Committee For Justice
Holding Judges and Politicians Accountable to the Constitution

The Committee for Justice
1629 K St. NW #300
Washington, D.C. 20006

(202) 270-7748
committeeforjustice.org
contact@committeeforjustice.org

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

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

Comments of the Committee for Justice

SUBMITTED: APRIL 20, 2020

ASHLEY BAKER
DIRECTOR OF PUBLIC POLICY
THE COMMITTEE FOR JUSTICE

INTRODUCTION

We at the Committee for Justice ("CFJ") write to the Federal Communications Commission ("FCC") in response to the Commission's Notice and request for public comment[1] seeking to refresh the record in its Restoring Internet Freedom and Lifeline proceedings. Founded in 2002, CFJ is a nonprofit legal and policy organization that promotes and educates the public and policymakers about the rule of law and the benefits of constitutionally limited government. CFJ has recently focused on issues at the intersection of constitutional law and technology. Consistent with that mission, our latest efforts have encompassed areas such as administrative law, antitrust law, telecommunications and privacy law and policy.[2]

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[1] Federal Communications Commission, *Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit's Mozilla v. FCC Decision*, WC Docket Nos. 17-108, 17-287, 11-42, (February 19, 2020), https://docs.fcc.gov/public/attachments/DA-20-168A1.pdf.

[2] *See, e.g.,* a panel discussion hosted by the Committee for Justice earlier this month, *Mozilla v. FCC: What Next?*, (April 10, 2010), https://bit.ly/3eBgI4g (panel video); *See also*, Ashley Baker, *Comments Submitted to the DOJ Antitrust Division Regarding Competition in Television and Digital Advertising,* (June 14, 2019) http://bit.ly/2PwehnJ.

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Last year, the D.C. Circuit issued its opinion *in Mozilla v. Federal Communications Commission*[3] in which the court largely upheld the Commission's 2017 Restoring Internet Freedom Order[4] that reversed the Obama Administration's 2015 decision[5] to apply common carrier regulation to the Internet.

While the court upheld the bulk of the agency's actions as reasonable under the Supreme Court's rulings in *Chevron* and *Brand X*[6], the Court also remanded three discrete issues for further consideration by the Commission: 1.) public safety; 2.) pole attachments; and 3.) the Lifeline program. These comments seek to address the implications of reclassification and of the Commission's light-touch regulatory approach for public safety.

PUBLIC SAFETY AND THE RESTORING INTERNET FREEDOM ORDER

According to the D.C. Circuit opinion, "[t]he Order failed to examine the implications of its decisions for public safety."[7] Although the merit of this assertion by the Court's majority is debatable, we will refrain from relitigating whether this aspect of the Commission's decision was arbitrary and capricious under the Administrative Procedure Act (APA), nor will we reevaluate the pro-consumer, pro-safety public policy results of the repeal of the Title II restrictions. The D.C. Circuit has not asked us to do so.

But as for the first of the three issues remanded to the Commission for further public input, recent events have made the RIFO's public safety implications abundantly clear. During the current crisis surrounding the COVID-19 pandemic, Internet Service Providers (ISPs) have been able to handle the increased broadband load resulting from an exponential increase in traffic, emergency services have been able to respond at a high speed, service providers have acted in the best interest of consumers by offering flexible payment options and waiving fees, and the recent

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[3] *Mozilla Corp. v. Federal Communications Commission*, 940 F.3d 1 (D.C. Cir. 2019), https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf.

[4] *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report, and Order, 33 FCC Rcd 311 (2017) (*Restoring Internet Freedom Order* or "*RIFO*"), https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order.

[5] *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order (2015) ("*Title II Order*"), https://www.fcc.gov/document/fcc-releases-open-internet-order.

[6] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) and *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[7] See *Mozilla*, 940 F.3d at 13.

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increased investment in broadband infrastructure spurred by the repeal of Title II has enabled millions of Americans to telework and to use telehealth services.[8]

Public safety concerns raised prior to the *Mozilla* decision are negated by the fact that the RIFO has not just proven to not pose a threat to public safety – it actually *promotes* it. In fact, in the current scenario, previous policies under Title II would *inhibit* broadband access and *obstruct* emergency response.

