safety Private Core (Mar. 27, 2018), <https://www.verizon.com/about/news/verizon-unveils-public-safety-private-core>. “The public safety core separates data traffic of public safety mobile users from commercial users across Verizon’s 4G LTE network. Public safety users will have their data immediately recognized as public safety with priority access at the tower and through the network. The private core leverages leading edge networking technology to provide security, flexibility and reliability.” *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* “[Mobile Broadband Priority Service] enables priority service for public safety officials using applications on smartphones or tablets, transmitting data from first responder vehicles or video from surveillance cameras.” *Id.*

<sup>105</sup> *Id.* Verizon “is committed to building applications and providing other support for public safety. For example, Verizon provides first responders with an Application Ecosystem that offers purpose-built applications to improve operational efficiency, an enhanced customer experience, a secure infrastructure for public safety applications, and a centralized product portal to simplify operations. To increase capacity when first responders need it most, Verizon also maintains a fleet of cells on wheels (COWs), cells on light trucks (COLTs), satellite picocells on trailers (SPOTs), and repeaters on trailers (RATs) that are stored at regional sites where they can be readily deployed.” CTIA Reply at 9; see also Verizon, *Public Safety*, <https://enterprise.verizon.com/solutions/public-sector/public-safety/>.

26. Similarly, U.S. Cellular offers “enhanced data priority services for first responders and other emergency response teams.”<sup>106</sup> The company uses a “dedicated broadband LTE network that separates mission-critical data from commercial and consumer traffic,” ensuring that national security and emergency preparedness personnel “have access to vital services” during emergency situations.<sup>107</sup> In addition to prioritizing network access, U.S. Cellular uses preemption “to automatically and temporarily reallocate lower priority network resources to emergency responders so they can stay connected during emergencies or other high-traffic events.”<sup>108</sup> T-Mobile also launched a specialized set of rate plans for first responder organizations in early 2019, aimed at addressing these organizations’ needs that their high-speed data allowance not run out or be slowed during emergencies.<sup>109</sup> These dedicated or specialized types of service plans allow first responder organizations to receive unlimited smartphone or hotspot data that receives high priority on the network at all times. T-Mobile is also expanding these efforts by offering Connecting Heroes, a program launching later this year to provide a version of this service for free to U.S. state and local public and non-profit law enforcement, fire, and emergency medical services (EMS) agencies.<sup>110</sup>

27. Though many communications between public safety entities increasingly take advantage of these enterprise-level dedicated public safety broadband services, the record reflects that public safety entities employ broadband Internet access services for their communications between public safety officials as well.<sup>111</sup> As the Association of Public-Safety Communications Officials-International, Inc. (APCO) explains, public safety agencies rely on retail broadband services for a variety of public safety applications, including for example, accessing various databases, sharing data with emergency responders, translating communications with 911 callers and patients in the field, streaming video into 911 and emergency operations centers, and accessing critical information about a 911 caller that is not delivered through the traditional 911 network.<sup>112</sup>

28. While this proceeding focuses on a specific data service—broadband Internet access service—we note that the universe of public safety to public safety communications extends beyond this particular service. The enterprise services described above often provide a viable alternative for states and localities to purchase dedicated broadband connections to use for public safety communications. In addition, voice services continue to play an important role. The Commission has historically supported

---

<sup>106</sup> U.S. Cellular, *U.S. Cellular Introduces Enhanced Data Priority for Public Safety* (Feb. 25, 2019), <https://www.uscellular.com/get-to-know-us/our-company/press-room/2019/uscellular-introduces-enhanced-data-priority-for-public-safety>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> CTIA Reply at 9; *see also* T-Mobile, *T-Mobile for Government*, <https://www.t-mobile.com/business/public-safety>.

<sup>110</sup> CTIA Reply at 8-9; *see also* T-Mobile, *T-Mobile for Government*, <https://www.t-mobile.com/business/public-safety> (last visited May 14, 2020).

<sup>111</sup> APCO Comments at 2 (“Public safety agencies commonly rely on retail broadband services for a variety of public safety applications.”); Digital Civil Society Lab Comments at 3 (“[A]ctors, associations, and organizations rely on mass-market retail broadband services covered by the Restoring Internet Freedom Order when mobilizing to respond to public safety threats and crises at their various levels of operation, both local and national.”); Jon M. Peha Comments at 5; Double Perfect Reply at 2-4 (explaining that public safety entities rely on retail mobile broadband services for a variety of emergency and budgetary reasons, and because “dedicated wireless networks and devices that support them have become available only recently”).

<sup>112</sup> APCO Comments at 2; *see also* County of Santa Clara et al. Comments at 6 (explaining that County emergency personnel in the field may need to access WebEOC (a virtual emergency operations center) through a mass market broadband service); Peha Comments at 5 (“For example, I have worked with the City of Pittsburgh on its system, which provides a wide range of applications and capabilities to first responders by using services from commercial mobile network operators. They are hardly unique.”).

these efforts through the establishment of three priority services programs that support prioritized voice services for public safety users.<sup>113</sup> As noted above, we recently proposed modernizing these rules to broaden the scope of information covered to address data and video and to remove outdated requirements that may impede the use of IP-based technologies.<sup>114</sup>

29. *Communications Between Public Safety Entities and the Public.* Communications between public safety entities and the public occur using a wide array of communications technologies. With respect to broadband services, the record reflects broad consensus that not only do public safety entities and first responders need to be able to communicate rapidly and reliably with each other during crisis situations, but members of the public using mass-market services must also be able to easily and efficiently communicate with first responders and access public safety resources and information.<sup>115</sup> As the County of Santa Clara states, “[T]he fundamental work of government, including public safety personnel, is outward facing: To protect our residents, we must be able to communicate with them, and they with us.”<sup>116</sup> The record suggests that most data communications between public safety entities and individuals likely take place over broadband Internet access services, and not enterprise or dedicated services. As CTIA explains, consumers regularly use their mobile devices and broadband connections “to access broadly available information regarding threatening weather, shelter-in-place mandates, ongoing active-shooter scenarios, and other matters essential to public safety.”<sup>117</sup> Members of the public often rely on broadband services during emergencies to enable them to find and receive potentially life-saving information, and to allow public safety officials to build on-the-ground situational awareness with information they gather from residential broadband service users.<sup>118</sup> First responders can also gain

---

<sup>113</sup> The Telecommunications Services Priority System (TSP) authorizes the “assignment and approval of priorities for provisioning and restoration of common-carrier provided telecommunication services” and “services which are provided by government and/or non-common carriers and are interconnected to common carrier services.” *National Security Emergency Preparedness Telecommunications Service Priority System*, GEN Docket No.87-505, Report and Order, 3 FCC Rcd 6650, 6672-78 (1988); 47 CFR pt. 64, Appx. A § 1(b); 47 CFR pt. 64, Appx. A § 4(a)(2). The Government Emergency Telecommunications Service (GETS) “provides government officials, first responders, and NSEP personnel with ‘priority access and prioritized processing in the local and long distance segments of the landline networks, greatly increasing the probability of call completion.’” *Priority Services Notice*, 35 FCC Rcd at 7699, para. 42; *see also About GETS*, <https://www.cisa.gov/about-gets> (last visited Aug. 4, 2020); FCC, *Government Emergency Telecommunications Services*, <https://www.fcc.gov/general/government-emergency-telecommunications-service>. And, the Wireless Priority Service program (WPS) provides “prioritized voice calling for subscribers using Commercial Mobile Radio Service . . . networks.” *Priority Services Notice*, 35 FCC Rcd at 7961, para. 13.

<sup>114</sup> *See Priority Service Notice*, 35 FCC Rcd 7685.

<sup>115</sup> As the *Mozilla* court recognized, broadband services are used by “first responders, providers or critical infrastructure, and members of the public to communicate during a crisis.” *Mozilla*, 940 F.3d at 60.

<sup>116</sup> Santa Clara et. al Comments at 4; *see also* Broadband Institute of California at Santa Clara University School of Law (BBIC) Comments at 7 (observing that “[p]ublic safety concerns” must include “communications from the public to a wide variety of institutions and to other members of the public.”); Karuk Tribe Comments at 1; AT&T Reply at 4 (noting that broadband Internet access is “more critical than ever for a host of civic and social objectives, including public safety communications”); NTCA Reply at 4; USTelecom Reply at 3, 7 (explaining that robust broadband networks “improve access to consumers’ public safety information” and agreeing that “consumers’ use of mass-market broadband to access information plays an important role in protecting public safety”).

<sup>117</sup> CTIA Comments at 21; *see also* INCOMPAS Comments at 9-10 (“For example, in 2017, Twitter and Facebook were key in the wake of Hurricane Harvey . . . as a way for ordinary citizens engaging in rescue efforts of their neighbors. Citizens took to social media and used hashtags to flag rescuers and to compile helpful databases.”); Karuk Tribe Comments at 2 (“The local volunteer fire department’s primary method of communication with residents is by Facebook posts” and “[r]oad closures, forest fire encroachment, and even evacuation notices may only be available by email or social media.”); County of Santa Clara et al. Comments at 6.

<sup>118</sup> *See, e.g.*, Free Press Comments at 18; EFF Comments at 2 (explaining that the public uses broadband services to access public safety information about evacuation zones, quarantines, and other emergency services); County of

(continued....)



valuable information from members of the public through mass-market broadband access, such as when “citizens used hashtags to flag rescuers and to compile helpful databases” in the wake of Hurricane Harvey in 2017.<sup>119</sup>

30. Further, “public safety” communications may encompass more than just communications during emergencies, as the COVID-19 pandemic has demonstrated, with many Americans relying on telemedicine over mass-market broadband services for “routine health care, triage, and basic health advice” as well as for updates on public health information and stay-at-home and quarantine orders.<sup>120</sup> 5G networks’ ability to transmit massive amounts of data in real time will also help enable new applications that will allow more advanced communications between the public and health care officials, such as allowing health care professionals, through ubiquitous wireless sensors, to remotely monitor patients’ health and transmit data to their doctors before problems become emergencies, and to develop connected ambulance services for faster patient transport.<sup>121</sup>

31. Non-data and one-way broadcast communications services, notably including members of the public making use of voice services to call 911, continue to play a central role in public safety communications between Americans and public safety entities. Consistent with Congressional direction, the Commission has “designate[d] 9–1–1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance,”<sup>122</sup> and has adopted regulations designed to improve its performance and effectiveness.<sup>123</sup> Audio and video communications also are important for public safety communications to the public, including for communicating emergency alerts. The Emergency Alert System is a national public warning system through which broadcasters, cable systems, and other service providers deliver audio alerts that include modulated data that can be converted into a visual message to the public to warn them of impending

---

Santa Clara et al. Comments at 7 (explaining that the County distributes critical and time-sensitive public-health information through Facebook Live and YouTube, and although these are critical public-safety communications, none of the endpoints are identifiably governmental); *see also, e.g.*, Digital Civil Society Lab Comments at 5 (“Civil society has been and remains dependent on commercial communications services for their regular and crisis-oriented work, including managing online donations of money and goods in response to public safety needs, coordinating volunteers and paid staff, functioning mutual aid networks, and coordinating kinship care and other vital activities that take place in civil society during public safety crises.”).

<sup>119</sup> INCOMPAS Comments at 10.

<sup>120</sup> *See* Karuk Tribe Comments at 1; County of Santa Clara et al. Comments at 7-9.

<sup>121</sup> *See, e.g.*, Taxpayers Protection Alliance Comments at 2; Verizon Reply at 15; *see also Updating the Commission’s Rule for Over-the-Air Reception Devices*, Notice of Proposed Rulemaking, 34 FCC Rcd 2695, para. 1 (2019) (stating that the development of 5G technology “holds the potential to bring enormous benefits to American consumers by delivering faster speeds and lower latency and by supporting the development of advanced applications like the Internet of Things, smart cities, and telehealth”).

<sup>122</sup> 47 U.S.C. § 251(e)(3).

<sup>123</sup> *See, e.g.*, *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, Sixth Report and Order and Order on Reconsideration, FCC 20-98 (July 17, 2020) (requiring improved accuracy in the location information for wireless 911 calls); *Implementing Kari’s Law and Section 506 of RAY BAUM’s Act et al.*, PS Docket No. 18-261, et al., Report and Order, 34 FCC Rcd 6607 (2019) (implementing the direct dialing and notification requirements of Kari’s Law to facilitate timely emergency response and improved location accuracy across communications platforms); *Improving 911 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, PS Docket Nos. 13-75 and 11-60, Report and Order, 28 FCC Rcd 17476 (2013) (requiring covered 911 service providers to take reasonable measures to provide reliable 911 service); *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) (requiring interconnected VoIP service providers to supply E911 capabilities to their customers).

emergencies and dangers to life and property in accordance with Commission regulations.<sup>124</sup> In addition, communications via text message also have taken on an important public safety role, including through Commission-mandated text-to-911 capabilities<sup>125</sup> and Wireless Emergency Alerts.<sup>126</sup> Consistent with its statutory duties, the Commission has played a major role in establishing and facilitating these means of communication between public safety entities and the public.

### 3. The Benefits of Increased Innovation, Investment, and Regulatory Certainty Provided by the *Restoring Internet Freedom Order* Will Enhance Public Safety

32. In the *Restoring Internet Freedom Order*, the Commission “eliminat[ed] burdensome regulation that stifles innovation and deters investment” and predicted that “this light-touch information service framework will promote investment and innovation.”<sup>127</sup> The *Mozilla* court affirmed this finding, concluding that our position as to the economic benefits of reclassification away from public-utility style regulations was “supported by substantial evidence.”<sup>128</sup> The record reflects that our finding applies just as much, if not more so, to public safety communications.<sup>129</sup> Consistent with our findings in the *Restoring Internet Freedom Order*, a number of commenters assert that the Commission’s reclassification of broadband Internet access services has “restored a regulatory environment that encourages robust investment in broadband networks and facilities that can be used for many purposes, including public safety purposes,”<sup>130</sup> and that this light-touch regulatory environment has improved and expanded the

---

<sup>124</sup> See, e.g., *Amendment of Part 11 of the Commission’s Rules Regarding Emergency Alert System*, PS Docket No. 15-94, Report and Order, 32 FCC Rcd 10812 (2017) (revising the EAS rules to adopt a new event code that would allow the transmission of Blue Alerts to the public over the EAS); *Review of the Emergency Alert System; Independent Spanish Broadcasters Association, The Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, Petition for Immediate Relief*, EB Docket No. 04-296, Fifth Report and Order, 27 FCC Rcd 642 (2012) (revising the EAS rules to specify the manner in which EAS participants must be able to receive alert messages formatted in the Common Alerting Protocol and by streamlining the EAS rules to enhance their effectiveness and clarity); *Review of the Emergency Alert System; Independent Spanish Broadcasters Association, The Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, Petition for Immediate Relief*, EB Docket No. 04-296, Second Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 13275 (2007) (adopting updated EAS requirements); *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, FO Docket Nos. 91-301, 91-171, Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 1786 (1994) (changing the name from the Emergency Broadcast System to the Emergency Alert System and upgrading and automating the system).

<sup>125</sup> See, e.g., *Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications; Framework for Next Generation 911 Deployment*, PS Docket Nos. 11-153, 10-255, Second Report and Order and Third Further Notice of Proposed Rulemaking, 29 FCC Rcd 9846 (2014) (requiring CMRS providers and other providers of interconnected text messaging applications to be capable of supporting text-to-911).

<sup>126</sup> See, e.g., *Commercial Mobile Alert System*, PS Docket No. 07-287, Third Report and Order, 23 FCC Rcd 12561, 12575, para. 32 (2008) (stating the requirements for wireless providers volunteering to participate in wireless emergency alerts).

<sup>127</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 312, para. 1.

<sup>128</sup> *Mozilla*, 940 F.3d at 49.

<sup>129</sup> See, e.g., Consumer Action for a Strong Economy Comments at 1-2; Free State Comments at 5; Edward Davis Comments at 1-2 (asserting, as the former Commissioner of the Boston Policy Department, that “there is nothing in the *Restoring Internet Freedom Order* which has an adverse impact on public safety[]” and he “expect[s] that rising investment since the Commission adopted the *Order* actually *enhances* public safety”); CTIA Comments at 20; Hispanic Technology & Telecommunications Partnership Comments at 2-3; Institute for Policy Innovation (IPI) Comments at 2; USTelecom Comments at 8; ACT Reply at 6; Information Technology and Innovation Foundation Comments at 5.

<sup>130</sup> ACA Connects Comments at 3-4.

resources available to public safety entities and consumers alike.<sup>131</sup> Though many factors affect ISPs' investment decisions,<sup>132</sup> these comments lend support to our findings in the *Restoring Internet Freedom Order* that “reclassification of broadband Internet access service from Title II to Title I is likely to increase ISP investment and output”<sup>133</sup> and that the “ever-present threat of regulatory creep is substantially likely to affect the risk calculus taken by ISPs when deciding how to invest their shareholders' capital, potentially deterring them from investment in broadband.”<sup>134</sup>

33. As described above, an increasing number of public safety entities subscribe to enterprise-level quality-of-service dedicated public safety data services.<sup>135</sup> These types of plans were not subject to the requirements of the *Title II Order* or the *Open Internet Order*.<sup>136</sup> However, even these non-mass-market offerings benefit from the *Restoring Internet Freedom Order*'s light-touch approach, regulatory certainty, and likely investment incentives because they often make use of infrastructure that also is used to facilitate broadband Internet access services (e.g., middle mile connections).<sup>137</sup> As CTIA

---

<sup>131</sup> See, e.g., CTIA Comments at 20; Hispanic Technology & Telecommunications Partnership Comments at 2-3 (“Underserved communities, public safety providers and first responders are best served by policies that encourage the rapid buildout and expansion of communications and broadband networks, including 5G wireless networks and keep individuals safe online. . . . [The] Restoring Internet Freedom Order helps to facilitate increased private investment in broadband and 5G technologies during a time when many Americans face unprecedented economic hardships as a result of the Covid-19 global health crisis.”); Institute for Policy Innovation (IPI) Comments at 2 (“The *RIF Order*'s market-driven principles have cultivated an investment friendly environment that has enabled ISPs to build robust networks, which benefit public safety users as well as all other broadband users.”); USTelecom Comments at 8 (“Although many factors drive investment, investment has increased in the wake of the *RIF Order* (contrary to the warnings of Title II advocates), and that investment improves, rather than degrades, consumer access to public safety information via broadband.”); ACT Reply at 6 (“The [*RIF*] Order allows for the infrastructure investment necessary to ensure that the United States has a strong and continually growing public safety network.”); Information Technology and Innovation Foundation Comments at 5 (“[The *Restoring Internet Freedom Order*] encourages greater investment in the same facilities that can be shared for public safety communications.”).

<sup>132</sup> See *Restoring Internet Freedom Order*, 33 FCC Rcd at 365, para. 92 (observing that factors such as “technological change, the overall state of the economy, and the fact that large capital investments often occur in discrete chunks rather than being spaced evenly over time, may affect investment). Given the variety of factors and the limited nature of the scope of the remand and subsequent record, described below, we do not reopen or expand on these predictions at this time.

<sup>133</sup> *Id.* at 368, para. 98.

<sup>134</sup> *Id.* at 370, para. 102.

<sup>135</sup> While the Greenlining Institute raises concerns that the record does not specify the number of public safety entities that purchase enterprise-grade services, or the affordability and competitiveness of the fees for such services, see Greenlining Institute Reply at 5, we observe several commenters explained the widespread nature of such services. For example, NCTA explains that one of its members provides data connectivity solutions “for thousands of public safety entities, including police and fire departments, hospitals, ambulance services, public safety dispatchers, medical dispatch centers, and 911 providers throughout the country.” NCTA Reply at 9; see also Verizon Reply at 11 (“Verizon has hundreds of individualized agreements with public safety entities.”). Further, as noted above, as of August 2019, FirstNet was deployed in all 50 states, and nearly 9,000 public safety agencies and organizations were subscribers of the network. As Verizon explains, public safety entities generally purchase enterprise service contracts that are “similar to other large agreements that government entities use to buy most goods and services on favorable terms for a fair price,” explaining that some states use master agreements negotiated by nationwide purchases organizations such as the National Association of State Procurement Offices, for example. Verizon Reply at 11. We also note that because such services were excluded from regulation under the *Title II Order*, that *Order* did not reduce the costs of such services in any case.

<sup>136</sup> See, e.g., Charter Comments at 3-4; ACA Connects Comments at 6.

<sup>137</sup> See, e.g., CTIA Reply at 10; CTIA Comments at 20; ACA Connects Comments at 5 (explaining that broadband facilities that are being deployed more robustly in the wake of the *Restoring Internet Freedom Order* could be put to

(continued....)

states, “[r]obust and expansive broadband infrastructure benefits both consumers and public safety personnel, whether they rely on mass-market connectivity or enterprise offerings, because even infrastructure built principally to serve mass-market broadband consumers (such as middle-mile networking) increases overall network capacity, improving the experience of enterprise and government users *and* those utilizing non-[broadband Internet access service] data services.”<sup>138</sup> Further, as broadband speeds and other performance characteristics continue to improve, the range of public safety services and applications that could potentially be offered over these networks expands.<sup>139</sup>

34. The record reflects that the regulatory certainty and light-touch approach the *Restoring Internet Freedom Order* affords also likely gives ISPs stronger incentives to upgrade networks to 5G, paving the way for new and innovative applications and services that can benefit public safety.<sup>140</sup> 5G networks’ ability to transmit massive amounts of data in real time will help enable new applications that provide immediate situational awareness to enable public safety professionals and first responders to “provide more informed support and make better decisions during an emergency.”<sup>141</sup> For example, 5G

---

use serving specialized public safety needs, such as connections to 911 call centers or backhaul capacity for first responder networks); Consumer Action for a Strong Economy Comments at 1-2.

<sup>138</sup> CTIA Comments at 20.

<sup>139</sup> See ACA Connects Comments at 5; CTIA Comments at 20 (“[P]roviders are competing to serve public safety by investing in increasingly resilient networks and offering new, innovative services to meet mission-critical needs. For example, fueled by the removal of barriers to infrastructure investment, the nationwide wireless providers have each been competing fiercely to serve public-safety operations. Such competition benefits all parties in the ecosystem.”); AT&T Business, Public Sector News, No connection is more important than one that can save a life, <https://about.att.com/pages/publicsector>; Verizon, Verizon Unveils Public Safety Private Core, <https://www.verizon.com/about/news/verizon-unveils-public-safety-private-core>; Donny Jackson, T-Mobile makes 10-year commitment to free public-safety broadband, if Sprint merger is completed (Nov. 8, 2019), <https://urgentcomm.com/2019/11/08/t-mobile-makes-10-year-commitment-to-free-public-safety-broadband-if-sprint-merger-is-completed>.

<sup>140</sup> See, e.g., Internet Innovation Alliance Comments at 8 (asserting that “[e]ach problem the Nation faces with respect to the broadband future – for instance, the transition to 5G, broadband adoption, closing divides between rural and urban America – is easier as investment in broadband rises.”); Rysavy Comments at 2 (asserting that 5G “hugely expands the range of possible use cases for wireless communications” and that with these enhanced capabilities, “5G networks will be able to address far more applications, far more effectively, than previous cellular generations, including smart factories, autonomous vehicles, telemedicine, robotics, drones, augmented reality, virtual reality, and thousands, if not millions, of yet-to-be-invented innovations”); Hispanic Technology and Telecommunications Partnership Comments at 3 (“The order provides the regulatory framework for new investment in broadband and 5G technologies which could connect America’s surging rural Latino population to better, more affordable broadband service, and unlock countless opportunities—from employment to education to telemedicine which helps sustain the lives and livelihoods of the Latino community.”); R Street Institute Comments at 4 (asserting that “the return to light-touch regulation will promote investment and innovation in broadband more generally, improving coverage and baseline service quality for all users and that 5G networks “will significantly benefit public safety by improving access to telemedicine, ensuring reliable connectivity during emergencies, enabling near-real-time gathering and sharing of data, streamlining search-and-rescue missions, and supporting...”); National Organization of Black Law Enforcement Executives Comments at 2 (urging 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” and “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.”).

<sup>141</sup> ICLE Comments at 18; see also *id.* (“5G-enabled applications like [augmented and virtual reality] will allow public safety agencies to develop realistic simulations of crisis situations for training and testing purposes.”); National Organization of Black Law Enforcement Executives Comments at 2 (“Faster, more accessible broadband such as 5G will allow law enforcement to deploy new types of unmanned robotic vehicles that send and receive

(continued....)

capabilities will enable search and rescue drones and other unmanned vehicles to reach areas that would otherwise be inaccessible,<sup>142</sup> and will also help enable products “like augmented reality headsets that can help firefighters see through smoke, and create augmented disaster mapping that helps rescue teams get a clearer picture of the situation on the ground.”<sup>143</sup> The deployment and growth of 5G and the innovative applications it will enable will have clear public safety benefits, and we believe that our light-touch, market driven approach likely has, and likely will continue, to encourage ISPs’ investments in these networks.<sup>144</sup>

35. The record reflects that improved, more robust broadband networks and services also have obvious and significant benefits for communications between public safety entities and the public. According to one commenter, “[t]hree in ten Americans describe themselves as ‘constantly’ online,” and that “the best way to reach them will be for public safety communication to also take place online.”<sup>145</sup> As the Edward Davis Company explains, “better, faster, and more widespread broadband connections make it easier for the public to contact public safety in times of need and help public safety respond more quickly.”<sup>146</sup> Indeed, the Public Safety Broadband Technology Association asserts that light-touch regulation “promotes extensive deployment and quick adoption of fast broadband, which enables citizens to reach public safety more easily in times of need.”<sup>147</sup> Similarly, USTelecom observes that increased investment has “given rise to robust, reliable, and resilient networks that improve consumers’ access to public safety information, providing first responders and other government agencies with new and innovative ways to communicate and share, analyze, and act on information during emergencies.”<sup>148</sup>

36. The COVID-19 pandemic has brought that point into stark relief. The robustness and reliability of ISPs’ networks have helped make possible the large-scale changes to daily life, including reliance on telework, digital learning, telehealth, and online communications with local and state officials. The record demonstrates that, even with unprecedented increases in traffic during the COVID-19 pandemic, broadband networks have been able to handle the increase in traffic and shift in usage patterns.<sup>149</sup> The ability of these networks to absorb major increases in traffic has allowed Americans to maintain social distancing, which experts have found to yield tremendous public health and safety

---

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>142</sup> International Center for Law & Economics (ICLE) Comments at 18; Verizon Reply at 16; *see also* R Street Institute Comments at 4-5 (explaining that 5G “innovations will significantly benefit public safety by improving access to telemedicine, ensuring reliable connectivity during emergencies, enabling near-real-time gathering and sharing of data, streamlining search-and-rescue missions, and supporting aerial supply drops and mass evacuation during natural disasters”).

<sup>143</sup> Verizon Reply at 14.

<sup>144</sup> *See, e.g.*, Verizon Reply at 7-8 (stating that its “investments in 4G and 5G have been facilitated by the light-touch federal regulatory framework that has applied to broadband for all but the two-plus years that the Title II Order was in effect”).

<sup>145</sup> Electronic Frontier Foundation Comments at 4.

<sup>146</sup> The Edward Davis Company Comments at 2.

<sup>147</sup> Public Safety Broadband Technology Association Comments at 3.

<sup>148</sup> USTelecom Reply at 3.

<sup>149</sup> *See* ACA Connects Comments at 5; American Conservative Union Comments at 2; ACI Comments at 5; Free State Comments at 1; Haney Comments at 2; IPI Comments at 2; NCTA Comments at 8; Pelican Institute et al. Comments at 1 (stating that “even with these massive disruptions to our everyday lives [due to COVID-19], many can continue to work, go to school, and communicate with our friends and family during this troubling time. This is only possible due to the massive increase in broadband infrastructure . . .”); R Street Comments at 5; American Principles Project (APP) Comments at 2.

benefits by “flattening the curve” of viral transmissions.<sup>150</sup> USTelecom observes that one study showed that out of the ten countries with the highest populations in the world, the United States was the only country to not experience any download speed degradation in April 2020.<sup>151</sup> Further, unlike the European Union, which takes a utility-style approach to broadband regulation and has had to request that bandwidth intensive services such as Netflix reduce video quality in order to ease stress on its network infrastructure, the United States has not had to take similar steps, despite similar surges in Internet traffic.<sup>152</sup> This country’s robust and resilient broadband networks are, in significant part, the result of over two decades of almost continuous light-touch regulation, which has promoted substantial infrastructure investment and deployment.<sup>153</sup> For the foregoing reasons, we conclude that our decision to return broadband Internet access service to its historical information service classification benefits public safety communications by encouraging the deployment of more robust, resilient broadband services networks and infrastructure over which public safety communications to, from, and among the public ride.

