

## TITLE I BROADBAND POLICY WILL HAVE A SMALL OR BENEFICIAL NET EFFECT ON PUBLIC SAFETY COMMUNICATIONS

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Restoring Internet Freedom

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The Federal Communications Commission (FCC) requested a refresh of the record regarding the effect of reinstatement of Title I internet policy for public safety, pole attachments, and Lifeline.<sup>1</sup> A common tactic from commenters opposing the FCC's deregulatory efforts is to formulate worst-case scenarios in which the Restoring Internet Freedom Order (RIFO) would be the proximate cause of implausible social calamities such as unreliable breathing machines in hospitals,<sup>2</sup> FCC censorship of public safety communications,<sup>3</sup> widespread disruption to emergency

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1. Restoring Internet Freedom, DA 20-168 (FCC, Feb. 19, 2020) (public notice).

2. Broadband Institute of California (BBIC), Comment on Restoring Internet Freedom, at 8 (Apr. 20, 2020), <https://ecfsapi.fcc.gov/file/104211478729214/BBIC%20Comments%20FCC%20Net%20Neutrality%20Mozilla%20remand%20final.pdf>. (“ISP conduct that may slow Internet traffic that does not pay for priority as allowed by the FCC’s 2018 Internet Freedom Order creates safety and reliability risks,” including to “[p]eople on breathing equipment.”)

3. *Id.* at 3 (demanding that the FCC rescind the remand notice and commence a new proceeding over internet regulation because the notice “appears to contemplate” regulation of public safety officers’ speech that “raises constitutional issues”). Beyond a puzzling and general citation—with no pincite—to *FCC v. Fox*, a case about FCC enforcement of indecency rules for broadcast TV, BBIC makes no attempt to explain how curtailing intrusive broadband regulations burdens speech.

communications,<sup>4</sup> and even spoiled food.<sup>5</sup> No public agency could function if it had to meticulously disprove the remote possibility of every ultimate effect that opposing advocates and firms could tenuously connect to agency action.

Considering that the RIFO is largely a restoration of the legal framework in place until 2015, the likelihood of the RIFO leading to such industry dysfunction is remote. As the think tank TechFreedom points out, the review of the FCC's analysis on these remanded topics will be deferential.<sup>6</sup> The FCC should provide adequate consideration of the issues the DC Circuit remanded but should not create a precedent of responding to and ruling out the implausible scenarios and predictions proffered by Title II regulation advocates.

This comment explains that reinstatement of Title I broadband policy will have a small or modestly beneficial net effect on public safety communications.

## THE EFFECT ON PUBLIC SAFETY COMMUNICATIONS SHOULD BE SMALL OR BENEFICIAL

The FCC asks,

Could the network improvements made possible by prioritization arrangements benefit public safety applications . . . ? To what extent do public safety officials (at both the state and local level) even rely on mass-market retail broadband services covered by the Restoring Internet Freedom Order . . . ?<sup>7</sup>

Enterprise, or “specialized,” broadband services generally fell outside Open Internet regulations and were unaffected by the RIFO. However, as the R Street Institute points out, employees in public safety organizations use both mass-market and specialized broadband services.<sup>8</sup> Furthermore, as Richard Bennett notes, with regard to the “mass market” versus “specialized” dichotomy, public safety networks can sometimes be hard to classify.<sup>9</sup> For the mass-market, or “mixed,” broadband services that public safety organizations use, the RIFO should have a negligible or beneficial effect.

The Free State Foundation notes that “[p]aid prioritization arrangements offer an option, if needed, for government agencies responsible for public safety to use communications services featuring higher quality and improved reliability compared to traditional best-efforts networks.”<sup>10</sup> The FirstNet network is an illustrative example of (a) the difficulty in making the mass-market or specialized classifications and (b) the social benefits of paid priority. FirstNet spectrum Band 14 is

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4. INCOMPAS says that, absent Title II regulation, “there is risk that BIAS providers can disrupt or undermine the competitive OTT services that citizens and first responders use to stay connected during emergency situations.” INCOMPAS, Comment on Restoring Internet Freedom, at 10 (Apr. 20, 2020), <https://ecfsapi.fcc.gov/file/10420031426546/INCOMPAS%20Final%20Net%20Neutrality%20Remand%20Comments%204.20.2020.pdf>.

5. Broadband Institute of California, *supra* note 2, at 8. (“Millions who depend on food in the refrigerator and freezer would face increased safety risks and financial hardships if Internet slowdowns led to energy blackouts and required consumers to replace spoiled foods.”)

