

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Restoring Internet Freedom;

Bridging the Digital Divide for Low-
Income Consumers;

Lifeline and Link Up Reform and
Modernization.

WC Docket No. 17-108

WC Docket No. 17-287

WC Docket No. 11-42

COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

AROCLES AGUILAR
HELEN M. MICKIEWICZ
KIMBERLY J. LIPPI

505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-5822
Email: kimberly.lippi@cpuc.ca.gov

April 20, 2020

Attorneys for the California
Public Utilities Commission

I. INTRODUCTION

The California Public Utilities Commission (CPUC) submits these comments in response to the Federal Communications Commission (Commission or FCC) Wireline Competition Bureau's Public Notice (Notice) seeking to refresh the record in the above-captioned proceedings in light of the United States Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *Mozilla v. FCC*.¹

The FCC's 2018 Restoring Internet Freedom Order² (*RIF Order*) reclassified broadband Internet access service (BIAS) as an "information service" and repealed the Net Neutrality Rules that it had adopted in its 2015 *Open Internet Order*.³ Several petitioners, including the CPUC, challenged the lawfulness of that order. On October 1, 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court) issued its decision.⁴ Although the Court upheld the FCC's reclassification of BIAS and elimination of Net Neutrality Rules, it remanded to the FCC on three issues: (1) the Order failed to examine the implications of its decision on public safety; (2) the Order did not sufficiently explain what reclassification means for the regulation of pole attachments; and (3) the FCC did not adequately address concerns about the effects of broadband reclassification on the Lifeline Program.⁵ On February 6, 2020, the D.C. Circuit denied all pending petitions for rehearing, and the Court issued its mandate on February 18, 2020. On February 20, 2020, the Wireline Competition Bureau issued a Public Notice seeking to refresh the record regarding these issues.

The CPUC provides these comments regarding the impact that reclassification of BIAS as an "information service" has on public safety in the regulation of public utilities,

¹ Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit's *Mozilla* Decision, WC Docket Nos. 17-108, 17-287, 11-42, Public Notice, DA 20-168 (rel. Feb. 19, 2020).

² *In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) ("*RIF Order*").

³ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) ("*Open Internet Order*").

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

⁵ The Court also struck down and vacated the FCC's "Preemption Directive", which would have barred States from imposing their own Net Neutrality rules. *Mozilla v. FCC*, 940 F.3d at 74.

federal and State Lifeline programs, and BIAS providers' access to utility poles. Reclassification of BIAS as an information service and the elimination of Net Neutrality rules negatively impact the ability of the CPUC and the FCC to perform their central functions in these areas. A free and open Internet is critical to areas such as energy, education, medicine, and public safety. Given the importance of an open Internet in our society, strong non-discriminatory net neutrality rules are necessary to ensure consumers can enjoy unfettered access to the Internet. As discussed further below, nondiscriminatory Internet access is necessary for a broad array of “public safety communications”⁶ beyond that which is needed for emergency services personnel. The “Internet of things” is deeply intertwined with many facets of society, including Critical Infrastructure such as the energy grid and water industries. The safety and reliability of these systems depends on instantaneous, nondiscriminatory access to communications. The classification of BIAS is also inextricably linked to public safety. As the *Mozilla* Court made clear, reclassifying BIAS as an information service takes BIAS-only providers outside the federal pole attachment and Lifeline statutory regimes. The current coronavirus pandemic highlights the critical need to expand broadband deployment as we have all been pushed to teleworking, video-conferencing, telemedicine, and on-line education. There is also an enormous need to expand Lifeline in light of the significant increase in unemployment; access to communications by all is vital to public health and safety.

The CPUC urges the FCC to reverse course, reclassify broadband Internet access service as a “telecommunications service”, and act in a manner that preserves federal and State ability to maximize public safety, establish pole attachment terms for BIAS providers on a non-discriminatory basis, as well as promote competition and advance universal service.

⁶ The CPUC notes that “public safety communications” is not defined in the Commission’s February 19, 2020, Public Notice seeking to refresh the record in the *Restoring Internet Freedom* docket.

II. DISCUSSION

A. **The FCC Is Legally Obligated to Evaluate and Respond to Safety Concerns in Rendering a Decision Regarding Net Neutrality Rules.**

As the D.C Circuit found, the FCC failed to perform the statutorily-required review of the safety impacts its determination to rescind net neutrality rules would have throughout the United States.⁷ In particular, since California and other parties explicitly raised safety concerns in the record of this proceeding, the FCC was obligated to consider and address the safety concerns identified.