#### 4. **The *Restoring Internet Freedom Order* Is Unlikely to Harm Public Safety Communications, and Any Harm that It Could Cause Would Be Minimal**

37. We find that our reclassification and rule determinations in the *Restoring Internet Freedom Order* are not likely to adversely affect public safety communications over broadband Internet access service. First, we explain why the same protections we identify in the *Restoring Internet Freedom Order* as sufficient to protect openness generally—transparency, antitrust, and consumer protection law—equally protect the openness of public safety communications. Next, we find an absence of evidence of harms to public safety communications arising from the *Restoring Internet Freedom Order* or from the two-decade history of light-touch regulation of the Internet. We then review assertions regarding specific forms of possible harm to public safety communications—blocking, throttling, loss or delay due to paid prioritization, barriers to communications by individuals with disabilities, and damage to the safety and reliability of critical infrastructure—and conclude that the record reflects insufficient evidence of such harms as a result of the *Restoring Internet Freedom Order* or that such harms are likely to arise. Finally, we conclude that even if a harm to public safety communication were to somehow arise from the *Restoring Internet Freedom Order*, its impact would be limited because broadband Internet access service, while important, is only a part of the broader public safety communications ecosystem.

38. *Transparency, Antitrust, and Consumer Protection Laws Prevent Harms.* The protections highlighted in the *Restoring Internet Freedom Order* are important factors in preserving the openness of public safety communications over broadband Internet access service. Among these protections are the transparency rules we adopted, which “require ISPs to disclose any blocking, throttling, affiliated prioritization, or paid prioritization in which they engage.”<sup>154</sup> As we explained in the

---

<sup>150</sup> ACA Connects Comments at 5-6; OTI Comments at 4; Greenlining Institute Reply at 6.

<sup>151</sup> See USTelecom Reply at 4 (citing Tyler Coper, *Internet Performance Around the World Amid COVID-19*, BroadbandNow (May 6, 2020), <https://broadbandnow.com/report/international-internet-performance>).

<sup>152</sup> See American Principles Project (APP) Comments at 2 (stating that “in Europe, where streaming services like YouTube and Netflix are being forced to reduce video quality in order to help ease stress on their network infrastructure. That’s not happening here in the United States.”); CEI Comments at 7; Haney Comments at 2; Wallsten Comments at 5 (“The current coronavirus crisis additionally highlights the robustness of U.S. networks. Data . . . shows U.S. networks maintaining an average of over 130 Mbps, faster than most European networks []. While EU regulators asked streaming services to reduce the resolution, and therefore bandwidth needs, during the crisis, U.S. regulators did not.”); NCTA Reply at 11.

<sup>153</sup> See *Restoring Internet Freedom Order*, 33 FCC Rcd at 362-63, 375, paras. 86, 109-10; see also, e.g., Comcast Comments at 2 (asserting that “the substantial investments Comcast has made in its broadband network – investments that have thrived under the *RIF Order*’s approach . . . 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”); NCTA Comments at 2; AT&T Reply at 5; USTelecom Reply at 2-3; Verizon Reply at 2.

<sup>154</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 439, para. 219.

*Restoring Internet Freedom Order*—in analysis that the *Mozilla* court upheld as reasonable—“[h]istory demonstrates that public attention, not heavy-handed Commission regulation, has been most effective in deterring ISP threats to openness and bringing about resolution of the rare incidents that arise. The Commission has had transparency requirements in place since 2010, and there have been very few incidents in the United States that plausibly raise openness concerns.”<sup>155</sup> “Transparency thereby ‘increases the likelihood that harmful practices will not occur in the first place and that, if they do, they will be quickly remedied.’”<sup>156</sup>

39. Indeed, many ISPs, including all major ISPs, have gone further than disclosing their policies by making “enforceable commitments to maintain Internet openness.”<sup>157</sup> As NCTA explains, “[a]ll major broadband providers have now publicly made enforceable commitments not to engage in conduct that violates consensus open Internet principles.”<sup>158</sup> ISPs have made these commitments despite the lack of Title II regulation,<sup>159</sup> and the record reflects that ISPs recognize the importance of these commitments with respect to public safety communications—for example, Comcast explains that its incentives to adhere to public commitments to open Internet protections “are rightly even stronger . . . when it comes to serving the public safety community, particularly first responders during an emergency.”<sup>160</sup> These commitments are not merely empty promises with no binding effect; instead, as a direct result of the *Restoring Internet Freedom Order*, the terms of such commitments are now enforceable by the Federal Trade Commission (FTC), the nation’s premier consumer protection agency. Indeed, a Memorandum of Understanding between the Commission and the FTC states that the FTC will “investigate and take enforcement action as appropriate against Internet service providers for unfair, deceptive, or otherwise unlawful acts or practices, including . . . actions pertaining to the accuracy of the disclosures such providers make pursuant to the *Internet Freedom Order*’s requirements, as well as their marketing, advertising, and promotional activities.”<sup>161</sup>

40. Commitments to transparency carry particular force in the context of public safety communications because of the strong incentive for ISPs to maintain or improve their reputations by protecting such communications. As NCTA explains, “broadband providers recognize the vital importance of ensuring robust and reliable networks for public safety communications, and know that they would need to answer to customers and policymakers if their practices were to threaten to hamper public safety in any way.”<sup>162</sup> In addition, there are strong business incentives for broadband providers to

---

<sup>155</sup> *Id.* at 450, para. 241; *Mozilla*, 940 F.3d at 56-57.

<sup>156</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 439, para. 217 (quoting *Open Internet Order*, 25 FCC Rcd at 17936-37, para. 53).

<sup>157</sup> CTIA Comments at 6; *see also Restoring Internet Freedom Order*, 33 FCC Rcd at 451, para. 244 (stating that “[m]any ISPs have committed to abide by open Internet principles”).

<sup>158</sup> NCTA Comments at 7; *see also, e.g., Verizon Reply* at 3 (explaining that it is committed to an open Internet); Charter Comments at 1 (same); Comcast Comments at 6 (stating that, along with other major ISPs, it has “long been committed to the core open Internet principles not to block, throttle, or unreasonably discriminate against any lawful Internet content—a pledge that Comcast executives have repeatedly affirmed”).

<sup>159</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 379, para. 117.

<sup>160</sup> Comcast Comments at 6.

<sup>161</sup> *Restoring Internet Freedom FCC-FTC Memorandum of Understanding* at 2 (Dec. 14, 2017), [https://www.ftc.gov/system/files/documents/cooperation\\_agreements/fcc\\_fcc\\_mou\\_internet\\_freedom\\_order\\_1214\\_final\\_0.pdf](https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf).

<sup>162</sup> NCTA Comments at 4; *see also ACA Connects Comments* at 7 (asserting that “no provider wishes to be held responsible for a communications failure that results in harm to first responders or the public at large” and “[a]mong other considerations, there are strong business incentives to avoid the reputational damage and loss of customer goodwill that such an outcome would bring”); Comcast Comments at 7 (“[I]t would make no sense for Comcast or any other ISP to deliberately block or throttle service for its public safety customers.”); AT&T Reply at 6-7 (“ISPs

(continued....)

ensure that public safety communications remain unharmed.<sup>163</sup> As we previously found in the *Restoring Internet Freedom Order*, even when public safety is not at stake, it is likely that “any attempt by ISPs to undermine the openness of the Internet would be resisted by consumers and edge providers.”<sup>164</sup>

41. Likewise, consistent with our findings in the *Restoring Internet Freedom Order*, we find that antitrust law can also protect consumers from practices that may hinder their ability to access public safety resources and similarly helps protect public safety communications over broadband Internet access service from blocking, throttling, alleged degradation due to paid prioritization, and other harms to openness. The antitrust laws, particularly sections 1 and 2 of the Sherman Act, as well as section 5 of the FTC Act, protect competition in all sectors of the economy, including broadband Internet access.<sup>165</sup> Consequently, if an ISP attempts to block or degrade traffic in a manner that is anticompetitive, relief may be available under the antitrust laws.<sup>166</sup> Moreover, to the extent an ISP has market power, antitrust laws could be used to address any anticompetitive paid prioritization practices by an ISP.<sup>167</sup> As we explained in the *Restoring Internet Freedom Order*, “[o]ne of the benefits of antitrust law is its strong focus on protecting competition and consumers.”<sup>168</sup> The transparency rule the Commission adopted amplifies the power of antitrust law and the FTC Act to deter and, where needed, remedy behavior that harms consumers, including for public safety purposes.<sup>169</sup>

42. Further, consistent with our conclusion in the *Restoring Internet Freedom Order*, we believe that consumer protection laws also help protect public safety communications from practices that could harm openness. The FTC has broad authority to protect consumers from “unfair and deceptive acts or practices.”<sup>170</sup> Reclassification restored the FTC’s authority to enforce those consumer protection

---

know they would gain nothing and lose much—including brand value, consumer goodwill, and customers—if they blocked or throttled lawful content on the public internet.”); *cf. Restoring Internet Freedom Order* 33 FCC Rcd at 467, para. 264 (“[M]ost attempts by ISPs to block or throttle content will likely be met by a fierce consumer backlash.”).

<sup>163</sup> ISPs have more than business incentives to ensure that broadband communications remain unhampered by harmful network management practices. As ACA Connects explains, the community-based providers that it represents also “have a personal stake in ensuring the safety of their neighbors, family and friends.” ACA Connects Comments at 7.

<sup>164</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 396, para. 142.

<sup>165</sup> 15 U.S.C. §§ 1-2, 45.

<sup>166</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 415, para. 172.

<sup>167</sup> *Id.* at 461, para. 256.

<sup>168</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 402-03, para. 153. If the types of conduct and practices that had been prohibited under the *Title II Order* were challenged as anticompetitive under the antitrust laws, such conduct would likely be evaluated under the “rule of reason,” which amounts to a consumer welfare test. A welfare approach was established in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). See Joshua D. Wright and Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405 (2013).

<sup>169</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 451, para. 244.

<sup>170</sup> 15 U.S.C. § 45(a)(1). The FTC’s unfair-and-deceptive-practices authority “prohibits companies from selling consumers one product or service but then providing them something different,” which makes voluntary commitments not to engage in blocking, throttling, or paid prioritization enforceable. *Restoring Internet Freedom Order*, 33 FCC Rcd at 394-95, para. 141 (quoting Acting Chairman Ohlhausen Comments at 10-11). The FTC also requires the “disclos[ur]e [of] material information if not disclosing it would mislead the consumer,” so if an ISP “failed to disclose blocking, throttling, or other practices that would matter to a reasonable consumer, the FTC’s deception authority would apply.” *Restoring Internet Freedom Order*, 33 FCC Rcd at 394-95, para. 141 (quoting Acting Chairman Ohlhausen Comments at 11); see also FTC Broadband Report at 129. If any unfair deceptive acts or practices occur, the FTC has authority to bring an enforcement action against the ISP. *Restoring Internet Freedom Order*, 33 FCC Rcd at 394-95, para. 141.



requirements in the case of broadband Internet access service.<sup>171</sup> Indeed, the FTC has already successfully used its authority to pursue a complaint against AT&T for allegedly deceptively marketing one of its own mobile broadband subscription plans.<sup>172</sup> And all states have laws proscribing deceptive trade practices.<sup>173</sup>

43. The D.C. Circuit found that the Commission's reliance on antitrust and consumer protection laws to limit anticompetitive behavior was reasonable, especially as part of the broader regulatory and economic framework,<sup>174</sup> and we do not revisit those prior Commission findings here. Nor do we find that reasoning substantially diminished when public safety concerns are at issue. For one, that reasoning retains its full force with respect to protections that flow from the ISPs' own public statements. ISPs know that their public statements regarding network management—whether made to comply with our transparency rule or otherwise—are subject to enforcement by the FTC.<sup>175</sup> Thus, ISPs' public statements, in effect, create *ex ante* requirements to which they are bound. The record does not reveal that enforcement of those statements, such as through the FTC's consumer protection authority, would be any less effective at preventing contrary ISP conduct than would enforcement of Commission rules prohibiting the same network management practices.

44. Consumer protection and antitrust laws help guard against risks from conduct not foreclosed by providers' public statements, as well. The record here does not reveal credible claims that ISPs would somehow target their conduct to harm public safety in a manner that would require *ex ante* public safety-focused legal protections.<sup>176</sup> Instead, commenters' concerns here reflect the view that the ISP conduct that could lead to public safety harms is the same conduct about which concerns have been expressed more generally, even if the consequences of such conduct could be particularly dire in the public safety context. Because consumer protection and antitrust laws help safeguard users of broadband Internet access service from conduct that could undermine Internet openness—and because that same conduct underlies the public safety concerns expressed by commenters here—those laws help address any public safety concerns notwithstanding their lack of an express public safety focus.<sup>177</sup> Even *ex post* FTC

---

<sup>171</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 394-95, para. 141.

<sup>172</sup> R Street Comments at 6; Fed. Trade Commission, *AT&T to Pay \$60 Million to Resolve FTC Allegations It Misled Consumers with "Unlimited Data" Promises*, (Nov. 5, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/att-pay-60-million-resolve-ftc-allegations-it-misled-consumers>; [https://www.ftc.gov/system/files/documents/cases/doc\\_190\\_2019-11-05\\_proposed\\_stipulated\\_final\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/doc_190_2019-11-05_proposed_stipulated_final_order.pdf).

<sup>173</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 395-96, para. 142.

<sup>174</sup> *Mozilla*, 940 F.3d at 58-59.

<sup>175</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 395-96, para. 142.

<sup>176</sup> See, e.g., ACA Connects Comments at 7 (“[N]o provider wishes to be held responsible for a communications failure that results in harm to first responders or the public at large. Among other considerations, there are strong business incentives to avoid the reputational damage and loss of customer goodwill that such an outcome would bring.”); Charter Comments at 2-3 (“[W]ith respect to the provision of services to public safety entities[,] . . . broadband providers have no incentive to offer substandard or unreliable service and have substantial non-economic incentives to provide [them] with reliable connections.”); Comcast Comments at 7 (“[I]t would make no sense for Comcast or any other ISP to deliberately block or throttle service for its public safety customers.”); NCTA Comments at 4 (“Broadband providers have no incentive whatsoever to harm public safety communications—and, in fact, have every incentive to ensure that public safety communications are protected. Broadband providers recognize the vital importance of ensuring robust and reliable networks for public safety communications, and know that they would need to answer to customers and policymakers if their practices were to threaten to hamper public safety in any way.”); Verizon Reply at 5: (“ISPs have no conceivable economic incentive to harm consumer access to content from public safety websites through blocking, throttling, or paid prioritization because public safety websites do not compete with ISPs in any way.”).

<sup>177</sup> Although some commenters observe that antitrust and consumer protection laws are not framed with a focus on public safety concerns, see, e.g., BBIC Comments at 42-43; BBIC Reply at 73, neither the Title II regulatory

(continued....)

enforcement of such conduct as “unfair” or anticompetitive practices would have a significant effect by causing providers to avoid conduct in the first instance if it has the potential to result in liability under those legal regimes.<sup>178</sup> We anticipate a similar deterrent effect from consumer protection laws. Although the *Mozilla* court noted that the record reflected concern about adequacy of *ex post* enforcement in the public safety context to the extent that such potential for enforcement did not fully deter harmful ISP conduct from occurring, we find that to be a far more limited concern than some commenters claim.<sup>179</sup> As a threshold matter, while the court focused on commenters’ concerns about “dire, irreversible” public safety consequences from ISP conduct such as loss of life,<sup>180</sup> commenters here raise a wide array of situations with a claimed nexus to safety of life and property where it is doubtful that ISP conduct—even assuming *arguendo* that it occurred and had momentary effects on the relevant applications—would result in meaningful harm, let alone loss of life.<sup>181</sup> More fundamentally, we rely on transparency, consumer protection laws, and antitrust laws only as one part of a broader set of considerations that collectively persuade us that public safety harms are unlikely to result from the regulatory approach in the *Restoring Internet Freedom Order*. For example, ISPs’ conduct in the first instance is likely to be informed by the highly probable reputational effects. In addition, as we explain below, even if ISP conduct like paid prioritization were to occur, the record does not reveal likely practical harm to applications used for public safety communications over mass market broadband Internet access service.<sup>182</sup>

45. *Absence of Proven Harms.* The Internet has been subject to light-touch regulation for the entirety of the time since enactment of the 1996 Act, apart from the short period in which the *Title II Order* controlled. Further, during most of the past two decades, the Commission did not have in place

---

framework nor the restrictions on ISP conduct in the bright line and general conduct rules adopted in the *Title II Order* specified particular restrictions on ISPs in connection with public safety, either. Although “traffic prioritization . . . practices that serve a public safety purpose, may be acceptable under our rules as reasonable network management” under the *Title II Order*, *Title II Order*, 30 FCC Rcd at 5653, para. 125 n.284, the restrictions on ISP conduct under the bright line rules were not framed in terms of public safety, nor did the factors identified by the Commission to guide the application of its general conduct rule focus on public safety concerns. *Title II Order*, 30 FCC Rcd at 5661-64, paras. 138-45. This conclusion is not diminished by the fact that the Commission did adopt a public safety-focused *carve-out* from those conduct rules, *Title II Order*, 30 FCC Rcd at 5731-32, para. 300, because that carve-out rule did not restrict ISP conduct in any way. In sum, even the *Title II Order* itself thus adopted rules restricting ISP conduct that it anticipated ultimately could benefit public safety, notwithstanding the lack of a public safety focus. *See, e.g., Title II Order*, 30 FCC Rcd at 5653-55, para. 126 (discussing concerns raised in the record about the effects of paid prioritization). And some of these same commenters contend that public safety-related communications generally are not separately identifiable from other communications, in any event. *See, e.g., BBIC Reply* at 9; *AARP Reply* at 14. Consequently, although we do not presume that consumer protection and antitrust laws themselves provide perfect protections against all possible public safety concerns, we conclude that they do still provide significant protections notwithstanding their lack of an express public safety focus, and rely on them in conjunction with the broader range of considerations that collectively persuade us that public safety harms are unlikely under our regulatory framework in the *Restoring Internet Freedom Order*.

<sup>178</sup> *See, e.g., Restoring Internet Freedom Order*, 33 FCC Rcd at 401-02, paras. 151-52 (discussing the deterrent effect of antitrust law).

<sup>179</sup> *See Mozilla*, 940 F.3d at 61.

<sup>180</sup> *Id.* at 61-62.

<sup>181</sup> *See, e.g., BBIC Reply* at 29 (discussing the use of “an email list to organize fire safe council events and share information about fire safety issues”); *id.* at 41, 59 (discussing downloading books and software and “Remote Real-time Captioning for classes”).

<sup>182</sup> We note that such public safety communications often occur over specialized networks which generally include quality-of-service guarantees—unlike best efforts broadband Internet access service—which further limits the scope of communications potentially affected.

potentially enforceable attempts at conduct regulation.<sup>183</sup> Yet for all this time from which to draw, commenters claiming that the *Restoring Internet Freedom Order* harms public safety communications are only able to point to a few heavily-contested public-safety-related incidents.<sup>184</sup> Even if these claims were valid—and we find below that they are not—they do not establish a compelling basis to reconsider the *Restoring Internet Freedom Order*'s determinations and impose preemptive, industry-wide, utility-style regulations.<sup>185</sup> The dearth of evidence of practices harmful to public safety is unsurprising, as ISPs lack an economic incentive to engage in practices such as blocking or throttling, especially when these practices may harm public safety.

46. Commenters opposing the *Restoring Internet Freedom Order* repeatedly cite as support a 2018 incident involving the decrease in the Santa Clara, California fire department's broadband service speed during an emergency.<sup>186</sup> However, as explained below, the changed regulatory posture in the *Restoring Internet Freedom Order* had no bearing on how this incident played out, both because the broadband service at issue was not subject to either regulatory regime and because the provider's conduct would not have been prohibited under the *Title II Order* even if it did apply.<sup>187</sup> The County of Santa Clara asserts that while the County's firefighters were "in the midst of fighting the Mendocino Complex Fire in the summer of 2018, Verizon severely throttled the broadband internet" of the fire department, which prevented the department's equipment "from tracking, organizing, and prioritizing resources from around the state and country to where they are most urgently needed."<sup>188</sup> The County of Santa Clara concedes that Verizon reduced the speed of the fire department's broadband service because the fire department's account had exceeded its monthly data cap.<sup>189</sup> Although Verizon's established practice was to not enforce data speed restrictions on public safety users' plans during emergency situations, a

---

<sup>183</sup> The Commission adopted the *Comcast-BitTorrent Order*, which attempted to directly enforce federal Internet policy that it drew from various statutory provisions, in August 2008. *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices et al.*, File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008) (*Comcast-BitTorrent Order*). On April 6, 2010, the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's action, holding that the Commission had not justified its action as a valid exercise of ancillary authority. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*). The Commission adopted the *Open Internet Order* in December 2010, but it was not effective until some months later. *Open Internet Order*, 25 FCC Rcd 17905. The *Verizon* court decision was decided on January 14, 2014, and the *Title II Order* was not adopted until over a year later, on February 26, 2015, and became effective several months later. *See Title II Order*, 30 FCC Rcd at 5881, para. 585; *see also Restoring Internet Freedom Order*, 33 FCC Rcd at 451, para. 243.

<sup>184</sup> Notably, none of the claims arise from the time period prior to the existence of rules governing ISPs. *See Comcast Comments at 7. Cf. Restoring Internet Freedom Order*, 33 FCC Rcd at 375, para. 110 ("[I]t is telling that the *Title II Order* and its proponents in this proceeding can point only to a handful of incidents that purportedly affected Internet openness, while ignoring the two decades of flourishing innovation that preceded the *Title II Order*.").

<sup>185</sup> *See NCTA Reply at 6* ("Even for public safety entities that choose to use mass-market BIAS, there is no evidence of any public safety problems in the nearly two decades of delivering BIAS before it was reclassified to a Title II service in 2015.")

<sup>186</sup> *See, e.g., EFF Comments at 5; INCOMPAS Comments at 11; County of Santa Clara et al. Comments at 11.*

<sup>187</sup> *See, e.g., CTIA Comments at 19; NCTA Comments at 7; Verizon Comments at 17-18.* Notably, no commenter contested in their reply comments other commenters' claims that the incident would not have been prevented under the *Title II Order*. *See, e.g., County of Santa Clara et al. Reply* (not mentioning incident in reply comments despite raising it in their initial comments, *see County of Santa Clara et al. Comments at 11*); *Public Knowledge et al. Reply* (same, *see Public Knowledge et al. Comments at 7-8*); *BBIC Reply at 54* (discussing incident as evidence that ISPs will ignore safety concerns but not contending the incident would have been prevented by *Title II Order*).

<sup>188</sup> *County of Santa Clara et al. Comments at 11.*

<sup>189</sup> *County of Santa Clara et al. Comments at 11; see also USTelecom Comments at 11* ("The local government agency had subscribed to a non-mass-market, tiered data plan that included an unlimited amount of broadband data, but also specified that data speeds could be slowed if usage exceed a pre-set amount . . .").

customer service error led to the speed of the fire department's service being reduced despite this policy.<sup>190</sup> Verizon contends that once its management learned of the customer's complaint, Verizon "immediately and publicly addressed the situation, including by updating training for call center representatives to ensure that they are aware that they must promptly remove any data throughput limitations for first responders in an emergency."<sup>191</sup>

47. As an initial matter, the Santa Clara incident is not relevant to an analysis of the effect of the *Restoring Internet Freedom Order* on public safety. Because the fire department's service plan from Verizon was an enterprise plan rather than a mass-market service, it is not a broadband Internet access service under either the *Title II Order* or the *Restoring Internet Freedom Order*.<sup>192</sup> Even if the service plan had been a mass-market service, however, the record does not demonstrate that it would have run afoul of the *Title II Order*. Neither the classification of broadband Internet access service as a telecommunications service nor the *Title II Order*'s bright line rules prohibited data use caps such as the one in the fire department's service plan. In fact, the *Title II Order* specifically explained that "[a] broadband provider may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier."<sup>193</sup> Neither does the record demonstrate that the possibility of case-by-case review of data caps under the general conduct rule—with its uncertain outcomes—would have prohibited such plans.<sup>194</sup> Following the incident, to avoid another such error, Verizon took a number of steps, such as "updating training for call center representatives to ensure that they are aware that they must promptly remove any data throughput limitations for first responders in an emergency" and "introducing a new plan for public safety customers that eliminated any data speed restrictions for first responders, at no additional cost."<sup>195</sup> Thus, the issue was quickly addressed due to public awareness and market-based pressure on Verizon to take swift corrective action—precisely the mechanisms that we anticipated would be most effective under the *Restoring Internet Freedom Order*'s light-touch approach. Further, the record does not provide demonstrable evidence that the *Title II Order* regime would have resulted in any incremental benefit.<sup>196</sup>

48. We also disagree with ADT that two incidents from 2015 and 2016 warrant Commission rules prohibiting blocking and throttling of public safety-related services. ADT alleges an incident occurred in 2015, in which a number of its customers in Puerto Rico using a specific broadband provider suddenly lost the ability to use features of its home automation service that enables customers to control their alarm systems remotely or to access their video surveillance cameras, and another, similar incident

---

<sup>190</sup> See USTelecom Comments at 11.

<sup>191</sup> Verizon Reply at 18. That same week, Verizon introduced a new plan for public safety customers that eliminated any data speed restrictions for first responders, at no additional cost, and that gave other public safety customers two month' leeway before any throughput limitation would be enforced. *Id.*

<sup>192</sup> See Verizon Comments at 17-18.

<sup>193</sup> *Title II Order*, 30 FCC Rcd at 5652, para. 122.

<sup>194</sup> *Id.* at 5668-69, para. 153 (observing that data allowances and usage-based pricing "may benefit consumers" but ultimately "declin[ing] to make blanket findings about these practices" and instead "address[ing] concerns under the no-unreasonable interference/disadvantage on a case-by-case basis").

<sup>195</sup> Verizon Comments at 18.

<sup>196</sup> We disagree with Free Press's assertion that "Title II allowed the Commission to do more than just enforce those Net Neutrality rules. It also empowered the Commission to assess and prevent other forms of unjust or unreasonable behavior – which may well have included Verizon's decision to cap and throttle firefighters during an emergency . . ." See Free Press Comments at 19. It is undisputed that Verizon's plan with respect to Santa Clara County was not a broadband Internet access service offering; therefore, as discussed above, it would not have been subject to the Internet conduct rules under the *Title II Order*, including the no unreasonable interference/disadvantage standard.

occurred on the mainland in 2016.<sup>197</sup> We considered and rejected such concerns as a basis for conduct rules in the *Restoring Internet Freedom Order*, however, explaining that “it is unclear if the blocking was intentional and the blocking was resolved informally.”<sup>198</sup> ADT does not provide any new information here that justifies revisiting those observations. Further, we observe that ADT has not pointed to any such issues since the adoption of the *Restoring Internet Freedom Order*, consistent with our expectation that ISPs are unlikely to risk the reputational damage of engaging in such practices. In addition, our transparency rule requires ISPs to disclose such practices, which would enable alarm services companies like ADT to address such issues in a timely manner. Indeed, ADT itself recognizes that the currently mandated disclosures “provide a framework for ensuring that public safety and alarm company communications using broadband services are afforded protections against unintentional blocking or throttling, that they are informed of mechanisms to promptly restore services, including any repair or restoration performance metrics, and that they are provided contact information necessary to trigger ISP corrective actions.”<sup>199</sup> Relevant to its concerns about discrimination by ISPs with competing alarm monitoring services, ADT notes that ISPs have “stated commitments to refrain from engaging in unreasonable discrimination” and recognizes that “[f]ailure to comply with disclosed practices exposes ISPs to liability.”<sup>200</sup> Thus, we conclude that the incidents cited by ADT do not justify revisiting the regulatory approach we adopted in the *Restoring Internet Freedom Order*.

49. *Speculation Regarding Specific Forms of Harm.* We next review speculative claims in the record regarding various specific types of harm to public safety communications that allegedly could arise from the *Restoring Freedom Order*. In each case, we find no evidence that the form of harm at issue has occurred and conclude that such harm is unlikely to arise as a result of the *Restoring Internet Freedom Order*.

