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 AARP

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The FCC's universal service policies have failed the COVID-19 “stress test”

The COVID-19 crisis has subjected this nation’s universal service policies to a “stress test.” The results of this stress test illustrate a gaping digital divide—it is now painfully obvious that all Americans do not have access to affordable and high quality broadband services. The essential nature of broadband communication services that has been highlighted by the COVID-19 crisis makes it abundantly clear that without affordable and high quality broadband services, workforce participation, commerce, education, healthcare, civic engagement, and social activity are impossible or significantly curtailed. This is true whether or not there is a shelter-in-place emergency that compels individuals to conduct their jobs, education, shopping, and socialization online. The digital divide is negatively affecting millions of Americans in the best of times and the COVID-19 stress test simply confirms that the Commission’s existing universal service programs, combined with low levels of broadband competition, are not fulfilling statutory objectives or meeting the basic needs of Americans.

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Mozilla presents an opportunity for the Commission to solidify universal service, public safety, and competition policies

The Mozilla decision\(^2\) provides the Commission with the opportunity to place the nation on the right track with regard to broadband universal service, and to also improve prospects for reliable public safety communications, and broadband competition. As noted in Mozilla, important elements of this Commission’s statutory responsibility associated with promoting universal service, public safety, and competition cannot be reasonably satisfied under the current Title I approach to the regulation of broadband.\(^3\) The problems identified in Mozilla are all the more pressing given the Commission’s stated objective of increasing broadband adoption among Lifeline customers:

We believe that broadband adoption, and the impact it will have on closing the digital divide, should be a focus of the Lifeline program. Increasing broadband adoption as a goal will help to ensure that Lifeline funds are appropriately targeted toward bridging the digital divide.\(^4\)

This objective is consistent with the increasing number of consumers who seek only a standalone broadband connection.\(^5\) However, as noted in Mozilla, the Title I classification of broadband hamstrings the Commission’s ability to achieve this objective.\(^6\) The Commission should use this opportunity to establish the needed foundation to ensure that sustainable universal service programs provide affordable broadband services, especially standalone broadband, to all

\(^{2}\) *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), hereinafter, “Mozilla”.

\(^{3}\) *Mozilla*, pp. 93-100 (public safety), pp. 104-109 (pole attachments), and pp. 109-113 (Lifeline universal service program).


\(^{6}\) *Mozilla*, p. 111.
Americans. In addition, correcting the problems highlighted in *Mozilla* will promote public safety and broadband competition.

The Commission can and should take immediate action to remedy the problems illustrated by *Mozilla* by reclassifying broadband Internet access service as a Title II service for purposes of promoting universal service, public safety, and broadband competition. This reclassification can apply broad forbearance to provide a light regulatory touch while delivering the necessary legal foundation that the *Mozilla* decision clearly indicates vanished with the changes implemented in the *Restoring Internet Freedom Order.* Without the foundation of Title II authority, the Commission cannot sufficiently promote public safety or ensure that broadband competition will have the necessary foundation to deliver benefits to consumers. Nor can the Commission develop effective and sustainable universal service policies and programs. It is time for this Commission to reclassify broadband as a Title II telecommunication service.

**Title II would also support the creation of a sustainable contribution base**

The current Title I classification of broadband as an information service also fails to address a fundamental problem with the FCC's universal service programs—the FCC's ongoing refusal to reform the contribution base. Since 2011, universal service programs have supported both voice and broadband services, but the assessment to support these programs continues to fall solely on voice services. This approach is unsustainable, and unfairly burdens older Americans who purchase more voice services than other age groups. To successfully achieve universal service objectives, the Commission should address the non-contributing status of broadband services and

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expand the contribution base. A sustainable and more equitable outcome will result if broadband services contribute to support broadband universal service objectives. To provide a sustainable foundation to support statutory universal service objectives, the Commission should place broadband under Title II.

Path forward
Existing universal service policies have not delivered outcomes consistent with statutory objectives which require the availability of affordable and high-quality broadband services for all Americans. The solution requires a comprehensive approach. First, the Commission should determine the true status of broadband deployment in the U.S. and take steps to correct the deployment deficiencies that are discovered. Second, the Commission should work to close the digital divide and examine the affordability of broadband services both for low-income Americans and for those who are not classified as low-income. The Commission should establish programs that will enable all Americans to have access to affordable and high-quality broadband services, as envisioned in The National Broadband Plan. Similarly, the Commission should develop meaningful solutions to close the homework gap and to ensure that all Americans can take advantage of connected care and advanced telehealth services. Third, the Commission should expand the contribution base by assessing broadband services to support universal service objectives.