The FCC's action of repealing the Open Internet rules and reclassifying broadband Internet access service as an information service negatively impact public safety and cut a wide swath through many CPUC programs. In addition to the public safety concerns present in the context of pole attachments and Lifeline programs, discussed further below, the FCC's actions negatively impact the CPUC's ability to perform essential functions related to the safety and reliability of utility networks considered to be Critical Infrastructure.

B. **Elimination of Open Internet Rules will impact the safety and reliability of Critical Infrastructure sectors, including electric, gas, water, and communications utilities, which in turn negatively impacts public safety.**

Safety is the *sine quo non* of utility infrastructure operations. Under both federal energy and telecommunications law, States have primary authority to ensure the safety of the energy and communications infrastructure. The Communications Act specifically preserves the authority of the States to "protect the public safety and welfare."⁸ The Energy Policy Act of 2005, too, provides that it shall not "be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any

⁷ Mozilla v. FCC, 940 F.3d at 59-60.

⁸ 47 U.S.C. § 253(b).

reliability standard.”⁹ Certain sectors of the economy, including utilities, emergency services, healthcare, transportation, information technology, and key manufacturing, business, and scientific industries, are designated as “Critical Infrastructure” vital to the nation’s economy, security, and future.¹⁰ The interdependency between and among critical services and communications services, including access to the Internet, has increased dramatically in the last 20 years. Access to communications and Internet services is essential to functioning in the modern economy, and is embedded in many critical sector services.¹¹ President Trump’s Executive Order on Cybersecurity and Critical Infrastructure recognizes the essential role of Internet and communications services to Critical Infrastructure, including energy. That Executive Order adopts as 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.”¹² The current COVID-19 pandemic further highlights the essential role of Critical Infrastructure, “considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety....”¹³

⁹ 16 U.S.C. § 824o(i)(3).

¹⁰ Critical Infrastructures Protection Act of 2001, 42 U.S.C. 5195(e) (2001)(defining “critical infrastructure” as “means 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.”) *See also*, Presidential Exec. Order No. 13010, 61 FR 37347, 1996 WL 33673768 (July 15, 1996); *See* Critical Infrastructures Protection Act of 2001 (CIPA), 42 U.S.C. § 5195c (Supp. I 2001), Pub.L. 107-56, Title X, § 1016, Oct. 26, 2001, 115 Stat. 400; Homeland Security, Critical Infrastructure Sectors, [hereinafter Critical Infrastructure Sectors], <http://www.dhs.gov/critical-infrastructure-sectors>.

¹¹ 42 U.S.C. § 5195c.

¹² Presidential Exec. Order No. 13800, 82 FR 22391, 1996 WL 33673768 (May 11, 2017).

¹³ *See*, <https://www.cisa.gov/critical-infrastructure-sectors>, Department of Homeland Security identification of essential Critical Infrastructure sectors. The Governor of California recently issued a State of Emergency and Shelter-in-Place Order identifying essential Critical Infrastructure sectors consistent with this list. California Executive Order N-33-20, available at <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>; <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>.

Allowing Internet service providers (ISPs) to force “individualized” negotiations for “differentiated” Internet access undercuts the ability of the CPUC, other public utilities regulatory agencies, and the FCC to carry out their duties with regard to safety and reliability of various critical infrastructure sectors, including electric, natural gas, water and sewer utilities. Further, in its 2015 *Open Internet Order*, the FCC itself recognized that the absence of strong nondiscriminatory rules could undermine public safety and critical infrastructure.¹⁴

The State of California has acknowledged these concerns. After the FCC eliminated Net Neutrality protections, California enacted the California Internet Consumer Protection and Net Neutrality Act of 2018.¹⁵ In adopting its own Net Neutrality protections, the California Legislature found that “almost every sector of California’s economy, democracy, and society is dependent on the open and neutral Internet that supports vital functions regulated under the police power of the state”, including, but not limited to, police and emergency services, health and safety services and infrastructure, utility services and infrastructure, education, government services, and voting.¹⁶

The FCC should acknowledge these concerns as well. The FCC has an obligation to consider public safety and the impact its decisions will have not just on “public safety communications”, but on Critical Infrastructure providers as well. 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.”¹⁷ Accordingly, the Commission is “required to consider public safety by... its enabling act.”¹⁸

¹⁴ 2015 *Open Internet Order*, at ¶¶ 114, 126, 150.

¹⁵ Codified at Cal. Civil Code §§ 3100-3104. The State of California agreed to stay enforcement of this law pending the resolution of *Mozilla Corp. v. FCC*.

¹⁶ Senate Bill 822, 2018 Cal ALS 976, 2018 Cal SB 822, 2018 Cal Stats. ch. 976, 2018 Cal ALS 976, 2018 Cal SB 822, 2018 Cal Stats. ch. 976.

¹⁷ 47 U.S.C. § 151.