6. TechFreedom, Comment on Restoring Internet Freedom, at 4–5 (Apr. 20, 2020), <https://ecfsapi.fcc.gov/file/10420177798132/TechFreedom%20Net%20Neutrality%20RIFO%20Comments.pdf>.

7. FCC, *supra* note 1.

8. R Street Institute, Comment on Restoring Internet Freedom, at 5 (Apr. 20, 2020), [https://ecfsapi.fcc.gov/file/10420337001214/R%20Street%20Mozilla%20remand%20comments\\_FINAL.pdf](https://ecfsapi.fcc.gov/file/10420337001214/R%20Street%20Mozilla%20remand%20comments_FINAL.pdf).

9. Richard Bennett, Comment on Restoring Internet Freedom, at 9 (Apr. 8, 2020).

10. Free State Foundation, Comment on Restoring Internet Freedom, at 3 (Apr. 17, 2020), <https://ecfsapi.fcc.gov/file/10417285117912/FSF%20Mozilla%20Remand%20Comments%20-%20Final%20041720.pdf>.

shared between public safety users and AT&T's retail customers.<sup>11</sup> When public safety use of the network is low, Band 14 is used to supplement capacity to mass-market consumer services. At times of wireless network congestion during an emergency, public safety users are prioritized over consumer and commercial wireless users.<sup>12</sup> This is accomplished via "ruthless preemption" features, which AT&T unveiled for its FirstNet network in late 2017.

The RIFO, therefore, is a significant improvement over the 2015 Open Internet Order, which may have brought FirstNet and other quality-of-service improvements under FCC scrutiny. Given the ambiguity surrounding the broadband internet access service (BIAS) and the open-ended nature of the Title II order's "general conduct" standard,<sup>13</sup> it's quite possible that AT&T would have been subjected to FCC investigation for its prioritization of FirstNet traffic. As former FCC chief technologist Jon Peha warned, the 2015 Open Internet Order did "not ma[k]e sufficiently clear what a . . . non BIAS data service . . . is, nor have they [the FCC] made clear what rules apply to such services."<sup>14</sup>

Prioritization and quality-of-service techniques have always been in tension with net neutrality principles and are typically characterized by Title II proponents as a loophole or violation of net neutrality regulations.<sup>15</sup> The view expressed by one of the Electronic Frontier Foundation's technologists, that "network operators shouldn't be doing *any* sort of discrimination when it comes to managing their networks," is one commonly held by net neutrality proponents.<sup>16</sup> The breadth, length, and indeterminacy of resolutions of previous FCC inquiries into "non-neutral" traffic management entangle companies in costly investigations and discourage network experiments and improvements.

The 2015 order's uncertainty for providers is intentional. As Public Knowledge CEO Gene Kimmelman has said, Title II is necessary because it threatens the industry with vague but severe rules: "Legal risk and some ambiguity around what practices will be deemed 'unreasonably discriminatory' have been effective tools to instill fear for the last 20 years" for the telecom industry.<sup>17</sup> Kimmelman adds, Title II functions as a "[way] to keep the shadow and the fear of

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11. RadioResource Media Group, *AT&T Deploys 700 MHz Band 14 Spectrum in 500 Markets*, MISSIONCRITICAL COMMUNICATIONS (Jan. 9, 2019), <https://www.rrmediagroup.com/News/NewsDetails/NewsID/17815> ("An AT&T statement said that when not in use by FirstNet subscribers, AT&T customers can enjoy band 14's added coverage and capacity").

12. Donny Jackson, *FirstNet Launches Ruthless-Preemption Functionality for 'Primary' Public-Safety Subscribers*, URGENT COMMUNICATIONS (Dec. 12, 2017), <https://urgentcomm.com/collections/firstnet-launches-ruthless-preemption-functionality-for-primary-public-safety-subscribers/> ("If public safety has a need for a large amount of bandwidth within a given cell sector, that normally could be accommodated by moving consumer/commercial users to another spectrum band or lowering their data speeds, as opposed to removing them from the network entirely").

13. See Brent Skorup, Comment In the Matter of Restoring Internet Freedom, at 15 (Aug. 30, 2017), <https://ecfsapi.fcc.gov/file/10830271311126/Skorup-Restoring-Internet-Freedom-Mercatus-Comment-v1.pdf> ("The OIO's vague standards, particularly the Internet conduct standard and advisory opinion process, ensure that . . . prospective IP services face the risk of interminable legal challenges at the FCC and in court").

