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Lawrence J. Spiwak, President

14 December 2023

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

RE: Comments – WC Docket No. 23-320

Dear Ms. Dortch:

The Commission recently issued a *Notice of Proposed Rulemaking* in this Docket¹ in which the Commission proposes to reinstate, with some new additions, the Commission's 2015 *Open Internet Rules*.² Among other requests for comment, the Commission asks whether there is any evidence that Internet Service Providers ("ISP") investment is closely tied to the regulatory classification of Broadband Internet Access Services ("BIAS").³ As explained in the attached paper by Phoenix Center Chief Economist Dr. George S. Ford entitled *Investment in the Virtuous Circle: Theory and Empirics*, the answer to that question appears to be "yes."⁴

In this paper, Dr. Ford begins by providing a theoretical analysis of the Commission's "virtuous circle" hypothesis—the hypothesis which drives the Commission's Net

¹ *Safeguarding and Securing the Open Internet*, FCC 23-83, NOTICE OF PROPOSED RULEMAKING, __ FCC Rcd. __ (rel. October 20, 2023) (hereinafter "2023 NPRM").

² *Protecting and Promoting the Open Internet*, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, 30 FCC Rcd. 5601 (2015) (hereinafter "2015 Order"), *aff'd* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied* 855 F.3d 381 (2017).

³ 2023 NPRM at ¶ 57.

⁴ George S. Ford, *Investment in the Virtuous Circle: Theory and Empirics*, PHOENIX CENTER POLICY PAPER No. 62 (December 2023) (available at: <https://phoenix-center.org/pcpp/PCPP62Final.pdf>).

Neutrality policies. Dr. Ford shows that *under the Commission's own hypothesis*, broadband providers have no apparent incentive to depart from the neutral treatment of traffic.

Dr. Ford also conducts an empirical analysis of the economic effects of the agency's nearly fifteen-year efforts to impose some sort of Title II regulation on Broadband Internet Access Services. Dr. Ford finds that the FCC's Title II regulatory approach reduced investment by \$8.1 billion annually (10%), on average, between 2011 and 2020, or \$81.5 billion over ten years, reducing employment in the information sector by about 81,500 jobs and total employment by about 195,600 jobs (many of them union jobs), reducing labor compensation by \$18.5 billion annually. Gross Domestic Product ("GDP") has been reduced by \$145 billion annually, or \$1.45 trillion over ten years. This evidence suggests that the looming threat of Title II regulation that hangs over the industry, during both the regulatory and deregulatory episodes, is a chronic obstacle to infrastructure investment as periods of lighter regulation are perceived as temporary. And Dr. Ford argues the investment-reducing effects will be even worse under the Commission's new *Notice of Proposed Rulemaking*, which is more far-reaching than its prior Title II proposals. Dr. Ford's empirical findings—coupled with Congress's clearly stated preference for deregulation in the Telecommunications Act of 1996⁵—clarify that the question of whether the FCC should subject broadband Internet access services to Title II regulation is a question of significant economic importance.

We are also dismayed that the current Commission believes that the evidence the previous Commission relied upon in the *Restoring Internet Freedom Order*⁶ to show a causal relationship between investment and reclassification was "unsubstantiated."⁷ The evidence the Commission relied upon in the *RIFO*, but now chooses to ignore, is our own. The Commission may not be aware that Dr. Ford's analysis was subsequently published in a peer-reviewed economics journal, so Dr. Ford's work satisfied professional standards—unlike the empirical attempts to show otherwise.⁸ There is no evidence to substantiate the Commission's claim the evidence on investment effects is "unsubstantiated." We are also attaching a copy of that paper, *Regulation and Investment in the U.S. Telecommunications Industry*, APPLIED ECONOMICS (23 July 2018) for the record.

Along the same lines, we are also attaching another peer reviewed paper by Dr. Ford entitled *Net Neutrality and Investment in the US: A Review of Evidence from the 2018 Restoring Internet Freedom Order*, 17 REVIEW OF NETWORK ECONOMICS 175–205 (2019). In this paper,

⁵ Preamble, Telecommunications Act of 1996, Public Law 104–104; 47 U.S.C. § 230(b)(2).

⁶ *Restoring Internet Freedom*, DECLARATORY RULING, REPORT AND ORDER, AND ORDER, 33 FCC Rcd. 311 (2018) at ¶¶ 95–98, *aff'd by, in part, vac'd by, in part, rem'd by Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

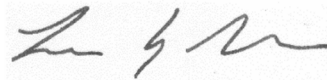
⁷ 2023 NPRM at ¶ 57.

⁸ See, e.g., E. Bohlin, *Expression of Concern: Testing the Economics of the Net Neutrality Debate*, 44 TELECOMMUNICATIONS POLICY 101869 (2020) (available at: <https://www.sciencedirect.com/science/article/pii/S0308596120300975>) (issuing an interregnum of Chris Hooton's work due to "spurious results."). The paper's author was offered a change to provide corrections but was unable to provide a response. See also G.S. Ford, *Testing the Economics of the Net Neutrality Debate: A Comment*, 45 TELECOMMUNICATIONS POLICY 102137 (2021) (available at: <https://www.sciencedirect.com/science/article/abs/pii/S0308596121000422>).

Dr. Ford looked carefully at what economic evidence the Commission relied upon and what evidence it rejected (and why) in the *Restoring Internet Freedom Order*. We believe this paper will be helpful to the Commission as it revisits reclassification in this proceeding.

Finally, we note that the 2023 NPRM claims that the Commission's proposed rules do not constitute price regulation (NPRM at ¶ 105) and, as such, there is no takings problem under the Fifth Amendment (NPRM at ¶¶ 223-23). These claims are false. As detailed in the attached two law reviews, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, 67 FEDERAL COMMUNICATIONS LAW JOURNAL 1 (2015) and *USTelecom and its Aftermath*, 71 FEDERAL COMMUNICATIONS LAW JOURNAL 39 (2019), the D.C. Circuit in *Verizon v. FCC* explicitly recognized that the Commission's "no blocking" rule is "zero price" rate regulation.⁹ Yet how does the Commission get a regulated rate of zero? It has neither conducted a cost analysis nor identified a ratemaking methodology (TELRIC, LIRC, etc.). By forcing Internet Service Providers to carry traffic for free without adhering to basic ratemaking principles, the Commission's no blocking rule is the definition of a "confiscatory" rate in violation of the "just and reasonable" standard of Section 201, and forbearance from Section 203 deprives broadband providers of their due process rights to challenge that confiscatory rate.

Respectfully Submitted



Lawrence J. Spiwak
President

Attachments

⁹ *Verizon v. FCC*, 740 F.3d 623, 658 (D.C. Cir. 2014).