



1212 New York Ave. N.W.
Suite 900
Washington, D.C. 20005
202-525-5717

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

Comments of R Street Institute¹

Tom Struble
Technology and Innovation Manager

Jeff Westling
Technology and Innovation Resident Fellow

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¹ The R Street Institute (“R Street”) is a nonprofit, nonpartisan, public-policy research organization. R Street’s mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

I. Introduction

With its 2017 *Restoring Internet Freedom Order* (“2017 Order”),² the Federal Communications Commission (“FCC” or “Commission”) wisely reversed course from the 2015 *Protecting and Promoting the Open Internet Order* (“2015 Order”),³ repealing core sections and restoring the light-touch approach to broadband regulation that had previously been in place. Under the light-touch approach, both the broadband industry and the Internet ecosystem have thrived, attracting trillions of dollars of investment, producing millions of jobs, and fostering rapid innovation throughout the information and communications technology sectors.

In returning to this light-touch approach, the Commission largely justified its decision to reject the prescriptive, heavy-handed approach to broadband regulation of the 2015 Order.⁴ However, the reviewing court was unsatisfied with the Commission’s explanation of how this would impact three issues: public safety, pole attachments, and the Lifeline program.⁵ The Commission now seeks to refresh the record with respect to these issues.⁶

With these comments, R Street will explain the likely impact the 2017 Order will have on these three issues going forward. Specifically, the 2017 Order and the return to light-

² Declaratory Ruling, Report and Order, and Order, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (Dec. 14, 2017) [“2017 Order”], <https://bit.ly/2QAZE4f>.

³ Report and Order on Remand, Declaratory Ruling, and Order, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (Feb. 26, 2015) [“2015 Order”], <https://bit.ly/2UoYKZJ>.

⁴ See *Mozilla Corp. v. FCC*, 940 F.3d 1, 18 (D.C. Cir. 2019).

⁵ *Id.*

⁶ Public Notice, *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 (Feb. 19, 2020), <http://bit.ly/3aasRdG>.

touch broadband regulation will benefit public safety, allow the Commission to continue regulating pole attachments, and allow the Commission to continue modernizing and reforming the Lifeline program. The Commission should therefore continue the great progress that has been made under the light-touch approach to broadband regulation.

II. Light-Touch Broadband Regulation Will Benefit Public Safety

In *Mozilla v. FCC*, the court determined that the FCC had not adequately considered and explained the impact that the 2017 Order would have on public safety.⁷ The 2017 Order, and the preceding 2015 Order, applied only to mass-market retail broadband service,⁸ not enterprise broadband service, telephony, texting, or emergency services. Therefore, the likely impact on public safety will be minor, which explains why the Commission discussed it only briefly in the 2017 Order. However, in considering the likely impact that the 2017 Order will have on public safety, we can draw two conclusions: Removing regulatory barriers will promote innovation in public safety, and the Commission's existing authority can adequately protect public safety going forward.

A. Removing Regulatory Barriers Will Promote Innovation in Public Safety

The 2015 Order implemented a blanket ban on “paid prioritization,” severely restricting the ability of broadband providers to experiment with differential traffic management techniques.⁹ However, there are many cases in which differential traffic management, including prioritization, can provide significant benefits for public safety. For example, the County of Santa Clara, California, explained that its Sheriff's Office has developed web-

⁷ *Mozilla*, at 59–63.

⁸ 47 C.F.R. § 8.1.

⁹ 2015 Order, ¶ 18.

based tools to improve its operations, most notably by sharing investigation and law-enforcement data.¹⁰ If the Sheriff's Office needs fast, reliable connectivity—yet still chooses to rely on mass-market retail broadband connections—then prioritized access can help ensure that this important traffic will not be delayed or lost even during times of high congestion. Indeed, public safety officials have emphasized the benefits that such priority access can provide.¹¹ 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.

