



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <https://www.fcc.gov>
TTY: 1-888-835-5322

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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

Comment Date: March 30, 2020

Reply Comment Date: April 29, 2020

In the *Restoring Internet Freedom Order*,¹ the Commission ended utility-style regulation of the Internet and returned to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades. In *Mozilla Corp. v. FCC*,² the U.S. Court of Appeals for the District of Columbia Circuit upheld the vast majority of the Commission's decision, remanding three discrete issues for further consideration by the Commission.³ On February 6, 2020, the D.C. Circuit denied all pending petitions for rehearing, and the Court issued its mandate on February 18, 2020. With this Public Notice, the Wireline Competition Bureau seeks to refresh the record regarding the issues remanded to the Commission by the *Mozilla* Court.

Public Safety. First, we seek to refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect public safety.⁴ In the *Restoring Internet Freedom Order*, the Commission predicted, for example, that permitting paid prioritization arrangements would “increase network innovation,” “lead[] to higher investment in broadband capacity as well as greater innovation on the edge provider side of the market,” and “likely . . . be used to deliver enhanced service for applications that need QoS [i.e., quality of service] guarantees.”⁵ Could the network improvements made possible by prioritization arrangements benefit public safety applications—for example, by enabling the more rapid, reliable transmission of public safety-

¹ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) (*Restoring Internet Freedom Order* or *Order*).

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

³ *Id.* at 18. The *Mozilla* court also vacated the portion of the *Restoring Internet Freedom Order* that “expressly preempts ‘any state or local requirements that are inconsistent with [its] deregulatory approach.’” *Id.* at 74.

⁴ *Mozilla*, 940 F.3d at 59-63; see also *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd 4434, 4457-58, 4460-62, paras. 69, 77, 83, 86 (2017) (*Restoring Internet Freedom NPRM*).

⁵ *Restoring Internet Freedom Order*, 33 FCC Rcd at 457-63, paras. 254-58.

related communications during emergencies? Relatedly, the Commission concluded that, because prioritizing packets for latency-sensitive applications would not typically degrade other applications on the same network, any non-profits, libraries, or independent content providers who declined to pay for prioritization would not be harmed.⁶ Would this same logic also apply to public safety communications? Do broadband providers have policies in place that facilitate or prioritize public safety communications?⁷ To what extent do public safety officials (at both the state and local level) even rely on mass-market retail broadband services covered by the *Restoring Internet Freedom Order* (i.e., services that only promise “best efforts” in the delivery of content), rather than dedicated networks with quality-of-service guarantees (i.e., enterprise or business data services) for public safety applications? With respect to public safety incidents described in the *Mozilla* decision and elsewhere, would the providers’ allegedly harmful conduct have been prohibited under the rules adopted by the Commission in the *Title II Order*? Are concerns or consequences of broadband providers’ possible actions different for public-safety-to-public-safety communications, such as onsite incident response or Emergency Operations Center communications, versus public safety communications made to or from the public?⁸ Do the Commission and other governmental authorities have other tools at their disposal that are better suited to addressing potential public safety concerns than classification of broadband as a Title II service? Are there any other impacts on public safety from the changes adopted in the *Restoring Internet Freedom Order*? Finally, how do any potential public safety considerations bear on the Commission’s underlying decision to classify broadband as a Title I information service?

Pole Attachments. 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.⁹ To what extent are ISPs’ pole attachments subject to Commission authority in non-reverse preemption states by virtue of the ISPs’ provision of cable or telecommunications services covered by section 224? What impact would the inapplicability of section 224 to broadband-only providers have on their access to poles? Have pole owners, following the *Order*, “increase[d] pole attachment rates or inhibit[ed] broadband providers from attaching equipment”?¹⁰ How could we use metrics like increases or decreases in broadband deployment to measure the impact the *Order* has had on pole attachment practices? Are there any other impacts on the regulation of pole attachments from the changes adopted in the *Order*? Finally, how do any potential considerations about pole attachments bear on the Commission’s underlying decision to classify broadband as a Title I information service?

Lifeline Program. Third, we seek to refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect the Lifeline program.¹¹ In particular, we seek to

⁶ *Id.* at 462-63, para. 258 & n.943.

⁷ *Mozilla*, 940 F.3d at 61-62.

⁸ *See, e.g., id.* at 60-61 (identifying examples of web-based alerting systems and Internet-based systems to monitor emergency situational data; referencing California Department of Forestry and Fire Protection’s dependence on broadband access to “track fire threats, fires, and manage forests and vegetation to prevent fires”).

⁹ *Id.* at 65-67; *see also Restoring Internet Freedom Order*, 33 FCC Rcd at 423-25, paras. 185-191; *Restoring Internet Freedom NPRM*, 32 FCC Rcd at 4457-58, para. 69.

¹⁰ *See Mozilla*, 940 F.3d at 67.

¹¹ *Mozilla*, 940 F.3d at 68-70; *see also Restoring Internet Freedom Order*, 33 FCC Rcd at 426, para. 193; *Restoring Internet Freedom NPRM*, 32 FCC Rcd at 4457, para. 68.

refresh the record on the Commission’s authority to direct Lifeline support to eligible telecommunications carriers (ETCs) providing broadband service to qualifying low-income consumers. In the *2017 Lifeline NPRM*, the Commission proposed that it “has 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,” and that “[t]his 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.”¹² How, if at all, does the *Mozilla* decision bear on that proposal, and should the Commission proceed to adopt it? For example, the Court in *Mozilla* invited the Commission to explain how its authority under section 254(e) could extend to broadband, “even ‘over facilities-based broadband-capable networks that support voice service’ now that broadband is no longer considered to be a common carrier.”¹³ We seek to refresh the record in light of the Court’s invitation. We also ask parties to refresh the record on whether there are other sources of authority that allow the Commission to provide Lifeline support for broadband services.¹⁴ Are there any other impacts on the Lifeline program from the changes adopted in the *Restoring Internet Freedom Order*? Finally, how do any potential considerations about the Lifeline program bear on the Commission’s underlying decision to classify broadband as a Title I information service?

These proceedings shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte*

¹² *Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket No. 17-287 et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd 10475, 10502-03, para. 77 (2017) (*2017 Lifeline NPRM*).

¹³ *Mozilla*, 940 F.3d at 69 (internal citations removed) (citing *Restoring Internet Freedom Order* at para. 193).

¹⁴ See *2017 Lifeline NPRM*, 32 FCC Rcd at 10503, para. 79 (“We seek comment on the Commission’s legal authority to adopt the proposed changes to Lifeline support. Are there other sources of authority that allow the Commission to make these changes to Lifeline support proposed in this section?”). See also National Lifeline Association Comments, WC Docket No. 17-287 et al., at 49-50 (Feb. 21, 2018) (arguing the Commission has authority to support broadband in the Lifeline program under section 4(i) of the Act, in addition to section 254); TracFone Wireless, Inc. Comments, WC Docket No. 17-287 et al., at 73-74 (Feb. 21, 2018) (same).

¹⁵ 47 CFR §§ 1.1200 *et seq.*

presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <https://www.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

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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.

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