¹⁸ *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006) (“Congress has given an agency the responsibility to regulate a market such as the telecommunications industry that it has repeatedly

The CPUC and California utilities further have an obligation under state law to protect the safety and health of the public.¹⁹ Protection of public safety is a core exercise of a State’s police powers, and the CPUC has exercised its jurisdiction to ensure the safety and reliability of the energy grid, as well as the safety of all poles and conduit in California. The Commission is also required to “encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs” and to “consult and cooperate with State and local officials responsible for emergency services and public safety.”²⁰

1. The elimination of Open Internet rules negatively impacts the safety and reliability of the energy grid.

Communications services, including the Internet, are embedded in many critical sector services, including the nation’s energy grid.²¹ Nondiscriminatory Internet access rules are crucial to the safe and efficient operation of the energy grid by the California Independent System Operator (CAISO). 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. For example, bidders that negotiate “better than typical” broadband service gain a non-transparent advantage in California’s real-time markets, raising market manipulation concerns. The FCC’s decision to reclassify BIAS failed to consider whether negotiated deals such as these would directly conflict with Federal Energy Regulatory Commission rules prohibiting anticompetitive conduct designed to limit market power and ensure the efficient operation of regulated markets.

Programs that affect the safety and reliability of the energy grid also depend on an Open Internet. As part of the effort to modernize the nation’s electrical grid, California

deemed important to protecting public safety,” then the agency’s decisions “must take into account its duty to protect the public.”)

¹⁹ See, e.g., Cal. Pub. Util. Code § 451.

²⁰ 47 U.S.C. § 615 (The Wireless Communication and Public Safety Act of 1999, Pub. L. No. 106–81, § 3, 113 Stat. 1286, 1287).

²¹ 42 U.S.C. § 5195c.

invested in Advanced Metering Infrastructure (AMI), an integrated system of smart meters, communications networks, and data management systems that enables two-way communication between utilities and customers. These networks include in-home displays, home area networks, energy management, and other customer-side-of-the-meter equipment that enable Smart Grid functions in residential, commercial, and industrial facilities.²²

Smart devices rely on a fast, reliable Internet. Following several heat waves that stressed the electric system and threatened reliability, the CPUC expanded the utilities' demand response programs. Demand response is a tool where customers shed load during times of peak demand. During 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. Asking customers to conserve power is generally a recurring phenomena during times when electric demand or energy prices are high state-wide; there have been numerous such instances in recent years. For example, Southern California Edison called on its customers to conserve power multiple times during heat waves in August and September of last year, in an effort to balance electric load with available supply.

Electric customers are also able to grant permission to third-party demand response aggregators, also known as Demand Response Providers (DRPs), for direct access to their energy usage information. The program pairs enabling technology and the click of a "Green Button" on the utilities' website. This allows customers the option of enrolling in a demand response program offered by their utility or with a competing third-party DRP. DRPs also began participating in the CAISO energy markets, bidding dispatchable demand response "negawatts" as supply-side resources in the same manner as conventional generation. As a result, the California grid operator relies on demand

²² See, California Public Utilities Commission, Decision [D.]16-11-022, *Decision on Large Investor Owned Utilities' California Alternative Rates for Energy and Energy Savings Assistance Program Applications*, Application (A.) 14-11-007, (rel. Nov. 21, 2016), available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M155/K759/155759622.PDF>.

response to directly balance load, manage congestion, and satisfy reliability standards. Flexible resources, such as demand response, also allow the CAISO to respond to new grid fluctuations brought on by California's increased levels of wind and solar power that, by its nature, is more variable than conventional generation.

Demand response programs are increasingly important in California's battle against catastrophic wildfires. The State's electric utilities increasingly are employing Public Safety Power Shutoffs (PSPS), or pre-emptive de-energization actions, to help prevent wildfires. Demand response is vital in the effort to reduce PSPS events. Since demand response relies on a fast, instantaneous communication to the customer, the absence of non-discriminatory Open Internet rules jeopardizes a DRP's commitment to provide a set quantity of load reduction to the CAISO when requested. Consequently, the FCC's elimination of Net Neutrality rules creates risk to the CAISO's ability to rely on dispatching demand response during times of extreme grid stress.

It is critical to energy safety and reliability 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—not be subject to paid prioritization delays, payment demands, or service degradation due to priority accorded to other users who pay extra. The FCC did not take these concerns into account when it decided to reclassify BIAS as an information service, and eliminate Net Neutrality rules. The FCC should reverse course and restore strong Net Neutrality rules that are necessary for Critical Infrastructure.

2. The elimination of Open Internet rules and reclassification of BIAS negatively impacts the safety and reliability of communications networks.