Beyond 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. Unlike telephony, where technological improvements see little change in end-user experience, improvements in broadband can lead to drastically different end-user experiences. New 5G networks, for example, offer gigabit speeds with significantly reduced latency,¹² while improvements in cable broadband promise to reach speeds of 10 gigabits per second.¹³ These 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

¹⁰ Comments of the County of Santa Clara, *In the Matter of Restoring Internet Freedom*, WC Docket 17-108, at 11–13 (Dec. 6, 2017), <https://bit.ly/2Wm8QwI>.

¹¹ See, e.g., Comments of Free State Foundation, *In the Matter of Restoring Internet Freedom*, WC Docket 17-108, at 52–53 (July 17, 2017) (citing Paul Kirby, *State Official Hails Benefit of AT&T Providing Priority Access, Preemption on LTE Network*, TRDAILY (July 12, 2017)), <https://bit.ly/2TWgSLe>.

¹² *What is the Latency of 5G*, VERIZON (Feb. 2, 2020), <https://vz.to/2WknQeL>.

¹³ *Introducing 10G: The Next Leap for Broadband*, NCTA (Jan. 7, 2019), <https://bit.ly/2Qo2Uji>.

aerial supply drops and mass evacuation efforts during natural disasters.¹⁴ Indeed, with the recent coronavirus pandemic driving more people indoors and online, the nation's broadband infrastructure has thus far risen to the challenge to help ensure that communities can work from home and stay connected without risking direct contact and transmission of the virus.¹⁵

The record demonstrates that public-safety entities rely on widespread connectivity to protect them.¹⁶ To achieve this connectivity, early indications show that light-touch regulation better promotes investment and deployment of this critical infrastructure, while the heavy-handed approach of the 2015 Order threatened to slow down the deployment of next generation broadband infrastructure.¹⁷ By rejecting this heavy-handed approach, the Commission can ensure that market forces continue to incentivize innovation and deployment of critical broadband infrastructure that will provide significant benefits to public safety.

B. The Commission's Existing Authority Can Adequately Protect Public Safety

First responders and other government employees critical to public safety all presumably subscribe to enterprise-grade broadband services, but some public-safety communications still necessarily utilize mass-market retail broadband services. Even though the Commission

¹⁴ *How 5G Can Power Public Safety Communications*, VERIZON (Nov. 21, 2019), <https://vz.to/38SWChL>.

¹⁵ Press Release: *FCC Chairman Thanks Companies That Have Gone Above and Beyond The Keep America Connected Pledge*, FEDERAL COMMUNICATIONS COMMISSION (Mar. 18, 2020), <https://bit.ly/3bd70Tn>; see also Jeffrey Westling, *FCC, Broadband Industry Rising to the Challenge of Covid-19*, R STREET INSTITUTE (Mar. 26, 2020), <https://bit.ly/2JOWPIJ>.

¹⁶ See, e.g., Santa Clara Comments, *supra* note 10, at 6–7.

¹⁷ Patrick Brogan, *U.S. Broadband Investment Continued Upswing in 2018*, USTELECOM (July 31, 2019), <https://bit.ly/2QoW7FO>.

overturned the 2015 Order, returning to the light-touch approach by reclassifying broadband as a Title I “information service” does not give broadband providers carte blanche to throttle or block lawful traffic, and existing authority can ensure that public-safety communications are adequately protected.

Most notably, the 2017 Order left in place strong transparency requirements designed to ensure broadband providers explicitly outline what end users can expect.¹⁸ With accurate information about what the service will entail, users can make the choices that best fit their needs. And if the providers fail to honor the terms in their service offerings, the Federal Trade Commission has clear authority to intervene using its Section 5 deception authority.¹⁹

Indeed, the often-cited example of Verizon “throttling” Santa Clara County Fire Prevention District illustrates this key point. The Fire Prevention District’s traffic was throttled because they mistakenly purchased a mass-market retail plan that slowed speeds after exceeding a certain data cap, a practice allowable under both the 2015 Order and the 2017 Order.²⁰ But if Verizon was unclear in marketing its plan, or failed to upgrade the Fire Prevention District to an enterprise-grade plan once requested, the FTC can file a complaint under Section 5.²¹ Indeed, the FTC has already successfully used this authority to pursue a complaint against AT&T for deceptively marketing one of its own plans.²² This enforcement

¹⁸ 2017 Order ¶ 215.

