

**Before the Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of  
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  
DA 20-168

**Comments of the Center for Democracy & Technology  
May 20, 2020**

The Center for Democracy & Technology respectfully submits these comments in response to the Federal Communications Commission Wireline Competition Bureau's Public Notice in which it seeks to refresh the record in light of the issues remanded to the Commission in *Mozilla v. FCC*.<sup>1</sup>

In *Mozilla v. FCC*, the United States Court of Appeals for the District of Columbia Circuit reviewed the FCC's 2018 "Restoring Internet Freedom" Order ("Order"), in which it reclassified broadband internet access service ("BIAS") as an "information service" and attempted to preempt state laws addressing net neutrality. The court vacated the portion of the Order that claimed authority to preempt state laws, and remanded the Order to the FCC because the FCC had failed to consider the Order's implications for public safety, pole attachments, and the Lifeline program.<sup>2</sup> Section 706(2)(A) of the Administrative Procedure Act ("APA"), provides that the court "shall hold unlawful and set aside" agency actions found to be arbitrary or capricious.<sup>3</sup> The court found that the failure to fully consider the implications of the Order made the FCC's actions arbitrary and capricious.<sup>4</sup>

Although courts have occasionally remanded agency actions without vacatur, they do not excuse an agency's failures, nor does remand without vacatur allow an agency to repair its

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<sup>1</sup> *Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit's Mozilla Decision*, Public Notice, DA 20-168, (February 19, 2020) ("Notice"); *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

<sup>2</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 59-63 (D.C. Cir. 2019); *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2017).

<sup>3</sup> 5 U.S.C. § 706(2)(A).

<sup>4</sup> *Mozilla v. FCC*, 940 F.3d at 59.

failings with additional insufficient procedure.<sup>5</sup> Instead, the agency must fulfill its original duties under its authorizing statute and the APA. In this case, the FCC must consider with an open mind the implications of every aspect of its Order with respect to the three issues it originally neglected: public safety, pole attachments, and the Lifeline program. It cannot do so by merely “refreshing the record.”

To provide adequate notice of its intended actions and to demonstrate its openness to alternative conclusions, the FCC must conduct its procedure anew, including consideration of public comments addressing the Commission’s conclusions with respect to public safety, pole attachments, and Lifeline. Without agency conclusions and the reasoning to support them, the public cannot provide meaningful feedback, and the agency cannot meet its requirements under the APA. After refreshing the record, the FCC must conduct a formal rulemaking in which it provides notice to the public of its conclusions and proposed actions, considers and addresses comments, and explains the reasoning behind its final conclusions.<sup>6</sup>

**The scope of public safety contemplated in the Public Notice is too narrow and too vague to inform the public or the Commission.**

CDT agrees with commenters that the Public Notice offers insufficient notice to the public and fails to address many aspects of the Order’s potential impacts on public safety.<sup>7</sup> In February of 2020, the Wireline Competition Bureau (“WCB”) issued a Public Notice (“Notice”) seeking to refresh the record in the Restoring Internet Freedom and Lifeline proceedings. The words “public safety” appear many times in the document, yet the phrase is never defined nor is a single meaning discussed. Instead, the Commission refers to public safety in several different contexts, such as public safety applications, public safety communications, public safety-related communications, public safety officials, and public safety incidents.<sup>8</sup>

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<sup>5</sup> *Tex Tin Corp. v. EPA*, 992 F.2d 353 (D.C. Cir. 1993) (finding EPA explanation issued in response to earlier remand without vacatur to be arbitrary and capricious).

<sup>6</sup> 5 U.S.C §§ 553, 706.

<sup>7</sup> Comments of the Broadband Institute of California @ Santa Clara University School of Law (April 20, 2020) (“BBIC Comments”) at 24-33; Comments of Public Knowledge, Access Humboldt, Access Now, and the National Hispanic Media Coalition (April 20, 2020) (“Public Knowledge Comments”) at 4-5.

<sup>8</sup> Notice at 1-2.

Some of these uses imply an extremely narrow view of public safety, while other uses imply a broader view. For example, the Notice asks “To what extent do public safety officials [ ] even rely on mass-market retail broadband services covered by the Restoring Internet Freedom Order [ ], rather than dedicated networks with quality-of-service guarantees (i.e., enterprise or business data services) for public safety applications?”<sup>9</sup> This might reasonably imply that public safety communications only include communications between public safety officials. In contrast, the very next question acknowledges that some kinds of public safety communications involve the public: “Are concerns or consequences of broadband providers’ possible actions different for public-safety-to-public-safety communications, such as onsite incident response or Emergency Operations Center communications, versus public safety communications made to or from the public?”<sup>10</sup> While the WCB may have a particular meaning for and intended scope of public safety, the Notice offers no guidance as to what that includes.