50. *Speculative Harm—Blocking and Throttling.* We disagree with commenters who assert that the *Restoring Internet Freedom Order* will lead to ISPs engaging in blocking and throttling practices that harm public safety.<sup>201</sup> As an initial matter, all major ISPs have made written commitments not to engage in practices considered to violate open Internet principles, including blocking and throttling.<sup>202</sup> Even in the absence of such commitments, as we previously found in the *Restoring Internet Freedom Order*, it is likely that “any attempt by ISPs to undermine the openness of the Internet would be resisted

---

<sup>197</sup> ADT Comments at 5.

<sup>198</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 468-70, para. 256 n.980.

<sup>199</sup> ADT Comments at 7.

<sup>200</sup> ADT Comments at 6; *see also id.* at 6-7 (observing that “the transparency rule requires disclosure of port blocking and ‘any practice’ that would favor an affiliate”); Alarm Industry Communications Committee Nov. 20, 2017 Comments (reflecting concerns about possible effects of light-touch regulation on commercial alarm services); ADT July 17, 2017 and August 30, 2017 Comments (same).

<sup>201</sup> *See, e.g.*, BBIC Comments at 14 (expressing concern that “current ISP practices including throttling those who use more than certain quantities of data to 2G speeds will interfere with education, public health access, and undercut public safety”); BBIC Reply at 72 (“The FCC’s Title I classification allows ISPs to demand extra payments for priority transmission or to be safeguarded from the ISPs intentional acts that manipulate priority.”); Greenlining Institute Reply at 7 (“Public safety communications’ include an extremely broad array of activities and services, and providers’ narrow interpretation could lead to the blocking or throttling of online activity that is critical to protecting public safety. The consequences of this blocking or throttling could result in injury or death.”); Public Knowledge et al. Comments at 8 (“The FCC’s reclassification leaves the FCC with no corrective tool to prevent carriers from throttling emergency services.”).

<sup>202</sup> *See, e.g.*, NCTA Comments at 7 (“All major broadband providers have now publicly made enforceable commitments not to engage in conduct that violates consensus open Internet principles.”); CTIA Comments at 6 (“Providers have made strong and legally enforceable commitments to maintain Internet openness.”); Comcast Comments at 6 (stating it has “long been committed to the core open Internet principles not to block, throttle, or unreasonably discriminate against any lawful Internet content”).

by consumers and edge providers.”<sup>203</sup> Consequently, ISPs lack an economic incentive to engage in practices such as blocking or throttling, especially when these practices may harm public safety.<sup>204</sup> As the D.C. Circuit explained, “the harms from blocking and throttling during a public safety emergency are irreparable.”<sup>205</sup> We agree, and as such note ISPs’ enforceable commitments against blocking and throttling,<sup>206</sup> and again note that such emergency communication often occur over specialized, non-mass market data services to maintain quality-of-service. We observe that the record lacks evidence of blocked or throttled public safety as a result of the reclassification of broadband Internet access service as an information service and the elimination of the Internet conduct rules. Thus, we find no basis on this record to conclude that ISPs have engaged or are likely to engage in blocking or throttling that cause harm to public safety in a manner that would have been prohibited under Title II.

51. Importantly, although proponents of Title II regulation express concern that a light-touch framework will lead to practices such as throttling and blocking,<sup>207</sup> the record does not contain even one recent example of such conduct harmful to public safety that would have been prohibited under Title II.<sup>208</sup> If unleashing ISPs from Title II regulation truly endangered public safety, then one would expect that this threat would have materialized in the more than two years that have passed since the *Restoring Internet Freedom Order* took effect. Instead, there has been no evidence that the anticipated harms have occurred,<sup>209</sup> or that ISPs plan to engage in blocking or throttling of public safety traffic.

52. Likewise, we find unpersuasive commenters’ concerns regarding the effect of service plans that limit data or speeds on members of the public who rely on mass market broadband Internet access services to access public safety information.<sup>210</sup> We observe that broadband service plans that limit

---

<sup>203</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 396, para. 142.

<sup>204</sup> See Comcast Comments at 7; USTelecom Comments at 7; NCTA Reply at 2.

<sup>205</sup> *Mozilla*, 940 F.3d at 62.

<sup>206</sup> Even if, as the County of Santa Clara et al. claims, “[i]t is difficult, if not impossible for governments to identify harm caused by violations of net neutrality principles,” we observe that it would be as difficult to detect violations of binding net neutrality rules as it is voluntary commitments. County of Santa Clara et al. Comments at 11. Cf. AT&T Reply at 9 (“[E]ven if ISPs could and did engage in widespread ‘violations of net neutrality principles’ without fear of detection, it is unclear what purpose would be served by supplementing transparency obligations with prescriptive behavioral rules; by hypothesis, those rules would never be enforced because the violations would never come to light.”).

<sup>207</sup> See, e.g., BBIC Comments at 14; BBIC Reply at 72; Greenlining Institute Reply at 7; Public Knowledge et al. Comments at 8; County of Santa Clara July 17, 2017 Comments (asserting that blocking, throttling, and paid prioritization threaten the effectiveness of the County’s various Internet-based programs protecting public safety); County of Santa Clara August 30, 2017 Reply at 4-8 (maintaining that public safety, emergency, healthcare, and social services rely on Internet services free from blocking, throttling, and paid prioritization).

<sup>208</sup> See, e.g., Verizon Reply at 15-16 (“As the Commission has already noted, these claims are ‘purely speculative’ and ‘hypothetical.’ . . . In fact, the evidence shows that an ISP blocking or throttling content to or from public safety websites, or engaging in paid prioritization that harmed such content, would be both operationally infeasible and economically irrational. The Transparency Rule — which requires providers to disclose their practices regarding blocking, throttling, affiliated prioritization, and congestion management for consumer broadband, and would include disclosure of any such practices affecting access to public safety websites — renders it all the more inconceivable that broadband providers would utilize any such scheme to the detriment of public safety. . . .”); USTelecom Comments at 7; ACA Connects Reply at 11; AT&T Reply at 6.

<sup>209</sup> See NCTA Reply at 6; Verizon Reply at 4; AT&T Reply at 6.

<sup>210</sup> BBIC Comments at 14 (raising concerns about ISPs “throttling those who use more than certain quantities of data to 2G”); see also, e.g., *id.* at 23 (observing that several victims of the 2019 California Camp Fire “filmed their evacuation as they fled the Camp Fire” and posted it on the Internet and that this information was important “as people sought evacuation routes while the Camp Fire raged.” (internal quotation marks omitted); *id.* (stating that

(continued....)

data or speeds were not prohibited even under the *Title II Order*; as such, we find the return of broadband Internet access service to its information services classification and elimination of the conduct rules irrelevant to the impact on the permissibility of throttling under a data plan when the data cap is exceeded.<sup>211</sup> We also observe that the record provides no evidence of any actual incidences of throttling or usage-based plan allowances that have harmed consumers' mass market broadband Internet access service communications in the public safety context.

53. We are similarly unpersuaded by commenters' concerns that public safety communications may be harmed if ISPs theoretically engaged in blocking or throttling practices because "transmissions from public safety officials" cannot "reliably be isolated and identified as governmental communications."<sup>212</sup> Because ISPs understand that broadband Internet access service is used for public safety communications,<sup>213</sup> they have strong incentives to act in accordance with their commitments to abide by open Internet principles for all communications, lest they risk reputational damage they might suffer if they were found to be hampering communications that have public safety implications. ISPs' successful response to the exponential network demands during the COVID-19 pandemic demonstrate their willingness and ability to act under a light-touch regulatory framework to protect and facilitate public safety communications during crises.

54. Taken together, these considerations persuade us that commenters' concerns that the regulatory approach of the *Restoring Internet Freedom Order* would lead to ISP blocking or throttling that causes harm to public safety are speculative and unlikely to occur. The dearth of real-world examples of public safety harms from blocking or throttling mass market broadband Internet access service bolsters our views discussed above that the transparency rule, coupled with consumer protection

---

"[s]tudents at Marjorie Stoneman Douglas High School in Parkland, Florida posted photos, videos, and texts from inside their school during the 2018 shooting").

<sup>211</sup> See *Title II Order*, 30 FCC Rcd at 5652, para. 122 ("[A] broadband provider may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier."); *id.* at 5668-69, para. 153 ("Given the unresolved debate concerning the benefits and drawbacks of data allowances and usage-based plans, we decline to make blanket findings about these practices and will address concerns under the no-unreasonable interference/disadvantage on a case-by-case basis.").

<sup>212</sup> BBIC Reply at 12; see also INCOMPAS Comments at 12 ("It is difficult to foresee how degrading access to a particular type of service or application could harm households and businesses during emergencies."); Open Technology Institute and Common Cause Comments at 5 ("[A]n ISP may not know that a residential customer is actually a city epidemiologist working from home on emergency efforts to contain the spread of COVID19."); County of Santa Clara Comments at 5 ("[P]ublic safety-related communications cannot be identified and treated differently because 21st Century public safety systems rely on myriad connections between and among public officials, members of the public, and public and private systems and platforms.").

<sup>213</sup> See, e.g., ACA Connects Comments at 5-7 (acknowledging the increased reliance on broadband networks for telework, classroom lessons, and medical care, which has "yielded tremendous public health and safety benefits by 'flattening the curve' of viral transmission"); Comcast Comments at 7 ("With unprecedented shifts in broadband usage and demand during this pandemic, ISPs like Comcast are working tirelessly to maintain robust service and ensure that all consumers remain connected."); CTIA Comments at 21 (explaining that "the increased connectivity available to consumers also plays a critical role in ensuring health and safety" and that "consumers regularly use their mobile devices and broadband Internet access connections to access broadly available information regarding threatening weather, shelter-in-place mandates, ongoing active-shooter scenarios, and other matter essential to public safety"); AT&T Reply at 4 ("There is widespread consensus among virtually all major commenters that broadband internet access is more critical than ever for a host of civic and social objectives, including public safety communications."); NCTA Reply at 5 ("[A]s all agree, broadband is crucial to public safety . . ."); USTelecom Reply at 5 (agreeing that "broadband is indeed essential – for education, healthcare, commerce, and of course public safety, as highlighted by the current public health crisis"); USTelecom Reply at 7 (recognizing that "public safety personnel such as volunteers or people working from home sometimes perform their duties using their personal mass-market broadband accounts"); Verizon Reply at 10 (explaining that Verizon is "committed to supporting its public safety customers to the extent stay-at-home orders have required them to carry out their health and safety responsibilities remotely").

and antitrust laws—especially when further coupled with the particular reputational harms likely to arise were ISPs to block or throttle traffic in a way that harmed public safety—substantially reduce the likelihood of such conduct occurring in the first instance. And scenarios of concern to commenters involving service plans with data caps or speed limits would not have been addressed differently under the Title II regime in any event. As a result, these speculative concerns do not justify altering our regulatory approach in the *Restoring Internet Freedom Order*.

55. *Speculative Harm—Paid Prioritization.* We are unpersuaded by commenters who assert that the *Restoring Internet Freedom Order* will result in ISPs engaging in harmful paid prioritization practices that will have an adverse effect on public safety.<sup>214</sup> The Commission has long recognized and permitted prioritization of public safety communications. For decades, National Security and Emergency Preparedness (NSEP) personnel<sup>215</sup> have had access to priority services programs that leverage access to commercial voice communications infrastructure to support national command, control, and communications by providing prioritized connectivity during national emergencies.<sup>216</sup> The Commission recently proposed to update its rules to expand the scope of the priority services programs to include data, video, and IP-based voice services.<sup>217</sup> As the variety and volume of dedicated services for prioritization of public safety traffic demonstrate, prioritization of public safety communications is critically important to protecting life and property, and nothing in our rules currently prevents service providers from prioritizing public safety communications.<sup>218</sup> Moreover, the Commission’s proposals, should they be

---

<sup>214</sup> See, e.g., BBIC Comments at 38; California Public Utilities Commission (California PUC) Comments at 6; Free Press Comments at 17.

<sup>215</sup> “NSEP personnel” generally refers to individuals who are responsible for maintaining a state of readiness or responding to and managing any event or crisis (local, national, or international), which causes or could cause injury or harm to the population, damage to or loss of property, or degrades or threatens the NSEP posture of the United States. See 47 CFR pt. 64, Appx. A § 3(f); *id.* Appx. B § 2(d)(4)(e).

<sup>216</sup> This prioritized connectivity may consist of prioritized provisioning and restoration of wired communications circuits or prioritized communications for wireline or wireless calls. The current priority services programs were established pursuant to Executive Order 12472, issued in 1984, which called for development of priority services programs to facilitate communications among top national leaders, policy makers, military forces, disaster response/public health officials, public utility services, and first responders. See Exec. Order No. 12472, 3 CFR 193 (1985). The Commission’s rules for the current priority services programs date back to the establishment of the Telecommunications Service Priority (TSP) System in 1988 and the creation of the Priority Access Service (PAS), more commonly referred to as Wireless Priority Service (WPS), in 2000. See *National Security Emergency Preparedness Telecommunications Service Priority System*, Gen. Docket No. 87-505, Report and Order, 3 FCC Rcd 6650, 6672-81 (1988) (*TSP Order*); *Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Agency Communication Requirements through the Year 2010*, WT Docket No. 96-86, Second Report and Order, 15 FCC Rcd 16720 (2000) (*PAS Order*). As the Commission explained when it classified wireline broadband Internet access service as an information service, for example, the “classification of wireline broadband Internet access service as an information service, . . . will not affect the Commission’s existing rules implementing the National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System.” *Wireline Broadband Classification Order*, 20 FCC Rcd at 14917, para. 116. In any case, even assuming *arguendo* that classification of broadband Internet access service as a telecommunications service otherwise might have affected the application of these rules—such that obligations under those rules newly would have applied as a result of that classification—that outcome did not actually result from the *Title II Order* given the forbearance granted there. See, e.g., *Title II Order*, 30 FCC Rcd at 5858-60, para. 528. We recently sought comment on updating and revising our rules governing the priority services programs. See *generally Priority Services Notice*, 35 FCC Rcd 7685.

<sup>217</sup> *Priority Services Notice*, 35 FCC Rcd at 7694, para. 24.

<sup>218</sup> Even the *Title II Order* acknowledged that public safety could benefit from traffic prioritization without running afoul of the bright-line rules in effect at the time, noting that “traffic prioritization, including practices that serve a public safety purpose, may be acceptable under our rules as reasonable network management.” *Title II Order*, 30 FCC Rcd at 5653, para. 125, n.284; see also *id.* at 5732, para. 302 (“[I]n connection with an emergency, there may

(continued....)



adopted, could provide an additional avenue to ensure that public safety communications are appropriately prioritized. As Free State Foundation explains, “[s]haring 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.”<sup>219</sup>

56. The Commission explained in the *Restoring Internet Freedom Order* that “we expect that eliminating the ban on paid prioritization will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefiting consumers and competition.”<sup>220</sup> We see no basis for departing from this reasoning in the public safety context.<sup>221</sup> Concerns expressed by commenters regarding potential adverse effects to public safety as a result of paid prioritization of non-public safety communications appear to be purely hypothetical at this point.<sup>222</sup> Indeed, even as the country faces an unprecedented crisis, the harms predicted by such commenters have not materialized.<sup>223</sup> Moreover, ISPs have made clear, enforceable written commitments to their customers

---

be federal, state, tribal, and local public safety entities, homeland security personnel, and other authorities that need guaranteed or prioritized access to the Internet in order to coordinate disaster relief and other emergency response efforts, or for other emergency communications. Most commenters recognize the benefits of clarifying that these obligations are not inconsistent with open Internet rules.”); *see also* Comcast Comments at 8-9.

<sup>219</sup> Free State Foundation Comments at 7-8.

<sup>220</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 456, para. 253.

<sup>221</sup> *See, e.g.*, Bret Swanson Reply at 4 (asserting that paid prioritization offerings could be “especially crucial for public safety” and that “[p]rohibiting technical and data products – existing and future – would not only reduce the specific technical capabilities of today’s networks, but it could also depress the long-run advance of network capacity and innovation”); ICLE Comments at 22 (The availability of prioritization as a service creates a mechanism by which the developers of applications used for public safety—or other high-priority functions—can identify themselves to network operators. Indeed, this would facilitate joint development opportunities where the network operators may be able to help optimize the design of specific applications for real-world network environments.”); R Street Institute Comments at 4 (“With the blanket ban on paid prioritization removed, broadband providers will have increased freedom to experiment with these network-management practices and develop new devices and services that can be used to support public safety”); Free State Foundation Comments at 8 (asserting that “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”).

<sup>222</sup> *See, e.g.*, Comcast Reply at 8-9 (asserting that the concern about prioritization harming public safety communications is a “red herring” because ISPs do not engage in paid or affiliate prioritization); CTIA Reply at 11 (“[N]o party has supplied evidence of any incidents of paid prioritization, either before or after the [*Restoring Internet Freedom Order*] took effect. Given that paid prioritization has been lawful for the great majority of the past 25 years, but has not occurred, and given the significant commercial and market disincentives for a provider engaging in it in the future, the Commission can reasonably conclude that there is little chance of such prioritization manifesting in any material way, let alone in any way that would pose any meaningful risk to public safety”); AT&T Reply at 8 n.5 (observing ISPs have not engaged in paid prioritization for “economic and technological reasons”); Comcast Comments at 2 (observing that paid priority, among other practices, have “not materialized in the many years that the information service classification of BIAS has been in effect”).

<sup>223</sup> We note that paid prioritization arrangements are ubiquitous throughout our economy. As Free State Foundation explains, “[b]oth 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 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

(continued....)

not to engage in paid prioritization.<sup>224</sup> We also observe that our theories in the *Restoring Internet Freedom Order* for when paid prioritization might be used contemplated fairly narrow scenarios that are unlikely to be the kind of pervasive practices feared in the *Title II Order*, and the record here does not undercut that assessment.<sup>225</sup> In particular, we rejected assertions that allowing paid prioritization would lead ISPs to create artificial scarcity on their networks by neglecting or downgrading non-paid traffic or public safety communications, creating a widespread need for, and purchase of, paid prioritization arrangements.<sup>226</sup> Instead, we anticipated paid prioritization being used to address innovative, but ultimately targeted, scenarios.<sup>227</sup> In addition, a number of ISPs question the likelihood and prevalence of paid prioritization arrangements actually occurring in practice.<sup>228</sup> Given those considerations, neither scarcity of network resources nor instances of paid prioritization are likely to be anywhere as pervasive as feared by proponents of the *Title II Order*, particularly to the point of adversely impacting public safety communications. Further, as AT&T points out, the *Title II Order* did not ban all prioritization.<sup>229</sup> That Order expressly permitted direct interconnection between ISPs and content delivery networks, which act as agents for paying content providers.<sup>230</sup> The *Title II Order* also made clear that certain categories of service, such as “enterprise” services and those services considered “non-BIAS services,” were not subject to the Order’s restrictions.<sup>231</sup> Finally, under the *Title II Order*, the Commission was authorized to grant waivers of the paid priority ban where the petitioner could demonstrate that “the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.”<sup>232</sup> We thus conclude that the scenarios of potential concern for public safety communications are much narrower than commenters fear.<sup>233</sup> As a result, such concerns do not alter our decision to retain the regulatory framework of the *Restoring Internet Freedom Order*.

---

effects of paid prioritization arrangements and to thereby better fulfill their duties to the public.” Free State Foundation Comments at 7-8. *See also Restoring Internet Freedom Order*, 33 FCC Rcd at 458-59, para. 255 (“Indeed, in other areas of the economy, paid prioritization has helped the entry of new providers and brands. It is therefore no surprise that paid prioritization has long been used throughout the economy.”).

<sup>224</sup> *See Comcast Comments* at 6 (“Comcast’s and other ISPs’ open Internet disclosures make . . . clear . . . that they do not engage in paid prioritization or affiliate prioritization.”); *NCTA Comments* at 7 (“All major providers have now made publicly enforceable commitments not to engage in conduct that violates open Internet principles.”).

<sup>225</sup> *See Restoring Internet Freedom Order*, 33 FCC Rcd at 462-63, para. 258 (explaining that “in practice paid prioritization is likely to be used to deliver enhanced service for applications that need QoS guarantees”).

<sup>226</sup> *Id.* at 462-63, para. 258.

<sup>227</sup> *See, e.g., id.* at 457-59, paras. 254-55 (noting examples of services that need high quality of service, such as “remote health-care monitoring, health service delivery by mobile networks, and connected vehicle technologies” as well as high definition videoconferencing, and multi-player online gaming).

<sup>228</sup> *See, e.g., Comcast Reply* at 8-9; *CTIA Reply* at 11; *AT&T Reply* at 8 n.5; *Comcast Comments* at 2.

<sup>229</sup> *AT&T Reply* at 8 n.5.

<sup>230</sup> *Title II Order* at 5657, para. 128 (“We . . . clarify that that the ban on paid prioritization does not restrict the ability of a broadband provider and [content delivery network] to interconnect.”); *see AT&T Reply* at 8 n.5.

<sup>231</sup> *Title II Order*, 30 FCC Rcd at 5683, 5698, paras. 189-90, 207-13.

<sup>232</sup> *Id.* at 5658, para. 130.

<sup>233</sup> *Cf., e.g., BBIC Comments* at 18-19 (“The FCC and reviewing courts must recognize that ISP throttling of some traffic to accommodate paid priority can result in telemedicine, education, energy, and other communications *failing*, not just in delayed transmission.”); *id.* at 38 (“Video conferencing, VoIP, and streaming services are designed to withstand a certain degree of signal degradation compensation, but paid priority could reduce those services below the established thresholds.”); *California PUC Comments* at 6 (“Allowing ISPs to engage in paid prioritization deals with energy suppliers undercuts the ability of regulatory agencies to ensure oversight and compliance with California’s wholesale electric power markets.”); *Free Press Comments* at 17 (“Paid prioritization arrangements would not be beneficial for first responders that do rely on mass-market broadband connections, many

(continued....)

57. We are unpersuaded by assertions that permitting paid prioritization practices that were impermissible under the *Title II Order* will necessarily lead to degradation of public safety communications.<sup>234</sup> Such commenters “mistakenly believe that QoS is a zero-sum game, one in which it is impossible to tailor the management of network resources to the needs of specific organizations and applications without impairing those not so managed.”<sup>235</sup> As we already concluded in the *Restoring Internet Freedom Order*, “‘prioritizing the packets for latency-sensitive applications will not typically degrade other applications sharing the same infrastructure,’ such as email, software updates, or cached video.”<sup>236</sup> The record here supports a similar conclusion for a wider array of applications, as well. As Rysavy Research explains, for example, “prioritizing one application over another does not necessarily mean a poorer experience for the lower-priority applications. A video streaming application can tolerate considerable delay because the player buffers information, so a user watching a video will never notice some slightly-delayed data. . . . Because different applications have different needs, traffic management is not a zero-sum game.”<sup>237</sup> As such, we find that commenters’ concerns that the *Restoring Internet Freedom Order* will lead to reduced speed for customers that do not pay extra for paid prioritization, resulting in harms to public safety, are not well-founded.

58. *Speculative Harm—Communications by Individuals with Disabilities.* We are not persuaded by the claims of some commenters that the regulatory approach adopted in the *Restoring Internet Freedom Order* would detrimentally effect the safety of life and property for persons with disabilities.<sup>238</sup> Consistent with the Commission’s commitment to communications services for individuals

---

of which would not be able to afford prioritization and would be more likely degraded by prioritization arrangements that benefit other entities.”); Professor Catherine Sandoval Aug. 30, 2017 Reply at 25-33 (detailing concerns that paid prioritization would undermine national safety and security); California PUC July 17, 2017 Comments at 29 (arguing that the “absence of strong anti-discriminatory rules could undermine critical infrastructure and public safety” and that “without non-discriminatory rules, providers of emergency services or public safety agencies might have to pay extra for their traffic to have priority”).

<sup>234</sup> See, e.g., Peha Comments at 2; EFF Comments at 5 (“[P]rioritization operates by slowing down competing traffic, not somehow boosting desired traffic”); Free Press Comments at 17; BBIC Comments at 8; BBIC Comments at 35-45.

<sup>235</sup> Richard Bennett Comments at 4; Richard Bennett Reply at 8.

<sup>236</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 462-63, para. 258.

<sup>237</sup> Rysavy Research Comments at 2; see also Broadband Internet Technical Advisory Group, *Differentiated Treatment of Internet Traffic*, October 2015, available at [https://www.bitag.org/documents/BITAG\\_-\\_Differentiated\\_Treatment\\_of\\_Internet\\_Traffic.pdf](https://www.bitag.org/documents/BITAG_-_Differentiated_Treatment_of_Internet_Traffic.pdf) (cited in How Title II Net Neutrality Undermines 5G, Rysavy Research (2019) at 7 n.4 (attachment to Rysavy Research Comments)), (“For example, some differentiation techniques improve the Quality of Service (QoS) or Quality of Experience (QoE) for particular applications or classes of applications without negatively impacting the QoE for other applications or classes of applications.”); Richard Bennett Comments at 4 (stating that “Title II proponents mistakenly believe that QoS is a zero-sum game, one in which it is impossible to tailor the management of network resources to the needs of specific organizations and applications without impairing those not so managed” but “[t]he imagination that can conceive of scenarios in which this is the case can also find the more abundant scenarios in which it is not”); Richard Bennett Reply at 8-12.

<sup>238</sup> See, e.g., California PUC Comments at 10-12; BBIC Reply at 56-59. BBIC contends that “[t]hese issues fall within the *Mozilla v. FCC* remand to examine public safety issues since the inability of people with disabilities to enjoy unfettered Internet access without ISP interference and the ability of employers and universities to comply with their duties under the ADA and § 504 of the Rehabilitation Act of 1973 affects whether the person with disabilities can receive services at their residence or must travel to places or work or study, factors that implicate safety of life and health.” BBIC Reply at 59. We consider these arguments insofar as they relate to the public safety remand in *Mozilla*. To the extent that these comments raise other issues related to the effect of the *Restoring Internet Freedom Order*’s regulatory approach on persons with disabilities, see, e.g., California PUC Comments at 10-12 (making various arguments divorced from the three remanded issues); BBIC Reply at 56-59 (similar), we do not reopen those issues from the *Restoring Internet Freedom Order* here and thus reject the arguments as outside the scope of this proceeding.

with disabilities,<sup>239</sup> we conclude that the regulatory approach established in the *Restoring Internet Freedom Order* ultimately benefits public safety communications by individuals with disabilities in the same manner as public safety communications more generally—by encouraging competition and deployment. Further, as held in the *Restoring Internet Freedom Order*, the regulatory approach adopted there does not significantly alter the regulatory landscape of statutory protections for communications by persons with disabilities.<sup>240</sup>

59. In substantial part, the concerns raised about potential public safety harm to persons with disabilities are the same harms commenters raise with respect to the public more generally from potential blocking, throttling, or paid prioritization—that users’ broadband Internet access service-based communications services needed for public safety reasons might be hindered by such ISP conduct and/or that users might pay more for broadband Internet access services with capabilities that avoid such harms.<sup>241</sup> To the extent that commenters simply raise the same concerns that we have considered and found unpersuasive in the case of the public more generally, we likewise reject them in the specific context of persons with disabilities for the same reasons.

60. Nor does the record persuade us that there are likely public safety harms in connection with services used specifically by persons with disabilities as a result of the regulatory approach adopted in the *Restoring Internet Freedom Order*. The California Public Utilities Commission (California PUC) contends that persons with disabilities “increasingly rely upon Internet-based video communications, both to communicate directly (point-to-point) with other persons who are deaf or hard of hearing who use sign language, and through video relay service,” and that “[t]hese applications often require significant bandwidth, making their use particularly sensitive to data caps and network management practices.”<sup>242</sup> As to data caps, however, neither the classification of broadband Internet access service as a telecommunications service nor the *Title II Order*’s bright line rules prevented such caps.<sup>243</sup> Nor does the record demonstrate that the possibility of case-by-case review of data caps—with its uncertain outcomes—would meaningfully address commenters’ hypothetical public safety concerns that data caps would hinder the functionality of services relied upon by persons with disabilities for public safety-related

---

<sup>239</sup> See, e.g., *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities*, Report and Order, 35 FCC Rcd 831 (2020); *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities*, Report and Order, 34 FCC Rcd 11265 (2019); *Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd 8483 (2019); *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities*, Declaratory Ruling, 35 FCC Rcd 7017 (CGB 2020); *FCC Announces Anticipated Renewal of Its Disability Advisory Committee and Solicits Applications For Membership on the Committee*, Public Notice, 35 FCC Rcd 6973 (CGB 2020); *Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, Order, 35 FCC Rcd 6649 (CGB 2020); *Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, Order, 35 FCC Rcd 6432 (CGB 2020).