Paid prioritization arrangements allow emergency services and the government to respond quickly in times of crisis. As the Free State Foundation explained in comments filed prior to the RIFO's adoption, "as emergency services evolve, governments may want to have paid prioritization available as an option for Amber alerts, severe weather alerts, Homeland Security warnings and other highly time-sensitive functions."[9]

TITLE I RECLASSIFICATION, REMOVING REGULATORY BARRIERS PROMOTES INFRASTRUCTURE INVESTMENT AND INNOVATION IN PUBLIC SAFETY

In 2018, following the repeal of the 2015 order, U.S. broadband providers invested $80.0 billion in network infrastructure, and increase of $3.1 billion from $76.9 billion in 2017.[10] Investments also increased $1.8 billion to a total of $27.4 billion in 2019.

With more of the workforce and more services being driven online, broadband infrastructure has risen to the challenge to help ensure that communities across the United States can work from home and stay connected without risking their own safety.

THE FEDERAL TRADE COMMISSION HAS THE AUTHORITY TO POLICE PRIORITY ACCESS AGREEMENTS TO ENSURE THEY DO NOT HARM CONSUMERS

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[8] *See, e.g.,* Kelcee Griffis, *ISPs' COVID Response Said To Negate Net Neutrality Rules,* Law360, (9 April, 2020), https://www.law360.com/articles/1262137/isps-covid-response-said-to-negate-net-neutrality-rules. ("According to Layton, the D.C. Circuit correctly affirmed that a lighter-touch, so-called Title I regulatory framework is a better fit for ISPs because there is no evidence that they systematically degrade consumers' internet experience … more than 600 ISPs that pledged to keep up service for customers even if their accounts become delinquent, waive late payment fees and open Wi-Fi hotspots to anyone who needs them during the coronavirus outbreak.")

[9] *See* Comments of the Free State Foundation, *Restoring Internet Freedom*, WC Docket No. 17-108, (July 17, 2017), https://freestatefoundation.org//wp-content/uploads/2019/08/FSF-Initial-Comments-Restoring-Internet-Freedom-071717-1.pdf.

[10] Patrick Brogan, "U.S. Boadband Investment Continued upswing in 2018," U.S. Telecom Association Research Brief, (July 31, 2019) , https://www.ustelecom.org/wp-content/uploads/2019/07/USTelecom-Research-Brief-Capex-2018-7-31-19.pdf.

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It should be noted that priority access agreements are not unregulated. The RIFO correctly concluded that all major broadband service providers pledge in their standard terms of service not to engage in conduct such as harmful throttling. Under the RIFO, those terms of services are enforceable by the FTC. This is enforceable by the FTC, as any ISP in violation of these terms could face enforcement actions brought by the FTC.

As Joel Thayer and Garrett Johnson recently pointed out, the RIFO "does not turn the internet into the Wild West. Priority access agreements are now, and always have been, a question of consumer protection and competition where the Federal Trade Commission (FTC) has domain. Under the FTC's watch, ISPs cannot make priority access agreements that stifle competition or harms consumers. Instead of the FCC's overzealous Title II approach, the FTC serves more like an umpire calling balls and strikes on a case-by-case basis. Under Title II, the FCC assumes competitive harm and acts more like an ISP's parole officer. Thus, under the FTC's jurisdiction, consumers and tech companies are effectively protected from having to rely on rules that assume harm without evidence, while tech companies are free to work out specific deals with ISPs."[11]

CONCLUSION

Experience is the best teacher. After the coronavirus pandemic, no one will reasonably believe that Title I reclassification presents a grave risk to public safety, if they ever did.

Still, it is our conclusion, as it was before the D.C. Circuit's decision and before the RIFO took effect, that reclassification does not pose harms to public safety, and nor does the current Commission's light-touch regulatory policy towards broadband.

[11] Joel Thayer and Garrett Johnson, *Deregulatory Efforts at the FCC Will Fuel Innovation,* Lincoln Policy Blog, (April 20, 2020), https://lincolnpolicy.org/2020/deregulatory-efforts-at-the-fcc-will-fuel-innovation/.