Initial comments demonstrate the ambiguity of the Notice’s scope with respect to public safety. Some commenters adopted a narrow view of public safety, addressing only public safety officials’ and first responders’ use of broadband services.<sup>11</sup> Other commenters suggest a far broader view of the appropriate scope for considering the Order’s impacts on public safety.<sup>12</sup> The Notice’s ambiguous yet narrow approach to public safety cannot satisfy the Commission’s obligation to provide adequate notice as to how it will consider public safety.

At the same time, the inconsistent interpretations of public safety cannot meaningfully inform the Commission’s consideration of the Order’s impacts. Although the initial comments comprise a spectrum of interpretations of public safety, the differences between these interpretations makes it impossible to contrast opposing viewpoints based on a common interpretation. At most, responses to the Notice might inform the WCB or the Commission as it contemplates the appropriate scope for a further proceeding.

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<sup>9</sup> Notice at 2.

<sup>10</sup> Notice at 2.

<sup>11</sup> Comments of the Competitive Enterprise Institute at 3-5 (April 20, 2020), Comments of ITIF at 4-5 (April 20, 2020).

<sup>12</sup> BBIC Comments at 2, 7-20.

CDT agrees with the Broadband Institute of California (“BBIC”) that the Commission must address the broadest possible scope when considering public safety impacts.<sup>13</sup> As BBIC’s comments demonstrate, public safety includes people’s ability to access and transmit information to a variety of network endpoints without interference.<sup>14</sup> The more narrowly scoped interpretations implied in the Notice omit the role of the public, which relies on BIAS as a means of such access. As the COVID-19 pandemic has demonstrated, public safety and health depend on more than communications to, from, and between public officials; public safety also depends on the internet as a venue for communication.<sup>15</sup> The Commission’s consideration should encompass the broadest reading of public safety and should not ignore the crucial role that access to an open internet plays in promoting public safety and health.

**The Public Notice alone cannot satisfy the Commission’s obligations under the Communications Act or the APA.**

CDT agrees with commenters that a Public Notice from the Wireline Competition Bureau is insufficient to meet the FCC’s obligations under the APA and that issuing a formal Notice of Proposed Rulemaking (“NPRM”) is the best way to address the issues on remand.<sup>16</sup> As Public Knowledge, et al., explain, the Commission’s duty is to determine whether its policy choice is consistent with its obligations under the Communications Act.<sup>17</sup> This must include considering the public safety impacts of the Commission’s reclassification decision and the repeal of net neutrality rules against blocking, throttling, and paid prioritization.<sup>18</sup> The Notice narrowly considers prioritization, but fails to mention blocking or throttling. Likewise, the Notice asks about governmental “tools” to address public safety, but does not contemplate how the Commission could address the public safety concerns associated with blocking, throttling, or paid prioritization using its authority under Title I. Any considerations based on responses to the limited issues raised in the Notice will be incomplete and insufficient to fulfil the Commission’s duty.

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<sup>13</sup> *Id.* at 24.

<sup>14</sup> *Id.* at 20.

<sup>15</sup> BBIC Comments at 3, 16-17, 27-30.

<sup>16</sup> Public Knowledge Comments at 1-5; Comments of BBIC; Comments of New America’s Open Technology Institute and Common Cause at 12.

<sup>17</sup> Comments of Public Knowledge at 2

<sup>18</sup> *Id.* at 2-3

Further, the Notice is an unacceptable vehicle to achieve the Commission's obligations under the APA. As Public Knowledge correctly explains, the Commission must approach the issues on remand with an open mind, including being open to its inability to reconcile its desired policy outcome with its duty to "promote safety of life and property through the use of wire and radio communications."<sup>19</sup> However, the Notice offers no indication that the Commission will contemplate alternative conclusions. Indeed, the Notice offers no conclusions, tentative or otherwise, to which the public might respond.

Without an indication of the Commission's intent or potential policy actions, the Notice offers insufficient notice for rulemaking proceedings under the APA and exposes the Commission to future legal challenges. For example, if the Commission were to find that it should modify or rescind the Order to accommodate broader public safety concerns (which should be among the potential outcomes the Commission considers), many commenters could rightly challenge the modified Order on the grounds that the Commission gave insufficient notice as to the scope of its considerations.

CDT agrees with commenters that issuing a new NPRM that adopts a broad scope of public safety considerations and offers clear indications of the Commission's intent, with respect to both process and policy decisions, is the best way to satisfy its obligations.<sup>20</sup> Otherwise, the Commission demonstrates a disregard for public input, administrative law, the court, and its own statutory obligations that is unbecoming of its status as an expert agency acting in the public interest.

Respectfully submitted,

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<sup>19</sup> 47 U.S.C. § 151.

<sup>20</sup> Public Knowledge Comments at 1-5; Comments of BBIC; Comments of New America's Open Technology Institute and Common Cause at 12.