<sup>240</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 432-33, para. 205 (explaining how “[t]he Communications Act provides the Commission with authority to ensure that consumers with disabilities can access broadband networks regardless of whether broadband Internet access service is classified as a telecommunications service or information service”).

<sup>241</sup> See, e.g., BBIC Reply at 56-59.

<sup>242</sup> California PUC Comments at 10; see also, e.g., *Telecommunications for the Deaf and Hard of Hearing et al. Comments*, WC Docket No. 17-108, at 2-7 (filed July 17, 2017) (discussing video communications applications used for critical communications and expressing concerns about bandwidth and data caps).

<sup>243</sup> See, e.g., USTelecom Comments at 11.

communications.<sup>244</sup> We do recognize that the use of broadband Internet access service to facilitate video communications by persons with disabilities is distinct from the specific types of applications “such as email, software updates, or cached video” that the *Restoring Internet Freedom Order* identified as typically unlikely to be degraded by prioritization of latency-sensitive applications on the same facilities.<sup>245</sup> But we do not find the likely effects on these services meaningfully different than our public safety analysis of the other video communications applications potentially used by the public more generally as raised by commenters in the record here.<sup>246</sup> Indeed, there is no evidence of such harm occurring since the *Restoring Internet Freedom Order* took effect. Consequently, we reject public safety concerns about video applications used by persons with disabilities for the same reasons we reject public safety concerns raised in connection with other latency-sensitive over-the-top services used by the public more generally for public safety purposes. Although the record does not persuade us of likely public safety harms to communications involving persons with disabilities using video communications over broadband Internet access service, should such evidence emerge we have authority to act consistent with the regulatory approach to broadband Internet access service adopted in the *Restoring Internet Freedom Order*. As we held in the *Restoring Internet Freedom Order*, the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) “directed the Commission to enact regulations to prescribe, among other things, that networks used to provide” advanced communications services (ACS), which includes electronic messaging and interoperable video conferencing services, “may not impair or impede

---

<sup>244</sup> *Title II Order*, 30 FCC Rcd at 5668-69, para. 153 (observing that data allowances and usage-based pricing “may benefit consumers” but ultimately “declin[ing] to make blanket findings about these practices” and instead “address[ing] concerns under the no-unreasonable interference/disadvantage on a case-by-case basis”). Commenters do not explain why they think the application of that case-by-case review would have addressed any theoretical concerns about public safety communications involving persons with disabilities.

<sup>245</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 462-63, para. 258. In addition to the video communications services cited by the California PUC, BBIC cites educational tools for persons with disabilities: “Remote Real-time Captioning for classes, E-Text through Bookshare.org (Accessing and Downloading Accessible Text Books) and the ability to access and download software including dictation software, screen readers, and Text To Speech Softwares.” BBIC Reply at 59. As a threshold matter, the nexus to public safety is unclear, particularly as it relates to the use of broadband Internet access service by persons with disabilities to download books and software. We also find that downloading books and software are likely akin to the non-latency-sensitive uses of broadband Internet access service that the Commission already held unlikely typically to be affected by prioritization of other traffic, and the record here does not demonstrate otherwise. *Restoring Internet Freedom Order*, 33 FCC Rcd at 462-63, para. 258. With respect to “Remote Real-time Captioning for classes,” we are not persuaded that any public safety implications are materially different for that use of broadband Internet access service than for others, like video communications, discussed in the text. To the extent that BBIC’s concern is about blocking or throttling of traffic, the Commission already rejected the likelihood of that in the *Restoring Internet Freedom Order*, and we do not revisit that conclusion here. Nor are we persuaded that there are public safety implications for these specific uses of broadband Internet access service cited by BBIC that cannot adequately be addressed, if needed, through the marketplace or other laws given that their nature and context does not appear to involve the need for immediate communications to address imminent threats to life or property. *Compare, e.g., Restoring Internet Freedom Order*, 33 FCC Rcd at 465-70, paras. 261-66 (discussing the role of the marketplace and legal protections that remain) *with Mozilla*, 940 F.3d at 62 (questioning the adequacy of such marketplace and legal protections in the public safety context when “lives are at stake” and “[p]eople could be injured or die”).

<sup>246</sup> *See, e.g.,* APCO Comments at 2 (referencing “streaming video into 9-1-1 and emergency operations centers”); MMTc *et al.* Comments at 2 (stating that consumers “video conference with their health care provider”); BBIC Reply at 14-15 (discussing the use of videoconferencing for telemedicine); BBIC Reply at 29 (stating that “[t]he Santa Clara County Fire Safe Council is holding meetings via Zoom video conferencing during the COVID-19 State of Emergency”); BBIC Reply at 43 (contending that a “massive shift to video conferencing for education has been undertaken to protect safety of life and property” in light of COVID-19); Karuk Tribe Reply at 1 (stating that “[m]ost telemedicine services available to patients require videoconferencing”).

the accessibility of information content when accessibility has been incorporated into that content for transmission through . . . networks used to provide [ACS].”<sup>247</sup>

61. We also are not persuaded by commenters’ claims that ISP conduct will lead to violations of laws establishing protections for persons with disabilities.<sup>248</sup> As a threshold matter, the nexus between those concerns and public safety issues (or any other remanded issue) is far from clear—and to the extent commenters raise issues lacking a nexus to the remanded issues, we reject them as beyond the scope of this proceeding. Independently, the record does not demonstrate that the regulatory approach adopted in the *Restoring Internet Freedom Order* will lead to the violation of the laws cited by commenters. Commenters express vague concerns about the potential violation of section 225 of the Act, which calls for the Commission to establish Telecommunications Relay Services (TRS) to provide certain persons with disabilities communications services that are functionally equivalent to voice telephone service.<sup>249</sup> The Commission’s rules define the standards that providers subject to section 225 must meet.<sup>250</sup> Although some TRS services are carried via broadband Internet access service, commenters do not explain how the regulatory approach in the *Restoring Internet Freedom Order* will preclude providers subject to section 225 from complying with the Commission’s rules implementing section 225. We also see no basis in this record to conclude that our policy discretion under section 225 of the Act to revise our TRS rules to reflect evolving standards over time would be materially affected under the regulatory approach adopted in the *Restoring Internet Freedom Order*.

62. Commenters’ arguments also are flawed insofar as they focus not on violations of laws by the ISPs themselves but on the theory that ISPs’ conduct might make it harder for third parties to comply with their obligations under laws protecting individuals with disabilities.<sup>251</sup> For one, the record does not demonstrate that such effects on third party compliance are likely. Independently, we are not persuaded that such speculative concerns would provide a sound basis upon which to revisit the regulatory approach of the *Restoring Internet Freedom Order*. Even assuming *arguendo* that certain regulation of ISPs could make it easier for third parties to comply with those third parties’ statutory obligations, the net result would be to shift compliance burdens away from the parties actually subject to the statutory duties and onto the ISPs. In effect, such regulation would require ISPs to implicitly

---

<sup>247</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 432-33, para. 205 (quoting 47 U.S.C. § 617(e)(1)(B)).

<sup>248</sup> See, e.g., California PUC Comments at 11 (arguing that “[r]eclassifying broadband to an information service adversely impacts the ability to provide functionally equivalent telecommunication services to vulnerable customers” contrary to section 225 of the Act and that “[t]he FCC should further explain how this change does not violate the Americans with Disabilities Act”); BBIC Reply at 57-59 (reiterating the California PUC’s concerns and raising the potential for violations of the ADA, the Rehabilitation Act of the 1973, and tort laws).

<sup>249</sup> 47 U.S.C. § 225(a)(3).

<sup>250</sup> 47 U.S.C. § 225(c); *Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities*, Order on Reconsideration, 21 FCC Rcd 8050, 8057, para. 15 (2006) (“As the Commission explained, TRS providers are obligated to provide functionally equivalent service, and that functionality is defined by the applicable mandatory minimum standards.”); *Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035, 1042 (10th Cir. 2011) (“Section 225 does not define ‘functionally equivalent’ and therefore leaves the definition to the FCC. . . . Consistent with this authority, the FCC has determined that ‘functional equivalency is met when the service complies with the mandatory minimum standards applicable to the specific service.’”).

<sup>251</sup> See, e.g., BBIC Reply at 58-59 (expressing concern about “the effect on educational costs and compliance with 504 of the Rehabilitation Act of 1973 raised by ISP demands that universities or colleges pay extra for their students with disabilities to have fast Internet access or not face ISP-induced slowdowns that interfere with education as well as receipt of health and safety services” and contending that “the ability of employers and universities to comply with their duties under the ADA and §504 of the Rehabilitation Act of 1973 affects whether the person with disabilities can receive services at their residence or must travel to places or work or study, factors that implicate safety of life and health”).

subsidize the compliance costs of the entities actually subject to the statutory duties. We are not persuaded that would be an appropriate basis for regulation.<sup>252</sup>

63. Finally, we are unpersuaded by BBIC's assertion that provider conduct no longer prohibited by the regulatory approach in the *Restoring Internet Freedom Order* might violate the ADA's "prohibit[on on] interference with rights granted under the ADA statute" or "raise state law tort issues such as claims for prospective interference with business advantage."<sup>253</sup> BBIC does not explain why the theoretical potential for a provider's conduct to violate any such requirements is, in itself, a reason to return to the regulatory approach of the *Title II Order*.<sup>254</sup> In other words, even assuming *arguendo* that certain provider conduct already is prohibited by a law like the ADA's prohibition on interference, the record does not reveal any public safety benefit from the Commission separately and independently regulating broadband Internet access service providers simply to ensure they comply with obligations they already otherwise are subject to by law. Finally, the record does not reveal any additional public safety concerns that would arise from the speculative claimed violation of these laws, independent of the concerns about the public safety effects of ISPs' pricing and network management practices that we already considered and rejected above.<sup>255</sup>

64. *Speculative Harm—Critical Infrastructure.* We disagree that the elimination of the Internet conduct rules will impact the safety and reliability of "critical infrastructure sectors,"<sup>256</sup> including

---

<sup>252</sup> Cf. *Reminder That Video Relay Service (VRS) Provides Access To The Telephone System Only and Cannot Be Used As A Substitute For "In-Person" Interpreting Services Or Video Remote Interpreting (VRI)*, Public Notice, 20 FCC Rcd 14528, 14529 (CGB 2005) (explaining that "employers, state and local government entities, and public accommodations" may not attempt to satisfy their own obligations "under the ADA to provide persons with hearing disabilities a reasonable accommodation, [which] may entail the use of a sign language interpreter" by relying on federally-supported video relay service "as a substitute for using an in-person interpreter or VRI in situations that would not, absent one of the parties' hearing disability, entail the use of the telephone").

<sup>253</sup> BBIC Reply at 58-59.

<sup>254</sup> Not only is the potential for violations theoretical, but BBIC has not sufficiently articulated a potential legal violation. We thus reject BBIC's assertion that "[t]he FCC must explain its analysis of whether the ADA interference statute is violated by ISP demands for payment for fast Internet access for additional payments or at risk of slowdown of the data or vital services including telemedicine for persons with disabilities." BBIC Reply at 58.

<sup>255</sup> Indeed, one concern raised by the California PUC appears even further removed, insofar as it expresses concern about the loss of "copper wires which carry 911, closed captioning and TTY services." California PUC Comments at 11. Neither the definition nor classification of broadband Internet access service is tied to the physical medium—copper vs. fiber—over which it is provided, however, nor does the California PUC give any indication of how the *Title II Order* would have addressed its concerns about the loss of copper network facilities better (or at all).

<sup>256</sup> Commenters cite various federal laws or statements of policy regarding critical infrastructure in general or the use of the Internet and other communications technologies as part of those sectors. See, e.g., California PUC Comments at 3-4 (discussing the Energy Policy Act of 2005, the Critical Infrastructures Protection Act of 2001, the Department of Homeland Security's identification of critical infrastructure sectors, and Presidential Executive Orders 13010 and 13800); BBIC Reply at 60-62 (discussing the Critical Infrastructures Protection Act of 2001, the Cybersecurity and Infrastructure Security Agency's identification of critical infrastructure sectors, and Presidential Executive Order 13800). In some cases, the cited materials appear to adopt principles or requirements specific only to the implementation of those statutes or involve communications services generally in a way that extends far beyond the scope of this proceeding. See, e.g., California PUC Comments at 3-4 (citing language in the Energy Policy Act of 2005 stating that that Act will not preempt state law except in certain respects); *id.* at 4 (stating that "[a]ccess to communications and Internet services is essential to functioning in the modern economy, and is embedded in many critical sector services" and citing 42 U.S.C. § 5195c); *id.* (citing the Cybersecurity and Critical Infrastructure Executive Order as "adopt[ing] . . . the policy of 'an open, interoperable, reliable, and secure internet that fosters efficiency, innovation, communication, and economic prosperity, while respecting privacy and guarding against disruption, fraud, and theft'"); *id.* at 4 n.10 (noting that critical infrastructure sectors had been identified in the Critical Infrastructures Protection Act of 2001, in an Executive Order, and by DHS); BBIC Reply at 61 (stating that "President Trump's Executive Order on Cybersecurity and Critical Infrastructure recognizes the essential role of

(continued....)

electric, gas, water, and communications utilities, “which in turn negatively impacts public safety,” as claimed by some commenters.<sup>257</sup> Commenters’ concerns about critical infrastructure-related risks are premised on the same ISP conduct that underlie commenters’ public safety concerns more generally—blocking, throttling, and paid prioritization—which we find unlikely to occur for the reasons already discussed above. As we found, the effects of ISP conduct involving paid prioritization, should they occur, are unlikely to detrimentally affect applications used for public safety purposes generally, and the record does not justify a different conclusion in the case of the applications cited by commenters in connection with critical infrastructure. Nor is there evidence of such harm occurring since the *Restoring Internet Freedom Order* took effect.

65. Although commenters discuss various applications that arguably have at least some nexus to critical infrastructure protection, the record does not reveal technical details regarding the operation of any of those applications that demonstrates that they would be significantly affected by ISP network management, let alone in a way that would have been prohibited by the rules adopted in the *Title II Order*.<sup>258</sup> Nor is it even clear that all of the cited applications rely on mass market broadband Internet

---

Internet and communications services to Critical Infrastructure”); *id.* at 62 (quoting the Cybersecurity and Critical Infrastructure Executive Order as describing the Critical Infrastructures Protection Act as requiring “federal and private sector work and collaboration to protect ‘systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters’”). To the extent that those laws and policies bear on the issues in this proceeding, the record does not persuade us that more is required than the consideration we give those issues here. Nor is our analysis altered by references to “state laws making the interference with administration of government an offense ranging from a civil to a criminal misdemeanor—or felony.” BBIC Reply at 65. The record is not sufficiently developed on these legal standards and their potential application to any provider conduct that theoretically could raise public safety concerns for us to formally opine on them here, and in any case BBIC does not explain why the theoretical potential for a provider’s conduct to violate any such requirements is, in itself, a reason to return to the regulatory approach of the *Title II Order*.

<sup>257</sup> California PUC Comments at 3-8; *see also, e.g.*, BBIC Comments at 7-11; BBIC Reply at 60-66. To the extent that commenters raise other issues, such as concerns about the economic regulation of the energy industry or energy conservation, we are not persuaded of the nexus with public safety and reject such arguments as beyond the scope of the proceeding. *See, e.g.*, California PUC Comments at 6 (contending that particular paid prioritization arrangements could “conflict with Federal Energy Regulatory Commission rules prohibiting anticompetitive conduct designed to limit market power and ensure the efficient operation of regulated markets”); BBIC Reply at 63 (discussing technologies that “forestall the need to build fossil-fueled power plants, promote environmental sustainability, and manage energy resources”). The California PUC also cites its efforts to “adopt[] a number of emergency customer protection measures to support residential and small business customers of utilities affected by disasters,” stating that these come in the aftermath of a disaster and involve what it asserts without elaboration are “vital communications services.” California PUC Comments at 9. The actual nexus between the California PUC’s customer protection measures and protection of critical infrastructure or public safety more generally is unclear on this record. And the California PUC’s concern in this regard appears to center on arguments certain providers made objecting to its regulations, among many other grounds, on the basis of the preemption portion of the *Restoring Internet Freedom Order*. California PUC Comments at 9-10 & n.25. These arguments appear to have been made prior to the *Mozilla* court vacating that portion of the *Restoring Internet Freedom Order*—a fact the California PUC does not address—and otherwise remain unresolved. We thus are not persuaded that these arguments demonstrate a public safety harm arising from the *Restoring Internet Freedom Order*’s regulatory approach.

<sup>258</sup> *See, e.g.*, California PUC Comments at 7 (explaining that “[d]uring high temperatures or when fire or other emergencies make conservation urgent, demand response can be used by utilities to send signals to smart thermostats to shut off or cycle a customer’s air conditioning unit to achieve immediate load reduction”); *id.* at 7-8 (discussing voluntary demand response programs and stating that “[t]he State’s electric utilities increasingly are employing Public Safety Power Shutoffs (PSPS), or pre-emptive de-energization actions, to help prevent wildfires” and asserting that “[d]emand response is vital in the effort to reduce PSPS events”); *id.* at 8 (arguing “that Internet communications—whether initiated by customers, suppliers, energy generators, contractors, regulators, public officials or safety officers, local communities in the utility service territory, or at the utility’s headquarters” are

(continued....)



access service, rather than enterprise services, specialized services, or other services that fell outside the scope of the *Open Internet Order* and *Title II Order*.<sup>259</sup> Indeed, it is the increasingly robust broadband made available since the *Restoring Internet Freedom Order* that has made possible the “fast, instantaneous communications” needed for many of the beneficial critical infrastructure-related programs to be effective.

66. *Limited Scope of Any Hypothetical Harm.* We emphatically agree with the *Mozilla* court that “whenever public safety is involved, lives are at stake.”<sup>260</sup> Our analysis above demonstrates that harms to public safety, and thus American lives, have not arisen and are unlikely to arise as a result of the *Restoring Internet Freedom Order*. To be thorough, we must further observe that if some harm were nonetheless to arise, its impact would necessarily be limited by the important but bounded role that broadband Internet access service plays in the broader public safety communications marketplace. Public safety entities often rely on enterprise-level broadband data services for communications between public safety officials, which were never subject to the *Title II Order*. And while mass market broadband services are a critical element of public safety communications for members of the public, such services are not the only means of disseminating, accessing, and conveying important public health and safety communications, as consumers rely on voice services (most notably 911 capabilities), the emergency alert system, and wireless emergency alerts for accessing important public safety information as well.

## 5. The Public Safety Benefits and Overall Benefits of the *Restoring Internet Freedom Order* Outweigh Any Unlikely Harms to Public Safety

67. Our analysis leads us to conclude that the likely benefits of the *Restoring Internet Freedom Order* for public safety clearly outweigh any harms. Getting broadband to more Americans sooner and at lower prices can and will likely save lives. This public safety benefit extends beyond broadband Internet access service to all commingled services that rely on the same facilities, and even to other services that ISPs may invest in with money that they would otherwise have spent on regulatory

---

“critical to energy safety and reliability”); BBIC Reply at 61 (citing arguments that “[t]he Internet enables the public to monitor and communicate information about grid threats including fire or other dangers”); *id.* at 63 (citing “Internet-based applications such as Internet-enabled demand response communications electric and gas utilities use to prevent power blackouts”); *id.* at 64 (citing “Smart Grid communication to the Internet-enabled backbone”); *id.* (discussing employees in the critical infrastructure sector working from home during COVID-19); Letter from Catherine Sandoval, Associate Professor, Santa Clara University School of Law, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108, Attach. C at 27-28 (filed Aug. 31, 2017) (Prof. Sandoval Aug. 31, 2017 *Ex Parte*) (discussing, in a generalized way, communications between utilities and users); *id.*, Attach. C at 29 (referencing “the smart grid, demand response, home area networks, smart thermostats, smart appliances, and other innovations” as relevant to critical infrastructure); *id.*, Attach. C at 30, 32 (discussing utilities’ use of digitized records); *id.*, Attach. C at 31 (discussing technology used to detect gas leaks); *id.*, Attach. C. at 39 (referencing use of “communications and the Internet to detect water leaks”); *id.*, Attach. C at 41 (discussing online videos with warnings or instruction related to utility safety).

<sup>259</sup> For example, it is not clear from the record that “Smart Grid communication to the Internet-enabled backbone,” BBIC Reply at 64, necessarily relies on mass market broadband Internet access service. Nor is it clear whether the operation of certain devices that facilitate the applications cited by commenters, such as “Internet-connected thermostats, solar panels, and energy storage units,” BBIC Comments at 7; *see also* California PUC Comments at 7-8 (stressing importance of Internet access for “smart devices” associated with energy demand response programs), would rely on mass market broadband Internet access service or instead on some other “non-BIAS data services” and as such, by default would not have been regulated by the *Title II Order* in any event. *See Title II Order*, 30 FCC Rcd at 5696-99, paras. 207-13 (explaining that the Internet conduct rules do not apply to non-broadband Internet access service data services, which would include, for example, “connectivity bundled with e-readers, heart monitors, or energy consumption sensors” and “limited purpose devices such as automobile telematics”). Commenters’ various high-level claims about the general importance of communications to critical infrastructure also appear to extend beyond mass market broadband Internet access services. *See, e.g.*, California PUC Comments at 4, 6, 8; BBIC Reply at 61-62; Prof. Sandoval Aug. 31, 2017 *Ex Parte*, Attach. C at 19, 26-29.

<sup>260</sup> *Mozilla*, 940 F.3d at 62.

compliance. Weighed against our conclusion that harms to public safety have not arisen and are unlikely to arise as a result of the *Restoring Internet Freedom Order*, it is clear that the benefits of the underlying order outweigh the costs as to public safety. Moreover, we must take into account that the likely benefits of the *Restoring Internet Freedom Order* extend far beyond public safety, and into every realm of American life touched by the Internet. As we explained in the *Restoring Internet Freedom Order*, reinstating the information service classification for broadband Internet access service “is more likely to encourage broadband investment and innovation, further our goal of making broadband available to all Americans and benefitting the entire Internet ecosystem.”<sup>261</sup> ISP investment does not simply take the form of greater deployment, but can also be directed toward new and more advanced services for consumers.<sup>262</sup> Enabling ISPs to freely experiment with services and business arrangements that can best serve their customers, without excessive regulatory and compliance burdens, “is an important factor in connecting underserved and hard-to-reach populations,”<sup>263</sup> and we agree with the Chamber of Commerce that the positive effects of the *Restoring Internet Freedom Order* likely will help “enable the deployment of rural broadband and 5G technologies that benefit the entire economy and will help close the digital divide.”<sup>264</sup> We thus conclude that the overall benefits of the *Restoring Internet Freedom Order* (including to public safety) clearly outweigh any harms to public safety.

## B. Pole Attachments

68. The *Mozilla* court directed us to “grapple with the lapse in legal safeguards” that results from reclassification eliminating section 224 pole attachment rights of ISPs that lack a commingled telecommunications service or cable television system (i.e., broadband-only providers).<sup>265</sup> For the reasons below, we find that the benefits of returning to the light-touch information service classification adopted in the *Restoring Internet Freedom Order* far outweigh any limited potential negative effects resulting from the loss of section 224 rights for broadband-only ISPs.

### 1. Section 224 Authority

69. The Commission has broad authority under section 224 of the Act to regulate attachments to utility-owned-and-controlled poles, ducts, conduits, and rights-of-way.<sup>266</sup> Section 224 defines pole attachments as “any attachment by a cable television system or provider of telecommunications service to a pole, duct conduit, or right-of-way owned or controlled by a utility.”<sup>267</sup> It authorizes us to prescribe rules to ensure that the rates, terms, and conditions of pole attachments are just and reasonable;<sup>268</sup> require utilities<sup>269</sup> to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems (collectively, attachers);<sup>270</sup> provides procedures

<sup>261</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 362, para. 86.

<sup>262</sup> *Id.* at 368, para. 99.

<sup>263</sup> *Id.* at 373, para. 106.

<sup>264</sup> U.S. Chamber of Commerce Comments at 2.

<sup>265</sup> *Mozilla*, 940 F.3d at 108-109.

<sup>266</sup> See 47 U.S.C. § 224(a)(4).

<sup>267</sup> 47 U.S.C. §§ 224(b)(1)-(2).

<sup>268</sup> 47 U.S.C. § 224(a)(4).

<sup>269</sup> The Act defines a utility as a “local exchange carrier or an electric, gas, water, steam, or other public utility, . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” 47 U.S.C. § 224(a)(1). However, for purposes of pole attachments, a utility does not include any railroad, any cooperatively-organized entity, or any entity owned by a federal or state government. *Id.*

<sup>270</sup> 47 U.S.C. § 224(f). Section 224 excludes incumbent local exchange carriers from the meaning of the term “telecommunications carrier,” therefore these entities do not have a mandatory access right under section 224(f)(1). *Id.* at § 224(a)(5). The Commission has held that when incumbent local exchange carriers obtain access to poles,

(continued....)

for resolving pole attachment complaints;<sup>271</sup> governs pole attachment rates for attachers;<sup>272</sup> and allocates make-ready costs among attachers and utilities.<sup>273</sup>

70. The Act nonetheless only gives the Commission limited authority. It exempts from our jurisdiction those pole attachments in states that have elected to regulate pole attachments themselves, referred to as reverse preemption states.<sup>274</sup> Twenty-two states and the District of Columbia have elected this reverse preemption, leaving our rules to govern pole attachments in 28 states and the U.S. Territories.<sup>275</sup> Section 224 also does not cover poles owned by municipalities, electric cooperatives, railroads, or the federal or state governments.<sup>276</sup>

## 2. The Benefits of Reclassification Outweigh Any Potential Drawbacks for Broadband-Only ISPs

71. Based on the record, we find that the benefits of returning broadband Internet access service to its historical information service classification outweigh any potential adverse effects resulting from the loss of pole attachment rights under section 224 for broadband-only ISPs. First, we find that any drawbacks of reclassification are limited because in the areas where federal pole attachment regulation applies, almost all ISPs' pole attachments remain subject to section 224, as they commingle cable or telecommunications services with their broadband services. Second, we conclude that the benefits of reclassification for broadband-only providers outweigh any limited pole attachment-related drawbacks they face—and the *overall* benefits of reclassification outweigh the drawbacks of broadband-only ISPs' attachments no longer being subject to section 224.

72. *Drawbacks of Reclassification Are Limited.* Section 224 applies to attachments of cable television systems and providers of telecommunications services, but not to providers of only information services.<sup>277</sup> As the Commission has previously clarified, however, “where the same infrastructure would provide ‘both telecommunications and wireless broadband Internet access service,’ the provisions of section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service.”<sup>278</sup> This determination is consistent with the U.S. Supreme Court’s decision in *NCTA v. Gulf Power Co.*, in which the Court held that the protections afforded by section 224 to cable attachments remain in place when a service provider uses the same facilities to offer broadband Internet access service to its subscribers.<sup>279</sup> Thus, in non-reverse preemption states, “the protections afforded by section 224 to cable television systems and providers of telecommunications service remain in place when

---

section 224 governs the rates, terms, and conditions of those attachments. *Implementation of Section 224 of the Act*, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5328, para. 202 (2011). The Act allows utilities that provide electric service to deny access to their poles, ducts, conduits, or rights-of-way because of “insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.” *Id.* at § 224(f)(2).

<sup>271</sup> 47 U.S.C. § 224(b)(1).

<sup>272</sup> 47 U.S.C. §§ 224(d)-(e).

<sup>273</sup> 47 U.S.C. §§ 224(b), (h)-(i).

<sup>274</sup> *See* 47 U.S.C. § 224(c).

<sup>275</sup> *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 35 FCC Rcd 2784, 2784-85 (WCB 2020).

<sup>276</sup> *See* 47 U.S.C. § 224(a)(1).

<sup>277</sup> 47 U.S.C. § 224(a)(4).

<sup>278</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 424, para. 188 (citing *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5922-23, paras. 60-62 (2007) (*Wireless Broadband Internet Access Order*)).

