

**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 COMPETITIVE ENTERPRISE INSTITUTE**

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Introduction

On behalf of the Competitive Enterprise Institute (“CEI”), we respectfully submit these comments in response to the Federal Communications Commission’s (“FCC” or “the Commission”) request for comment following the DC Circuit Court’s (“the Court”) decision in *Mozilla Corp. v. FCC*.¹

CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective.² CEI previously submitted comments to FCC in response to its 2017 notice of proposed rulemaking regarding the *Restoring Internet Freedom Order* (“RIFO”) at issue in *Mozilla*.³

This comment letter specifically addresses the public safety questions raised by the Court in its decision and subsequently by the Commission in this notice.

Public Safety was an Open Internet Order Afterthought

Citing the Commission’s authorizing statute and its language regarding public safety imperatives as the central justification, the Court has asked FCC to more-thoroughly address the impact of *RIFO* on public safety.⁴ Yet it should be noted that the 2015 Open Internet Order (“OIO”), which preceded and was subsequently rolled-back by *RIFO*, says relatively little about its overall impact on public safety as well, standing in contrast to the Court’s request here despite the same underlying legal authority. In fact,

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

² See About CEI, <https://cei.org/about-cei> (last visited April 20, 2020).

³ Comments of the Competitive Enterprise Institute in the Matter of Restoring Internet Freedom, WC Docket No. 17-108. Available at: <https://ecfsapi.fcc.gov/file/10718307454684/CEI%20Comments%20-%20Restoring%20Internet%20Freedom.pdf> (July 17, 2017)

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

to the extent *OIO* discusses public safety at all, it states its impact on public safety is essentially neutral:

“In the *2014 Open Internet NPRM*, the Commission tentatively concluded that it should retain provisions which make clear that the open Internet rules do not alter broadband providers’ rights or obligations with respect to other laws, safety and security considerations, or the ability of broadband providers to make reasonable efforts to address transfers of unlawful content and unlawful transfers of content. We affirm this tentative conclusion and reiterate today that our rules are not intended to expand or contract broadband providers’ rights or obligations with respect to other laws or safety and security considerations—including the needs of emergency communications and law enforcement, public safety, and national security authorities.”⁵

The lack of impact on public safety was made explicit in other areas of *OIO* as well. The Commission stated that the rules only applied to “mass-market retail service.”⁶ A mass-market retail broadband service is defined under *OIO* as “a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries.”⁷

This has two distinct implications related to public safety concerns. First, this means *OIO* did not, and *RIFO* does not touch FirstNet, a dedicated, nationwide broadband

⁵ Report and Order on Remand, Declaratory Ruling, and Order, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (Feb. 26, 2015) <https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf>. ¶ 76 [“2015 Order”]

⁶ *Id.* at ¶ 299

⁷ *Id.* at ¶ 189

network for police, fire departments, emergency medical services, and other first responders.⁸

Second, the discussion of public safety in *OIO* rests heavily on concerns raised by Commissioner Catherine J.K. Sandoval of the California Public Utilities Commission. In an *ex parte* letter filed to FCC, Sandoval asserts the following:

“Subjecting public safety agencies, Critical Infrastructure, regulators, innovators, content creators, and consumers to individualized, discriminatory, ISP-controlled negotiations to obtain fast Internet access undermines public safety and universal service.”⁹

Yet, public safety agencies, critical infrastructure, regulators, and other large organizations and their web-enabled applications likely rely, in general, on enterprise broadband data services. The Commission made clear such services are outside the definition mass-market retail service and thus outside the scope of the *OIO* rules rolled-back by *RIFO*.¹⁰

What’s more, *OIO* states that some of the practices the Commission at the time sought to widely ban could actually prove beneficial to public safety:

“Other forms of traffic prioritization, including practices that serve a public safety purpose, may be acceptable under our rules as reasonable network management.”¹¹

⁸ For background on FirstNet see: Jill C. Gallagher, *The First Responder Network (FirstNet) and Next-Generation Communications for Public Safety: Issues for Congress*, Congressional Research Service (April 27, 2018), <https://fas.org/sgp/crs/homsec/R45179.pdf>

⁹ Letter from Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, 10-127, (filed Oct. 14, 2014) <https://ecfsapi.fcc.gov/file/10831111516878/2015%20Open%20Internet%20Ex%20Parte%20Letter%20Commissioner%20Sandoval.pdf>

¹⁰ 2015 Order, ¶ 189

¹¹ *Id.*, footnote 53

If some forms of prioritization are beneficial to public safety, then *OIO* actually has a negative impact on public safety compared to *RIFO* in this area. The framework established by *OIO* is *ex-ante* regulation of certain network management practices, meaning some forms of prioritization will be allowed, but only “if the petitioner demonstrates that the practice would provide some significant public interest benefit[.]”¹²

Logic dictates that such an approach inherently limits the total realized public safety benefits of prioritization practices versus what is possible. A presumptive ban means fewer resources would be dedicated to investment and innovation in prioritization services that may have either purposeful or incidental public safety benefits, as odds-are whatever proposed plan would be rejected.

In short, if a given portion of prioritization, or other network management practices, produce a public safety benefit, as *OIO* implies, then the way to maximize that benefit is presume that the general practice is allowed unless otherwise proven harmful. This is the framework embraced by *RIFO*.

The public safety benefits of prioritization and other network management practices curbed by *OIO* are not just speculative or ancillary. Increasingly, new technology and applications make such practices quintessential to public safety.