Communications systems, too, are an essential component of public safety. California has faced increasingly devastating wildfires in recent years. Having a resilient and dependable communications grid that aids first responders and communicates with the public in a timely manner is, literally, a matter of life and death, especially for our most vulnerable residents. First responders need fast and reliable communications tools

to respond to life-threatening situations. The public also needs to know in minutes, if not seconds, about threats that could affect them. First responders can notify residents and businesses by mobile phone, text message, email and social media with time-sensitive, geographically specific emergency notifications. Strong non-discriminatory rules are needed to ensure that providers of emergency services or public safety agencies are not impaired in providing comprehensive, timely information to the public in a crisis.

California wildfires burned an average of 60,000 acres a year from the 1960s to the 1990s, but in this decade they have been consuming an average of more than 250,000 acres annually. California experienced a record-breaking fire season in 2018. More than 8,000 fires burned close to 2,000,000 acres throughout the state,²³ and these devastating fires resulted in billions of dollars in damage and numerous lives lost. The fires cost hundreds of millions of dollars to fight and contain, to say nothing of the billions of dollars required to rebuild damaged communities. The State of California and the CPUC are still grappling with the failures and shortcomings of the communications grid highlighted by these disasters.

After the recent wildfires, the CPUC adopted a number of emergency customer protection measures to support residential and small business customers of utilities affected by disasters.²⁴ These measures are designed to ensure that Californians who experienced housing or financial crises due to disaster do not lose access to vital communications services. However, a coalition of communications providers, including AT&T, Frontier, Charter, Comcast and other providers, actively oppose the CPUC's effort to impose post-disaster requirements on them. Their objections are driven, in part,

²³ See, https://www.predictiveservices.nifc.gov/intelligence/2018_statssumm/fires_acres18.pdf.

²⁴ See, CPUC D.18-08-004, *Decision Affirming the Provisions of Resolution M-4833 and M-4835 as Interim Disaster Relief Emergency Customer Protections*, Rulemaking (R.)18-03-011 (rel. 8/20/2018), available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M221/K552/221552166.PDF>; and D. 19-08-025 *Decision Adopting An Emergency Disaster Relief Program for Communications Service Provider Customers*, R.18-03-011 (rel. 8/23/2019), available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M311/K547/311547724.PDF>.

by claims that States are preempted from regulating information services.²⁵ As noted below, the CPUC has similar concerns that Internet service providers would use the “information services” classification as a shield against State safety measures for pole attachments. Restoration of the telecommunications service classification will provide solid legal authority for necessary safety regulations.

3. BIAS Reclassification Negatively Impacts Access to the Internet by Persons With Disabilities.

The decision to reclassify BIAS to an information service also adversely affects access to the Internet by persons with disabilities. This creates another public safety issue as persons with disabilities may be without the ability to access life-saving communications in an emergency situation.

In the 2015 *Open Internet Order*, the FCC did not forbear from Sections 225, 255, and 251(a)(2), enabling individuals with disabilities to realize the benefits of Internet service by preventing barriers to access. These sections mandate the availability of interstate and intrastate Telecommunications Relay Services to the extent possible and in the most efficient manner to individuals in the United States who are deaf, hard-of-hearing, deaf-blind, and who have speech disabilities, and require telecommunications service providers and equipment manufacturers to make their services and equipment accessible to individuals with disabilities, unless not readily achievable. People who are deaf, blind, hard of hearing, deaf-blind, or who have speech 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. These applications often require significant bandwidth, making their use particularly sensitive to data caps and network management practices. Strong, nondiscriminatory Net Neutrality rules are essential to preserving access.

²⁵ See, VoIP Coalition Application for Rehearing of Decision 19-08-025, available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M315/K278/315278705.PDF>; AT&T California and AT&T Corp. Application for Rehearing of D.19-08-025, available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M313/K955/313955439.PDF>; Application of CTIA and AT&T Mobility for Rehearing of D.19-08-025, available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M313/K974/313974080.PDF>.

Further, Section 225 maintains the FCC's ability to ensure that individuals who are deaf, hard-of-hearing, deaf-blind, and who have speech disabilities can engage in service that is functionally equivalent to the ability of a hearing individuals who do not have speech disabilities to use voice communication services. Reclassifying broadband to an information service adversely impacts the ability to provide functionally equivalent telecommunication services to vulnerable customers, including disabled individuals and senior citizens. The FCC should further explain how this change does not violate the Americans with Disabilities Act, as for example, in rural areas where there is no substitute or functional equivalent for copper wires which carry 911, closed captioning and TTY services.