<sup>279</sup> *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (*NCTA v. Gulf Power*).

a service provider uses the same facilities to offer broadband Internet access service to its subscribers.”<sup>280</sup> Only the few ISPs that do not offer cable or telecommunications services over the same network would not be able to avail themselves of the protections Congress established in section 224 and the Commission’s implementing rules.<sup>281</sup>

73. We find that the vast majority of subscribers are served by ISPs that provide either cable or telecommunications services over their networks and therefore remain able to take advantage of the rights guaranteed by section 224 after the reclassification of broadband Internet access service as an information service. The record overwhelmingly confirms our conclusion.<sup>282</sup> According to ACA Connects, all of its members “‘commingle’ broadband with either or both a cable or telecommunications service over the same network.”<sup>283</sup> Likewise, the Edison Electric Institute’s members “report that at this time very few ISPs seek to attach to electric company poles to provide broadband-only service.”<sup>284</sup> USTelecom cites a November 2019 report stating that at least 96% of the broadband market was served by companies that either provided telecommunications services or operated a cable system.”<sup>285</sup> Further, we agree with ACA Connects that ISPs will continue to offer commingled services for the foreseeable future because “ISPs have an incentive to offer as many services as possible over their networks to achieve efficiencies and maximize revenues, and thus very few providers only offer over their networks standalone broadband service.”<sup>286</sup> In fact, NCTA argues that a reason broadband-only providers are particularly rare is “precisely because triple-play services are both popular with subscribers and beneficial to providers.”<sup>287</sup> Notably, multiple commenters agree that the majority of existing ISPs offer commingled

---

<sup>280</sup> NCTA Comments at 10; *see also* Digital Liberty et al. Comments at 3; R Street Comments at 7-8; Southern Co. Comments at 2; TechFreedom Comments at 10.

<sup>281</sup> *See, e.g.*, ACA Connects Comments at 10; Google Fiber Comments at 1-2; Southern Co. Comments at 1; WISPA Comments at 8.

<sup>282</sup> *See* ACA Connects Comments at 9-10 (“Based on the number of customers ACA Connects members serve and public data about the number of customers served by other providers that commingle broadband with either or both cable and telecommunications service over the same network, the universe of customers served by providers that only offer broadband service is very limited, and it is not expected to much change anytime soon. Accordingly, the RIF Order has no appreciable effect on the ability of broadband providers to invoke section 224 to obtain pole attachments.”); Charter Comments at 4-5; CTIA Comments at 10 (“Wireless providers typically engineer their networks with the ability to provide commingled telecommunications and information services. . . . [T]he *RIF Order* has not impacted wireless providers’ federal pole attachment rights because their attachments are capable of providing telecommunications services.”); NCTA Comments at 9-10 (“The vast majority of broadband providers can and do avail themselves of [nondiscriminatory and rate-regulated pole access] by offering cable or telecommunications services (or both) in addition to BIAS.”); USTelecom Comments at 14 (stating that the majority of the broadband market “was served by companies that either provided telecommunications services or operated a cable system”); AT&T Reply at 16-17 (“[I]t is likewise undisputed that the overwhelming majority of American broadband consumers are served by ISPs that also offer cable services, voice services, or both.”); Lincoln Network Reply at 5; Verizon Reply at 22 (“There is no evidence that a meaningful number of broadband-only attachers exist, however, and it is even more unlikely that those entities are harmed by not being able to benefit directly from Section 224’s provisions.”).

<sup>283</sup> ACA Connects Comments at 9.

<sup>284</sup> Edison Electric Institute Comments at 5.

<sup>285</sup> USTelecom Comments at 14 (citing Press Release, Leichtman Research Grp., *Top Broadband Providers Surpass 100 Million Subscribers* (Nov. 12, 2019), <https://bit.ly/2UTVwhY> (reporting that the largest eight cable and largest eight telephone companies, together, represent about 96% of the broadband marketplace).

<sup>286</sup> ACA Connects Comments at 10 n.25.

<sup>287</sup> NCTA Reply at 14.

services.<sup>288</sup> Further, ISPs may gain the status of telecommunications providers, and thus become eligible for section 224 pole attachment rights. Our experience with the substantial participation in the Connect America Fund (CAF) Phase II universal service support auction and, more recently, our Rural Digital Opportunity Fund Phase I auction demonstrates that providers are willing or able to become telecommunications carriers when they find it beneficial.<sup>289</sup> As another option, a broadband-only provider may also partner with an existing cable or telecommunications provider to invoke section 224 protections.<sup>290</sup>

74. Although we agree that timely “access to utility poles is a competitive bottleneck,”<sup>291</sup> based on the record, we are convinced that reclassification does not significantly limit new entrants to the marketplace or the effectiveness of the Commission’s recent one-touch-make-ready rules. Broadband-only providers now have the regulatory flexibility to enter into innovative and solution-oriented pole attachment agreements with pole owners.<sup>292</sup> Indeed, Southern Company notes that its operating

---

<sup>288</sup> See ACA Connects Reply at 4-5; AT&T Reply at 16-17; Verizon Reply at 22. Cf. Free Press Reply at 10 (“New technologies and innovative business models are not less important because they are not as widespread . . .”). But see WISPA Reply at 3 (“Many of the new market entrants in these underserved areas are not providers of ‘telecommunications service’ or ‘cable operators’ as defined in Section 224 of the Act, but simply broadband-only internet service providers.”).

<sup>289</sup> *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 6001-05, paras. 147-56 (2016) (*Phase II Auction Order*) (requiring auction applicants to already be designated as eligible telecommunications carriers (ETCs) or to obtain such designation after being selected as a winning bidder); see also, e.g., *Connect America Fund et al.*, Order on Reconsideration, 33 FCC Rcd 1380, 1387-88, para. 20 (2018) (rejecting requests under CAF Phase II that “broadband service providers need only offer broadband as a standalone service” given that voice telephony is the supported service and “Phase II auction recipients may be the only ETC offering voice in some areas and not all consumers may want to subscribe to broadband service”). 220 applicants qualified to bid in the CAF Phase II auction, and as of September 2020, 192 of 194 winning bidders had been designated as ETCs in 45 states and been authorized to begin receiving support. See *220 Applicants Qualified to Bid in the Connect America Fund Phase II Auction (Auction 903); Bidding to Begin on July 24, 2018*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, 33 FCC Rcd 6171 (2018); FCC, *Connect America Fund Phase II Auction (Auction 903)*, <https://www.fcc.gov/auction/903>. The Rural Digital Opportunity Fund auction imposed similar ETC designation requirements on applicants. *Rural Digital Opportunity Fund; Connect America Fund*, Report and Order, 35 FCC Rcd 686, 723, para. 81 (2020). Bidding in the Rural Digital Opportunity Fund Phase I auction is scheduled to begin on October 29, 2020, and the Commission received 505 applications to participate. See *Rural Digital Opportunity Fund Phase I Auction; Status of Short-Form Applications to Participate in Auction 904; Corrections Due September 23, 2020*, Public Notice, DA 20-960 (WCB/OEA rel. Sept. 1, 2020).

<sup>290</sup> See Verizon Reply at 22; see also R Street Comments at 10 (suggesting that broadband-only providers could “qualify as a ‘cable system’ for purposes of Section 224 by partnering with a virtual MVPD provider to offer those video services to consumers”); USTelecom Comments at 15 (“Broadband providers have a number of options for gaining access to poles, including negotiating directly with pole owners or partnering with existing attachers, which they used to gain access prior to reclassification of broadband as Title II services.”).

<sup>291</sup> BBIC Reply at 67-69.

<sup>292</sup> Edison Electric Institute Comments at 4 (stating that its members “may freely negotiate pole attachment contracts that reflect individual deployment needs, unencumbered by the market-distorting mandates of Section 224”); Lincoln Network Comments at 6 (“The 2018 RIF Order provides industry leaders with more regulatory flexibility to enter into procompetitive, innovative arrangements. Thus, the 2018 RIF Order is not only consistent with its other policies related to pole attachments, it encourages them.”); Southern Co. Comments at 2-3 (“Because of the flexibility facilitated by the absence of burdensome regulation, parties can (and do) reach innovative, solution-oriented deals.”); USTelecom Comments at 14 (“USTelecom members have thousands of pole attachment agreements with a variety of telecommunications and cable providers, many of which predate reclassification in the *Title II Order*, and these contracts have always allowed for attachments that provide information services to be deployed along with those that provide regulated cable or telecommunications services.”); ACA Connects Reply at 6; NCTA Reply at 13-14 (contending that Google Fiber’s decision not to take advantage of Title IV classification or

(continued....)

companies—Georgia Power, Alabama Power, and Mississippi Power—“routinely enter into pole license agreements with entities that are neither cable television systems nor telecommunications carriers” and “[t]he negotiation of these pole license agreements is often more efficient than negotiation of pole license agreements with cable television systems or telecommunications carriers because the prospective licensee appears to be more interested in a deal that works than they are interested in ensuring that any perceived regulatory rights are reflected in the agreement.”<sup>293</sup> Further, since the adoption of the *Restoring Internet Freedom Order*, there is only limited evidence in the record that a small number of broadband-only providers have experienced increased costs to obtain access to poles, and there is also evidence that such costs or other barriers have not increased.<sup>294</sup> For instance, Southern Company explains that “its operating companies have not increased pole attachment rates or prohibited a broadband provider from attaching equipment following the Order” and that it must “answer to a state public service commission when it comes to the lease of property capitalized within the rate base.”<sup>295</sup> Only WISPA provides some isolated and anecdotal examples of higher pole attachment rates,<sup>296</sup> but fails to demonstrate the existence of a widespread problem.<sup>297</sup> Indeed, WISPA emphasizes that these few incidents do not outweigh the overall positive impact of Title I reclassification for its members.<sup>298</sup> Although some commenters contend that the reclassification has adversely impacted broadband-only providers,<sup>299</sup> they largely fail to provide data or specific examples that connect the *Restoring Internet Freedom Order* to a rise in pole attachment rates or denials of pole access. For instance, while Google Fiber states that, prior to the *Title II Order*,

---

to comingle telecommunications services suggests that it prefers its Title I classification, despite the pole attachment-related drawbacks).

<sup>293</sup> Southern Co. Comments at 2.

<sup>294</sup> See NTCA Comments at 10 (“To the extent that an ISP chooses to offer only [broadband Internet access service]—a rarity given that doing so entails forgoing additional revenue streams—the record does not demonstrate that those providers have had any systemic issues obtaining access to poles or that any increased pole attachment costs borne by such broadband-only providers have prevented them from deploying services or competing effectively.”); TechFreedom Reply at 4-5; USTelecom Reply at 10; CTIA Comments at 3-4 (“A handful of commenters that assert that reclassification has adversely affected broadband-only providers do not provide supporting data or economic analyses to link the *RIF Order* to denials of pole access, but merely speculate that there might be future effects. They do not demonstrate through specific examples that, because of the RIF Order, providers were unable to secure access.”).

<sup>295</sup> Southern Co. Comments at 2-3; see also ACA Connects Comments at 11 (stating that while utilities do “thwart expeditious attachments by its members providing broadband Internet access service,” it “has not found that utilities have engaged in these activities as a result of the Commission’s adoption of the RIF Order”).

<sup>296</sup> WISPA Comments at 9 (describing three small WISPs that only provide broadband in Montana, Oklahoma, and Colorado that recently faced barriers to buildout).

<sup>297</sup> See NCTA Reply at 14 (“[T]he isolated and anecdotal examples mentioned by . . . WISPA . . . do not demonstrate a widespread problem, and WISPA notably does not call on the Commission to return to a Title II framework in response.”).

<sup>298</sup> WISPA Reply at 2, 5-7.

<sup>299</sup> See California PUC Comments at 15 (stating that it “is aware of existing [broadband Internet access service] BIAS providers in California that may only attach under commercial agreements to the extent that pole owners will allow them to, with such attachments priced well above the nondiscriminatory rates available to cable television corporations, telecommunications providers and CMRS companies that have access rights under state and federal law”); INCOMPAS Comments at 8 (“INCOMPAS is deeply concerned that our BIAS provider members will now be forced to provide a telecommunications or cable service, rather than only a BIAS service, to make sure they do not potentially lose their Section 224 protections to access poles and conduit.”); AARP Reply at 22 (arguing that “the lack of enforceable pole attachment rules simply throws another hurdle in the way of broadband competition”); BBIC Reply at 67 (“In short, regulated attachers continue to have the ability to delay and even block new deployments by non-regulated attachers.”); Next Century Cities Reply at 1-2 (“[C]urrent pole attachment rules could render broadband-only providers that have the resources to deploy to unserved or underserved areas unable to do so . . .”).

negotiations over pole attachment agreements with pole owners “were difficult and time consuming,” and it “had to be willing to pay higher rent than cable operators and telecommunications providers,”<sup>300</sup> as commenters note, Google does not provide examples of similar negotiation and rate difficulties since the adoption of the *Restoring Internet Freedom Order*.<sup>301</sup> Notably, Google merely speculates that it “may find itself with no right to use OTMR procedures in a given market.”<sup>302</sup> We find this speculation unconvincing and, to the contrary, agree with ACA Connects members that over time, new and existing attachers, as well as pole owners, will “find it to their advantage to use [the OTMR] process, making it an industry standard—regardless of whether an attacher has section 224 rights.”<sup>303</sup>

75. Further, despite its concerns that pole owners will use the reclassification of broadband Internet access service as an information service to delay and even block new deployments by broadband-only providers,<sup>304</sup> Google acknowledges that before broadband Internet access service was classified as a telecommunications service, it was able to enter into such agreements with utilities.<sup>305</sup> Southern Company confirms that in February 2014, “Google Fiber first approached Georgia Power about a pole license agreement” and “[b]y December 15, 2014, the parties had fully executed their agreement.”<sup>306</sup> Notably, although Google Fiber repeatedly emphasizes the unfairness of its inability to take advantage of pole access rights for cable operators under section 224, NCTA contends that Google Fiber could, in fact, be classified as a Title VI cable service due to its video offering, but has taken the position that its video offering is not a cable service in order to avoid regulatory burdens under Title VI.<sup>307</sup>

76. The limited impact of the loss of section 224 rights for broadband-only providers is further diminished by the fact that states have the ability to reverse-preempt the Commission’s rules under

---

<sup>300</sup> Google Fiber Comments at 2.

<sup>301</sup> See NCTA Reply at 13-14 (“Google Fiber hypothesizes that barriers to broadband-only pole attachments could arise under the current regulatory regime, but it notably does not claim to have had any actual difficulty in accessing poles as a result of the RIF Order.”); USTelecom Reply at 10 (“The only commenter that claimed it received less favorable rates was Google Fiber, but even Google Fiber – which referenced incidents occurring before the Title II Order, much less the RIF Order, had been released – did not provide any evidence to support its claims. Instead, Google Fiber offered only conjecture – and in the next breath, Google Fiber conceded that it is not even relying on pole attachments at this juncture and is instead using buried cable.”). Instead, Google appears to be moving away from pole attachments, focusing on “more innovative means of deploying wireline facilities, including shallow trenching.” Google Fiber Comments at 2.

<sup>302</sup> Google Fiber Comments at 4. Google Fiber advocacy at the time suggests that it anticipated accruing benefits from our adoption of OTMR. Google Fiber strongly supported OTMR adoption in the *2018 Wireline Infrastructure* proceeding, despite the fact this proceeding occurred after we reclassified broadband as an information service in the *Restoring Internet Freedom Order*. See, e.g., Letter from Kristine Laudadio Devine, Counsel to Google Fiber Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 1, 2018). Google Fiber also had a representative on the Broadband Deployment Advisory Committee who voted in favor of its report recommending that the Commission adopt OTMR. See Letter from Paul D’Ari, Designated Federal Officer, Broadband Deployment Advisory Committee, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed July 3, 2018), at Attach. Broadband Deployment Advisory Committee, FCC, *Report of the Competitive Access to Broadband Infrastructure Working Group* at 19, 21 (2018), <https://ecfsapi.fcc.gov/file/107030255502405/Competitive%20Access%20to%20Broadband%20Infrastructure%20Report>.

<sup>303</sup> ACA Connects Reply at 7-8.

<sup>304</sup> Google Fiber Comments at 2-4; see also BBIC Reply at 68 (“As Google Fiber’s Comments in this proceeding indicate, forcing new entrants who wish to provide standalone broadband service to negotiate with utility pole owners on an individualized basis with no federal rights to attach adds costs and delay that deters competition and service to the public.”).

<sup>305</sup> Google Fiber Comments at 2.

<sup>306</sup> Southern Co. Comments at 2; see also ACA Connects Reply at 6-7 (noting Southern Company’s comment).

<sup>307</sup> NCTA Reply at 13-14.

section 224(c)— and a substantial minority have in fact done so.<sup>308</sup> As multiple commenters note, our Title I classification does not impact the 22 states and the District of Columbia that have chosen to reverse-preempt our rules.<sup>309</sup> Therefore, if a state prefers to adopt a different regulatory approach, that state has the opportunity to exercise its authority to expand the reach of government oversight of pole attachments, and several states that have reverse preempted currently regulate pole attachments by information service providers.<sup>310</sup> The *Restoring Internet Freedom Order* does not disturb the authority of states that have reverse preempted to assert such jurisdiction or prevent states that have not reverse preempted from doing so in order to assert such jurisdiction.<sup>311</sup>

77. We note further that section 224 has several gaps, such that the exclusion of broadband-only providers is not aberrant. Section 224 applies to specific categories of poles and, as noted above, only in applicable states. As noted above, poles owned by municipalities, electric cooperatives, railroads, and Federal and state governments are not covered under section 224, and so the adoption of the *Restoring Internet Freedom Order* does not affect the access of any ISP to such poles.

78. *The Benefits of Reclassification Outweigh Any Pole Attachment-Related Drawbacks.* Ultimately, the record supports our determination that the reclassification of broadband Internet access service as an information service has facilitated rather than inhibited new technologies and business models, despite the rare potential for pole attachment access challenges.<sup>312</sup> To this end, given the overall benefits of Title I reclassification, we find that it would be counterproductive to upend our light-touch regulatory framework for broadband Internet access service because of speculative concerns that at most would impact a small minority of ISPs and consumers.<sup>313</sup>

79. First, there is no question that the overall benefits of reclassification outweigh the limited drawbacks that stem from broadband-only ISPs losing their section 224 pole attachment rights. As we have discussed, numerous commenters—including broadband-only ISPs—assert that Title I reclassification has promoted robust infrastructure investment and deployment in broadband networks and

---

<sup>308</sup> 47 U.S.C. § 224(c).

<sup>309</sup> See CTIA Comments at 10 n.30; PPUC Comments at 5 (“Pennsylvania is a reverse preemption state that has adopted the FCC’s substantive regulations on pole attachments. As such, the Pa. PUC is bound by those regulations.”); USTelecom Comments at 16-17; ACA Connects Reply at 8-9; AT&T Reply at 17.

<sup>310</sup> See, e.g., Ark. Admin. Code tit. 126.03 r. 25 § 1.01 (stating that pole attachment rules apply to attaching entities, defined as: “[a] provider of electric service, telecommunication service, cable television service, internet access service or other related information services”); Code Me. R. tit. 65-407 ch. 880 § 1 (defining “Joint-Use Entity” as “a public utility, voice service provider, wholesale or retail competitive local exchange carrier, cable television system, unlit fiber provider, telecommunications service provider or information service provider”); Utah Admin. Code r. 746-345-2 (defines an attaching entity as “[a] public utility, wireless provider, cable television company, communications company, or other entity that provides information or telecommunications services that attaches to a pole owned or controlled by a public utility”); Vt. Admin. Code tit. 18-1 r. § 8.3.702 (stating that attaching entities can include broadband service providers, defined as: “an entity authorized to do business in the state of Vermont that seeks to attach facilities that ultimately will be used to offer Internet access to the public”).

<sup>311</sup> The California Public Utilities Commission expresses concern that “ISPs may attempt to invoke the information services classification as a shield against a State’s jurisdiction to regulate pole attachment safety.” California PUC Comments at 15-16. It claims that “overloaded poles and/or insufficiently maintained attachments” have presented public safety issues. *Id.* However, California currently regulates pole attachments at the state level so it is free to assert its authority over pole attachments by broadband-only providers under California law as it wishes without federal restriction under the Act.

<sup>312</sup> See CTIA Comments at 3-6, 11; TIA Comments at 4; USTelecom Comments at 4-5; WISPA Comments at 4-7. Cf. Free Press Reply at 10 (stating that “[n]ew technologies and innovative business models are not less important because they are not as widespread”).

<sup>313</sup> See USTelecom Reply at 10 (“[T]he Commission’s role is to protect consumers and broadband competition, not individual business models, and the hypothetical concerns of broadband-only providers thus do not justify re-imposing Title II with its investment chilling and other costs.”).



facilities.<sup>314</sup> Indeed, the *Mozilla* Court upheld our cost-benefit analysis in the *Restoring Internet Freedom Order*,<sup>315</sup> stating that we made a “reasonable case that [our] ‘light-touch’ approach is more conducive to innovation and openness than the *Title II Order*.”<sup>316</sup>

80. Second, the regulatory certainty provided by the Commission’s actions in the *Restoring Internet Freedom Order* create incentives that likely help foster substantial investment in new broadband infrastructure, including poles, and increased broadband deployment.<sup>317</sup> For instance, “[a] WISPA member in Minnesota has invested \$1.5 million dollars to expand its network by adding 12 new towers since January 2018” and “[t]his expansion has allowed the company to fully cover two additional counties in Minnesota.”<sup>318</sup> We agree with the majority of commenters that these benefits outweigh the loss of section 224 protections for the very limited number of broadband-only providers that do not offer a cable or telecommunications service over the same network as they provide broadband Internet access service.<sup>319</sup> Indeed, despite a membership including broadband-only providers, WISPA emphatically confirms our position that “[t]here is no doubt that the *Restoring Internet Freedom Order*’s abandonment of burdensome Title II regulations for broadband Internet access service providers is of paramount importance in promoting deployment of new service and enhancing competitive offerings. If it were actually a choice between the world of Title II regulation and the lighter touch of Title I regulation, with no pole attachment protections for broadband-only providers, WISPA would choose the latter paradigm.”<sup>320</sup>

81. We decline at this time to address requests in the record to reinterpret section 224 or rely on other sources of authority to extend the availability of access rights under section 224 to broadband-

---

<sup>314</sup> See, e.g., ACA Connects Comments at 3; ACI Comments at 4; CASE Comments at 1-2; CEI Comments at 6; CTIA Comments at 3-4; Digital Liberty et al. Comments at 2; Institute for Policy Innovation (IPI) Comments at 2; Lincoln Network Comments at 6; National Association of Manufacturers (NAM) Comments at 1; NCTA Comments at 3, 12; Telecommunications Industry Association (TIA) Comments at 4; USTelecom Comments at 8; Wallsten Comments at 5; Taxpayers Protection Alliance (TPA) Comments at 1; WISPA Comments at 6-7; ACT Reply at 6; AT&T Reply at 5; CAGW Reply at 7; Swanson Reply at 6; Verizon Reply at 7-8.

<sup>315</sup> *Mozilla*, 940 F.3d at 119.

<sup>316</sup> *Id.* at 116-17.

<sup>317</sup> See CTIA Comments at 3-6, 11 (“While mobile wireless investment fell in the wake of the *Title II Order*, dropping some 83 percent between 2015 and 2017 as compared to the prior two years, that investment has rebounded since the *RIF Order*’s release.”); TIA Comments at 4 (stating that “following the release of the RIF Order in January 2018 . . . U.S. broadband providers [] accelerated spending to improve broadband infrastructure and invested \$80.0 billion, a \$3.1 billion increase from the previous year. In 2018, broadband providers deployed more fiber to more new homes in the United States than in any year in history. On the mobile side, investments by wireless providers increased in 2017, reversing historic declines in investment, and in 2018, small cell deployment more than quadrupled. At the same time, prices for consumers fell by 11% according to common benchmarks for industry pricing”); USTelecom Comments at 4-5.

<sup>318</sup> WISPA Comments at 6-7.

<sup>319</sup> See ACA Connects Reply at 5 (contending that “the return to Title II regulation would dampen broadband investment incentives to a degree that would far outweigh any increased deployment from broadband-only providers by virtue of their gaining pole attachment rights under section 224”); AT&T Reply at 18 (“Tellingly, the Title II advocates do not even try to substantiate their premise that resolution of this exceedingly narrow pole attachment issue will have any significant effect on broadband deployment or competition as a general matter. And even if they had shown such an effect, they would still need to demonstrate that the effect was so immense and troubling within the grand scheme of things that it outweighed all of the critical, judicially affirmed policy reasons why the Commission reinstated a Title I regime in the first place.”); CTIA Reply at 5 (“Even if the *RIF Order* had some effect on broadband-only providers’ access to utilities’ poles, given the massive network investment benefits and broadband deployment associated with a Title I framework, the public interest would require far more significant evidence of detrimental effect to warrant consideration of a reversal back to a Title II regime.”).

<sup>320</sup> WISPA Reply at 2.

only providers.<sup>321</sup> For the purposes of this Order on Remand, we find that even assuming we lack authority to extend section 224 to cover broadband-only providers, the overall benefits of reclassification outweigh the limited drawbacks. Parties arguing in favor of extending pole attachment rights to broadband-only ISPs are free to file a petition for rulemaking or petition for declaratory ruling, which we then may consider with the benefit of a full and focused record on the topic.

### C. Lifeline Broadband Services

82. The D.C. Circuit in *Mozilla* directed us to consider on remand the statutory basis for broadband Internet access service's inclusion in the Lifeline program. After such consideration, we further explain our finding that we have legal authority under section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband service over broadband-capable networks that support voice service. That authority is undergirded by the clear intent of Congress that universal service efforts should increase access to advanced services, and the record in this proceeding offers broad support for our conclusion.

#### 1. The History of Funding Broadband Services Through the Universal Service Fund

83. In the 2011 *USF/ICC Transformation Order*, the Commission adopted comprehensive reforms to modernize the Universal Service Fund (USF or Fund) to “implement Congress’s goal of promoting ubiquitous deployment of, and consumer access to, both traditional voice calling capabilities and modern broadband services over fixed and mobile networks.”<sup>322</sup> As part of this modernization effort, the Commission leveraged the funding disbursed through the Fund’s high-cost mechanism to encourage the deployment of broadband-capable networks, even though broadband Internet access service was at the time classified as an information service. The Commission stated that by “referring to ‘facilities’ and

---

<sup>321</sup> A number of commenters propose sources of Commission authority to extend section 224 to cover broadband-only ISPs. For instance, WISPA proposes to directly apply section 224 or rely on ancillary authority. Specifically, WISPA contends that the plain text and objective of section 224, as well as provisions such as sections 157 and 257 of the Act, and section 706 of the 1996 Act, is “to level the playing field, promote competition, expand the public’s access to advanced services or ensure that customers have access to service at ‘just and reasonable rates.’” WISPA Comments at 11-14; *see also* Haney Comments at 5 (“Section 224 itself was intended to promote investment and innovation, and broadband-only providers clearly contribute to this objective.”). According to WISPA, we could also exercise our ancillary jurisdiction under section 154 or rely on section 706 as our statutory authority to extend pole access and rate rights to broadband-only providers. WISPA Comments at 12-15. AT&T, Verizon, and Lincoln Network also suggest that we could rely on ancillary authority to extend section 224. AT&T Reply at 19; Verizon Reply at 22 n.61; Lincoln Network Comments at 9. Other commenters offer general support for us to extend section 224 to cover broadband-only providers. *See* Haney Comments at 5 (“The Commission should either interpret the statute to cover broadband-only service providers or recommend that Congress update the law.”); INCOMPAS Reply at 14 (“The Commission should do everything it can to promote additional fixed broadband competition, and this includes allowing [broadband]-only providers to qualify for protections under [s]ection 224 of the Communications Act.”); ACA Connects Reply at 9 (stating that “‘no stone should be left unturned’ in ensuring all broadband providers can attach to poles at reasonable and non-discriminatory rates, terms, and conditions” and “urg[ing] the Commission to explore using authorities other than section 224 to provide this right”); CTIA Reply at 5 (“[I]f the Commission deemed it necessary to affirm broadband-only providers’ rights to access utilities’ poles, it could extend application of Section 224 to those entities, following the precedent of previous Commission actions applying Title II and other provisions to services that are not classified as telecommunications services.”). R Street recommends that we reinterpret “cable system” “to include broadband infrastructure used to provide certain qualifying virtual MVPD service” or “telecommunications service” “to include interconnected VoIP services offered in a similar fashion to the virtual MVPD services.” R Street Comments at 9-11. Alternatively, Southern Company proposes “to unwind many of the incumbent-friendly pole attachment regulations adopted by the Commission during the past decade, in order to allow broadband-only providers to compete on a more level regulatory playing field.” Southern Co. Comments at 4.

<sup>322</sup> *Connect America Fund et al.*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17683, para. 60 (2011) (*USF/ICC Transformation Order*).