Fifth Generation or 5G wireless technology, alongside technology such as Wi-Fi 6 are set to significantly expand Internet of Things or IOT applications.¹³ From remote surgeries to driverless cars, to countless other unforeseeable, yet critical applications, more and more Internet traffic will inherently need to be prioritized. Therefore, as the Internet increasingly expands from cyberspace to physical space, the correct

¹² *Id.* at ¶ 130

¹³ *5 Things to Know About Wi-Fi 6 and 5G*, CISCO (last accessed on April 20, 2020), https://www.cisco.com/c/m/en_us/solutions/enterprise-networks/802-11ax-solution/nb-06-5-things-WiFi6-5G-infograph-cte-en.html

regulatory structure must be in place to incentivize investment in the technology and other systems needed to ensure public safety.

Investment and Safety are Intrinsicly Linked

Internet applications, from information services widely available online today, to the IOT applications discussed above provide inherent public safety benefits themselves. However, if someone is to benefit from a telemedicine service today or be saved from a traffic accident by a driverless car tomorrow, the network enabling those technologies must exist and be properly maintained. To this end, the record subsequent *RIFO* unequivocally demonstrates that it is superior to the preceding *OIO*.

The promulgation of *OIO* corresponded with a decline in broadband infrastructure investment between 2014 and 2015 by \$500 million and an even deeper decline of \$2.7 billion between 2015 and 2016.¹⁴ These declines are significant given the fact they occurred outside of a recession—the last time such a year-over-year decline occurred.¹⁵ With the promulgation and finalization of *RIFO* however, investment rebounded by \$2.1 billion between 2016 and 2017 and \$3.1 billion between 2017 and 2018.¹⁶ This new investment means more Americans are connected to an ever-improving Internet.

As FCC Commissioner Brendan Carr has noted, the latest data show Internet speeds are up roughly 85 percent since the end of 2016.¹⁷ Per recent FCC data, the so-called “digital divide,” which measures the number of Americans without access to high-speed broadband, is rapidly closing:

¹⁴ Patrick Brogan, *U.S. Broadband Capex Growth Propels Deployment*, USTELECOM, (July 31, 2019), <https://www.ustelecom.org/u-s-broadband-capex-growth-propels-deployment/>

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Tweet by FCC Commissioner Brendan Carr, (Feb. 24, 2020, last accessed April 20, 2020), <https://twitter.com/BrendanCarrFCC/status/1232023583569956864?s=20>

“[F]rom December 2016 to December 2018, the number of Americans without any options for at least 250/25 Mbps fixed terrestrial broadband service plummeted by 74%, from 181.7 million to 47 million. And during that same time period, the number of Americans with no options for at least 25/3 Mbps fixed terrestrial broadband service fell by 30%, from 26.1 million to 18.3 million.”¹⁸

If network robustness and levels of access are at all associated with public safety, which the existence of an entirely separate and dedicated broadband network for first responders in FirstNet certainly indicates, it is hard to imagine how any reasonable threshold measurement of public safety-improvement over *OIO* has not been reached by *RIFO*.

In addition to the recent historical comparison, the public health crisis presented by the Covid-19 pandemic has provided a real-time contrast between the *RIFO* approach and “utility-style regulation” such as that of the preceding *OIO*.¹⁹ According to multiple recent reports, the European Union, which takes a utility-style approach to broadband regulation, has been forced to lean on companies such as Netflix and other-bandwidth intensive services to lower their quality in order to preserve connectivity for other services.²⁰ No such action has been required in the United States, despite similar surges in Internet traffic.²¹

¹⁸ Press Release: *New Data Shows Digital Divide is Closing and Broadband Competition is Increasing*, FEDERAL COMMUNICATIONS COMMISSION (Feb. 20, 2020)

¹⁹ 2020 Public Notice

²⁰ Rebecca Klar, EU calls on Netflix, other services to stream in lower quality due to bandwidth concerns, THE HILL (Mar. 19, 2020), <https://thehill.com/policy/technology/488469-eu-calls-on-netflix-and-others-to-stream-in-lower-quality-due-to-bandwidth>

²¹ Brendan Carr, U.S. Internet and Telecom Networks Showing Strength with COVID-19, MEDIUM, (Mar. 27, 2020), <https://medium.com/beat-the-virus/americas-broadband-networks-showing-strength-with-covid-19-f2a403c9700f>

By most accounts, the US Internet networks are holding up well.²² The contrast with Europe can be explained by investment data. Alec Stapp of the Progressive Policy Institute explains:

“According to data from the Organisation for Economic Co-operation and Development, the United States regularly invests almost 80 percent more per capita in telecommunications than Europe.”²³

The ability for people to move their economic activity, from work to entertainment, online has obvious and almost-incalculable public safety benefits during a public health crisis such as the Covid-19 pandemic. Investment in broadband networks is inextricably linked to such ability and both historical and real-time comparisons show the utility-style regulation of *OIO* is inferior in this regard.

Conclusion

Given that the principle objective of *RIFO* is reversing *OIO*, one can hardly blame the Commission for not giving sufficient consideration to a category of criteria *OIO* so explicitly intended to leave largely unchanged. Nevertheless, the subsequent record under *RIFO* demonstrates that the impact on public safety has been a net-positive. CEI appreciates the opportunity to submit comments to the FCC on this matter and we look forward to further participation.

Respectfully submitted,

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²² *Id.*

²³ Alec Stapp, *Why Netflix and YouTube Aren't Breaking the Internet in the United States*, MORNING CONSULT, (Apr. 10, 2020), <https://morningconsult.com/opinions/why-netflix-and-youtube-arent-breaking-the-internet-in-the-united-states/>