Although the FCC acknowledged that a variety of accessibility requirements already apply in the context of broadband Internet access service, including under the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),²⁶ the *RIF Order* failed to address the requirements of Sections 255 and 251(a)(2) of the 1996 Telecommunications Act, and the FCC's implementing rules, which are incremental to the requirements of the CVAA. This is in stark contrast to the 2015 *Open Internet Order*, where the FCC stated:

We are persuaded by the record of concerns about accessibility in the context of broadband Internet access service that we should not rest solely on the protections of the CVAA, however. Thus, for example, outside the self-described scope of the CVAA, providers of broadband Internet access services must ensure that network services and equipment do not impair or impede accessibility pursuant to the sections 255/251(a)(2) framework. In particular, we find that these provisions and regulations are necessary for the protection of consumers and forbearance would not be in the public interest.²⁷

²⁶ See, *RIF Order*, at ¶ 205, citing Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (codified in various sections of 47 USC) (CVAA), *amended by* Pub. L. No. 111-265, 124 Stat. 2795 (2010) (technical corrections).

²⁷ See, 2015 *Open Internet Order*, at ¶ 474.

The *RIF Order* spent a scant one paragraph on the subject of disability access. Rather than explaining how the FCC can and will continue to ensure that broadband networks are accessible to and usable by individuals with disabilities, the FCC chose to punt the issue. The CPUC supports retaining the protections for persons with disabilities embodied in Sections 225, 255, and 251(a)(2), enabling individuals with disabilities to realize the benefits of Internet service by preventing barriers to access. Reclassifying BIAS as an information service removes BIAS providers from obligations specific to Sections 225, 255, and 251(a)(2). The CPUC urges the FCC to restore these protections and ensure BIAS providers carry out their statutory obligations under the Act with regard to providing service to persons with disabilities.

C. Reclassifying BIAS as an Information Service Eliminates Pole Attachment Rights for BIAS-only Providers.

The Public Notice asks how the changes adopted in the Restoring Internet Freedom Order might affect the regulation of pole attachments in States subject to federal regulation. The Notice also asks about any other impacts on the regulation of pole attachments from the *RIF Order*.

The FCC’s decision to reclassify BIAS as an “information service” takes BIAS-only providers outside the statutory scheme governing pole attachments. Federal law affords pole attachment rights *only* to cable television systems and “telecommunications service[s]”.²⁸ Unless a State reverse-preempts the FCC pursuant to Section 224(c), the 1996 Telecommunications Act (1996 Act) provides that the FCC “shall regulate the rates, terms, and conditions for pole attachments.”²⁹ Section 224 defines “pole attachment” by reference to Title II “telecommunications service.”³⁰ Internet service providers only have pole-access rights under federal law if BIAS is classified as a telecommunications

²⁸ 47 U.S.C § 224(a)(4).

²⁹ 47 U.S.C § 224(b)(1).

³⁰ 47 U.S.C. § 224(a)(4), defining “pole attachment” as “any attachment by a cable television system of provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” *See also*, § 224(f)(1): “A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”

service. Reclassifying BIAS as an information service means that BIAS-only providers no longer enjoy a statutory right, under federal law, to nondiscriminatory, just and reasonable access to poles and conduit.

The inability of broadband-only providers to access poles has significant impact on broadband deployment and competition. The FCC’s determination to reclassify BIAS as an information service and eliminate Net Neutrality rules was driven in part by the FCC’s belief that competitive pressures would protect Internet openness.³¹ The FCC also found widespread support for measures that would speed deployment and increase competition.³² In fact, in the *RIF Order* the FCC cited to CPUC comments in which the CPUC stated that access to utility poles is a competitive bottleneck limiting new network entrants and may raise prices for some telecommunications services.³³ However, the FCC’s belief that the Title I regime would somehow encourage the buildout of broadband networks was apparently based on its erroneous reading of federal law.

As the D.C. Circuit Court’s *Mozilla* decision noted, in the *RIF Order* the FCC seemed to “whistle past the graveyard” by implying that Section 224 would continue to govern reclassified broadband.³⁴ On the one hand, the Commission stated that “Internet traffic exchange arrangements are no longer subject to Title II and its attendant obligations,” including obligations under Section 224.³⁵ Yet on the other hand, the Commission implied that Section 224 obligations would continue to govern reclassified broadband, when it “remind[ed] pole owners of their continuing obligation to ‘offer rates, terms, and conditions [that] are just and reasonable.’”³⁶ The Commission also implied that States which have reverse-preempted FCC jurisdiction over pole attachments via

³¹ See, e.g., *RIF Order*, at ¶¶ 123, 153, 170.

³² *Id.*, at ¶ 185, n. 701.

³³ *Id.*, at ¶ 185, n.701, citing CPUC Comments 6-7. The CPUC continues to stand by that statement, and incorporates those comments by reference.

