

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

In the Matter of)	
)	
<i>Restoring Internet Freedom</i>)	
)	
<i>Bridging the Digital Divide for Low- Income Consumers</i>)	WCB Docket Nos. 17-108, 17-287, 11-42
)	
<i>Lifeline and Link Up Reform and Modernization</i>)	

REPLY COMMENTS OF NEXT CENTURY CITIES

Francella Ochillo
Executive Director
Next Century Cities
1342 Florida Ave NW
Washington, DC 20009

Ryan Johnston
Policy Counsel
Next Century Cities
1342 Florida Ave NW
Washington, DC 20009

May 20, 2020

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

In the Matter of)	
)	
<i>Restoring Internet Freedom</i>)	
)	
<i>Bridging the Digital Divide for Low- Income Consumers</i>)	WCB Docket Nos. 17-108, 17-287, 11-42
)	
<i>Lifeline and Link Up Reform and Modernization</i>)	

REPLY COMMENTS OF NEXT CENTURY CITIES

I. Introduction

Next Century Cities (“NCC”)¹ submits this reply in response to the Federal Communications Commission’s (“FCC” or “Commission”) request to refresh the record for the Restoring Internet Freedom Order and Lifeline proceedings in the above captioned dockets.² As many commenters have suggested, NCC agrees that the Lifeline program and pole attachment rights are inextricably linked to the Commission’s Title II authority.

Communications technologies are essential, even more so in the wake of the coronavirus (COVID-19) health crisis. The Lifeline Program ensures that low-income families are able to get online to apply for jobs, attend classes, go to work, and communicate with healthcare providers while stay-at-home orders remain in place. These are among the many reasons why the Commission should work quickly to adopt a strong legal framework that protects Lifeline’s broadband internet access service (BIAS) and the low-income consumers that Lifeline serves.

Additionally, the Commission’s decision to reclassify BIAS as an “information service” removes BIAS-only providers from the statutory scheme that governs pole attachments. If a portion of those who would provide broadband only services are unable to attach, that will limit the Commission’s ability to promote broadband build-out. Equally worrisome, current pole attachment rules could render broadband-only providers that have the resources to deploy to

¹ Next Century Cities is a nonprofit nonpartisan 501(c)(3) coalition of over 200 member municipalities that works collaboratively with local leaders to ensure reliable and affordable broadband access for every community, while helping others realize the economic, social and public health importance of high-speed connectivity.

² *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 et. al., DA 20-168 (WCB 2020).

unserved or underserved areas unable to do so at a time when families and businesses are relying on the FCC to promote policies that will make it easier for them to connect. The consequences of this reclassification will inevitably contribute to the digital divide.

II. The Commission is Widening the Digital Divide by Preventing BIAS-Only Providers From Participating in the Lifeline Program

In its public notice the Commission sought comment on whether there were alternative avenues by which it could continue to provide broadband services through programs such as Lifeline. As NCC stated, if broadband is not designated as a Title II service it cannot be subsidized through the Lifeline program.³ Other commenters have sought to make the distinction that under Section 254 of the Telecommunications Act the Commission could include broadband that was provided by a telecommunications carrier that also provided voice or cable services.⁴ However, this distinction necessarily implies that broadband internet access service (“BIAS”) only providers would not be able to subsidize their service through programs such as Lifeline.

Under Section 254(c) of the Communications Act universal service is defined as “an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies services.”⁵ The Commission has listed broadband as a supported service in the Code of Federal Regulations.⁶ As we have previously stated, broadband’s inclusion in the Lifeline program is dependent on its common carrier status.⁷ The court in *Mozilla* explained:

Section 254(e) provides that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(e) (*emphasis added*). And the statute expressly defines an “eligible telecommunications carrier” as a “common carrier” under Title II. *Id.* § 214(e)(1).⁸

Under this rationale, an entity that provides telephone or cable services that is designated as a common carrier, and further as an ETC, could provide broadband services and be subsidized by the Lifeline program. However, BIAS-only providers that do not provide telephone or cable services cannot be designated as common carriers or ETCs and therefore would not be able to be subsidized under the Lifeline program.

³ See Comments of Next Century Cities at 3 (NCC Comments).

⁴ See Comments of National Consumer Law Center and The United Church of Christ, OC, Inc. at 5-8 (NCLC Comments); Comments of R Street Institute at 12-13 (R Street Comments).

