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

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

REPLY COMMENTS OF LINCOLN NETWORK

Lincoln Network[1] appreciates the opportunity to provide its replies to some of the submissions to the Federal Communications Commission's ("FCC's" or "Commission's") Public Notice ("Notice") in the above-captioned proceedings.[2] Lincoln Network is a non-profit organization that seeks to bridge the often siloed discussions between policy makers in Washington, D.C. and technologists in Silicon Valley so as to advance smart policy that encourages innovation.

The D.C. Circuit largely upheld the FCC's 2018 Restoring Internet Freedom Order ("2018 RIF Order")[3] in *Mozilla v. F.C.C.*,[4] but the Court requested that the FCC seek comment on three aspects of its 2018 RIF Order (*i.e*, public safety, pole attachments, and Lifeline). After

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[1] Lincoln Network, https://joinlincoln.org/ (last visited May 20, 2020).
[2] *In the Matter of the Wireline Competition Bureau Seeks to Refresh Record in Restoring Intent Freedom and Lifeline Proceedings in Light of the D.C. Circuit's Mozilla Decision*, WC Docket Nos. 17-108, 17-287, 11-42, Public Notice, DA 20-168 (Rel. Feb. 19, 2020). Available at https://docs.fcc.gov/public/attachments/DA-20-168A1.pdf.
[3] *Restoring Internet Freedom, Declaratory Ruling*, Report and Order, and Order, 33 FCC Rcd. 311 (2017).
[4] 941 F.3d 1 (D.C. Cir. 2019).

careful review of the docket, Lincoln Network remains convinced that the 2018 RIF Order is necessary to promote the stated policy objectives listed in the Notice and agrees with the Commission that consumers are better protected by the Federal Trade Commission ("FTC") on issues related to net neutrality more generally. This is because the issue of net neutrality is only appropriately analyzed through the lenses of competition and consumer protection, which is primarily for the FTC to resolve. The 2018 RIF Order's light-touch regulatory approach allows industry to innovate and the FTC to perform its duty to protect competition and consumers consistent with "net neutrality" principles in the broadband Internet access service ("BIAS") market.

I. Filers Adverse to the 2018 RIF Order Fail to Provide Any Convincing Rationale as to Why the Commission's Order Runs Contrary to the Its Goals and Policies Related to Public Safety, Pole Attachments, and Lifeline Program

The Commission received close to 24 million comments on this proceeding. Like many proceedings open to the public, there exists substantive and non-substantive feedback. This proceeding is no different. The lion's share of dissenting comments are various political form letters that express disapproval with the Commission's action. Those comments seem intended to merely flood the docket instead of providing any substantive guidance to the Commission. Moreover, they fail to justify their claims or even articulate their rationale. The more substantive dissenters argue that the Commission lacks the statutory grounds to effect the Notice's stated policy objectives by offering incomplete legal analysis when asserting their claims. However, all the dissenters' filings (substantive or not) make the same underlying claim: The FCC needs Title II-style regulations to ensure public safety, pole attachments, and its Lifeline programs. As we articulate here and wrote in our initial comments, that is simply untrue.

A. Dissenters Are Wrong to Suggest that Priority Access Arrangements Do Not Promote Public Safety

Giving public-safety authorities their own priority access network allows them to make more use of innovative technologies because they do not have to be concerned with other users inundating their network with commercial-oriented services. However, some commenters asserted that the 2018 RIF Order harms public safety because it allows BIAS providers to deprioritize public safety connections without pointing to a single example.[5] Those commenters either downplay or fail to mention entirely that the FCC's Title II Order recognized the value of prioritizing such services as a form of "reasonable network management."[6] Ironically, the issue public-safety constituencies had with the Title II Order was that they wished for a clearer exemption from its rules.[7]

As we noted in our initial comments, public safety officials are increasingly relying on internet-of-things and "big data" services during times of crisis to respond to emergencies.[8] The Commission's action to reclassify mobile BIAS as a Title I service allows first responders to better articulate their needs to carriers, app developers, and others that provide innovative platforms, which, in turn, allows carriers, app developers, and platform companies to meet first responders' needs. Now that the 2018 RIF Order is in effect, public-safety officials can freely

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[5] Comments of Free Press, WC Docket Nos. 17-108, 17-287, 11-42 (filed Apr. 20, 2020); Public Knowledge; Comments of the Cal. Pub. Utilities Comm'n, WC Docket Nos. 17-108, 17-287, 11-42 (filed Apr. 20, 2020) ("CPUC Comments).

