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

REPLY COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

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I. INTRODUCTION

The California Public Utilities Commission (CPUC) submits these reply 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 comments filed to date detail numerous negative impacts the *Restoring Internet Freedom Order* has on public safety, including harms to critical infrastructure such as communications networks and energy grid, and on broadband deployment. The best remedy for these harms is to return the Commission's proper authority over broadband in Title II.

These reply comments are not exhaustive. Silence with respect to any party's comments should not be construed as assent or dissent.

II. DISCUSSION

A. The FCC Should Ensure the Participation of Leading Public Safety Voices.

The CPUC supports the City of Los Angeles, the City of New York, the County of Santa Clara, and the Santa Clara County Central Fire Protection District's request for an extension of time to submit comments in this proceeding.[2] The *Mozilla v. FCC* decision,

[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] Letter from City of Los Angeles, et al., to Annick Banoun, Competition Policy Division Wireline Competition Bureau, FCC, at pp. 1-2 (filed April 16, 2020) (*City of Los Angeles Letter*).

which triggered the instant remand review,[3] found that the Commission failed to consider public safety in its *Restoring Internet Freedom Order*.[4] The Court specifically referenced the concerns of the County of Santa Clara, one of the parties to this request, in finding that the Commission failed to consider and address public safety issues. The record would not be complete without its participation. These local jurisdiction parties have amply demonstrated that the pandemic – including shelter-in-place orders, emergency declarations, and the work of emergency and public safety officials – has prevented them from providing complete comments at this time. It is unfathomable that the Commission would require State and local governments to choose between protecting public health and safety, and participating in this proceeding. Their voices and expertise are critical to understanding how the FCC's actions impact public safety, and the record would not be complete without their full participation.

The Commission should demonstrate that it is serious about considering and promoting public safety in its decision-making process by ensuring the full participation of these parties and others that are on the front lines of the COVID-19 pandemic. Failure to do so shows that the Commission is not genuinely committed to addressing the errors it committed in *Restoring Internet Freedom Order*.[5]

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[3] *Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings In Light of the D.C. Circuit's Mozilla Decision*, DA 20-168 (Feb. 19, 2020).

[4] *Mozilla Corp. v. FCC*, 940 F.3d 1, 100 (D.C. Cir. 2019).

[5] California notes that the FCC rejected the request for additional time in part because the Commission found that the filing parties had not sufficiently demonstrated the negative impact of the pandemic on their operations, justifying the need for an extension. Yet, in their letter requesting the extension, the filing parties stated their "governmental personnel, including emergency operations staff and centers, continue to be fully occupied by response to the current

B. The Focus of the Public Notice is Too Narrow and Rests on Faulty Assumptions.

The CPUC agrees with commenters who argue that the focus of the Public Notice is too narrow and asks the wrong questions.[6] As Santa Clara County et al. point out, the Public Notice makes faulty assumptions that (1) it is possible to know which communications relate to public safety and treat them differently from other communications; and (2) public safety internet traffic travels primarily or exclusively on business- and enterprise-grade plans not subject to the *Order*, implying that local governments' reliance on the open internet extends no further than their own Internet service providers (ISPs) and broadband plans.

The Broadband Institute of California further notes that the Notice omits consideration of critical infrastructure.[7] These questions ignore the fact that public safety depends on the public being able to communicate as well, not only with first responders and emergency personnel, but in other contexts that also have public safety implications. The CPUC further agrees with BBIC that the FCC's failure to define "public safety communications" creates a notice issue under the Administrative Procedure Act.[8] Although the Public Notice seemingly suggests a narrow focus, the vagueness of the term

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State of Emergency" and "because many of the Commission's inquiries request information that can only be provided by these personnel and resources, we have been unable to obtain much of the requested information within the period set by the Commission." *City of Los Angeles Letter*, at pp. 1-2.

[6] *See, e.g.,* Comments of the County of Santa Clara, et al., at p. 4; Comments of Broadband Institute of California, at pp. 2, 7, 21-22.

[7] The CPUC's comments, for example, illustrate the need for the public to communicate with energy providers for demand response programs to work.

[8] *See, e.g.*, Comments of BBIC, at pp. 2, 20-21.