Finally, fulfilling the statutory goals associated with universal service, public safety, and competition will be more expeditious if broadband is reclassified as a Title II service. Reclassification need not result in the imposition of heavy-handed regulation. Rather, through forbearance the Commission can continue to impose its light-touch approach to protecting
network neutrality, while having in place the necessary legal foundation to address the critical
issues raised in Mozilla, as well as the tools to remedy any unforeseen problems associated with
network neutrality, universal service, public safety, or broadband competition.

Mozilla and Lifeline
The Record Refresh asks how Mozilla bears on the Commission’s assertion that it has authority
“under Section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband
service over facilities-based broadband-capable networks that support voice service.”8 The
Record Refresh asks further whether “[t]his legal authority does not depend on the regulatory
classification of broadband Internet access service and, thus, ensures the Lifeline program has a
role in closing the digital divide regardless of the regulatory classification of broadband
service.”9 There is no question that Mozilla has an impact on the Commission’s previous
conclusion on this matter and that no clear alternative source of authority exists. As Mozilla
clearly explains, the statutory foundation of the Lifeline program is firmly and inextricably
linked to common carrier regulation. Section 254(e) states that “only an eligible
telecommunications carrier designated under section 214(e) of this title shall be eligible to
receive specific Federal universal service support.”10 Mozilla notes that the congressional
understanding that those entities that provide Lifeline service must be common carriers regulated
under Title II “pervades the statute” and that as a result “broadband’s eligibility for Lifeline
subsidies turns on its common-carrier status.” Mozilla also notes that the Restoring Internet

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8 Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in
Hereinafter “Record Refresh.”
9 Record Refresh, p. 3.
10 47 U.S.C. 254(e).
Freedom Order’s reclassification of broadband as an information service “facially disqualifies broadband from inclusion in the Lifeline Program.” Furthermore, Mozilla dispenses with the Commission’s claim that as long as a broadband network also supports voice services that Section 254(e) will apply. “The Commission completely fails to explain how its ‘authority under Section 254(e)’ could extend to broadband, even ‘over facilities-based broadband-capable networks that support voice service. . . .’” The Mozilla decision continues:

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.” . . . And the statute expressly defines an “eligible telecommunications carrier” as a “common carrier” under Title II. Thus, it is clear both from the statute and from Mozilla that the Restoring Internet Freedom Order has removed this Commission’s authority to address broadband universal service through the Lifeline program. As discussed earlier, Title I classification also makes sustaining all universal service programs more difficult as consumers migrate to standalone broadband and diminish the use of voice services.

It is this Commission’s primary mission to make available “to all the people of the United States. . . wire and radio communications services with adequate facilities at reasonable charges.” Congress has further instructed the Commission to encourage the deployment of advanced telecommunications capability “to all Americans.” Congress has also recognized that universal service is an “evolving level of telecommunications services that the Commission shall establish

11 Mozilla, p. 111.
12 Mozilla, p. 112, citation omitted, emphasis in the original.
periodically under this section, taking into account advances in telecommunications and
information technologies and services.”\textsuperscript{15} To receive the Lifeline universal service support
needed to achieve these objectives, service providers must be common carriers capable of
receiving the eligible telecommunications carrier designation.\textsuperscript{16} Thus, because of the
reclassification of broadband as a Title I information service, the Commission finds itself on the
horns of a dilemma: to satisfy the statutory objectives, the Commission must continue to support
the Lifeline program. To support the Lifeline program, broadband must be a Title II service.
Absent statutory changes, the clear path to support of the Lifeline program, and universal service
policies in general, is the reclassification of broadband as a Title II telecommunications service.

\textbf{Mozilla and public safety}

As noted in Mozilla, public safety is central to the Commission’s mission which includes
“promoting safety of life and property through the use of wire and radio communications.”\textsuperscript{17}
The questions posed by the Record Refresh fail to acknowledge key elements of Mozilla’s
discussion of the public safety issue. While the Record Refresh frames the public safety issue as
one that affects public safety operators, and wonders whether public safety officials “even rely
on mass-market retail broadband,”\textsuperscript{18} Mozilla makes it clear that public safety depends on
unfettered network performance for public safety officials \textit{and} for broadband end users:

Santa Clara County, for example, explained that the 2018 Order would have a “profound
negative impact on public welfare, health, and safety” communications. … \textit{The County
and its fire department have implemented new, Internet-based services that depend on}
community members’ speedy and unimpeded access to broadband Internet. “For

\begin{footnotes}
\item[16] 47 U.S.C. §§254(e) and 214(e).
\item[18] Record Refresh, p. 2.
\end{footnotes}
example, the County’s virtual Emergency Operations Center, used by the County and County Fire to coordinate crisis response, relies on contributors’ access to the internet on nondiscriminatory terms.”