¹⁹ 15 U.S.C. § 45(a)(1).

²⁰ Berin Szoka, *False Alarm: Verizon’s Fire Department Customer Service Fail Has Nothing to Do with Net Neutrality*, MEDIUM (Aug. 28, 2018), <https://bit.ly/39Z0Fuj>.

²¹ *Id.*

²² *AT&T to Pay \$60 Million to Resolve FTC Allegations It Misled Consumers with “Unlimited Data” Promises*, FED. TRADE COMM’N (Nov. 5, 2019), <http://bit.ly/392kLT4>.

backstop will ensure broadband providers clearly lay out and honor the terms of their service plans.

Finally, since the 2015 Order applied only to mass-market retail broadband service, emergency services themselves were not affected by the 2017 Order. The Commission's authority over emergency services is all outside Title II of the Communications Act, so that authority has no bearing on them.²³ At the same time, Title II classification of broadband potentially opens important services like FirstNet to future limitations on prioritization despite the need for reliable emergency communications.²⁴ Classifying broadband as a Title I service therefore best balances consumer protection with the needs of public safety entities.

III. The Commission Can Continue Regulating Pole Attachments

Communications infrastructure—be it wires, cables, fiber, or wireless equipment—supports a wide variety of devices and services. This means that the same infrastructure used to provide information services like broadband can also be used to provide telecommunications services like telephony, or multichannel video programming distribution (“MVPD”) services like cable television. Indeed, the vast majority of communications providers offer at least two if not all three of these services using the same underlying infrastructure.

Accordingly, where the Commission has authority over pole attachments,²⁵ communications providers seeking to deploy infrastructure for broadband service can avail

²³ See, e.g., 47 U.S.C. §§ 615, 623, 1201–1205.

²⁴ Mike Dano, *AT&T CFO: FirstNet's Prioritized Service for Public Safety "a Challenge" to Net Neutrality*, FIERCEWIRELESS (Aug. 8, 2017), <https://bit.ly/2WkkTL1>.

²⁵ Of course, the FCC lacks authority to regulate infrastructure attached to certain utility poles, as well as pole attachments in the states who have reverse-preempted the FCC's authority under 47 U.S.C. § 224(c).

themselves of the Commission’s pole-attachment regulations by virtue of their telephony and MVPD capabilities. There may be some providers who wish to offer broadband service, but not telephony or MVPD service, meaning they would fall outside the Commission’s regulations. However, this concern is likely to be minor in scope, and if the Commission wishes to address it there are several options available that would preserve the light-touch approach to broadband regulation.

A. Any Concern About Broadband-Only Providers Will Likely Be Minor in Scope

Any concern about broadband-only providers will likely be minor in scope for two reasons. First, the Commission’s authority to regulate pole attachments is already quite limited. It applies only to utility poles owned by communications providers or public utilities—not to any utility poles owned by cooperatives or government bodies.²⁶ And the Commission’s authority does not apply in any state that has reverse-preempted its pole-attachment regime,²⁷ which over twenty states have done thus far.²⁸ But even where the Commission’s authority does apply, the number of broadband-only providers is likely to be limited for a second reason.

As R Street has found in researching state laws for its annual “Broadband Scorecard” project,²⁹ most state laws governing access to public rights of way, construction permits, and franchising are similar to the Communications Act in that they are tied to the offering of

²⁶ 47 U.S.C. § 224(a)(1).

²⁷ 47 U.S.C. § 224(c).

²⁸ Ryan M. Appel et al., *A Declaration of Independence: Pennsylvania to Regulate Pole Attachments*, DAVIS WRIGHT TREMAINE LLP (Sept. 9, 2019), <http://bit.ly/2UhKd1x>.

