

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS,
DISSENTING**

Re: *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.

The Internet has never been more important to the world around us, and our everyday lives. As COVID-19 forced many businesses to shut down, companies, organizations, and governments quickly moved operations online to keep our economy afloat. Social distancing measures have forced Americans to rely on broadband to work from home, engage in distance learning, access telehealth treatments, and participate in our democracy. Meanwhile, public safety communications resources have been critical to our response to this year's natural disasters, from hurricanes in the Southeast, to superstorms in the Midwest, to massive forest fires in California and the Pacific Northwest. These events show that the case for ensuring that all Americans have high-quality, affordable, and reliable broadband service has never been clearer.

Five years ago, the *Open Internet Order* anticipated these challenges by taking a common sense approach towards ISP regulation that encouraged deployment but also affirmed the FCC's authority to protect competition, public safety, privacy, and consumer rights. A year later, the D.C. Circuit upheld those rules in their entirety. The *Restoring Internet Freedom Order (RIF Order)* undid that progress based on a belief that broadband providers would prioritize consumers over their own monetary interests.

Nearly three years later, what do we have to show for this dramatic policy shift? According to an analysis of U.S. Census data, more than 77 million people in the United States lack a home broadband connection, meaning they either have no home internet service at all or rely solely on mobile wireless service. This is particularly the case for our most vulnerable Americans. More than half of low-income households lack a fixed broadband connection, including 30 percent of Black and Latinx people, and 34 percent of Native Americans. From this alarming baseline, the trends are moving in the wrong direction: wired home broadband adoption rates are slowing, with an increasing number of households accessing the internet only via their mobile devices. Once again, this is particularly concerning for vulnerable communities; low-income households are nearly four times more likely to be mobile-only than the wealthiest households.¹

More Americans than ever are struggling, and it should be our mission to ensure that a lack of connectivity isn't adding to their burdens. According to one recent study of nearly 300 broadband plans in 28 cities around the world, the United States has the highest average monthly prices for home broadband.² Those costs add up, and as the economic consequences of COVID-19 hit home, a lot of Americans are worried about how they're going to pay their bills. According to an April 2020 Pew Research survey, nearly one-third of consumers reported concerns about how they were going to pay their

¹ See S. Derek Turner and Matthew F. Wood, Comments of Free Press, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 20-269 (filed Sept. 18, 2020) at 17 (Figure 3), 19-20 (Figure 6), 21 (Figure 7), 24-25.

² Becky Chao and Claire Park, "The Cost of Connectivity," Open Technology Institute at 29 (July 15, 2020), available at <https://www.newamerica.org/oti/reports/cost-connectivity-2020/>. See also Inti Pacheco and Shalini Ramachandran, "Do You Pay Too Much for Internet Service? See How Your Bill Compares," Wall Street Journal, December 24, 2019, available at <https://www.wsj.com/articles/do-you-pay-too-much-for-internet-service-see-how-your-bill-compares-11577199600?mod=searchresults&page=1&pos=1> (finding a \$66/month median price for home broadband service).

home broadband and wireless bills, with over half of low-income households reporting such worries.³ According to another recent survey, 30 percent of Black, Latinx and other non-white adults earning less than \$50,000 a year have missed at least one payment on their internet bill since the pandemic began.⁴ And almost half of lower-income people of color are worried about paying for their home broadband connections moving forward.⁵

Those are troubling signs regarding the current state of broadband in America. The majority has dismissed arguments about Net Neutrality with attacks on Twitter straw men and jokes about our continued ability to stream cat videos. But their primary argument rests on the idea that the *Open Internet Order* somehow strangled investment that was restored by the *RIF Order*. As evidence of the benefits of deregulation, they've recently pointed to how well our networks have performed under historic loads due to COVID-19 social distancing measures, particularly in comparison to Europe.

Let me be clear: I value and deeply appreciate the work American communications providers have done to respond to COVID-19, and am proud of how our networks appear to have performed under historically high loads of traffic. But any successes aren't due to the *RIF Order*. They just aren't. Increases in download speeds or capital investments instead reflect long-term trends that pre-dated the *RIF Order* and, if anything, were higher under the *Open Internet Order's* regulatory regime.

Let's be real – while capital investment decisions may not take place in a regulatory vacuum, they are based on multi-year business plans, anticipated market conditions, and technology cycles. They don't turn on a dime with the FCC's actions.

I'm not focused on these old arguments. We're in the middle of a worldwide health crisis in which the internet has proven essential to keeping our economy running and our citizens connected. I'm focused on the fact that the *RIF Order* has abandoned any regulatory oversight over ISPs and left consumers to corporations with a fiduciary duty to maximize their profits.