Similarly, the California Public Utility Commission warned that the 2018 Order could “profoundly impair[]” the ability of state and local governments “to provide comprehensive, timely information to the public in a crisis.” . . . . Catherine Sandoval, former Commissioner of the California Public Utilities Commission, . . ., noted that the Utility Commission authorized energy utility companies to expend taxpayer funds on Internet-based “demand response programs” that are “activated during times of high demand, or when fire or other emergencies make conservation urgent,” and “call on people and connected devices to save power.”

Public safety applications that rely on broadband thus require unimpeded broadband access, with no blocking or throttling of the senders and the receivers of information. Furthermore, as is clear from the quotes above, the senders and receivers are interchangeable. Some public safety applications will require that end-users be the senders and the public safety officials the receivers. For other applications, public safety officials will be the senders and broadband end users will be the receivers. While the Record Refresh asks whether broadband providers have policies in place to facilitate public safety communications, just how broadband providers would track all communications that have public safety implications is not at all clear. Robust and effective public safety and emergency communications must not rely on the decisions of broadband providers as to what communication is related to public safety outcomes. A policy of no blocking and throttling of all communications provides a superior starting point for ensuring that the critical public safety elements of the Commission’s mission are satisfied. Title II classification would ensure that the Commission can satisfy its critical public safety mission.

19 Mozilla, pp. 94-95, emphasis added, citation omitted.
20 Mozilla, p. 95, emphasis added, citations omitted.
21 Record Refresh, p. 2.
Mozilla and pole attachments
As noted in Mozilla, the ultimate impact of the reclassification of broadband as an information service may be on competition and broadband deployment. The Record Refresh asks whether pole attachments are subject to Commission authority in non-reverse preemption states. Certainly, for the key issue of access to poles for broadband providers, the Commission’s authority was erased with the reclassification of broadband as a Title I information services: “Section 224’s regulation of pole attachments simply does not speak to information services. Which means that Section 224 no longer speaks to broadband.” As a result, an important foundation for both broadband competition and broadband deployment has been undermined by the RIF Order.

Mozilla also makes clear that the disruption in the federal foundation for the regulation of pole attachments also upends the reverse preemption that enables states to take responsibility for the regulation of pole attachments. “But this whole regulatory scheme applies only to cable television systems and “telecommunications service[s]”—categories to which, under the 2018 Order, broadband no longer belongs.” In other words, as the 2018 RIF Order noted: “We make clear that as a result of our decision to restore the longstanding classification of broadband Internet access service as an information service, Internet traffic exchange arrangements are no longer subject to Title II and its attendant obligations,” including obligations under “Section 224 (pole attachments).” Thus, it is clear that the pro-competitive foundation enabled by Title II

22 Mozilla, pp. 106-107.
23 Record Refresh, p. 2.
24 Mozilla, p. 106.
25 Mozilla, p. 106.
26 RIF Order, ¶163 and footnote 600.
has been undermined by the *RIF Order*. As *Mozilla* notes, the impact will be most profound on broadband providers that focus on the delivery of standalone broadband service—the very service that a growing number of consumers deem as essential.27

Given the deregulatory policy the Commission embraced with the *RIF Order*,28 consumers are left to the vagaries of market forces to govern broadband prices, terms, and conditions. Likewise, market forces determine how and where broadband services will be delivered for the overwhelming majority of Americans. The result is a digital divide. The impact of the *RIF Order* on broadband competition and deployment is decidedly negative, and it is not clear to AARP how the Commission can resolve this issue absent reclassification.

**Conclusion**

AARP does not believe that the Commission can achieve its core universal service, public safety, and pro-competition missions while broadband continues to be regulated as Title I information services. AARP has previously noted that the necessary reclassification does not need to include heavy handed regulation.29 The Commission may exercise forbearance from unnecessary Title II provisions and continue to impose the *RIF Order’s* regulatory framework. However, Title II classification will provide the needed foundation for the Commission to deliver outcomes that are consistent with the statutory mandates. While the Commission could seek to remedy the problems highlighted in *Mozilla* through a legislative solution, that path is fraught with uncertainty. Through reclassification the Commission can control its destiny and provide the

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27 *Mozilla*, p. 108.
28 *RIF Order*, 29 and *passim*.
necessary legal foundation for a light-touch regulatory framework that supports the key policy objectives that Mozilla clearly explains cannot be satisfied as long a broadband remains a Title I information service.