"public safety communications" leaves uncertain the scope of communications under consideration, and fails to apprise the public of the "terms or substance of the proposed rule or a description of the subjects and issues involved."[9]

Indeed, a review of the comments submitted demonstrates the broad range of Internet communications that implicate public safety, in various iterations. The BBIC's comments, for example, demonstrate the need for the FCC to consider critical infrastructure sectors including education, healthcare, and energy.[10] The CPUC also outlined in its opening comments the *Order*'s potential impact on critical infrastructure, including energy grid safety and reliability. In addition, the FCC should include in its assessment the effects of the *Order* on the alarm industry. As ADT's comments discuss, the alarm industry provides critical location data that improves situational awareness for first responders.[11] Santa Clara County, et al., detail the increased risk the *Order* has on public safety by preventing robust and reliable transmission of public health and safety-related communications between and among local governments and residents.[12] The CPUC agrees that robust and unencumbered community access to broadband has a vital impact on public safety.

These comments also demonstrate the need for strong, nondiscriminatory rules to prevent abusive ISP practices that threaten an open Internet. ISP policies slowing users

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[9] *See, id*., at p. 2, citing U.S.C.A. § 553 (West); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 412 (2004).

[10] Comments of BBIC, *passim*.

[11] ADT Security Services Comments, at pp. 2-4.

[12] Comments of Santa Clara County, et al., at pp. 4-11.

to 2G speeds or below, to the point that critical functions such as telemedicine and video conferencing cannot be supported, are discussed in detail in the BBIC's comments.[13] This is an example of a practice that could have been challenged as a violation of the reasonable network management rule under the 2015 Open Internet rules. Santa Clara County, et al. comments also highlight the dangers in relying on voluntary ISP promises, noting that, in reality, ISPs[14] continue to prioritize profits over safety by disconnecting users for failure to pay –despite signing a pledge not to do so. The CPUC echoes Santa Clara and BBIC's comments and concerns about these practices. Preventative rules are needed to constrain ISP conduct that threatens public safety.

The CPUC agrees that if the Commission focuses too narrowly on one subset of public safety communications, it runs the risk of further violating its statutory duty to promote the "safety of life and property through the use of wire and radio communications." (47 U.S.C. § 151.)

C. Reclassifying BIAS as an Information Service Eliminates Pole Attachment Rights for BIAS-only Providers, Impacts Pole Safety, and Impedes Broadband Deployment.

The CPUC concurs with Pennsylvania that the Public Notice's focus on non-reverse preemption States, again is too narrow and fails to capture the effects of the information service classification on pole attachment regulation.[15] Both the Pennsylvania Public Utility Commission (Pa. PUC) and the CPUC have detailed how the information

[13] BBIC Comments, at pp. 44-49.

[14] Comments of Santa Clara County, et al., at pp. 10-11.

[15] *See, e.g.*, Comments of the Pennsylvania Public Utility Commission (Pa. PUC), at p. 4.

services classification negatively impacts pole attachment rights for BIAS-only providers. Like the Pa. PUC, the CPUC is also concerned with the discriminatory treatment of BIAS-only providers and the resulting impediment for universal broadband deployment. The CPUC has detailed its concerns about enforcing safety regulations on pole attachments by BIAS providers that may attempt to use the information services classification as a shield to State jurisdiction.[16] The FCC should acknowledge and address the effect the information service reclassification has on States that have asserted jurisdiction over pole attachments.

Some commenters claim, incorrectly, there is no evidence demonstrating that utilities subject to 47 U.S.C. § 224 used the information service classification as a basis to materially impede broadband deployment, or that broadband providers have faced unique challenges to obtaining pole access.[17] As the CPUC noted in its comments, we are 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.[18] Google Fiber, Inc. also details its experience in attempting to negotiate commercial pole attachment agreements, an often "difficult and time consuming" process

[16] The CPUC agrees with the Pennsylvania PUC that for purposes of pole attachment regulation, States may deviate from the Commission's information service classification should it be necessary and in accordance with applicable law. *See*, Pa. PUC Comments, at p. 5.

[17] *See, e.g.*, Comments of USTelecom-The Broadband Association, at p. 12; Comments of Charter Communications Inc., at p. 5.