While I'm glad that many ISPs pledged not to disconnect customers during the initial months of the pandemic, the *RIF Order* has removed any FCC authority to enforce this voluntary commitment. Moreover, the pledge ended five months ago, even as our country continues to face historic levels of unemployment and economic distress. But the FCC has no authority to prevent providers from disconnecting customers who can't pay their bills.

There are many battles that we face: epic fires in the Western United States, repeated hurricanes in the Southeast, and unprecedented storms in the Midwest. Throughout the country, first responders and other public safety personnel are relying on communications technology to protect us all. Yet through its elimination of Title II authority, the *RIF Order* has left the Commission with no ability to compel ISPs to share their network performance data, let alone to impose reliability standards to ensure operations under disaster conditions.

The FCC ought to have a leadership role in responding to these crises. Regulatory action may not be necessary in all instances, but cheerleading voluntary industry efforts is not leadership. Through the *RIF Order*, we've lost any authority to protect vulnerable consumers and public safety organizations whose broadband connections may be at risk.

³ See Emily A. Vogels, Andrew Perrin, Lee Rainie, and Monica Anderson, "53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak," Pew Research Center (April 30, 2020), *available at* <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.

⁴ Sam Sabin, "Among Lower Earners, People of Color are More Likely Than Whites to Worry About Paying Internet, Phone Bills," Morning Consult (June 30, 2020), *available at* <https://morningconsult.com/2020/06/30/internet-service-providers-pandemic-low-incomebilling-poll/>.

⁵ *Id.*

The D.C. Circuit remanded the *RIF Order* because it found insufficient the majority's claim that deregulation will benefit, or at least not harm, public safety, pole attachment access, and the Lifeline program. The *Remand Order* claims to address these deficiencies but in reality it still falls well short.

Let's begin with public safety. I've already mentioned how the FCC has surrendered its authority to force ISPs to share their network performance data. While I'm glad that the ISPs report that their networks have performed well, we shouldn't have to take their word for it. In fact, some reports suggest that network performance has not been perfect for all Americans.⁶ The FCC should be able to confirm ISPs' claims through an independent analysis of performance data so we can identify issues and take regulatory action if necessary. In fact, that sounds pretty core to a well-functioning regulatory agency.

When an ISP harms public safety communications, we're not talking about streaming cat videos – someone may get a busy signal when she calls 911 or firefighters may be unable to communicate with each other in the middle of a forest fire. As the D.C. Circuit observed, “[w]henver public safety is involved, lives are at stake.... [U]nlike most harms to edge providers incurred because of discriminatory practices by broadband providers, the harms from blocking and throttling during a public safety emergency are irreparable. People could be injured or die.”⁷

The *Remand Order* excuses our loss of authority to prevent ISPs from engaging in throttling, blocking and otherwise harming public safety communications because of the purported severe consequences that an ISP would likely suffer from any misconduct. For example, the *Remand Order* claims that ISPs could experience severe reputational harm, be subject to consumer protection enforcement by the FTC or state agencies for deceptive practices, or even be sued by the Justice Department for antitrust violations. But none of those situations address the D.C. Circuit's concerns about the effectiveness of such after-the-fact “remedies” in the public safety context.

The *Remand Order* also claims that the potential loss of life or other harms to public safety are outweighed by the benefits resulting from the *RIF Order's* deregulatory approach. But the *Remand Order* fails to provide any specific evidence supporting these claims. For example, while the order claims that the enterprise services relied upon by many public safety entities would benefit from additional “middle-mile” investment supposedly generated under the *RIF Order's* approach, it provides no information about the number of public safety entities that have purchased such services or how the *RIF Order* has affected the affordability and competitiveness of the fees for or quality of such services. Indeed, the *Remand Order* explicitly says that consideration of how the *RIF Order* has impacted such investment is outside the scope of the remand. So the *Remand Order's* point falls under its own weight, and more the point, it's hard to understand how this addresses the D.C. Circuit's direction.

Strike One.

There are similar issues with the *Remand Order's* approach to pole attachments. At first glance, this issue may seem like one only a telecom lawyer could love, but ISPs have struggled to build out their networks without attaching equipment to utility poles. While cable and telecom providers remain protected under the *RIF Order*, the decision left broadband-only ISPs with no FCC recourse, placing them at a huge disadvantage against incumbent providers.