[6] *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 at n. 284 (2015) ("Title II Order") (writing "[o]ther forms of traffic prioritization, including practices that serve a public safety purpose, may be acceptable under our rules as reasonable network management.").

[7] Title II Order paras. 299-303, & 395.

[8] We provided the Commission with the example a mobile app, called AskRail, draws on big data to assist firefighters and other first responders to stay safe, save lives, and protect communities in the event of railroad accidents. Bob Vlolino, *Mobile App Helps First Responders Quickly and Safely Assess Rail Accidents*, ZDNet (Mar. 1, 2018, 10:03 P.M.), https://www.zdnet.com/article/mobile-app-helps-first-responders-quickly-and-safely-assess-rail-accidents/.

engage with BIAS providers and third-party apps alike to provide them with life-saving services without fear of violating aspects of the Title II Order.

B. The Commission's 2018 RIF Order Encourages More Pole Attachments

Dissenters on the issue of pole attachments make two broad claims: 1) there is no evidence suggesting that BIAS's Title I classification promotes investment in wireless infrastructure, other than the FCC's reliance on its interpretation of federal law; and 2) the FCC's 2018 RIF Order forbids the Commission from relying on Section 224 to promote pole attachments. [9] Both are untrue. As we stated before, categorical bans on prioritization techniques for BIAS can not only disrupt market forces when these networks are deployed, but it can also force network providers to reconsider expending billions of dollars to build out its networks for 5G.[10] We are not alone in this assessment as academics and industry groups have conducted empirical studies that demonstrate the adverse effects public-utility style regulations for BIAS, such as the ones in the Title II Order, have on broadband investment. [11] This is important because the rollout of 5G will depend immensely on carriers' ability to deploy hundreds of thousands of small cells, in part, via pole attachments.[12] The 2018 RIF Order provides industry leaders with more regulatory flexibility to enter into procompetitive, innovative arrangements. Thus, the 2018

[9] CPUC Comments at 12.
[10] Comments of Lincoln Network, WC Docket Nos. 17-108, 17-287, 11-42 (filed Apr. 8 2020) (citing studies show that industry capital investment grew each year and peaked in 2014 at $78 billion before the Title II Order and declined substantially after its promulgation).
[11] *E.g.*, Patrick Brogan, *U.S. Broadband Investment Continued Upswing in 2018*, USTelecom Research Brief (rel. Jul. 31, 2019), https://www.ustelecom.org/wp-content/uploads/2019/07/USTelecom-Research-Brief-Capex-2018-7-31-19.pdf ("USTelecom Study"); *see* Thomas Hazlett & Josh Wright, *The Effect of Regulation on Broadband Markets: Evaluating the Empirical Evidence in the FCC's 2015 'Open Internet' Order,* 50 REVIEW OF INDUSTRIAL ORGANIZATION 487–507 (2017).
[12] CTIA estimates that "[t]he number of small cells deployed is predicted to rapidly increase over the next few years from about 13,000 small cells in 2017 to 86,000 this year—a 550% increase—and over 800,000 by 2026." CTIA, *The State of Wireless*, Report (2018). Available at https://api.ctia.org/wp-content/uploads/2018/07/CTIA_State-of-Wireless-2018_0710.pdf.

RIF Order is not only consistent with its other polices related to pole attachments, it encourages them.

As for the Commission's pole attachment authority under Section 224, some commenters resorted to "cherry picking" the *Mozilla* opinion to make their case.[13] In connection with Section 224, the D.C. Circuit expressly stated that the Commission reverting broadband services back to an information service will not affect its authority for carriers that provide both BIAS and telecommunications service.[14] Moreover, the U.S. Supreme Court held that service providers that offer cable services and BIAS are afforded the same Section 224 protections.[15] As we argued in our initial comments, we believe that the D.C. Circuit would support a rationale that Section 224 protections extend to pole attachments that enable BIAS so long as they also support telecommunications or cable services. Given that an overwhelming majority of BIAS providers also provide telecommunications or cable services (or both), the FCC's RIF Order in fact does more to encourage a majority of deployments by allowing the market to dictate consumer behavior as it relates to BIAS and affording the majority of BIAS deployments Section 224 protections.