[18] CPUC Comments, at p. 15.

that resulted in higher rents than those paid by cable operators or telecommunications carriers.[19]

In fact, in California, the CPUC denied Google Fiber's request to gain access to public utility infrastructure in accordance with the same rates, terms, and conditions as those enjoyed by competitive local exchange carriers (CLECs).[20] The request was denied because the CPUC lacked explicit statutory authority under California law to (1) grant video service providers (VSPs) such as Google Fiber the right to access public utility infrastructure, and (2) promulgate and enforce safety regulations with respect to VSPs. In response to Google Fiber's claim that our safety concerns may be resolved by allowing access to utility infrastructure only to those VSPs agreeing to comply with the CPUC's safety regulations, the CPUC said:

> The flaw in Google's reasoning is that the Commission lacks explicit statutory authority to enforce safety regulations with respect to VSPs. It is conceivable that if a major safety violation were to occur, the offending VSP--which originally pledged to comply with the Commission's safety regulations in order to obtain access to utility infrastructure -- may argue that it is not a public utility and thus exempt from the Commission's authority to investigate the incident and to

[19] Comments of Google Fiber Inc., at p. 2.

[20] CPUC Decision (D.) 15-05-002 Denying Google Fiber Inc.'s Petition to Modify Decision 07-03-014, 2015 Cal. PUC LEXIS 254 (Rulemaking 06-10-005, Filed Oct. 5, 2006). Available at http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M151/K560/151560796.PDF. Electric utilities that owned the infrastructure to which Google sought attachment rights filed comments in that proceeding, noting that broadband network providers and/or VSPs have negotiated private contracts for utility infrastructure access that may come at a higher cost which reflects the shift of oversight and enforcement of safety regulations from the CPUC to the electric utility. CPUC D.15-05-002, slip op., at pp. 15-16, 2015 Cal. PUC LEXIS 254, *22.

> impose fines, sanctions, and other remedies for violations of the Commission's safety regulations.[21]

The CPUC is concerned that broadband providers similarly will use the "information services" classification as a shield against State authority to impose and enforce safety regulations. USTelecom asserts these concerns proffer no legal basis for the argument that ISPs would avoid State safety regulation.[22] As the CPUC noted in its Opening Comments, we have been presented in numerous contexts with claims from communications providers that States are preempted from regulating information services.[23] Although the CPUC will not here delve into the merit, or lack thereof, of these claims, we note that these are not "speculative concerns," as USTelecom puts it.[24] If, as USTelecom asserts, reclassifying broadband as an information service will not result in any entity ignoring State rules ensuring the safety of pole attachments,[25] then the Commission should so acknowledge. The FCC should state affirmatively that States may

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[21] CPUC D. 15-05-002, slip op., at p. 22, 2015 Cal. PUC LEXIS 254, *35. CTIA is simply incorrect then when it claims that "States therefore can extend the *benefits* of pole attachment access and rights to any attaching entities, including broadband providers, without regulating those entities." (CTIA Comments at p. 10, fn. 30.) Without clear and direct authority to impose and enforce safety regulations, States cannot extend the benefits of pole attachment rights to broadband entities. Contrary to CTIA's assertions, regulating the public utilities that own/control the poles is not the same as affording nondiscriminatory pole attachment rights to broadband providers. As noted above, broadband providers may attempt to enter into private agreements for pole access, but those agreements come at a higher price. To do otherwise would be to conscript public utilities to enforce safety regulations with respect to ISPs.

[22] Comments of USTelecom-the Broadband Association, at pp. 16-17.

[23] CPUC Comments, at pp. 9-10.

[24] USTelecom Comments, at p. 15.

[25] USTelecom Comments, at p. 17.

enforce all State pole attachment safety rules and regulations against BIAS providers, regardless of their federal regulatory classification.

Finally, some commenters claim that the "information service" classification does not present a material impediment to broadband deployment. These comments refer mainly to services comingled with telecommunications services.[26] The issue, however, is with standalone broadband providers. For the reasons discussed above, classifying BIAS as an information service *does* present a barrier to deployment for standalone broadband, a service that Americans have come to "increasingly…favor," and to depend on heavily.[27] At the very least, the FCC should stop "whist[ing] past the graveyard," acknowledge these concerns and address them in a reasoned manner.

D. There is No Viable Alternative Legal Support for Including Standalone BIAS in the Federal Lifeline Program Other Than Title II.