The *Remand Order* acknowledges that access to these poles is a “competitive bottleneck,” and observes that cable operators, wireless internet service providers and others have filled the record with stories about the difficulties in obtaining reasonable access to poles. Nevertheless, the *Remand Order* finds that reclassification does not significantly limit new entrants to the marketplace, and in an exercise in circular reasoning, simply restates the *RIF Order's* claim that most ISPs will remain entitled to FCC

⁶ See, e.g., Tara Lachapelle, “How's the Internet Doing? Depends Where You Look?,” Bloomberg (April 8, 2020), available at <https://www.bloomberg.com/opinion/articles/2020-04-08/coronavirus-internet-is-holding-up-for-now-but-more-data-needed>.

⁷ *Mozilla Corp. v. FCC*, 940 F.3d 1, 62 (D.C. Cir. 2019).

protection because their broadband service will come bundled with Title II or cable services. As for broadband-only ISPs, the *Remand Order* blithely suggests that they could receive FCC protection if they simply began providing video or telecom services, notwithstanding their own business plans or financial circumstances.

For those ISPs who prefer to adhere to their own business plans and don't want to incur the substantial expense of providing telecom or video services, the *Remand Order* directs them to their state regulatory authorities, and notes that several states have preempted the FCC's Section 224 pole attachment authority or have statutes regulating pole attachment rates charged to ISPs. Of course, if the ISPs can't get state law changed, the *RIF Order* finds that "it would be counterproductive to upend our light-touch regulatory framework for broadband Internet access service because of speculative concerns that at most would impact a small minority of ISPs and consumers."⁸ Once again, I fail to see how such a response will satisfy the D.C. Circuit.

Strike two.

The final issue remanded by the court is the effect of the *RIF Order* on the Commission's Lifeline program. Nearly 8 million vulnerable Americans rely on this vital program to stay in touch with their families, employers and health care providers. When the Commission added broadband to the Lifeline program in 2016, we clearly based that determination on broadband's status as a telecommunications service under Title II. As the D.C. Circuit found, however, the *RIF Order* ignored the impact of reclassification on the Lifeline program, effectively eliminating the agency's authority to offer Lifeline support for broadband.

In response to the D.C. Circuit, the majority engages in a strained legal reading to find that a provider may continue to receive Lifeline support for broadband service as long as that provider remains an Eligible Telecommunications Carrier offering telecom services to some customers. This would be tricky on its own terms, but voice service in the Lifeline program will be phased out next year. What will happen to Lifeline providers who may not have any remaining voice customers after the phase-out? This is perilous to the millions of vulnerable Americans who depend on the program. To address this problem, the *Remand Order* points to the phase-out exception, which permits continued voice service support in census blocks with only one Lifeline provider. According to the *Remand Order*, as long as a provider offers voice service to someone, it may continue to receive Lifeline support for broadband. The *Remand Order* concludes that the Commission may engage in these legal gymnastics, because its support for broadband service ultimately contributes to the buildout and maintenance of the same network that offers telecom services.

The *Remand Order* ultimately concludes that, even if its legal reasoning falls short, "the benefits of reclassification would outweigh the removal of broadband Internet access service from the Lifeline program...."⁹ Given that the *Remand Order* acknowledges that those benefits remain in dispute, this statement is chilling. The majority would rather disconnect nearly 8 million Americans from a critically needed service during a pandemic than subject ISPs to any form of FCC oversight. The millions of Lifeline subscribers who depend on this essential program deserve better.

Strike three.

The fight for Net Neutrality—on the issues raised in the remand and others—isn't over. We are a week away from a historic election, and its result may dictate whether we affirm the deregulatory path adopted by the majority or take a different course. The House has already passed the Save the Internet Act, which would restore the *Open Internet Order*'s protections.

⁸ *Remand Order* at para. 78.

⁹ *Remand Order* at para. 103.

But the stakes are too high to wait. We should take stock of the lessons we've learned since adoption of the *Open Internet Order*. We should adopt new rules that are forward-looking and that reaffirm the basic principle of consumer choice reflected in the 2005 *Internet Policy Statement*. That means building on the consensus that blocking and throttling should be prohibited. It means protecting competition by banning paid prioritization. And it means providing more specific guidance regarding our transparency rules so consumers don't have to scroll through pages of lawyer-speak to make informed choices about their service.

Finally, as we vote on this item, I'm struck by the majority's inconsistency in affirming the *RIF Order* even as the Chairman has announced his plan to circulate a rulemaking on Section 230. After all, in the *RIF Order* the majority pointed to Section 230 as evidence of Congress's intent that broadband should receive a "free market approach" as an information service. It's absurdly ironic that some of Net Neutrality's strongest opponents now argue that the Commission should interpret Section 230 to control the speech of private companies. These pieces don't fit together. You can't pretend to have a light-touch regulatory framework when you're proposing to regulate online content with a heavy hand. This ideological about-face shows that the imminent Section 230 rulemaking is more about pleasing the President than making good policy.

I dissent.