⁵ 47 U.S.C. § 254(c).

⁶ 47 C.F.R. 54.400(n).

⁷ NCC Comments at 3.

⁸ *Mozilla Corp. v. FCC*, 940 F.3d 1, 112 (D.C. Cir. 2019).

Some commenters have suggested that the Commission could look to the Universal Services Transformation Order for the legal authority to continue supporting Lifeline broadband.⁹ In that order, the Commission found that it had authority under section 254 to use universal service funds to administer broadband services provided by ETCs, even if broadband is classified under Title I.¹⁰ The Commission argued that “Section 254 grants the Commission clear authority to support telecommunications services and to condition the receipt of universal service support on the deployment of broadband networks, both fixed and mobile, to consumers.”¹¹ Next Century Cities disagrees that section 254 provides a meaningful solution for BIAS-only providers to continue to provide service under the Lifeline Program.

Commenters have noted that when the Connect America Fund broadband requirement was challenged, the Court of Appeals for the Tenth Circuit upheld the Commission’s interpretation of section 254.¹² Importantly, the Court found that the language in Section 254(e) which requires carriers to use universal service support only for the provision, maintenance, and upgrading of *facilities and services* is not narrowly limited, but “was intended as an implicit grant of authority to the FCC to flesh out precisely what ‘facilities and services’ USF funds should be used for.”¹³ However, providing universal service funds under this rationale is also conditioned upon an ETC designation.

The inability for BIAS-only providers to be classified as a common carrier is particularly problematic when unserved and underserved communities may not have access to options other than BIAS only providers. The Commission’s decision to reclassify broadband under Title I has removed the ability for BIAS-only providers to provide low-cost service to the communities they serve.

Notably, COVID-19 has highlighted why every American, regardless of income, must be able to get online to work, learn, obtain healthcare, and stay connected to friends and family.¹⁴ Eliminating broadband only providers from the market flies in the face of the Commission’s efforts to support unserved and underserved populations who rely on Lifeline for access to broadband and widens the digital divide.

⁹ See NCLC Comments at 6; R Street Comments at 11-12; National Lifeline Association Comments at 6-9.

¹⁰ See Connect America Fund, et al., WC Docket No. 10-90, et al., Report and Order, Further Notice of Proposed Rulemaking, FCC 11-161 (2011) ¶ 65 (Universal Service Transformation Order).

¹¹ *Id.* at ¶ 60.

¹² See *Direct Commc’ns. Cedar Valley, LLC v. FCC* (In re FCC 11-161), 753 F.3d 1015, 1046- 54 (10th Cir. 2014).

¹³ *Id.* at 1047.

¹⁴ See Lisa R. Youngers, *Strong broadband matters more than ever — let's build it right*, The Hill (May 4, 2020), <https://thehill.com/opinion/technology/495973-strong-broadband-matters-more-than-ever-lets-build-it-right>

In order for the Lifeline Program to remain as robust as possible, the Commission should seek to give communities as many options to connect. As more telecommunications carriers leave markets or relinquish their ETC designation, Lifeline subscribers may only be able to turn to BIAS-only providers. However, if classified under Title I, BIAS-only providers will be unable to provide the low-cost options. Consequently, reclassification may be the difference between populations in need being able to connect or being left on the wrong side of the digital divide.

III. The Reclassification of Broadband Under Title I Eliminates Pole Attachment Rights for BIAS-Only Providers

The FCC’s decision to reclassify BIAS as an “information service” will have incredibly detrimental effects on BIAS-only providers as it will effectively strip them of the ability to attach to poles. The California Public Utilities Commission correctly points out, federal law affords pole attachment rights only to cable television systems and “telecommunications services.”¹⁵ The Commission regulates the “rates, terms, and conditions for pole attachments” unless a state reverse-preempts the FCC under Section 224(c) of the Communications Act of 1996.¹⁶

The Court in *Mozilla* acknowledged, the Commission’s rationale adequately addressed mixed-use or commingled service facilities. However, the Court explained that the “plain text of Section 224 speaks only of telecommunications services and cable televisions services”¹⁷ which would necessarily exclude any pole-attachment protections for BIAS-only providers.¹⁸ The Telecommunications Act defines a telecommunications service as the “offering of telecommunications for a fee directly to the public. . . regardless of the facilities used.”¹⁹ If BIAS is not considered a “telecommunications service,” the BIAS-only provider would fall outside of the scope of Section 224 and have no statutory avenue to attach to poles in a state that does not reverse preempt the Commission.