The CPUC agrees with the numerous comments asserting the FCC is wrong to suggest reclassification of BIAS as an information service has no impact on the applicability of Title II provisions addressing universal service. As the D.C. Circuit Court stated in *Mozilla*:

> As a matter of plain statutory text, the 2018 Order's reclassification of broadband—the decision to strip it of Title II common-carrier status— facially disqualifies broadband from inclusion in the Lifeline Program.[28]

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[26] *See, e.g.*, USTelecom Comments, at pp. 13-16; CTIA Comments, at pp. 8-10.

[27] *Mozilla v. FCC*, 940 F.3d at 67. *See also*, *Lifeline and Linkup Reform*, Third Report and Order, Further Report and Order, and Order on Reconsideration, WC Docket 11-42, 31 FCC Rcd 3962, para. 49 ("Standalone broadband services are increasingly popular as consumers transition from bundled services to broadband-only plans.")

[28] Mozilla v. FCC, 940 F.3d 1, 69 (D.C. Cir. 2019) (*Mozilla*).

As several commenters have noted, the *RIF Order's* reclassification of BIAS service definitively eliminates the FCC's authority to support stand-alone *information services* like BIAS. None of the commenters have articulated an alternate sustainable legal theory, absent Title II, to support Commission authority to include standalone BIAS in the federal Lifeline program. As NARUC notes, the statute nowhere affords the FCC discretion to provide support to carriers offering broadband service over facilities-based broadband capable networks – just because those networks also support some type of voice service.[29] The plain text of the Act provides no discretion for the FCC to support BIAS-only facilities. The fact that a carrier's network might be "voice capable" in some undefined sense, on its face does not solve the problem. The carrier must also be offering a *telecommunications service*. *Mozilla* dispenses with the fiction that, as long as broadband capable networks also "support" voice service, then § 254(e) support will apply. Indeed, *Mozilla* stands for exactly the opposite conclusion - § 254(e) support will *not* apply where the service being offered is *not* a telecommunications service.

Some commenters claim reclassification poses no harm to the Lifeline program as the *RIF Order* merely restores the regulatory framework that existed prior to the *2015 Open Internet Order*.[30] This argument ignores the FCC's attempt to phase out voice support in favor of Lifeline support for BIAS-only. Given the statutory limitations on providing Lifeline support for information services, not to mention the lack of a

[29] Comments of the National Association of Regulatory Utility Commissioners (NARUC), at pp. 10-11.

[30] *See, e.g*. Comments of Comcast, at pp. 2, 4.

sustainable contribution base,[31] it simply is not feasible for the FCC to continue down this path. The CPUC agrees with CTIA that the Commission should abandon the pending phase-out of support for voice services in Lifeline.[32]

Finally, the CPUC agrees with parties urging the Commission not to interfere with State universal service programs that provide low-cost broadband services for low-income households.[33] In particular, the CPUC agrees with NARUC that the Commission should assure that its actions do not prejudice "States' authority reserved under Section 253(b) . . . 'to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard' consumers' rights; and otherwise avoid an unlawful and inefficient application of forbearance authority under 47 U.S.C. §160 to provisions of the Act that reserve State authority."[34] The fact that the Act does not provide the Commission with discretion to include BIAS in the federal Lifeline program leaves open whether, regardless of its federal classification, a State could mandate including BIAS in its State Lifeline program.

III. CONCLUSION

The comments submitted demonstrate the negative impact the *RIF Order's* reclassification of BIAS and the elimination of net neutrality rules have had on public

[31] The CPUC and others have detailed the FCC's refusal to reform the universal service contribution base. *See, e.g*., July 17, 2017 Comments of the CPUC filed in WC Docket 17-108, at pp. 19-20; Comments of AARP, pp. 3-4.

[32] *See, e.g*. Comments of CTIA, at p. 13.

[33] *See, e.g.*, Opening Comments of the Greenlining Institute, at p. 5; Comments of NARUC, at p. 3.

[34] NARUC Comments, at p. 3, fn. 5.

safety, Lifeline, and pole attachments. The CPUC strongly urges the Commission to reclassify BIAS as a telecommunications service, restore its authority over broadband, and reinstate non-discriminatory net neutrality rules. The *RIF Order* constrains the FCC's ability and impacts States' ability to perform their central functions, including promoting safety and competition by ensuring BIAS providers' access to utility poles, providing assistance to low-income individual through the Lifeline program and ensuring the safety and reliability of critical infrastructure.

Respectfully submitted,

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