‘services’ as distinct items [in section 254(e)] for which federal universal service funds may be used . . . Congress granted the Commission the flexibility not only to designate the types of telecommunications service for which support would be provided but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b) and any other universal service principle that the Commission may adopt under section 254(b)(7).<sup>323</sup> The Commission further concluded that section 254 allowed it to condition the receipt of universal service support on ETCs offering broadband capabilities to their customers.<sup>324</sup> The Tenth Circuit affirmed this approach as a reasonable interpretation of the statute and upheld the Commission’s authority to structure universal service support to ensure that the universal service policies set out in section 254(b) of the Act are achieved.<sup>325</sup>

84. The Commission first funded broadband Internet access service offerings in the Lifeline program when it launched the Lifeline Broadband Pilot Program as part of the reforms adopted in the *2012 Lifeline Order*.<sup>326</sup> In doing so, the Commission relied upon the same theory of legal authority it applied to the high-cost mechanism in the *USF/ICC Transformation Order*.<sup>327</sup> At the time that the Commission initiated the Lifeline Broadband Pilot Program, broadband Internet access service was classified as an information service under Title I. After a successful pilot program, in the *2016 Lifeline Order*, the Commission expanded the Lifeline program to include support for broadband Internet access service funding.<sup>328</sup> However, since broadband Internet access service had been reclassified as a telecommunications service subject to Title II regulatory requirements before the *2016 Lifeline Order*, the Commission relied on that reclassification when expanding the Lifeline program to include support for broadband but did not disavow the legal authority theory used in the *USF/ICC Transformation Order* or the *2012 Lifeline Order*.<sup>329</sup>

85. In the *2017 Lifeline Notice*, to ensure that the Commission was administering the Lifeline program on sound legal footing, the Commission proposed to apply the same theory of legal authority it used in the *USF/ICC Transformation Order* and the *2012 Lifeline Order* to continue funding broadband Internet access service in the Lifeline program.<sup>330</sup> In that *Notice*, the Commission asserted that it had the proper authority “under Section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband service over facilities-based broadband-capable networks that support voice service.”<sup>331</sup> The Commission concluded that this “legal authority does not depend on the regulatory classification of broadband Internet access service, and thus, ensures the Lifeline program has a role in closing the digital divide regardless of the regulatory classification of broadband service.”<sup>332</sup> Indeed, the Commission further concluded that it had a “‘mandatory duty’ to adopt universal service policies that advance the principles outlined in section 254(b) and we have the authority to ‘create some inducement’ to ensure that

---

<sup>323</sup> *Id.* at 17685-86, para. 64.

<sup>324</sup> *Id.* at 17686-87, para. 65.

<sup>325</sup> *See In re FCC 11-161*, 753 F.3d 1015, 1044-48 (10th Cir. 2014).

<sup>326</sup> *See Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6794-807, paras. 321-354 (2012) (*2012 Lifeline Order*).

<sup>327</sup> *See id.* at 6797-99, para. 328-332 (stating that section 254 also “allows us to impose conditions on the support provided to entities designated as ETCs.”).

<sup>328</sup> *See Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3926, 3978-88, paras. 45-68 (2016) (*2016 Lifeline Order*) (defining broadband Internet access service as a Lifeline supported service).

<sup>329</sup> *See Title II Order*, 30 FCC Rcd at 5607-18, paras. 14-59; *2016 Lifeline Order*, 31 FCC Rcd at 3975-77, paras. 38-43; *see also 2012 Lifeline Order*, 27 FCC Rcd at 6797-98, paras. 328-330.

<sup>330</sup> *See 2017 Lifeline Notice*, 32 FCC Rcd at 10503, para. 78.

<sup>331</sup> *Id.* at 10502, para. 77.

<sup>332</sup> *Id.* at 10503, para. 77.

those principles are achieved.”<sup>333</sup> In the same *Notice*, the Commission sought comment on eliminating the Lifeline Broadband Provider category of ETC, a broadband-only ETC designation that had been newly created in the *2016 Lifeline Order* when broadband Internet access service had been classified as a Title II service.<sup>334</sup>

86. Finally, in the *2019 Lifeline Order*, the Commission re-evaluated the legal structure of the Lifeline Broadband Provider ETC category.<sup>335</sup> With no obligation to offer the supported voice service under section 254(c), the Commission found that the Lifeline Broadband Provider category was in conflict with section 214.<sup>336</sup> As such, the Commission eliminated this ETC category.<sup>337</sup> Thus, all ETCs currently are required to offer voice service on a common carrier basis.

## 2. The Commission Has Authority to Support Broadband Service in the Lifeline Program

87. Upon further review and having considered the record in both the *Restoring Internet Freedom* proceeding and in response to the *2017 Lifeline Notice*, we determine that we have authority under section 254 of the Act to provide support for broadband Internet access service from the Lifeline program in addition to a qualifying voice service. First, we elaborate on our application of the theory of legal authority adopted in the *USF/ICC Transformation Order* to the Lifeline program. Second, we address how this authority is not dependent on the regulatory classification of broadband Internet access service and is consistent with the section 214(e) requirement that ETCs be common carriers. Third, we make necessary adjustments to the Commission’s rules to implement this approach. Finally, we address how this legal authority will still allow the Lifeline program to reimburse broadband-only service offerings.

88. *Legal Authority Under Section 254.* We conclude, as the Commission found in the context of the high-cost mechanism, that we have authority under section 254 to continue funding broadband Internet access service offerings in the Lifeline program and that this position is strongly supported by the text of the Communications Act and the record.<sup>338</sup> Under section 254(e), carriers

<sup>333</sup> *Id.* at 10503, para. 78 (citing the *USF/ICC Transformation Order*, 26 FCC Rcd at 17685, para 65).

<sup>334</sup> *See 2017 Lifeline Notice*, 32 FCC Rcd at 10496, para. 58.

<sup>335</sup> *See Bridging the Digital Divide for Low Income Consumers et al.*, WC Docket No. 17-287, Fifth Report and Order, Memorandum Opinion and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 34 FCC Rcd 10886, 10898-913, paras. 27-63 (2019) (*2019 Lifeline Order*).

<sup>336</sup> *See id.* at 10902-04, paras. 41-42.

<sup>337</sup> *See id.* at 10913, paras. 62-63.

<sup>338</sup> *See Charter Comments* at 5-6 (“The Commission’s interpretation of Section 254 as permitting universal service support to both . . . broadband and voice services is well-established, long predates the Title II Order, and is unaffected by the regulatory classification of broadband Internet access services.”); *CTIA Comments* at 14-15 (asserting that “the Commission can . . . similarly continue to direct Lifeline support to both voice and broadband services”); *Hispanic Technology and Telecommunications Partnership Comments* at 3 (stating that the Commission’s authority under section 254(e) does not “depend on the regulatory classification of broadband Internet”); *Lincoln Network Comments* at 12 (“The statute leaves enough ambiguity for the Commission to reasonably intend its USF support to go towards standalone broadband services irrespective of its classification as an information service.”); *Multicultural Media, Telecom and Internet Council (MMTC) et al. Comments* at 2 (“The restored Title I classification of broadband does not change the fact that the FCC still has jurisdiction under Section 254(e) . . . .”); *NCTA Comments* at 12 (asserting that “[t]he RIF Order’s return to the classification of BIAS as an information service does not preclude the Commission from providing low-income consumers discounts for broadband services under the Lifeline program”); *National Lifeline Association (NaLA) Comments* at 2 (asserting that “the Commission does have the authority to support Lifeline broadband even though it is once again an information service”); *Pennsylvania Public Utility Commission (PUC) Comments* at 9 (“Section 254 grants the Commission express statutory authority to promote access to both telecommunications services and information services.”); *R Street Comments* at 12-13 (“Using its existing authority, the Commission has already modified its

(continued....)

receiving support “shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”<sup>339</sup> Under this statutory provision, the Commission has flexibility to design its support mechanisms to fund both the service itself—here, voice telephony—and the underlying facilities used to offer the supported service—here, broadband-capable networks. Modern communications networks are multi-use networks used to provide an array of services. Providing Lifeline support when ETCs provide broadband Internet access service thus has the effect of supporting the underlying broadband-capable network also used to offer voice telephony. As in the high-cost program, the Commission’s support mechanisms can and should incentivize ETCs to offer access to the services that advance the principles of section 254(b).<sup>340</sup> All ETCs participating in the Lifeline program are and will remain common carriers offering voice services, but the Commission can also continue to support broadband Internet access service in the Lifeline program, and the universal service support will flow to the facilities of ETCs that are by definition common carrier providers of voice services.

89. Section 254(e) states that ETCs “shall be eligible to receive specific Federal universal service support” and that an ETC receiving universal service support “shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”<sup>341</sup> Additionally, section 254(b) establishes the principles on which the Commission shall base its policies for the preservation and advancement of universal service.<sup>342</sup> Such principles include ensuring that quality services are available at “affordable rates”<sup>343</sup> and that “access to advanced telecommunications and information services should be provided in all regions of the Nation.”<sup>344</sup>

90. As the Commission concluded in the *USF/ICC Transformation Order*, by requiring in section 254(e) that ETCs use high-cost support for both facilities *and* services, Congress granted the Commission flexibility to not only designate the types of services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b).<sup>345</sup> In addition, the Commission has a “mandatory duty” to implement universal service policies that advance the principles outlined in section 254(b), and to accomplish that duty we have the authority to “create some inducement” to ensure that those principles are achieved.<sup>346</sup> Our

---

Universal Service programs to include broadband support, so it can do the same with Lifeline.”); Smith Bagley Comments at 13-17; TechFreedom Comments at 5 (“Reclassification of BIAS providers as title I information services will not affect the Commission’s ability to award Lifeline subsidies for broadband service.”); USTelecom Comments at 18-20 (asserting that “the Commission historically offered Lifeline support for broadband when broadband was classified as an information service, and the explanation is straightforward, consistent with Commission precedent, and has already been endorsed by the Tenth Circuit”); Verizon Reply at 24-25; Citizens Against Government Waste Reply at 3-4; Letter from The Leadership Conference et al., to Ajit V. Pai, Chairman, FCC, WC Docket Nos. 17-287 et al., at 2-3 (offering that the Commission has authority under section 254 to reimburse for broadband Internet access service) (Leadership Conference *Ex Parte*). The Leadership Conference *Ex Parte* also raises a number of suggestions for further Commission action to respond to the COVID-19 pandemic, which we do not address here as they are beyond the scope of this remand proceeding. Other commenters argue that the Commission lacks authority to fund broadband Internet access services through the Lifeline program under section 254. We believe this is incorrect, and we address those arguments below.

<sup>339</sup> See 47 U.S.C. § 254(e).

<sup>340</sup> See *USF/ICC Transformation Order*, 26 FCC Rcd at 17686-87, para. 65 (citing *Qwest Corp v. FCC*, 258 F.3d 1191, 1200, 1204 (10th Cir. 2001)).

<sup>341</sup> 47 U.S.C. § 254(e).

<sup>342</sup> See 47 U.S.C. § 254(b).

<sup>343</sup> 47 U.S.C. § 254(b)(1).

<sup>344</sup> 47 U.S.C. § 254(b)(2).

<sup>345</sup> See *USF/ICC Transformation Order*, 26 FCC Rcd at 17685-86, para. 64.

<sup>346</sup> *Id.* at 17686-87, para. 65 (citing *Qwest Corp v. FCC*, 258 F.3d 1191, 1200, 1204 (10th Cir. 2001)).

authority under section 254 therefore permits us to direct universal service support through the Lifeline program to both voice services and broadband Internet access service in accordance with our long-standing principle “that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.”<sup>347</sup> In upholding the Commission’s reliance on this approach when it instituted the modernized high-cost programs, the Tenth Circuit approvingly noted that by “interpreting the second sentence of § 254(e) as an implicit grant of authority that allows it to decide how USF funds shall be used by recipients, the FCC also acts in a manner consistent with the directive in § 254(b) and allows itself to make funding directives that are consistent with the principles outlined in § 254(b)(1) through (7).”<sup>348</sup>

91. The D.C. Circuit in *Mozilla*, in remanding this issue back to the Commission, stated that we “fail[] to explain” how our authority under section 254(e) could extend to broadband Internet access service “now that broadband is no longer considered to be a common carrier[service].”<sup>349</sup> We clarify that while broadband Internet access service itself is not a common carrier service, many broadband providers are ETCs—and thus, by definition, are common carriers—by virtue of their offering of voice service. Voice service is and will remain a supported service under section 254(c). Section 254(e) permits us to direct universal service support to both the voice service and broadband Internet access service provided by such ETCs. This support flows regardless of the type of service provided, as long as it goes to support the facilities of a designated ETC. Thus, it is the “common-carrier status” of the provider, not the service, that governs whether the provider is eligible to receive Lifeline support for services provided over its network.<sup>350</sup> If a service provider does not offer common carrier voice service and thus cannot become an ETC, the Lifeline program cannot support its provision of broadband Internet access service.<sup>351</sup>

92. We thus reject arguments that we cannot support broadband Internet access service in the Lifeline program if it is not classified as a telecommunications service.<sup>352</sup> Our approach outlined today does not impact the ETC designation process or the requirement that support recipients be ETCs and, consistent with the statute,<sup>353</sup> ETCs will still offer voice telephony service on a common carrier basis.<sup>354</sup>

---

<sup>347</sup> See *id.* at 17686-87, para. 65.

<sup>348</sup> *In re FCC 11-161*, 753 F.3d at 1047. The National Lifeline Association (NaLA) and AT&T propose that the Commission may be able to rely on its ancillary authority under section 4(i) of the Act to continue to support broadband Internet access service in the Lifeline program. See NaLA Comments at 18-19; AT&T Reply at 15 (citing 47 U.S.C. § 154(i)). The National Consumer Law Center (NCLC) and the United Church of Christ (UCC), as well as AT&T, pointed to section 254(j) as another potential source of authority for supporting broadband Internet access service in the Lifeline program. See NCLC and UCC Comments at 8; AT&T Comments at 13-14; see also Leadership Conference *Ex Parte* at 3. Additionally, the Lifeline Connects Coalition urged us to explore using Title I’s general jurisdictional grant as an option to support broadband Internet access service in the Lifeline program or ancillary authority options for the principles outlined in section 254(b). See Lifeline Connects Coalition Comments, WC Docket No. 17-108, at 13-14 (filed July 17, 2017). Because we find that section 254(e) provides a clear source of authority for the Commission to support ETCs providing broadband Internet access service in the Lifeline program, we do not find it necessary to rely on the other sources of legal authority proposed in the record.

<sup>349</sup> See *Mozilla*, 940 F.3d at 69.

<sup>350</sup> *Mozilla*, 940 F.3d at 69.

<sup>351</sup> See *In re FCC 11-161*, 753 F.3d at 1048 (noting that there is “no imminent possibility that broadband-only providers will receive USF support under the FCC’s Order, since they cannot be designated as ‘eligible telecommunications carriers’”).

<sup>352</sup> See, e.g., AARP Comments at 6; Next Century Cities and American Library Association Comments at 3-4; NARUC Comments at 10-11.

<sup>353</sup> See 47 U.S.C. § 214(e)(1).

<sup>354</sup> See 47 U.S.C. § 214(e)(1); 47 CFR § 54.101(a)(1) (defining supported voice telephony services as providing voice grade access to the public switched network or its functional equivalent); see also *2019 Lifeline Order*, 34 FCC Red at 10902-04, paras. 41-42.

This approach simply enables low-income consumers to receive discounts for broadband Internet access service provided by ETCs, allowing us to work towards fulfilling our principles of ensuring affordable rates and access to advanced telecommunications and information services across all regions of the Nation.<sup>355</sup>

93. We further reject arguments that the Commission cannot apply the legal authority articulated in the *USF/ICC Transformation Order* because of the differences between the high-cost program and the Lifeline program.<sup>356</sup> Every ETC, whether they participate in the high-cost program, Lifeline program, or both programs, necessarily incurs network costs associated with the provision of the supported voice service and advanced services, such as broadband Internet access service. In the case of facilities-based Lifeline providers, these costs arise in deploying and maintaining their own broadband-capable networks used to offer the voice telephony supported service. Resellers participating in the Lifeline program likewise incur costs associated with the network used to offer the supported voice service by directly compensating the underlying facilities-based providers for the wholesale voice services.<sup>357</sup> Both programs ultimately offset those network costs. The main difference is that the high-cost program provides supplemental support for areas that are especially expensive to serve, while the Lifeline program compensates providers for some of their costs so they can offer discounted service to low-income Americans, thus incentivizing ETCs to provision, maintain, and upgrade facilities and services where low-income consumers live.<sup>358</sup>

94. We also reject arguments by some commenters that we cannot justify supporting broadband Internet access service through the Lifeline program if the supported voice service is scheduled to eventually receive no Lifeline reimbursement in certain parts of the country.<sup>359</sup> First, support for voice-only services is not ending entirely, as the Lifeline program will continue to offer support to eligible subscribers in a Census block with only one ETC.<sup>360</sup> Second, voice services will continue to be a

---

<sup>355</sup> See 47 U.S.C. § 254(b)(1), (2).

<sup>356</sup> See Berkeley Law Student Comments at 2, 5-6; Free Press Reply at 11-12. However, as articulated in this section, we do not believe that the program differences are material with respect to the Commission's authority under section 254(e) to provide funding for broadband service in the Lifeline program, as funding will ultimately flow to supported facilities.

<sup>357</sup> See, e.g., *2017 Lifeline Notice*, 32 FCC Rcd at 10500, para. 72; CTIA Comments at 16-18. Some commenters also raised concerns that our actions to reclassify broadband Internet access service as an information service would bar resellers from the Lifeline program. See American Association of Law Libraries, American Library Association, Chief Officers of State Library Agency Comments, WC Docket No. 17-108, at 22 (filed July 17, 2017). In the *2017 Lifeline Notice* the Commission sought comment on the continued role of resellers in the Lifeline program more generally, as well as on other possible rule changes that might be warranted should resellers remain in the Lifeline program. *2017 Lifeline Notice*, 32 FCC Rcd at 10500, para. 72. Although we do not adopt changes in that regard in this *Order*, those issues remain pending.

<sup>358</sup> See 47 U.S.C. § 254(e).

<sup>359</sup> See Berkeley Law Students Comments at 4-5; Free Press Comments at 11. In the *2016 Lifeline Order*, the Commission adopted a phasing out of support for voice-only service in the Lifeline program in most areas after December 1, 2021. In doing so, the Commission concluded that "Lifeline should transition to focus more on [broadband Internet access service] given the increasingly important role that broadband service plays in the marketplace . . ." *2016 Lifeline Order*, 31 FCC Rcd at 4004, para. 119. The Commission also created a carve-out of the support phasedown, allowing continued support to voice services at a rate of \$5.25 per month after December 1, 2021 to eligible subscribers served by a provider that is the only Lifeline provider in a Census block. See *2016 Lifeline Order*, 31 FCC Rcd at 4003, para. 118; see also 47 CFR § 54.403(a)(2)(v).

<sup>360</sup> Nothing in the text of section 254 requires an ETC to receive universal service funds everywhere it offers the section 254(c)(1) supported service. Section 254(c)(1) refers to the services included in the definition of universal service as being "supported by Federal universal service support mechanisms," but does not specify the details of those mechanism or under what range of circumstances universal service funds must actually flow. 47 U.S.C. § 254(c)(1). Likewise, although section 254(e) requires ETCs to use support "only for the provision, maintenance,

(continued....)

component of many Lifeline offerings, as nearly 90% of Lifeline subscribers currently choose to apply their discount to a bundled offering that includes voice service along with broadband Internet access service that meets the program's minimum service standards.<sup>361</sup> As such, even as the voice phasedown continues, the Commission will continue to support the provision of voice services and voice-capable networks by ETCs. We therefore disagree with commenters asserting that it is unreasonable to claim that Lifeline support would benefit voice facilities while continuing to phase out support for voice-only service.<sup>362</sup> As to comments urging the Commission to pause the voice phasedown at this time,<sup>363</sup> we decline to decide here and the issue remains open from the *2017 Lifeline Notice*.<sup>364</sup> This Order is limited to addressing the three discrete issues remanded to the Commission by the D.C. Circuit. Nevertheless, we believe that a continued voice phasedown does not impede the Commission from relying on the legal authority we have explained herein.

95. We also disagree with commenters who argue that the best approach to supporting broadband Internet access service through Lifeline is to simply reclassify broadband Internet access service as a Title II service.<sup>365</sup> We find our approach today instead allows for the Lifeline program to fund broadband Internet access service offerings, while also allowing the Commission to continue to apply a light-touch regulatory approach to broadband Internet access service, and will promote investment and innovation without grafting costly and restrictive requirements onto a program that is focused on making vital services affordable.<sup>366</sup>

96. We next make necessary adjustments to the Commission's rules. In the *2016 Lifeline Order*, the Commission amended section 54.101 of its rules to include broadband Internet access service as a supported service.<sup>367</sup> As we discuss above, the classification of broadband Internet access service as an information service does not bar us from providing support for the provision of broadband by ETCs

---

and upgrading of facilities and services for which the support is intended," it does not specify how the Commission must direct those funds to be allocated as between support for "the provision. . . of services" vs. "the provision, maintenance, and upgrading of facilities" used to offer the section 254(c)(1) supported service. 47 U.S.C. § 254(e).

<sup>361</sup> See USAC, High Cost & Low Income Committee Briefing Book at 40 (Apr. 28, 2020), <https://www.usac.org/wp-content/uploads/about/documents/leadership/materials/hcli/2020/2020-04-HCLI-Briefing-Book-Public-Final.pdf> (showing that nearly 90% of consumers choose a Lifeline service plan that includes voice and broadband Internet access service).

<sup>362</sup> See Berkeley Law Students Comments at 4-5; Free Press Comments at 11.

<sup>363</sup> See, e.g., NaLA Comments at 12-16 (encouraging the Commission to stop its phasedown of voice support in the Lifeline program); CTIA Comments at 13, n. 35; CPUC Comments at 18-19; Leadership Conference *Ex Parte* at 3.

<sup>364</sup> See *2017 Lifeline Notice*, 32 FCC Rcd at 10501-02, paras. 74-76.

<sup>365</sup> See Free Press Comments at 8 (stating that to best resolve the Lifeline remand issue the Commission should "return to treating broadband providers as telecommunications carriers"); Greenlining Institute Comments at 5 (asserting that "the directive in section 254 requires that the Commission classify broadband under Title II in order to fulfill its mandate"); NCLC and UCC Comments at 6 (asserting that "the clearest path for Lifeline to support [broadband Internet access service] would be to classify [broadband Internet access service] as a Title II service"); Public Knowledge Comments at 19 ("The clearest authority to support standalone broadband subsidies through lifeline (sic) is a reclassification of broadband as a telecommunications service regulated by Title II."); New America's Open Technology Institute et al. Reply at 11 ("[T]he record also reflects that the Commission's Title II authority is its strongest basis to support broadband through Lifeline.").

<sup>366</sup> See *Restoring Internet Freedom Order*, 33 FCC Rcd at 2, 181-86, paras. 2, 304-323. Free Press also raises the possibility that as providers transition away from offering switched telephone service they may not be eligible to participate in the Lifeline program with broadband Internet access service classified as a Title I service. While Free Press casually raises this concern, it does not offer any evidence of it impacting the Lifeline marketplace today, or anytime in the near future. As such, we decline to address this concern at this time and believe that voice telephony as a supported service will not present any near-term challenges for providers. See Free Press Comments at 15.

<sup>367</sup> See *2016 Lifeline Order*, 31 FCC Rcd at 3972-75, paras. 30-37.



who are providing voice telephony, but broadband Internet access service cannot be an independent supported telecommunications service under section 254(c). Although section 254(e) directs that “[a] carrier that receives [universal service] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended,” section 254 is silent about the mechanics by which the Commission may determine the magnitude of high-cost or Lifeline support an ETC will receive, including the conditions that trigger the flow of support. By contrast, where Congress wished to specify in greater detail the mechanics of how support amounts would be calculated and triggered, it did so.<sup>368</sup> Consequently, so long as the Lifeline funds ultimately are used consistent with the requirements of section 254(e), there is no statutory bar to conditioning the receipt of support on the provision of an information service offered over the network that provides the section 254(c)(1) supported service, and calculating support amounts in a way that accounts for the fulfillment of that condition.<sup>369</sup> In the high-cost program, the Commission long has provided support without relying on a trigger based solely on the provision of the section 254(c)(1) supported service. For example, the Commission calculated the amount of high-cost support for rate-of-return carriers based on the number of voice or broadband Internet access services lines they provided, even though only voice telephony was the section 254(c)(1) supported service.<sup>370</sup> Thus, because broadband Internet access service is not a section 254(c) telecommunications service, we remove broadband Internet access service from the list of supported services in sections 54.101, while preserving our authority to fund broadband Internet access service through the Lifeline program.<sup>371</sup>

97. We note that, while we did not propose this specific rule change in the *2017 Lifeline Notice*,<sup>372</sup> the Commission did specifically seek comment on relying on section 254(e) as the legal authority to support broadband Internet access service in the Lifeline program without relying on the regulatory classification of broadband Internet access service as a telecommunications service.<sup>373</sup> Since this rule change is a direct result of our reliance on this legal theory, we find that removing broadband Internet access service as a supported service in these rule sections is supported by the text of the *Notice* itself and, in addition, is in any event a “logical outgrowth” of the proposal in the *Notice*. We also note that this rule change will have little practical effect on ETCs as the authority outlined today allows the Lifeline program to continue funding broadband Internet access service offerings.

98. *Continued Support for Plans that Only Satisfy the Broadband Minimum Service Standards.* We next clarify that the Lifeline program can continue to provide support for broadband-only offerings by ETCs to qualifying low-income households. In order to receive reimbursement for providing a Lifeline service, ETCs must identify if the service meets the mandatory minimum standards for voice or broadband to determine the amount of support they can claim from the Lifeline program. With the phasedown of voice support proceeding in accordance with the Commission’s current rules,<sup>374</sup> we expect

---

<sup>368</sup> See, e.g., 47 U.S.C. § 254(h)(1) (providing more details regarding the magnitude and triggers for universal service support or contributions offsets in the case of certain services for schools, libraries, and rural health care providers).

<sup>369</sup> The California PUC previously argued that if broadband Internet access service were reclassified as an information service, the Commission may not have the ability to impose its Lifeline minimum service standards on broadband services offered in the Lifeline program because of the limitations of section 254(c). See California PUC Comments, WC Docket 17-108, at 13 (filed July 17, 2017); 47 CFR § 54.408. As stated here, however, section 254(c) does not impose a bar on how the Commission might trigger universal support to a properly designated ETC.

<sup>370</sup> See *Connect America Fund*, WC Docket No. 10-90, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3120, para. 87 (2016) (*2016 CAF Order*) (discussing the approach and its underlying rationale).

<sup>371</sup> See 47 CFR §§ 54.101(a), 54.401(a). See also 47 U.S.C. §§ 214(e)(1)(a), 254(c).

<sup>372</sup> See *2017 Lifeline Notice*, 32 FCC Rcd at 10502-10503, para. 77-79.

<sup>373</sup> See *id.*

<sup>374</sup> See 47 CFR § 54.403.

to see some subscribers who receive a Lifeline service that only qualifies for Lifeline support because the service meets the program's minimum service standards for broadband Internet access service. Even though these offerings do not rely on a qualifying voice service—although they could very well include some level of bundled non-qualifying voice service, as many Lifeline subscribers receive today—we can continue to provide reimbursement under the statutory authority we outline today. As the *Mozilla* court notes, section 214(e) requires that entities designated as ETCs must be common carriers.<sup>375</sup> The common carrier requirement of section 214(e) creates a limitation on the *type* of entities that may be designated as an ETC, but it does not prohibit an ETC from providing a broadband only-service to a qualifying low-income household and also receiving Lifeline support for that service to that household. The statute does not mandate that ETCs *only* offer service on a common carrier basis, nor does it prevent the Commission from reimbursing broadband Internet access service offerings as a way to accomplish the principles on which the Commission is required to base its universal service policies pursuant to section 254(b).

99. Using universal support to promote advanced services by ETCs that are, by definition, common carriers is consistent with past Commission efforts in the high-cost mechanism. In 2016, for example, the Commission allowed high-cost support for broadband-only loops for rate-of-return carriers. In doing so, the Commission stated that it was applying the principle first outlined in the *USF/ICC Transformation Order* “that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.”<sup>376</sup> NaLA echoed this approach when it stated that, even if the Commission continues its phase-down in Lifeline voice support, “as long as voice telephony service remains a supported service and ETCs are offering voice service, the Commission can continue to provide universal service funding only for the provision of broadband service . . . .”<sup>377</sup> Under the approach we adopt today, ETCs, operating as common carriers, would still be required to offer voice service, including through bundled service offerings, but the Lifeline program would target its resources to induce ETCs to provide broadband Internet access service offerings, both bundled and standalone, to Lifeline subscribers.