14. Jon Peha, Comment on Restoring Internet Freedom, at 6 (Jul. 17, 2017).

15. See, e.g., *id.* (calling nonregulation of non-BIAS data services the "specialized services loophole" that incentivizes ISP discrimination against competing services).

16. Jeff Hecht, *Net Neutrality's Technical Troubles*, IEEE SPECTRUM (Feb. 12, 2015), <https://spectrum.ieee.org/telecom/internet/net-neutralitys-technical-troubles> (emphasis in original).

17. Jennifer Holt, *Net Neutrality and the Public Interest: An Interview with Gene Kimmelman, President and CEO of Public Knowledge*, 10 INTERNAT'L J. COMM. 5795, 5802 (2016).

‘going too far’ hanging over the dominant ISPs.”<sup>18</sup> Internet regulation advocates, he said, “*have to have fight after fight over every claim of discrimination, of new service or not*” (emphasis added).<sup>19</sup>

While it is unlikely that AT&T’s public safety network prioritization would have been ultimately prohibited under Title II regulations, it is likely that advocates would have demanded and received an FCC inquiry into prioritization techniques in the future. No provider is too small for net neutrality harassment. The FCC has in the past singled out for inquiry, for instance, MetroPCS, a wireless company with 3 percent market share experimenting with an innovative video compression service to provide unlimited YouTube service over spectrum slivers as small as 1.4 MHz.<sup>20</sup> The list goes on, including the FCC’s 2016 inquiry and indeterminate assessment of AT&T, Verizon, and T-Mobile’s popular zero-rating plans and the multiyear FCC inquiry into Comcast’s streaming TV service.<sup>21</sup> That even Facebook sought regulatory approval for its services in 2016 because of the Title II order shows the broad nature of the Title II order and its “bright line [sic]” rules.<sup>22</sup>

Recognizing that the Open Internet Order’s nonexhaustive, contradictory factors leave parties unaware of what practices are permissible, Title II advocates’ proposed remedy was that ISPs and app developers “obtain an advisory opinion from the Enforcement Bureau before . . . engaging in conduct it is unsure about.”<sup>23</sup> Sparing telecommunications and app providers this laborious approval process for quality-of-service improvement to “mixed” broadband services allows faster iteration and deployment of public safety communications networks.

## CONCLUSION

Thank you for the opportunity to comment on these broadband regulation issues. The FCC wisely decided to rescind the Title II classification of internet access services. That change in law has small or positive implications for public safety networks, as providers can feel free to test and offer niche quality-of-service improvements to public safety users. Some of those prioritization techniques are already used by FirstNet users.

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18. *Id.*

19. *Id.*

20. Free Press, Comment on Preserving the Open Internet (Jan. 10, 2011) (stating that “the Commission must act immediately to investigate MetroPCS’s harmful practices, and to discourage Verizon, AT&T, and other carriers from following suit”). See also Brent Skorup, *If You’re Reliant on the Internet, You Loathe Net Neutrality*, REALCLEARMARKETS (Feb. 12, 2014), [https://www.realclearmarkets.com/articles/2014/02/12/if\\_youre\\_reliant\\_on\\_the\\_internet\\_you\\_loathe\\_net\\_neutrality\\_100893.html](https://www.realclearmarkets.com/articles/2014/02/12/if_youre_reliant_on_the_internet_you_loathe_net_neutrality_100893.html) (“The first net neutrality ‘offender’ was not telecom giant Verizon, AT&T, or Comcast; it was diminutive MetroPCS—a wireless carrier with a market share under 3 percent”).

21. WIRELESS TELECOMMUNICATIONS BUREAU, POLICY REVIEW OF MOBILE BROADBAND OPERATORS’ SPONSORED DATA OFFERINGS FOR ZERO-RATED CONTENT AND SERVICES (2017); Brian Fung, *The FCC Is Dropping Its Probe into Internet Providers over This Controversial Practice*, WASH. POST (Feb. 3, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/02/03/the-government-is-dropping-its-probe-into-a-controversial-practice-by-your-internet-provider/> (Comcast’s “Stream TV app was the subject of a number of agency questions”).

22. Brian Fung, *Facebook Is Talking to the White House about Giving You “Free” Internet. Here’s Why That May Be Controversial*, WASH. POST, Oct. 6, 2016, <https://www.washingtonpost.com/news/the-switch/wp/2016/10/06/facebook-is-talking-to-the-white-house-about-giving-you-free-internet-heres-why-that-may-be-controversial/> (“Facebook has been in talks for months with U.S. government officials and wireless carriers with an eye toward unveiling an American version of an app that has caused controversy abroad. . . .”).

23. FCC, *supra* note 1.