However, some commenters indicated to the Commission that its Section 224 authority may not extend to providers that only provide BIAS.[16] Generally, Section 224 of the Communications Act only applies to poles owned and controlled by investor-owned utilities.[17]

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[13] CPUC Comments at p. 20.
[14] *Mozilla* at p. 66-67 (writing "[t]he best explanation the Commission provided was its reference to the 2007 Wireless Broadband Order. "As to section 224," the Commission said, the Wireless Broadband Order directs that "where the same infrastructure would provide 'both telecommunications and wireless broadband Internet access service,' the provisions of section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service."").
[15] See NCTA v. Gulf Power Co., 534 U.S. 327, 339 (2002).
[16] *E.g.*, Comments of Google Fiber, WC Docket No. 17-108, 17-287, 11-42 (filed Apr. 20, 2020).
[17] 47 U.S.C. § 224(a)(1).

Moreover, Section 224(a)(4) defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[18] Commenters rightly point out that these factors impose a significant statutory limitation in Section 224 for standalone-BIAS providers.

However, this concern has little to do with the Commission's 2018 RIF Order as the protections under Section 224 are not dispositive in whether state and local agencies grant or deny such providers' applications related to pole attachments for standalone BIAS networks. As Google Fiber indicated, it "was able to negotiate commercial pole attachment agreements with numerous investor-owned utilities before broadband was classified as a telecommunications service."[19] It is clear that the 2018 RIF Order is not what is discouraging such BIAS carriers to deploy meaning infrastructure in that regard, but it is more state and local governments that seem to impose barriers to their deployment. Such state and local policies include, but certainly not limited to, barriers to market entry "for independent network and telecommunications service providers," including municipalities that "restric[t] access to the [right-of-way] only to providers of commercial mobile services" or that impose "onerous zoning requirements on small cell installations when other similar [right of way] utility installations are erected with simple building permits."[20] Thus, these commenters issues are actually with policies at the state and local level, not the FCC's 2018 RIF Order.

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[18] 47 U.S.C. § 224(a)(4).

[19] See Google Fiber's Comments, at p.2.

[20] Crown Castle Comments WT Docket No. 17-79 at 7 (filed Jun. 15, 2017); see also Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 19, 2018) ("In Hillsborough, California, Crown Castle submitted applications covering 16 nodes, and was assessed $60,000 in application fees. Not only did Hillsborough go on to deny these applications, following that denial it also then sent Crown Castle an invoice for an additional $351,773 (attached as Exhibit A), most of which appears to be related to outside counsel fees—all for equipment that was not approved and has not yet been constructed.").

C. Dissenter's Make Inaccurate Assumptions of Law When Stating that BIAS Needs to Be a Title II Service for the Commission to Include it in Lifeline

Some commenters claimed that, without Title II, the Commission has no authority to include BIAS in its Lifeline program.[21] However, that is categorically false as the FCC has included standalone broadband well before it promulgated its Title II Order. As we pointed out in our initial comments, courts have already endorsed the Commission's use of Section 254 as a reliable source of statutory authority irrespective of BIAS's classification. [22] As we discussed in our initial filing, in *In re 11-161*, the petitioners argued that the concluding phrase of the second sentence of § 254(e) (reading "for which the support is intended") was a limit on the Commission's authority to use the Universal Service Fund ("USF") for telecommunications services only.[23] The 10th Circuit in that case held that Section 254(e) imposed no such limit on the Commission.[24] Section 254(e) only limits the Commission's authority to an eligible telecommunications "carrier," not the service they may provide. In fact, Section 254(e) of the Communications Act makes no mention of a particular service at all; it only states that the Commission "shall use that support only for the provision, maintenance, and upgrading of facilities and services *for which the support is intended* [emphasis added]."[25] Given this reading and the fact that the D.C. Circuit in *Mozilla* acknowledged that carriers can provide both telecommunications and information services,[26] the statute leaves enough ambiguity for the Commission to reasonably intend its USF support to go to standalone BIAS regardless of its

[21] Comments of Greenlining Institute, WC Docket No. 17-108, 17-287, 11-42 (filed Apr. 20, 2020); CPUC Comments p.18.
[22] *E.g.*, *In re 11-161*, 753 F.3d 1015 (10th Cir. 2014)
[23] *In re 11-161*, 753 F.3d at 1047.
[24] *In re 11-161*, 753 F.3d at 1054 (Stating "section 254 does not limit the use of USF funds to "telecommunications services." Thus, to the extent the FCC relies on section 706(b) as support for its broadband requirement, section 706(b) is not contrary to section 254.").
[25] 47 U.S.C. § 254(e).
[26] *Mozilla*, 941 F.3d at 66-67.

classification as an information service. Thus, any argument to the contrary seems to ignore the relevant legal precedent at issue.

CONCLUSION

Lincoln Network appreciates the opportunity to provide reply comments on this important proceeding and thanks the Commission in advance for considering its views as articulated above.

Respectfully submitted,

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May 20, 2020