100. A number of commenters expressed concern that the Commission would be unable to support broadband-only providers as a result of broadband Internet access service's status as an information service.<sup>378</sup> The Commission has already decided this issue and it is no longer before us now. As we explained in the *2019 Lifeline Order*, broadband-only providers that do not offer any voice service cannot participate in the program because they are not common carriers offering the supported voice service and thus do not satisfy the requirement in section 214(e)(1) that ETCs “offer the services that are supported by the Federal universal support mechanisms” under section 254(c).<sup>379</sup>

101. The California PUC raises a concern that classifying broadband Internet access service as a Title I service will impact states' ability to support broadband-only services in state universal service programs.<sup>380</sup> We disagree. Congress specifically delineated the states' authority to “advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunication service,

---

<sup>375</sup> See *Mozilla*, 940 F.3d at 69; 47 U.S.C. § 214(e)(1), (2), (3), (6).

<sup>376</sup> *2016 CAF Order*, 31 FCC Rcd at 3120, para. 87 (citing to *USF/ICC Transformation Order*, 26 FCC Rcd at 17679, paras. 43-45).

<sup>377</sup> NaLA Comments at 17.

<sup>378</sup> See California PUC Comments at 16-20; INCOMPAS Comments at 14; Free Press Comments at 14; Pennsylvania PUC Comments at 2, 10-11; Public Knowledge Comments at 15-18; BBIC Reply at 71.

<sup>379</sup> See *2019 Lifeline Order*, 34 FCC Rcd at 10902-04, paras. 41-42. See also 47 U.S.C. § 214(e). AARP encourages us to use section 706 of the 1996 Act as a source of authority to support stand-alone broadband. See AARP Reply at 12. However, we have determined that section 706 is not a grant of regulatory authority and merely a hortatory congressional statement. See *Restoring Internet Freedom Order*, 33 FCC Rcd at 161-70, paras. 268-83.

<sup>380</sup> California PUC Comments at 18.

and safeguard the rights of consumers.”<sup>381</sup> This authority is broad enough for the states to accomplish their universal service goals without forcing a burdensome federal regulatory regime (i.e., Title II) on broadband Internet access service offerings. It is true that the text specifically references telecommunications services, but that reference is part of a larger list of areas where states can act as long as the state action is not inconsistent with section 254.<sup>382</sup> Section 254 not only permits a state to work with telecommunications carriers in the state to support its own universal service programs, but it also allows states to “adopt regulations to provide for additional definitions and standards to preserve and advance universal service within the state . . . .”<sup>383</sup> As long as those state actions do not rely on or burden Federal universal support mechanisms,<sup>384</sup> then a state is permitted to structure its programs in a way that it deems best to promote universal service.

102. Finally, while we are confident that our analysis of the statutory authority allows for the continued support of broadband Internet access service through the Lifeline program, we would still reach the same conclusion on the classification of broadband Internet access service that we did in the *Restoring Internet Freedom Order* even if a court were to conclude that the Lifeline program could not support broadband Internet access service. As the Commission previously stated, a return to Title I classification better facilitates critical broadband investment through the removal of regulatory uncertainty and lower compliance burdens.<sup>385</sup> Further, Title I classification allows for greater freedom to operate and serve customers in rural or underserved areas of the country.<sup>386</sup> Additionally, by reclassifying broadband Internet access service as a Title I service the Commission sought to bring greater regulatory certainty to the market, removing a fog that stifled innovation.<sup>387</sup> As such, we believe that the benefits of reclassification would outweigh the removal of broadband Internet access service from the Lifeline program, were the sound statutory authority relied on today be found insufficient.

#### **D. The Order on Remand Is Consistent with the Administrative Procedure Act**

##### **1. The Commission’s Notice and Comment Procedures Comported with the Administrative Procedure Act**

103. We conclude that we have satisfied the notice and comment requirements of the Administrative Procedure Act (APA) in this proceeding.<sup>388</sup> The *Restoring Internet Freedom Notice* sought comment on returning to the long-standing information service classification of broadband Internet access service,<sup>389</sup> and we did just that in the *Restoring Internet Freedom Order*.<sup>390</sup> The D.C. Circuit’s decision in *Mozilla* left the regulatory approach adopted in the *Restoring Internet Freedom Order* in place while remanding to us for further analysis the effect on certain public safety, pole attachment, and

---

<sup>381</sup> 47 U.S.C. § 253(b).

<sup>382</sup> *See id.*

<sup>383</sup> 47 U.S.C. § 254(f).

<sup>384</sup> *See id.*

<sup>385</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 408-13, paras. 162-69.

<sup>386</sup> *Id.* at 371-74, para. 103-06.

<sup>387</sup> *See id.* at 368-69, para. 99-100.

<sup>388</sup> We therefore reject arguments to the contrary. *See, e.g.,* BBIC Comments at 2, 21; Public Knowledge *et al.* Comments at 1-2, 5; OTI *et al.* Comments at 12; Santa Clara *et al.* Comments at 4; BBIC Reply at 3-7, 9; CDT Reply at 2-5.

<sup>389</sup> *See generally Restoring Internet Freedom Notice*, 32 FCC Rcd at 4441-58, paras. 23-69; *see also, e.g.,* AT&T Reply at 19 (“[T]he original *NPRM* leading up to the *RIF Order* already raised for comment the basic issues ultimately remanded in *Mozilla* and teed up for further comment here.”).

<sup>390</sup> *See generally Restoring Internet Freedom Order*, 33 FCC Rcd at 318-434, paras. 20-206.

Lifeline universal service support issues.<sup>391</sup> The Commission sought comment in the *2017 Lifeline Notice* on, among other things, the treatment of broadband Internet access service under the Lifeline program irrespective of the regulatory classification of that service.<sup>392</sup>

104. Agencies generally have broad discretion to choose the appropriate procedural response to a court remand, including whether and to what extent to conduct a new rulemaking proceeding.<sup>393</sup> In this Order on Remand, we do not reconsider or alter any aspect of the regulatory approach adopted in the *Restoring Internet Freedom Order*.<sup>394</sup> Instead, we simply act in response to the *Mozilla* remand to explain our decision not to revisit that approach in light of the three discrete issues remanded by the D.C. Circuit. Thus, as a threshold matter, we conclude that the APA does not compel additional notice beyond that already provided.<sup>395</sup> Indeed, except to the extent that we remove broadband Internet access service from the list of supported services in our universal service rules, our Order on Remand procedurally could be analogized to a decision declining to initiate a rulemaking to revise the regulatory approach adopted in the *Restoring Internet Freedom Order* in light of the three remanded issues—which need not be preceded by its own notice and comment procedures under the APA.<sup>396</sup> Alternatively—and again, except to the extent that we modify our universal service rules to remove broadband Internet access service from the list of supported services—our response to the three remanded issues could be seen as, at most, an interpretive rule or policy statement.<sup>397</sup>

105. Independently, we conclude that even if some form of additional notice and comment procedures were required here in light of *Mozilla*, our procedures on remand have been sufficient. The Bureau elected to refresh the record on issues implicated by the *Mozilla* remand to supplement the original *Restoring Internet Freedom* rulemaking record and the record of the *2017 Lifeline Notice*,<sup>398</sup>

---

<sup>391</sup> *Mozilla*, 940 F.3d at 59-63, 65-67, 68-70.

<sup>392</sup> *2017 Lifeline Notice*, 32 FCC Rcd at 10502-03, paras. 77-79.

<sup>393</sup> See, e.g., Verizon Reply at 2-3 & n.6 (citing *Williams Nat. Gas Co. v. FERC*, 872 F.2d 438, 450-51 (D.C. Cir. 1989); *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999); *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006)); NCTA Reply at 3 n.5 (citing *Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 58 (D.C. Cir. 2000)); TechFreedom Reply at 3 n.7 (distinguishing cases cited by commenters that did not involve remands); *Sierra Club v. EPA*, 325 F.3d 374, 382 (D.C. Cir. 2003).

<sup>394</sup> To the extent that commenters contend that additional notice would be required to adopt an approach different than the one we take in this Order on Remand, those arguments are not applicable here. See, e.g., Public Knowledge *et al.* Comments at 1, 5; BBIC Reply at 3, 7; CDT Reply at 5.

<sup>395</sup> See, e.g., Letter from Kristine Hackman, Vice President, Policy & Advocacy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 17-108, 17-287, and 11-42, at 1 (filed July 30, 2020) (USTelecom July 30, 2020 *Ex Parte* Letter) (“As USTelecom and others have previously explained, nothing in the Administrative Procedure Act (‘APA’) requires the Commission to issue a Notice of Proposed Rulemaking (‘NPRM’) in response to the remand.”).

<sup>396</sup> See, e.g., *WWHT, Inc. v. FCC*, 656 F.2d 807, 813 (D.C. Cir. 1981) (“[t]he mere filing of a petition [for rulemaking] does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings” (quoting S. Rep. No. 752, 79th Cong., 1st Sess. (1945), reprinted in *Administrative Procedure Act: Legislative History, 79th Cong. 1944-46, S. Doc. No. 248, 79th Cong., 2d Sess. at 201-02 (1946)*)).

<sup>397</sup> See, e.g., *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (quoting “working definitions” from the Attorney General’s Manual on the Administrative Procedure Act (1947), defining interpretive rules as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers” and general statements of policy as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power”).

<sup>398</sup> *Restoring Internet Freedom Remand PN*, 35 FCC Rcd 1446 (comment period established in *Restoring Internet Freedom* proceeding); *Restoring Internet Freedom Remand Comment Extension Order*, 35 FCC Rcd 2893 (comment deadline extended in *Restoring Internet Freedom* proceeding); *Further Extension Denial Order*, 35 FCC Rcd 3672 (further extension denied in *Restoring Internet Freedom* proceeding).

consistent with similar actions taken by the Commission's Bureaus in many instances in the past.<sup>399</sup> The Bureau's request for comment on the *Mozilla* remand was published in the Federal Register.<sup>400</sup> We also agree with numerous commenters that the issues to be addressed on remand were apparent, including from the *Mozilla* decision itself.<sup>401</sup> Nothing about the *Restoring Internet Freedom Remand PN* hindered commenters from understanding the supplemental information that the Commission would be considering<sup>402</sup> or from raising the arguments they wished to raise in response to the remand.<sup>403</sup>

---

<sup>399</sup> See, e.g., *Wireline Competition Bureau Seeks To Refresh the Record on Ancillary Service Charges Related to Inmate Calling Services*, Public Notice, 35 FCC Rcd 189 (WCB 2020); *New Docket Established To Address Open Internet Remand*, Public Notice, 29 FCC Rcd 1746 (WCB 2014); *Wireline Competition Bureau Seeks Comment on Applying the Qwest Phoenix Forbearance Order Analytic Framework in Similar Proceedings*, Public Notice, 25 FCC Rcd 8013 (WCB 2010); *Public Safety and Homeland Security Bureau Seeks To Refresh the Record Regarding Service Rules For Wireless Enhanced 911 Phase II Location Accuracy and Reliability*, Public Notice, 24 FCC Rcd 13677 (PSHSB 2009); *Common Carrier Bureau Seeks Comment On Remand of \$650 Million Support Amount Under Interstate Access Support Mechanism For Price Cap Carriers*, Public Notice, 16 FCC Rcd 21307 (CCB 2001); *Comments Requested In Connection With Court Remand of August 1998 Advanced Services Order*, Public Notice, 14 FCC Rcd 15340 (CCB 2000); *Wireless Telecommunications Bureau Requests Comment On the Construction Requirements For Commercial Wide-Area 800 MHz Licensees Pursuant To Fresno Mobile Radio, Inc. v. FCC*, Public Notice, 14 FCC Rcd 7799 (WTB 1999); *Pleading Cycle Established For Comment On Remand Issues In the Payphone Proceeding*, Public Notice, 13 FCC Rcd 12093 (CCB 1998); see also Verizon Reply at 3 n.6. Nothing in the D.C. Circuit's remand displaced the Commission's authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice," nor to rely on Bureaus' actions on delegated authority for "the prompt and orderly conduct of its business." 47 U.S.C. §§ 154(j), 155(c)(1).

<sup>400</sup> 85 Fed. Reg. 12555 (Mar. 3, 2020); see also 85 Fed. Reg. 20276 (Apr. 10, 2020) (extending the comment period).

<sup>401</sup> See, e.g., AT&T Reply at 19-21; CTIA Reply at 2-3; USTelecom Reply at 12-13; Verizon Reply at 2-3. Before turning to specific questions upon which the Bureau sought to develop the record further, the *Restoring Internet Freedom Remand PN* began with requests for comment framed in terms that mirrored the scope of the D.C. Circuit's remand in *Mozilla*. *Restoring Internet Freedom Remand PN*, 35 FCC Rcd at 1446-47 ("First, we seek to refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect public safety. . . . Second, we seek to refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect the regulation of pole attachments in states subject to federal regulation. . . . Third, we seek to refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect the Lifeline program."). Commenters criticizing the scope of the *Restoring Internet Freedom Remand PN*'s request for comments on the remanded issues neglect that fact. See, e.g., BBIC Comments at 2, 21; Santa Clara *et al.* Comments at 4; BBIC Reply at 5-7, 9; CDT Reply at 2-4; Greenlining Reply at 2; Written *Ex Parte* of Public Knowledge [sic], Access Now, Common Cause, and New America's Open Technology Institute, WC Docket No. 17-108, at 5 (filed July 1, 2020) (Public Knowledge *et al.* July 1, 2020 *Ex Parte* Letter).

<sup>402</sup> See, e.g., CTIA Reply at 2-3; USTelecom Reply at 13; Verizon Reply at 2-3 & n.6. To the extent that some court precedent contemplates notice and comment in certain circumstances where an agency engages in new fact-gathering on remand, the objective is to ensure that parties have an opportunity to comment on any new factual information critical to the agency's decision whether to modify a rule on remand. See, e.g., *Chamber of Commerce v. SEC*, 443 F.3d at 900-01. While we consider the additionally-gathered information instead to supplement information in the original rulemaking record, even if it were critical information, we find that the objectives of that precedent have been satisfied here.

<sup>403</sup> See, e.g., AT&T Reply at 21; Richard Bennett Reply at 4 ("Title II enthusiasts uniformly assert that the Commission has failed to ask the proper questions. But they nevertheless go on to offer responses to the questions they would have liked the Commission to ask, such as the general impact of the RIF Order on public safety."); USTelecom Reply at 12-13 ("Public Knowledge *et al.* contend that the Public Notice 'does not say what [the Commission] ultimately intends to do when it has refreshed the record,' but then – on the *very next page* – answer their own question, correctly stating that the Commission's task here is (in the words of their header) 'To determine If Its Policy Choice is Consistent With Its Obligations Under the Communications Act.' This tracks the *Mozilla* court's express directives, and was self-evident to all participants." (footnotes omitted)); see also, e.g., *Nat'l Ass'n of* (continued....)

106. We also find that there was adequate time for participation by commenters. Commenters expressing concern about the timing of the comment period focus specifically on the development of the record related to public safety issues.<sup>404</sup> Commenters do not identify any inadequacy in the comment period provided in the *Restoring Internet Freedom Notice*, which provided a full opportunity for commenters to raise public safety concerns and which the Commission is considering in responding to the *Mozilla* remand.<sup>405</sup> With respect to the *Restoring Internet Freedom Remand PN* requesting comment to supplement the record in response to the remand, the process was appropriate, as well. As USTelecom observes, “the Commission published the Notice on March 3, 2020, more than a month and a half before comments were due.”<sup>406</sup> This comment cycle included an extension of time “to enable state, county, and municipal governments to be able to respond adequately to the issues raised in the Public Notice relating to how the Commission’s action affects public safety.”<sup>407</sup> This provided ample opportunity to submit information in response to the *Restoring Internet Freedom Remand PN*. To the extent that certain parties belatedly sought a further extension, we agree with the Bureau that the request was neither timely nor provided evidence that further extension of time was warranted.<sup>408</sup>

107. The record also does not persuade us that there are additional arguments or information that interested parties in fact would have raised under a different comment process that they were unable to raise in the record for consideration in this proceeding. We reject arguments in response to the *Restoring Internet Freedom Remand PN* that reiterate concerns that certain commenters’ efforts to address the COVID-19 pandemic limit their ability to fully participate even under the extended comment cycle.<sup>409</sup> Those arguments are not materially different from the arguments the Bureau considered and appropriately rejected in the *Further Extension Denial Order*.<sup>410</sup> Further, in addition to the formal comment process, parties were able to make *ex parte* filings, as well.<sup>411</sup> Insofar as certain parties sought a further 60-day extension of the already once-extended comment period, we note that substantially more than 60 days have passed since that comment deadline, during which time they have been free to raise their arguments in *ex parte* filings, which are considered by the Commission as part of the record in this proceeding.

108. We reject the claims of some commenters that the U.S. Supreme Court’s recent decision in *DHS v. Regents of the Univ. of Cal.* support their prior contentions that “the Commission must have a formal Notice of Proposed Rulemaking (NPRM) as a prelude to issuing any response to the remand by the *Mozilla* Court.”<sup>412</sup> Contrary to those claims, *DHS v. Regents of the Univ. of Cal.* does not specify that

---

*Broads. v. FCC*, 789 F.3d 165, 177 (D.C. Cir. 2015) (any error in OET, rather than the full Commission, issuing a Public Notice seeking comment was harmless).

<sup>404</sup> See, e.g., *Santa Clara et al.* Comments at 1-2; *OTI et al.* Comments at 12.

<sup>405</sup> *Mozilla*, 940 F.3d at 61, 63 (observing that “comments by Santa Clara County, former California Public Utility Commissioner Sandoval, and others repeatedly raised substantial concerns about the Commission’s failure to undertake the statutorily mandated analysis of the 2018 Order’s effect on public safety” and “remand[ing] with direction to address the issues raised”).

<sup>406</sup> USTelecom Reply at 13; see also 85 Fed. Reg. 12555 (Mar. 3, 2020) (initially establishing the comment period); 85 Fed. Reg. 20276 (Apr. 10, 2020) (extending the comment period).

<sup>407</sup> *Restoring Internet Freedom Remand Comment Extension Order*, 35 FCC Rcd at 2893-94, para. 3.

<sup>408</sup> *Further Extension Denial Order*, 35 FCC Rcd at 3673, paras. 4-6.

<sup>409</sup> See, e.g., *Santa Clara et al.* Comments at 1-2; *OTI et al.* Comments at 12-13; *OTI et al.* Reply at 10.

<sup>410</sup> *Further Extension Denial Order*, 35 FCC Rcd at 3673, paras. 4-6.

<sup>411</sup> See *Restoring Internet Freedom Comment PN*, 35 FCC Rcd at 1448-49 (explaining that this is a “permit-but-disclose” proceeding); 47 CFR § 1.1206 (rules for filings in “permit-but-disclose” proceedings).

<sup>412</sup> *Public Knowledge et al.* July 1, 2020 *Ex Parte* Letter at 1 (discussing *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020)).

a new, Commission-level Notice of Proposed Rulemaking would be required here. To the extent that *DHS v. Regents of the Univ. of Cal.* speaks to the procedures to be followed when an agency takes new action to provide additional explanation on remand, it does not adopt any one-size-fits-all approach, but merely observes that the procedures followed must be whatever otherwise is required for the relevant action.<sup>413</sup> In contrast to the posture in that case—where DHS’s prior decision was vacated<sup>414</sup>—the D.C. Circuit in *Mozilla* remanded without vacatur, leaving the *Restoring Internet Freedom Order* in place, and in this Order on Remand we do not modify or alter the regulatory approach adopted there. Consequently, whatever procedures theoretically might be required for DHS in response to *DHS v. Regents of the Univ. of Cal.*, it does not follow that a new, Commission-level rulemaking would be required here. Independently, as discussed above, we also find that even assuming *arguendo* that some manner of additional notice and comment were required, our procedures here have been adequate.<sup>415</sup>

## 2. The Commission Thoroughly Considered the Relevant Issues on Remand

109. In the substantive sections of this Order we thoroughly analyze the effects of the *Restoring Internet Freedom Order* on public safety, pole attachments, and Lifeline consistent with the D.C. Circuit’s remand, and explain why those considerations do not persuade us to depart from the regulatory approach we adopted in that *Order*. This included addressing the thousands of public comments by identifying which ones were responsive to the three specific issues subject to the remand and analyzing those responsive arguments here. Our action satisfies both the *Mozilla* remand and the APA’s reasoned decision-making requirements.<sup>416</sup>

110. Our analysis in the Order on Remand also demonstrates that we remained open-minded regarding the issues remanded in *Mozilla*.<sup>417</sup> For one, the cases cited by commenters expressing concern in this regard involved scenarios where the court was evaluating the adequacy of the original notice or opportunity for comment rather than where, as here, the agency is responding to a court’s remand to consider certain specific issues in evaluating whether they warrant a change in its prior decision.<sup>418</sup> Indeed, rather than evidence that the Commission had a closed mind on the remanded issues as some commenters contend,<sup>419</sup> the solicitation of comments in the *Restoring Internet Freedom Remand PN*

---

<sup>413</sup> See *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1908 (“An agency taking [new action] is not limited to its prior reasons but must comply with the procedural requirements for new agency action.”); see also USTelecom July 30, 2020 *Ex Parte* Letter at 1-2.

<sup>414</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1907.

<sup>415</sup> See, e.g., USTelecom July 30, 2020 *Ex Parte* Letter at 2.

<sup>416</sup> We therefore reject arguments that the Commission’s analysis of the remanded issues has failed, or will fail, the reasoned decision-making requirements of the APA. See, e.g., BBIC Comments at 2; Public Knowledge *et al.* Comments at 5; Santa Clara *et al.* Comments at 4; BBIC Reply at 5, 8, 13, 16, 34-35, 37-39, 41, 60-61, 65-66; CDT Reply at 4; Greenlining Reply at 2.

<sup>417</sup> In *Little Sisters of the Poor*, the Supreme Court recently “decline[d] to evaluate the final rules [at issue there] under the open-mindedness test” that had been used by the Third Circuit given that “the text of the APA provides the “maximum procedural requirements” that an agency must follow in order to promulgate a rule.” *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (*Little Sisters of the Poor*). The Court concluded that “the open-mindedness test violates the ‘general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.’” *Little Sisters of the Poor*, 140 S. Ct. at 2385. To the extent that commenters seek to advance the same basic “open-mindedness” test here, the Supreme Court’s decision provides an additional reason why it is unavailing. But in any case, we independently conclude that we did, in fact, remain open-minded for the reasons discussed in the text.

<sup>418</sup> See, e.g., Public Knowledge *et al.* Comments at 2 (quoting *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009)); BBIC Reply at 4 (citing *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 340 F.Supp.2d 1249, 1265 (D. Wyo. 2004)).

<sup>419</sup> See, e.g., Public Knowledge *et al.* Comments at 1-2; BBIC Reply at 4.

reveals our willingness to give full consideration to those issues.<sup>420</sup> Our analysis likewise demonstrates that we remained open-minded in that regard, but were not persuaded to depart from our regulatory approach in the *Restoring Internet Freedom Order* on the basis of those considerations.<sup>421</sup>

111. We also have no obligation in this proceeding to re-open issues from the *Restoring Internet Freedom Order* that were not remanded by *Mozilla*.<sup>422</sup> Insofar as commenters raise issues

<sup>420</sup> See, e.g., NCTA Reply at 3 n.5 (“As a procedural matter, *RIF Order* opponents are simply wrong in arguing that the Commission was required to issue a notice of proposed rulemaking in response to the *Mozilla* remand. . . . [T]he decision to proceed through the Public Notice does *not* suggest that the Commission has somehow preordained the result of this proceeding.”). In contrast to the Bureau’s requests for comment in the *Restoring Internet Freedom Remand PN*, the district court in *Int’l Snowmobile Mfrs. Ass’n v. Norton*, confronted a situation where agency decisionmakers made “definitive statements” about the outcome “before the [environmental review] process was complete.” 340 F.Supp.2d at 1265. A Bureau-level Public Notice requesting comment does not similarly represent “definitive statements” about the outcome the full Commission will reach in this proceeding.

<sup>421</sup> See, e.g., *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 217 & n.8 (D.C. Cir. 2013) (recognizing that “it is entirely proper for an agency to provide an explanation if directed to do so on remand” so long as the agency does not “resist engaging in any genuine reconsideration of the issues” and the “agency’s action on remand [is] more than a barren exercise of supplying reasons to support a pre-ordained result”); *Am. Fed. of Labor & Cong. of Indus. Org. v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991) (reversing the district court’s decision that the Department of Labor’s stated “reasons for its policy choice [were] ‘post hoc rationalizations,’ which demonstrated that DOL did not evaluate the evidence on remand with ‘an open mind,’” instead observing that “we do not see why the Department’s adherence to its policy position reflected in the interim rule is at all relevant to our review” because “[o]nly in rather extraordinary circumstances do we examine an agency’s motivation. . . . [a]nd when an agency on remand is giving a fuller explanation of its prior decision, its reasoning is in some sense necessarily post hoc”); see also, e.g., *Rural Cellular Ass’n v. FCC*, 588 F.3d at 1102 (observing that “[n]umerous commenters expressed support for the rule, and the Commission properly took those views into account when it decided to impose the interim cap” despite there also being comments opposed to the rule); *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 340 F.Supp.2d at 1265 (finding inadequate an agency decision “that did not seriously consider public comments”); USTelecom Reply at 12 & n.40 (asserting that “nothing in the D.C. Circuit’s decision or the Administrative Procedure Act (‘APA’) requires the Commission to issue a Notice of Proposed Rulemaking (‘NPRM’). . . . This is contrary to Public Knowledge et al.’s comments that the APA requires the FCC to proceed via a NPRM in order to keep an open mind about changing its decision.”).

<sup>422</sup> See, e.g., *Friedman v. FAA*, 890 F.3d 1092, 1097 (D.C. Cir. 2018) (In “emphasiz[ing] the narrowness of the issue before” the court: “Because the FAA sent its January 27 letter in response to this court’s remand, the only question we must answer is whether it has ‘fill[ed] the analytical gap identified in [our] opinion.”); *West Virginia v. EPA*, 362 F.3d 861, 872 (D.C. Cir. 2004) (rejecting challenges to EPA’s decision on remand based on certain issues where “EPA did not reopen these issues in the remand proceedings”); *Nat’l Coal. Against the Misuse of Pesticides v. Thomas*, 815 F.2d 1579, 1580-81 (D.C. Cir. 1987) (rejecting a challenge claiming “that EPA’s action on remand does not satisfy the concerns elucidated in our prior opinion” where the “EPA has now approached the issue at hand with proper attention to factors relevant under the FDCA; in addition, we are satisfied that the agency has resolved the matter in a reasoned fashion”); TechFreedom Comments at 4 (“[T]he *Mozilla* remand neither requires, nor warrants, a broad reassessment of net neutrality. The FCC should limit its inquiry to the three specific issues remanded: Lifeline, pole attachments, and public safety.”); CTIA Reply at 2 (“The Commission’s task here is well defined and discrete. The *Mozilla* court directed the agency to consider the *RIF Order*’s impact on three specific areas: pole attachments, Lifeline support, and public safety. Arguments in the record that extend beyond these three issues do not respond to the court’s directives, and they are not at issue in this proceeding. Here, the Commission should stick to the path set out by the D.C. Circuit, addressing the specific issues the court remanded and bringing this matter to its conclusion.” (footnote omitted)); TechFreedom Reply at 2 (asserting that certain “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”). Some commenters quote language from *DHS v. Regents of the Univ. of Cal.*, that an agency supplementing its original reasoning must “deal with the problem afresh.” Public Knowledge et al. July 1, 2020 *Ex Parte* Letter at 3 (quoting *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1908). To the extent that these commenters suggest that we therefore must reopen the issues in the *Restoring Internet Freedom Order* more broadly, we reject that claim. The DHS action at issue in *DHS v. Regents of the Univ. of Cal.* had been both vacated and remanded in full. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1907. The relevant

(continued....)



beyond the scope of the remanded issues, we reject them as outside the scope of this proceeding.<sup>423</sup> Taking up those broader issues here would unsettle reasoning and decisions not rejected by the court, giving us—and parties supportive of the *Restoring Internet Freedom Order*'s regulatory approach—a task on remand that not only was not required but that could not reasonably have been anticipated by *Mozilla*'s remand of “three discrete points.”<sup>424</sup> For example, commenters relitigate the question whether the Commission was correct in predicting that Title I classification would promote competition, investment, and innovation—a finding that was affirmed by the D.C. Circuit and is outside the scope of the remand.<sup>425</sup> While many commenters argue that experience following the *Restoring Internet Freedom Order* has borne out the Commission's prediction,<sup>426</sup> some argue that Title I classification has had no effect in

---

“problem” that DHS was dealing with there thus was the entirety of its action. Here, by contrast, the D.C. Circuit declined to vacate the *Restoring Internet Freedom Order*, leaving it in place while directing the Commission to address “three discrete points.” *Mozilla*, 940 F.3d at 17. In this context, it is most reasonable to define the “problem” that we consider afresh here to be the effect of the regulatory approach in the *Restoring Internet Freedom Order* on the public safety, pole attachment, and Lifeline universal service support issues identified by the *Mozilla* court. See, e.g., USTelecom July 30, 2020 *Ex Parte* Letter at 2-3.