²⁹ See Tom Struble & Jeffrey Westling, *2019 Broadband Scorecard Report*, R ST. INST. (Feb. 12, 2020), <http://bit.ly/2TYM4tu>.

certain services to the public.³⁰ Therefore, any communications providers wishing to avail themselves of the state regulations on pole attachments or other aspects of infrastructure deployment would need to offer at least one of either telephony or MVPD service. Otherwise, they would be forced to obtain permits and right-of-way access without those legal protections, likely making deployment slower and more costly. We think it unlikely that many providers would put themselves in this situation, foregoing both state and federal legal protections to offer broadband-only service.

B. If this Becomes an Issue, the Commission Could Potentially Address it in Multiple Ways While Still Preserving the Light-Touch Regulatory Approach to Broadband

If a substantial number of communications providers do wish to deploy broadband-only service, the Commission may wish to extend its pole-attachment regulations to cover these providers. In that case, there are at least two options available that would still preserve the Commission's light-touch approach to broadband regulation. The Commission's authority in this area applies only to pole attachments made "by a cable television system or provider of telecommunications service,"³¹ but these are ambiguous terms. As such, the Commission has interpreted and reinterpreted these terms over the years, and it could do so again to potentially offer pole-attachment protections even to broadband-only providers.

One way to extend pole-attachment protections to broadband-only providers would be to reinterpret "cable system" to include broadband infrastructure used to provide certain qualifying virtual MVPD services. The FCC recently determined that AT&T's over-the-top

³⁰ State laws vary slightly in their terminology, but typically refer to "telecommunications," "telephony," or "voice service," on the one hand, and "cable video," or "MVPD service," on the other. *See id.*

³¹ 47 U.S.C. § 224(a)(4).

(“OTT”) virtual MVPD service³² provides effective competition for legacy cable video services,³³ and the Commission still has an open rulemaking that proposed to reclassify some OTT video services as MVPDs.³⁴ That proposal was rightfully criticized for being overbroad and potentially harmful,³⁵ but the FCC could potentially develop a more narrow proposal, perhaps even making the reclassification voluntary. For example, the Commission could simply find that broadband-only providers may opt-in and qualify as a “cable system” for purposes of Section 224 by partnering with a virtual MVPD provider to offer those video services to consumers. AT&T TV Now is available nationwide,³⁶ and virtual MVPDs like Sling TV,³⁷ YouTube TV,³⁸ and Layer3 TV³⁹ have already partnered with broadband providers to market their services, so this could be a viable option for the FCC to consider going forward if pole attachments for broadband-only providers becomes a significant concern.

³² Currently marketed as AT&T TV Now, but formerly known as DirecTV Now. *See AT&T TV*, AT&T (last visited April 20, 2020), <https://www.att.com/tv/>.

³³ Memorandum Opinion and Order, *In the Matter of Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283, ¶ 1 (Oct. 25, 2019), <http://bit.ly/2xHiHmz>.

³⁴ Notice of Proposed Rulemaking, *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261 (Dec. 17, 2014), <http://bit.ly/2Wp0c0t>.

³⁵ *See, e.g.*, Comments of Competitive Enter. Inst. et al., *In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261 (Mar. 3, 2015), <http://bit.ly/3d94ZJu>.

³⁶ *See, e.g.*, Chris Welch, *AT&T TV Now Available Nationwide with Android TV Set-Top Box—and a Two-Year Contract*, VERGE (Mar. 2, 2020), <http://bit.ly/2QsD8dB>.

³⁷ *See, e.g.*, Ben Munson, *WOW! Targets Cord Cutters with Sling TV, fuboTV, YouTube TV and Philo Offers*, FIERCEVIDEO (Feb. 25, 2020), <http://bit.ly/3ddH5wi>.

³⁸ *See, e.g.*, Jeff Baumgartner, *Windstream Teams with YouTube TV*, LIGHTREADING (Feb. 24, 2020), <http://bit.ly/3b6ZZ6f>.