³⁴ *Mozilla v. FCC*, 940 F.3 at 66-67.

³⁵ *RIF Order*, at ¶ 163, n.600.

³⁶ *RIF Order*, at ¶ 186, quoting 47 U.S.C. § 224(b)(1)).

Section 224³⁷ could continue to regulate reclassified broadband.³⁸ However, as the *Mozilla* Court noted, both cannot be true. The whole pole attachment regulatory scheme, including reverse preemption under Section 224, applies only to cable television systems and “telecommunications services.” As the Court stated, “under the 2018 Order, the statute textually forecloses any pole-attachment protection for standalone broadband providers.”³⁹

The Commission has not articulated an alternative for pole attachment rights under federal law. BIAS providers must receive access to utility support structures, including poles and conduits, at nondiscriminatory rates, terms and conditions. The FCC has repeatedly recognized the critical importance of pole attachments to the deployment of communications networks.⁴⁰ The CPUC, too, recognizes this importance. As noted in previous comments, the CPUC recently conducted a comprehensive review of the California telecommunications market, and analyzed the state of competition in various state sub-markets.⁴¹ The CPUC found that competitive bottlenecks and barriers to entry in the telecommunications network limit new network entrants and may raise prices for some telecommunications services above efficiently competitive levels.⁴² One particular

³⁷ 47 U.S.C. § 224(c) (“Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions or access to poles, ducts, conduits, and rights-of-way...for pole attachments in any case where such matters are regulated by a State.”). California has reverse-preempted the FCC in this regard and has comprehensive rules and regulations governing terms, conditions, and rates for pole attachments in the state.

³⁸ *RIF Order*, at ¶ 185 (“[I]n the twenty states and the District of Columbia that have reverse-preempted Commission jurisdiction over pole attachments, those states rather than the Commission are empowered to regulate the pole attachment process.”); *see also* ¶ 196 (“Nor do we deprive the states of any functions expressly reserved to them under the Act, such as ...exclusive jurisdiction over poles, ducts, conduits, and rights-of-way when a state certifies that it has adopted effective rules and regulations over those matters under section 224(c).”).

³⁹ *Mozilla v. FCC*, 940 F.3d at 67.

⁴⁰ *See, e.g.*, 2015 *Open Internet Order*, at ¶¶ 56, 478; *see also, Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5241-43, ¶¶ 1-6 (2011).

⁴¹ *See*, CPUC D.16-12-025, *In the Matter of State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions Raised in the Limited Rehearing of Decision 08-09-042*, Investigation (I.) 15-11-007 (rel. Dec. 8, 2016).

⁴² CPUC D.16-12-025, slip op. at p. 189, Finding of Fact No. 24.

bottleneck is access to utility poles, where the CPUC found that its safety mandate intersects, and must be reconciled with, its goal of a competitive market.⁴³ All forms of telecommunications, including broadband, require access to poles and conduits. Access to poles, conduits, and rights-of-way controlled by incumbent local exchange carriers and other entities may affect cost, feasibility, and timing of constructing and offering broadband services.⁴⁴ The CPUC is aware of existing 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. The current coronavirus pandemic has pushed us all to telework, telemedicine, and tele-education, further highlighting the need to expand broadband deployment and ensure nondiscriminatory pole attachment rights for BIAS-only providers. The statutory implication on pole attachment rights for BIAS-only providers and the FCC's lack of a successful alternative could delay or harm broadband deployment and negatively affect competition, not to mention public health and welfare, throughout the nation.

Moreover, although States may independently regulate pole attachments pursuant to State law, including attachments by BIAS-only providers, the FCC's classification of BIAS as an information service raises safety implications. Protection of public safety is a core exercise of a State's police powers, and the CPUC has exercised its jurisdiction to ensure the safety of all poles and conduit in California by promulgating rules related to overhead electric and communications facilities (General Order 95) as well as to underground electric and communications facilities (General Order 128). As the CPUC has previously stated, unauthorized, and sometimes hazardous, attachments to poles are a regular occurrence. The CPUC is aware of a number of instances where overloaded poles and/or insufficiently maintained attachments have caused catastrophic fires and other accidents, resulting in millions of dollars of property damage and human

⁴³ *Id.*, slip op. at p. 3.