<sup>423</sup> See, e.g., AARP Comments at 22 (raising arguments about universal service contributions); California PUC Comments at 6-7 (raising arguments about electric grid reliability and Federal Energy Regulatory Commission rules prohibiting anticompetitive conduct); EFF Comments at 4 (raising arguments about zero rating); Greenlining Comments at 3 (raising arguments about access to broadband Internet access service); Santa Clara *et al.* Comments at 10 (raising arguments about the Keep Americans Connected Pledge); BBIC Reply at 35, 46-48 (raising arguments broadly suggesting that certain conduct by broadband Internet access service providers potentially could violate certain state laws); BBIC Reply at 49, 72-75 (raising general arguments about the possible effects of paid prioritization arrangements and other network management practices); BBIC Reply at 72 (characterizing broadband Internet access service providers as Internet gatekeepers); Free Press Reply at 13-14 (raising arguments about the effects of classification on investment); INCOMPAS Reply at 5-11 (raising arguments about competition for broadband Internet access service and arguing that providers have the incentive and ability to discriminate, and raising arguments regarding interconnection and traffic exchange); INCOMPAS Reply at 12-13 (raising arguments about the effects of classification on investment and provider conduct); Richard Bennett Reply at 5-13 (responding to general arguments about quality of service and paid prioritization); OTI *et al.* Reply at 13-14 (raising arguments about connectivity and the Keep Americans Connected pledge). While in some cases commenters raise issues with no clear nexus to the remanded issues at all, in other cases commenters raise arguments that potentially encompass, but extend beyond, the remanded issues. We reject arguments only insofar as they fall outside or extend beyond the remanded issues, and otherwise consider them in our analyses of public safety, pole attachments, and Lifeline support, respectively, insofar as they do in fact bear on any of those issues.

<sup>424</sup> *Mozilla*, 940 F.3d at 17.

<sup>425</sup> See *Mozilla*, 940 F.3d at 49-50.

<sup>426</sup> See, e.g., ACA Connects Comments at 3; American Consumer Institute (ACI) Comments at 4 (“[C]apital investment by broadband providers (ISPs) decreased during the Title II years (e.g. 2015 -2016), and grew in 2017 - 2018, when the shadow of Title II was lifted. . . . Specifically, U.S. broadband providers invested approximately \$80.0 billion in network infrastructure in 2018, up more than \$3.1 billion from \$76.9 billion in 2017.”); Competitive Enterprise Institute Comments at 6 (asserting that after the adoption and finalization of the *Restoring Internet Freedom Order*, “investment rebounded by \$2.1 billion between 2016 and 2017 and \$3.1 billion between 2017 and 2018,” which “means more Americans are connected to an ever-improving Internet”); Consumer Action for a Strong Economy (CASE) Comments at 1-2; CTIA Comments at 3-4 (“While mobile wireless investment fell in the wake of the *Title II Order*, dropping some 83 percent between 2015 and 2017 as compared to the prior two years, that investment has rebounded since the *RIF Order*'s release.”); Digital Liberty *et al.* Comments at 2 (“After the repeal [of the *Title II Order*], broadband providers immediately increased investment with approximately \$80 billion pouring into the networks in 2018 alone.”); Institute for Policy Innovation (IPI) Comments at 2 (“The *RIF Order*'s market-driven principles have cultivated an investment friendly environment that has enabled ISPs to build robust networks, which benefit public safety users as well as all other broadband users.”); Lincoln Network Comments at 6 (stating that “investment in broadband infrastructure grew by \$2.1 billion in 2017 and grew again in 2018 by \$3.1 billion”); National Association of Manufacturers (NAM) Comments at 1 (“The market-based approach to regulating today's internet ecosystem encourages ongoing private sector investment in broadband, which decreased following

(continued....)

investment,<sup>427</sup> and others still claim that it has decreased investment.<sup>428</sup> We need not and cannot settle this dispute here: because such issues lie outside the scope of the remand, commenters did not have a full and fair opportunity to address these issues in the same comprehensive way that they did prior to the *Restoring Internet Freedom Order*. Perhaps for that reason, the evidence offered in this proceeding fails to grapple with the effect of Title I classification on competition, investment, and innovation with nearly the same depth of analysis as the studies submitted in the *Restoring Internet Freedom* record, and therefore nothing in the comments in this remand proceeding provides firm ground to revisit the predictive judgment that we have already made.<sup>429</sup> Should parties wish to raise issues beyond those subject to the D.C. Circuit’s remand in support of a request for new rules, they may do so in a petition for rulemaking supporting their request for such broader action.<sup>430</sup>

#### **E. The Order on Remand Is Consistent with the First Amendment**

112. Our Order on Remand also is consistent with the First Amendment of the U.S. constitution. Contrary to the suggestion of some commenters,<sup>431</sup> neither the classification of broadband Internet access service as an information service nor the *Restoring Internet Freedom Remand PN* seeking comment on the *Mozilla* remand represents a government restriction on speech that requires scrutiny under the First Amendment. In particular, we are not persuaded that actions taken by broadband Internet access service providers to manage traffic on their networks constitute governmental action.<sup>432</sup> Nor does

---

the 2015 order and then increased \$1.5 billion in 2017 and again in 2018 due to the FCC’s actions.”); NCTA Comments at 3, 12; Telecommunications Industry Association (TIA) Comments at 4 (“In 2018, broadband providers deployed more fiber to more new homes in the United States than in any year in history. On the mobile side, investments by wireless providers increased in 2017, reversing historic declines in investment, and in 2018, small cell deployment more than quadrupled.”); USTelecom Comments at 8 (“In 2019, broadband providers were among the companies with the largest capital investments in the country. Meanwhile, consumers are paying less for their Internet service.”); Taxpayers Protection Alliance (TPA) Comments at 1 (“By removing onerous Title II regulations imposed on internet service providers by the previous administration, the FCC has helped boost investment and innovation in broadband infrastructure with private sector investment rather than tax dollars.”); WISPA Comments at 6-7; ACT Reply at 6 (“The [RIF] Order allows for the infrastructure investment necessary to ensure that the United States has a strong and continually growing public safety network.”); AT&T Reply at 5 (“[B]roadband providers have invested significantly more than they otherwise would because—except for the short-lived Title II experiment—they have always been subject to a light-touch regime rather than the vicissitudes of common carrier regulation . . .”); CAGW Reply at 7 (“Without the Title II restrictions, cable operators and mobile broadband providers have been able to increase their network capacity, as evidenced by the resiliency of the networks in the face of the coronavirus pandemic.”); Swanson Reply at 6; Verizon Reply at 7-8 (stating that its “investments in 4G and 5G have been facilitated by the light-touch federal regulatory framework that has applied to broadband for all but the two-plus years that the Title II Order was in effect”).

<sup>427</sup> Free Press Comments at 16; *see also* INCOMPAS Reply at 12-13 (stating that a recent study from George Washington University concludes that the passage and repeal of the net neutrality rules had no meaningful impact on broadband investment”); OTI et al. Reply at 9 (“The claim that Title II regulations are in any way connected to the amount of investment in ISPs’ networks has been debunked several times.”).

<sup>428</sup> Free Press Reply at 14 (“Aggregate industry investment at publicly-traded ISPs has actually declined nearly five percent during 2018-2019. Broadband adoption is actually slowing as we reach the top of an S-curve and the market becomes more saturated . . .”); INCOMPAS Reply at 12-13 (stating that “AT&T announced it will cut its capital investment by \$3 billion in 2020; at least half the 5.6 million new fiber-connected homes in 2018 were included as a condition of AT&T’s merger with Time Warner”).

<sup>429</sup> *See, e.g., Restoring Internet Freedom Order*, 33 FCC Rcd at 364-68, 382-92, paras. 89-98, 123-38.

<sup>430</sup> *See* 47 CFR § 1.401 (petitions for rulemaking).

<sup>431</sup> *See, e.g.,* BBIC Comments at 31, 33; BBIC Reply at 9, 75.

<sup>432</sup> *See, e.g., Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (“The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.”).

the record support the view that the request for comments in the *Restoring Internet Freedom Remand PN* somehow compelled, restricted, or otherwise chilled private parties' speech.<sup>433</sup>

#### IV. PROCEDURAL MATTERS

113. *Paperwork Reduction Act.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

114. [[The Commission will submit this draft Order on Remand to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is non-major under the Congressional Review Act, 5 U.S.C. § 804(2).] The Commission will send a copy of this Order on Remand to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

115. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

116. For further information about this rulemaking proceeding, please contact Annick Banoun, Competition Policy Division, Wireline Competition Bureau, at (202) 418-1521 or [annick.banoun@fcc.gov](mailto:annick.banoun@fcc.gov).

#### V. ORDERING CLAUSES

117. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201, 230, 231, 254, 257, 303, 332, 403, 501, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 230, 231, 254, 257, 303, 332, 403, 501, 503, and section 1.2 of the Commission's rules, 47 CFR § 1.2, this Order is ADOPTED.

118. IT IS FURTHER ORDERED that, pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR §§ 1.4(b)(1), 1.103(a), this Order on Remand SHALL BE EFFECTIVE 30 days after publication in the Federal Register.

119. IT IS FURTHER ORDERED that Part 54 of the Commission's rules IS AMENDED as set forth in Appendix A.

120. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Order on Remand to Congress and to the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

121. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Remand, including the Final Regulatory Flexibility Analysis (FRFA), to the Chief Counsel for Advocacy of the Small Business Administration.

---

<sup>433</sup> See, e.g., *Rumsfeld v. Forum for Institutional and Academic Rights, Inc.*, 547 U.S. 47, 60 (2006) (finding no First Amendment free speech violation where the law "neither limits what law schools may say nor requires them to say anything"); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (the freedom "protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); cf. *Laird v. Tatum*, 408 U.S. 1, 10 (1972) (declining to find standing to raise a First Amendment claim "by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be" overbroad).

**APPENDIX A****Final Rules**

1. Amend § 54.101 to read as follows

**§ 54.101 Supported services for rural, insular and high cost areas.**

(a) Services designated for support. Voice telephony services shall be supported by federal universal service support mechanisms.

(1) Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying low-income consumers as provided in subpart E of this part.

(b) An eligible telecommunications carrier eligible to receive high-cost support must offer voice telephony service as set forth in paragraph (a)(1) of this section in order to receive federal universal service support.

(c) An eligible telecommunications carrier (ETC) subject to a high-cost public interest obligation to offer broadband Internet access services and not receiving Phase I frozen high-cost support must offer broadband services within the areas where it receives high-cost support consistent with the obligations set forth in this part and subparts D, K, L and M of this part.

(d) Any ETC must comply with subpart E of this part.

2. Amend § 54.400 to read as follows

**§ 54.400 Terms and Definitions.**

\*\*\*\*\*

(n) *Supported service.* Voice Telephony service is the supported service for the Lifeline program.

3. Amend § 54.403 to read as follows:

**§ 54.403 Lifeline Support Amount.**

\*\*\*\*\*

(b) *Application of Lifeline discount amount.* (1) Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges must apply federal Lifeline support to waive the federal End User Common Line charges for Lifeline subscribers if the carrier is seeking Lifeline reimbursement for eligible voice telephony service provided to those subscribers. Such carriers must apply any additional federal support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers must apply the federal Lifeline support amount, plus any additional support amount, to reduce the cost of any generally available residential service plan or package offered by such carriers that provides at least one service commensurate with the requirements outlined in §54.408, and charge Lifeline subscribers the resulting amount.

## APPENDIX B

## Supplemental Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> this Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) supplements the Final Regulatory Flexibility Analysis (FRFA) included in the *2019 Lifeline Order* in WC Docket Nos., 17-287, 11-42, and 09-197,<sup>2</sup> to the extent required by the adoption of this Order on Remand. The Commission sought written public comment on the proposals in the *2017 Lifeline Notice*, including comment on the initial Regulatory Flexibility Analysis.<sup>3</sup> This Supplemental FRFA conforms to the RFA.<sup>4</sup>

**A. Need for, and Objectives of, the Order on Remand**

2. The Commission is required by section 254 of the Communications Act of 1934, as amended, to promulgate rules to implement the universal service provisions of section 254.<sup>5</sup> The Lifeline program was implemented in 1985 in the wake of the 1984 divestiture of AT&T.<sup>6</sup> On May 8, 1997, the Commission adopted rules to reform its system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition.<sup>7</sup> Since the *2012 Lifeline Order*, the Commission has acted to address waste, fraud and abuse in the Lifeline program and improved program administration and accountability.<sup>8</sup>

3. In this Order on Remand, the Commission addresses several items remanded to it by the D.C. Circuit Court of Appeals in *Mozilla v. FCC*.<sup>9</sup> As part of addressing those issues, the Commission clarifies its legal authority for reimbursing broadband Internet access service through the Lifeline program. This clarification requires minor revisions to the Commission's Lifeline rules. With this action, we fulfill the Commission's role as the steward of the Universal Service Fund (USF or Fund) and ensure that the Lifeline program can continue to allocate its limited resources to reimbursing increasingly important broadband Internet access service for low-income Americans.

---

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See *Bridging the Digital Divide for Low Income Consumers et al.*, WC Docket No. 17-287, Fifth Report and Order, Memorandum opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 34 FCC Rcd 10886 (2019) (*2019 Lifeline Order*).

<sup>3</sup> See *Bridging the Digital Divide for Low-Income consumers et al.*, WC Docket No. 17-287, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd 10475 (2017) (*2017 Lifeline Notice*).

<sup>4</sup> See 5 U.S.C. § 604.

<sup>5</sup> See 47 U.S.C. § 254 *passim*.

<sup>6</sup> See *MTS and WATS Market Structure, and Amendment of Parts 67 & 69 of the Commission's Rules and Establishment of a Joint Board*, Report and Order, 50 Fed. Reg. 939 (Jan. 8, 1985) (*MTS and WATS Market Structure Report and Order*).

<sup>7</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9006-9008, paras. 431-34 (1997) (*Universal Service First Report and Order*).

<sup>8</sup> See *Lifeline and Link Up Reform and Modernization et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012) (*2012 Lifeline Order*); *Lifeline and Link Up Reform and Modernization et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, (2015) (*2015 Lifeline Further Notice*); *Lifeline and Link Up Reform and Modernization et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016) (*2016 Lifeline Order*).

<sup>9</sup> *Mozilla Corp v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

**B. Summary of Significant Issues Raised by Public Comments to the IRFA or FRFA**

4. The Commission received no comments in direct response to the IRFA contained in the 2017 Lifeline Notice or the FRFA in the 2019 Lifeline Order.

**C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration**

5. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rule(s) as a result of those comments.<sup>10</sup>

6. The Chief Counsel did not file any comments in response to the proposed rule(s) in this proceeding.

**D. Description and Estimate of the Number of Small Entities to Which Rules May Apply**

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.<sup>11</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>12</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>13</sup> A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>14</sup>

8. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.<sup>15</sup> First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>16</sup> These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.<sup>17</sup>

9. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>18</sup> The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual

---

<sup>10</sup> 5 U.S.C. § 604(a)(3).

<sup>11</sup> 5 U.S.C. § 604(a)(3).

<sup>12</sup> 5 U.S.C. § 601(6).

<sup>13</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>14</sup> See 15 U.S.C. § 632.

<sup>15</sup> See 5 U.S.C. § 601(3)-(6).

<sup>16</sup> See SBA, Office of Advocacy, “What’s New With Small Business,” (Sept 2019).

<sup>17</sup> *Id.*

<sup>18</sup> 5 U.S.C. § 601(4).

electronic filing requirements for small exempt organizations.<sup>19</sup> Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.<sup>20</sup>

10. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>21</sup> U.S. Census Bureau data from the 2017 Census of Governments<sup>22</sup> indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>23</sup> Of this number there were 36,931 general purpose governments (county<sup>24</sup>, municipal and town or township<sup>25</sup>) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts<sup>26</sup> with enrollment

---

<sup>19</sup> The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. See Annual Electronic Filing Requirement for Small Exempt Organizations — Form 990-N (e-Postcard), “Who must file,” <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

<sup>20</sup> See Exempt Organizations Business Master File Extract (EO BMF), “CSV Files by Region,” <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

<sup>21</sup> 5 U.S.C. § 601(5).

<sup>22</sup> See 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

<sup>23</sup> See U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). See also Table 2. CG1700ORG02 Table Notes\_Local Governments by Type and State\_2017.

<sup>24</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

<sup>25</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

<sup>26</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes\_Special Purpose Local Governments by State\_Census Years 1942 to 2017.

populations of less than 50,000.<sup>27</sup> Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”<sup>28</sup>

### 1. Wireline Providers

11. *Incumbent Local Exchange Carriers (Incumbent LECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers.<sup>29</sup> Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>30</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year.<sup>31</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>32</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.<sup>33</sup> Of this total, an estimated 1,006 have 1,500 or fewer employees.<sup>34</sup> Thus, using the SBA’s size standard the majority of incumbent LECs can be considered small entities.

12. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers<sup>35</sup> and under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>36</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year.<sup>37</sup> Of that number, 3,083 operated with fewer than 1,000

---

<sup>27</sup> While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

<sup>28</sup> This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations Tables 5, 6, and 10.

<sup>29</sup> See, U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers”*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>30</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>31</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, [https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePrev](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false)  
[iew=false](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePrev).

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

<sup>33</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>34</sup> *Id.*

<sup>35</sup> See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers”*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>36</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>37</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePrev>  
[iew=false](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePrev).



employees.<sup>38</sup> Based on these data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.<sup>39</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees.<sup>40</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>41</sup> Also, 72 carriers have reported that they are Other Local Service Providers.<sup>42</sup> Of this total, 70 have 1,500 or fewer employees.<sup>43</sup> Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

13. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers.<sup>44</sup> The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>45</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year.<sup>46</sup> Of that number, 3,083 operated with fewer than 1,000 employees.<sup>47</sup> According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>48</sup> Of this total, an estimated 317 have 1,500 or fewer employees.<sup>49</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

14. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The closest applicable NAICS Code category is Wired Telecommunications Carriers.<sup>50</sup> The applicable size standard under SBA rules is

---

<sup>38</sup> *Id.* The largest category provided by the census data is “1000 employees or more” and a more precise estimate for firms with fewer than 1,500 employees is not provided.

<sup>39</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517311 Wired Telecommunications Carriers”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>45</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>46</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ5, Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>47</sup> *Id.* The largest category provided by the census data is “1000 employees or more” and a more precise estimate for firms with fewer than 1,500 employees is not provided.

<sup>48</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>49</sup> *Id.*

<sup>50</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517311 Wired Telecommunications Carriers”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

that such a business is small if it has 1,500 or fewer employees.<sup>51</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year.<sup>52</sup> Of that number, 3,083 operated with fewer than 1,000 employees.<sup>53</sup> According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>54</sup> Of this total, an estimated 317 have 1,500 or fewer employees.<sup>55</sup> Consequently, the Commission estimates that the majority of OSPs are small entities.

15. *Local Resellers.* The SBA has not developed a small business size standard specifically for Local Resellers. The SBA category of Telecommunications Resellers is the closest NAICS code category for local resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry.<sup>56</sup> Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees.<sup>57</sup> 2012 Census Bureau data shows that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees.<sup>58</sup> Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.<sup>59</sup> Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>60</sup> Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by the rules adopted.

16. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. MVNOs are included

---

<sup>51</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>52</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>53</sup> *Id.* The largest category provided by the census data is "1000 employees or more" and a more precise estimate for firms with fewer than 1,500 employees is not provided.

<sup>54</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*). [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>55</sup> *Id.*

<sup>56</sup> U.S. Census Bureau, *517911 Telecommunications Resellers*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517911&search=2012+NAICS+Search&search=2012> (last visited Jan. 10, 2020).

<sup>57</sup> 13 CFR § 121.201, NAICS code 517911.

<sup>58</sup> U.S. Census Bureau, 2012 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 517911.

<sup>59</sup> See *Trends in Telephone Service*, at Table 5.3.

<sup>60</sup> See *id.*

in this industry.<sup>61</sup> The SBA has developed a small business size standard for the category of Telecommunications Resellers.<sup>62</sup> Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>63</sup> 2012 U.S. Census Bureau data show that 1,341 firms provided resale services during that year.<sup>64</sup> Of that number, 1,341 operated with fewer than 1,000 employees.<sup>65</sup> Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.<sup>66</sup> Of this total, an estimated 857 have 1,500 or fewer employees.<sup>67</sup> Consequently, the Commission estimates that the majority of toll resellers are small entities.

## 2. Wireless Carriers and Service Providers

17. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>68</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>69</sup> For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.<sup>70</sup> Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed 1000 employees or more.<sup>71</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of Wireless Telecommunications Carriers (except Satellite) are small entities. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018 there are 265 Cellular licensees that will be

---

<sup>61</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517911 Telecommunications Resellers”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517911&search=2017%20NAICS%20Search>.

<sup>62</sup> See 13 CFR § 121.201, NAICS Code 517911.

<sup>63</sup> *Id.*

<sup>64</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517911, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517911&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>65</sup> *Id.* Available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with “1000 employees or more.”

<sup>66</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>67</sup> See *id.*

<sup>68</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (except Satellite)”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search>.

<sup>69</sup> See 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

<sup>70</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012>.

<sup>71</sup> *Id.* Available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with “1000 employees or more.”

affected by our actions.<sup>72</sup> The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>73</sup> Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees.<sup>74</sup> Thus, using available data, we estimate that the majority of wireless firms can be considered small.

18. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.<sup>75</sup> The SBA has approved these small business size standards.<sup>76</sup> In the Commission’s auction for geographic area licenses in the WCS there were seven winning bidders that qualified as “very small business” entities, and one winning bidder that qualified as a “small business” entity.<sup>77</sup>

19. *Satellite Telecommunications Providers.* This category comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>78</sup> Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of \$35 million or less in average annual receipts, under SBA rules.<sup>79</sup> For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.<sup>80</sup> Of this total, 299 firms had annual receipts of less than \$25 million.<sup>81</sup> Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

---

<sup>72</sup> See <http://wireless.fcc.gov/uls>. For the purposes of this Supplemental FRFA consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

<sup>73</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>74</sup> See *id.*

<sup>75</sup> *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

<sup>76</sup> See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (*Alvarez Letter 1998*).

<sup>77</sup> *WCS Auction Closes; Winning Bidders in the Auction of 128 Wireless Communications Licenses; FCC Form 600s Due May 12, 1997*, 12 FCC Rcd 21653, DA-97-886, Report No. AUC-997-14-E (Auction No.14) (April 28, 1997).

<sup>78</sup> See U.S. Census Bureau, *2017 NAICS Definition, “517410 Satellite Telecommunications”*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017>.

<sup>79</sup> See 13 CFR § 121.201, NAICS Code 517410.

<sup>80</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 517410, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517410&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false&vintage=2012>.

<sup>81</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$35 million or less.

20. *Common Carrier Paging.* As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite).<sup>82</sup>

21. In addition, in the *Paging Second Report and Order*, the Commission adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>83</sup> A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.<sup>84</sup> The SBA has approved this definition.<sup>85</sup> An initial auction of Metropolitan Economic Area (“MEA”) licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold.<sup>86</sup> Fifty-seven companies claiming small business status won 440 licenses.<sup>87</sup> A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.<sup>88</sup> One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.<sup>89</sup>

22. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent Trends in Telephone Service, 291 carriers reported that they were engaged in the provision of “paging and messaging” services.<sup>90</sup> Of these, an estimated 289 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>91</sup> We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

23. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite).<sup>92</sup> Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>93</sup> For this industry, U.S. Census Bureau data for

<sup>82</sup> See U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”, <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210> (last visited Jan. 10, 2020).

<sup>83</sup> *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems et al.*, WT Docket No. 96-18 et al., Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 2732, 2811-12, paras. 178-81 (1997) (*Paging Second Report and Order*); *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems et al.*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085-88, paras. 98-107 (1999).

<sup>84</sup> *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

<sup>85</sup> See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (dated Dec. 2, 1998).

<sup>86</sup> See *929 and 931 MHz Paging Auction Closes*, Public Notice, 15 FCC Rcd 4858 (WTB 2000).

<sup>87</sup> See *id.*

<sup>88</sup> See *Lower and Upper Paging Bands Auction Closes*, Public Notice, 16 FCC Rcd 21821 (WTB 2001).

<sup>89</sup> See *Lower and Upper Paging Bands Auction Closes*, Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

<sup>90</sup> *2010 Trends Report* at Table 5.3, page 5-5.

<sup>91</sup> *Id.*

<sup>92</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517210 Wireless Telecommunications Carriers (except Satellite)”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search>.

<sup>93</sup> See 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

2012 show that there were 967 firms that operated for the entire year.<sup>94</sup> Of this total, 955 firms had fewer than 1,000 employees and 12 firms had 1000 employees or more.<sup>95</sup> Thus under this category and the associated size standard, the Commission estimates that a majority of these entities can be considered small. According to Commission data, 413 carriers reported that they were engaged in wireless telephony.<sup>96</sup> Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>97</sup> Therefore, more than half of these entities can be considered small.

24. *All Other Telecommunications.* The “All Other Telecommunications” category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.<sup>98</sup> This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.<sup>99</sup> Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.<sup>100</sup> The SBA has developed a small business size standard for “All Other Telecommunications”, which consists of all such firms with annual receipts of \$35 million or less.<sup>101</sup> For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.<sup>102</sup> Of those firms, a total of 1,400 had annual receipts less than \$25 million and 15 firms had annual receipts of \$25 million to \$49, 999,999.<sup>103</sup> Thus, the Commission estimates that the majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

### 3. Internet Service Providers

25. *Internet Service Providers (Broadband).* Broadband Internet service providers include wired (e.g., cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers.<sup>104</sup> Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to

---

<sup>94</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012>.

<sup>95</sup> *Id.* Available U.S. Census Bureau data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with “1000 employees or more.”

<sup>96</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>97</sup> *Id.*

<sup>98</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517919 All Other Telecommunications”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See 13 CFR § 121.201, NAICS Code 517919.

<sup>102</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 517919, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

<sup>103</sup> *Id.*

<sup>104</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517311 Wired Telecommunications Carriers”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.<sup>105</sup> The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees.<sup>106</sup> U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.<sup>107</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>108</sup> Consequently, under this size standard the majority of firms in this industry can be considered small.

**E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

26. As the changes enacted today are primarily clarifications of existing Commission rules or statutory authorities, we do not anticipate that the changes will result in significant additional compliance requirements for small entities. However, some small entities may have an additional burden. For those changes, we have determined that the clarity the rule changes will bring to the Lifeline program outweighs the burden of any increased compliance concerns. We have noted the applicable rule changes below impacting small entities.

27. *Compliance burdens.* The rules we implement impose some compliance burdens on small entities by requiring them to become familiar with the new rules to comply with them. In most instances, the burden of becoming familiar with the new rule in order to comply with it is the only additional burden the rule imposes.

28. *Adjusting systems to account for potential changes in Lifeline reimbursement rates.* The rules we implement may require small entities to change their billing systems, customer service plans, and other business operations to account for modifications in the Lifeline supported services. We believe these changes will not be significant.

**F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

29. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”<sup>109</sup>

30. This rulemaking could impose minimal additional burdens on small entities. These impacted small entities should already be familiar with the Commission’s supported services rules, but the removal of broadband Internet access service as a defined supported service may cause some small entities to adjust their business practices.

---

<sup>105</sup> *Id.*

<sup>106</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>107</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>108</sup> *Id.* The largest category provided by the census data is “1000 employees or more” and a more precise estimate for firms with fewer than 1,500 employees is not provided.

<sup>109</sup> 5 U.S.C. § 603(c)(1)-(4).

31. The Commission will send a copy of this Order on Reconsideration including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>110</sup> In addition, the Commission will send a copy of this Order on Reconsideration, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this Order on Reconsideration and the Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.<sup>111</sup>

---

<sup>110</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>111</sup> See 5 U.S.C. § 604(b).