³⁹ *See, e.g.*, John Bear, *Longmont’s NextLight Joins Forces with Denver-Based Layer3 TV*, DAILY CAMERA (Mar. 10, 2017), <http://bit.ly/2WohNWp>.

Another way to extend pole-attachment protections to broadband-only providers would be to reinterpret “telecommunications service” and “telecommunications” to include interconnected VoIP services offered in a similar fashion to the virtual MVPD services described above. VoIP providers like Vonage offer OTT telephony services that interconnect with the public switched telephone network and allow consumers to dial 9-1-1 emergency services.⁴⁰ Thus, if broadband-only providers do not want to provide telephony service directly, they could instead partner with an interconnected VoIP provider like Vonage and qualify as a “provider of telecommunications service” for purposes of Section 224 in that way. This would allow the Commission to extend pole-attachment protections to broadband-only providers while maintaining the light-touch approach to broadband regulation.

However, these potential reinterpretations should be explored only if access to poles becomes a substantial problem, which we think is unlikely to happen. In the meantime, the reclassification of broadband in the 2017 Order will have only a minor impact, if any, on pole attachments.

IV. The Commission’s Work to Modernize and Reform the Lifeline Program Should Continue

As discussed, the same infrastructure used to provide telephony is also used to provide broadband, and the vast majority of communications providers offer both of these services to consumers. Additionally, the vast majority of consumers purchase both telephony and broadband services. In combination, these two facts suggest that it is largely irrelevant whether Lifeline support is directed towards telephony or broadband. Most service

⁴⁰ *Vonage Provides 911*, VONAGE (last visited Apr. 20, 2020), <http://bit.ly/2IZCJv7>.

providers will be able to qualify for the Lifeline program in either case, since they offer both types of services. And most consumers will be able to use the support regardless, since any savings obtained from subsidization of one service can be used to help cover the cost of the other service.

This was the approach utilized by the Commission prior to the 2015 Order, and it has already been upheld in court as a valid exercise of the Commission’s authority under the Telecommunications Act of 1996.⁴¹ For example, in 2011 the FCC “comprehensively reform[ed] and modernize[d] the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation.”⁴² In doing so, the Commission required providers to offer both telephony and broadband service, of at least a certain quality, in order to qualify for support under the Connect America Fund, despite broadband being classified under Title I as an “information service” at the time.⁴³ The U.S. Court of Appeals for the Tenth Circuit upheld this order, recognizing that “[47 U.S.C. § 254] does not limit the use of [Universal Service] funds to ‘telecommunications services.’”⁴⁴ Additionally, the court recognized “[47 U.S.C. § 1302(b)] as an additional source of support for its broadband requirement.”⁴⁵

Therefore, the Commission has a tried-and-true approach to supporting broadband with Universal Service. Using its existing authority, the Commission has already modified its

⁴¹ Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

⁴² Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Connect America Fund et al.*, WC Docket No. 10-90, ¶ 1 (Oct. 27, 2011), <https://bit.ly/3a07EDg>.

⁴³ *Id.* ¶ 19

⁴⁴ *In re FCC 11-161*, 753 F. 3d 1015, 1054 (10th Cir. 2014).

⁴⁵ *Id.*

Universal Service programs to include broadband support, so it can do the same with Lifeline. And the Commission should use this authority to continue modernizing and reforming the Lifeline program to better support broadband service going forward. The heavy-handed approach of Title II broadband regulation is not necessary for those efforts.

And as with pole attachments, if a substantial number of broadband-only providers wish to participate in Lifeline, the Commission still has the potential to reinterpret “telecommunications” to include certain OTT interconnected VoIP services.⁴⁶ As with pole attachments, we expect this is unlikely to be a significant problem for the same reasons, but it could be a viable option for the Commission to explore if it becomes necessary. Otherwise, the Commission should continue to use the same tried-and-true approach as before.

Respectfully submitted,

_____/s/_____

Tom Struble
Technology and Innovation Manager

Jeff Westling
Technology and Innovation Resident Fellow

April 20th, 2020

⁴⁶ 47 U.S.C. § 214(e).