⁴⁴ *Id.*, slip op. at p. 85.

dislocation, and in multiple cases directly or indirectly causing fatalities. Our awareness of these safety issues has increased at the same time that advanced telecommunications technologies have driven demand for access to poles and conduit to unprecedented levels. Because safety often hinges on a greater awareness of conditions in the field, the CPUC has initiated a pole census or database to help us understand the deployed infrastructure and the problems it presents.⁴⁵

Removing BIAS from Title II, however, raises safety implications for pole attachment regulation. While States retain police power to protect public safety and welfare, a power the FCC cannot diminish through administrative action, ISPs may attempt to invoke the information services classification as a shield against a State's jurisdiction to regulate pole attachment safety.⁴⁶

D. Reclassifying BIAS as an Information Service Removes BIAS-only from the Federal Lifeline Program.

The Notice asks how the changes adopted in the *RIF Order* might affect the Lifeline program. The CPUC continues to support inclusion of broadband in the Lifeline program. However, as the *Mozilla* Court made clear, broadband's eligibility for Lifeline subsidies turns on its common-carrier status.⁴⁷ The Commission's decision to reclassify broadband and strip it of Title II common-carrier status facially disqualifies broadband from inclusion in the Lifeline Program.

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

⁴⁵ *Order Instituting Investigation into the Creation of a Statewide Database or Census of Utility Poles and Conduit in California and Order Instituting Rulemaking Regarding Access by Competitive Communications Providers to California Utility Poles and Conduit Consistent with the Commission's Safety Regulation*, CPUC I.17-06-027, R.17-06-028, adopted June 29, 2017.

⁴⁶ The FCC cannot diminish the States' police power whether it reclassifies BIAS, or otherwise attempts to preempt state action regarding utility poles.

⁴⁷ *Mozilla v. FCC*, 940 F.3d at 69, citing *In re FCC 11-161*, 753 F.3d 1015, 1048-1049 (10th Cir. 2014) (observing 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'").

that “[t]his legal authority does not depend on the regulatory classification of broadband Internet access service and, thus, ensure the Lifeline program has a role in closing the digital divide regardless of the regulatory classification of broadband service.”⁴⁸ As the *Mozilla* Court explained, however, Section 254(e) provides that “only an eligible *telecommunications carrier* designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.”⁴⁹ The statute expressly defines an “eligible telecommunications carrier” as a “common carrier” under Title II.⁵⁰ Moreover, the Federal Lifeline subsidy only supports the federal Lifeline “service”; support is not used for providing, maintaining, or upgrading of facilities capable of providing the federal Lifeline supported services. Similarly, only telecommunications providers are required to contribute to the Universal Service Fund.⁵¹ Accordingly, Title II common carriage forms the legal basis for offering Lifeline support for standalone broadband service.⁵²

These statutory limitations have significant bearing on the Commission’s underlying decision to reclassify broadband as a Title I information service. The 1996 Act obligates the Commission to ensure the affordability and widespread availability of safe, reliable, high-quality telecommunications services.⁵³ As the communications network transitions away from legacy voice services to Internet protocol-based services, universal service programs must include broadband Internet access. Universal

⁴⁸ *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, ¶ 77 (2017) (*2017 Lifeline NPRM*).

⁴⁹ *Mozilla v. FCC*, 940 F.3d at 69, citing 47 U.S.C. § 254(e) (emphasis added).

⁵⁰ 47 U.S.C. § 214(e)(1).

⁵¹ See 47 U.S.C. § 254(d), which requires “every telecommunications carrier that provides interstate telecommunications” to contribute to the USF programs.

⁵² *Mozilla v. FCC*, 940 F.3d at 69. See also, *Direct Communs. Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1049 (10th Cir. 2014) (explaining that, before broadband was classified as a telecommunications service, “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’”).

⁵³ 47 U.S.C. §§ 254(c) and (e).

service programs cannot fulfill their purpose unless they include broadband Internet access. After the Commission classified BIAS as a telecommunications service in 2015, it modernized the federal Lifeline program to provide low-income consumers access to affordable broadband.⁵⁴ However, reclassification renders the Commission without the appropriate authority to include BIAS-only providers in the federal Lifeline program.

Reclassification of BIAS also may impact the States' ability to include standalone broadband in state universal service programs. The 1996 Act preserves state authority to implement "requirements necessary to preserve and advance universal service [and] ensure the continued quality of *telecommunications services*."⁵⁵ If BIAS is not classified as a telecommunications service, the States could arguably be precluded from requiring standalone BIAS in their respective Lifeline programs.⁵⁶ As with the pole attachment issue, the CPUC is concerned that ISPs may attempt to claim that the information services classification exempts them from State jurisdiction to regulate Lifeline programs. State commissions must be able to enforce universal service obligations on entities that participate in the Lifeline program, as well as those safeguards intended to protect the integrity of the program.

The Commission should address and resolve how the States could mandate standalone broadband in Lifeline programs given these statutory limitations.