Additionally, the Communications Act defines a pole attachment as “any attachment by a cable television system or provider of *telecommunications service*. . . .”²⁰ The grant of authority provided in Section 224(b)(1) states that “the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable. . . .”²¹ This language limits pole access rights to telecommunications carriers only.²² Under this analysis, BIAS-only providers will no longer be able to enjoy statutory rights, under

¹⁵ See Comments of the California Public Utilities Commission at 12 (CPUC Comments).

¹⁶ 47 U.S.C. § 224(b)(2)-(3).

¹⁷ *Mozilla*, 940 F.3d at 67.

¹⁸ See Comments of the Pennsylvania Public Utilities Commission at 4 (Comments of the PPUC).

¹⁹ 47 U.S.C. § 153(51).

²⁰ 47 U.S.C. § 224(a)(4).

²¹ 47 U.S.C. § 224(b)(1).

²² See Comments of the PPUC at 12.

federal law, to nondiscriminatory, just and reasonable access to poles and conduits.²³ This will negatively impact competition and may prevent BIAS-only providers from building out new or existing networks, and will favor incumbent providers over new BIAS-only entrants.

Next Century Cities members are in states who reverse-preempt the Commission and those who do not. Several provide municipal broadband services. If a city does not own the poles to which they attach they must go through the same procedures the industry uses to attach to poles. This means negotiating pole attachment agreements with investor-owned utilities and they may be forced to pay higher pole rents than cable and telecommunications providers.²⁴ Furthermore, in those states that have not reverse-preempted the Commission, there is a stark lack of laws and regulations in place to promote consumer protection and provide for the enforcement and compliance regimes that are required to promote competition and universal service deployment.²⁵ However, as commenters have pointed out, the whole pole attachment regulatory scheme, including reverse preemption under Section 224, applies only to cable television systems and “telecommunications services.”²⁶

Again, the current health crisis has highlighted the need to expand broadband connectivity solutions. Pole attachments are key to the deployment of both wireline and wireless networks.²⁷ It is critical that the Commission avoids promoting policies that can bottleneck broadband deployment or create new barriers to entry that could raise prices.²⁸ The statutory implications on pole attachment rights for BIAS-only providers could delay or harm emergency broadband deployment efforts and negatively affect competition and public health.²⁹

As we and other commenters have pointed out, the classification of BIAS-only providers under Title I will create a series of negative impacts that may ultimately lead to delays in broadband deployment. Notably, it would prevent BIAS-only providers from sharing the same protections that are available to cable and telecommunications providers.

Fortunately, the Commission has an opportunity to reverse course. The Commission should reclassify broadband as a Title II service, which will allow the Commission to apply current rules and benefits regarding pole attachment procedures and pricing.

²³ *Id.* at 13

²⁴ *See* Comments of Google Fiber at 2.

²⁵ *See* Comments of Public Knowledge, Access Humboldt, Access Now, and the National Hispanic Media Coalition at 13 (Comments of PK et. al.).

²⁶ *Id.* at 14.

²⁷ *See, e.g.,* 2015 Open Internet Order, at ¶¶ 56, 478; *see also*, Implementation of Section 224 of the Act, A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5241-43, ¶¶ 1-6 (2011).

²⁸ *See* Comments of CPUC at 14.

²⁹ *Id.* 15.

IV. Conclusion

The Commission's reclassification will create a series of unintended consequences that will prevent BIAS-only providers from being able to provide services through the Lifeline program. This will keep those community members that cannot afford unsubsidized service from getting online and widen the digital divide, an outcome that is antithetical to the agency's universal goals.

By the same token, with the Commission's reclassification of BIAS under Title I, BIAS-only providers will find themselves outside of the statutory regime that governs pole attachments. This will ultimately slow broadband deployment and lead to a patchwork of state based regulatory regimes as not all states have reverse-preempted the Commission's pole attachment rules. As such, NCC remains committed to working with the Commission to reduce deployment gaps and promote deployment of broadband access to all Americans.