Resolving this issue is crucial. Under the existing federal Lifeline rules, the FCC is slated to stop subsidizing voice telephony beginning on December 1, 2021, but plans to still subsidize BIAS, which may or may not include voice telephony.⁵⁷ Eliminating voice

⁵⁴ See generally, *Lifeline & Linkup Modernization Order*, 31 FCC Rcd. 3962 (2016).

⁵⁵ 47 U.S.C. § 253(b) (emphasis added).

⁵⁶ Further, the Commission's assertion that § 706 of the 1996 Act is "hortatory" eliminates an alternate source of regulatory authority to include standalone BIAS in universal service programs.

⁵⁷ There is an exception to this rule, which is the situation whereby there is only one Eligible Telecommunications Carrier (ETC) in a census block. The CPUC continues to oppose shifting federal Lifeline funding now allocated for voice telephony service to subsidizing BIAS, or allowing federal Lifeline providers to offer "BIAS-only" service. The CPUC maintains its previous recommendation for the FCC to continue to require federal Lifeline providers to offer voice telephony service.

telephony and removing BIAS from the Lifeline program due to its information service classification would render the Lifeline program useless.

From public safety standpoint too, there is enormous value in ensuring that everyone, regardless of economic situation, is able to connect and communicate. Broadband is a necessity in this day and age, and it is critical for low-income households to have access to BIAS to meaningfully participate in our society. The current COVID-19 pandemic further highlights that broadband access is a necessity, as society is compelled to engage in video-conferences, teleworking, distance learning, and telemedicine. These tools should be available to everyone, but the lack of reliable Internet connections will leave underprivileged communities falling further and further behind.⁵⁸ Access to communications by all is vital to public health and safety. Both the States and the FCC should be able to establish and enforce minimum universal service obligations on BIAS, including safety obligations such as 911 standards, minimum service quality, and call completion requirements.

Finally, the FCC should have considered the impact its decision to reclassify would have on the continued viability of the federal Universal Service Fund programs. The CPUC continues to be concerned about potential inadequate funding for Lifeline, which includes BIAS, because BIAS providers are not contributing surcharge revenues. The CPUC maintains its previous recommendations that universal service funds be spent prudently and for the FCC to ensure that ratepayers are not unduly burdened in supporting these programs. It is unclear how customers of voice telephony services can be equitably required to support a service which itself is immune from the surcharge – either at the state or federal levels. Section 254(b) states that “all providers of

⁵⁸ For example, schools that have had to shut physical facilities have vastly different distance learning programs. Some schools have chosen not to engage in online learning, as doing so would be inequitable to those students that lack internet connection, either at home or because they are subject to shelter-in-place policies that prevent them from accessing the internet in a public setting. *See, e.g.*, “Coronavirus: As Bay Area schools shut down, students face wide disparities in online education plans”, Mercury News, March 15, 2020, available at <https://www.mercurynews.com/2020/03/15/coronavirus-bay-area-schools-close-online-education/>; see also, Closed Philadelphia Schools, Citing Inequity, Won’t Teach Students Online, Time Magazine, March 20, 2020, available at <https://time.com/5805932/philadelphia-schools-teach-online-coronavirus/>.

telecommunications service should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.”⁵⁹ If the FCC intends for the Universal Service Fund programs to support BIAS, providers of both voice telephony services and BIAS should be required to contribute to the Universal Service Fund. It would be inequitable for customers of voice telephone services to subsidize a service that does not contribute to the Universal Service Fund. To do otherwise would make BIAS a universal service without making its support a universal obligation.

III. CONCLUSION

The CPUC strongly supports the non-discriminatory rules adopted in the 2015 *Open Internet Order*, and opposes the FCC’s sustained effort to eliminate those rules, or otherwise to limit the FCC’s authority to ensure an open Internet and protect public safety. The CPUC further urges the Commission to reconsider the reclassification of BIAS as an information service in light of the public safety implications involved and statutory restrictions on including BIAS in the pole attachment and Lifeline regimes. The CPUC is concerned that both the FCC and the CPUC will be constrained in performing their central functions, including promoting safety and competition by ensuring BIAS providers’ access to utility poles, ensuring the safety and reliability of critical infrastructure, providing assistance to low-income individual through the Lifeline program, and ensuring access to the Internet for persons with disabilities. We urge the FCC to take these concerns into consideration and we thank the Commission for the opportunity to comment on this matter.

///

///

///

⁵⁹ 47 U.S.C. § 254(b)(1)(4).

Respectfully submitted,

AROCLES AGUILAR
HELEN M. MICKIEWICZ
KIMBERLY J. LIPPI

/s/ KIMBERLY J. LIPPI

KIMBERLY J. LIPPI

Attorneys for the
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102
Telephone: (415) 703-5822
Email: kimberly.lippi@cpuc.ca.gov

April 20, 2020