INITIAL BRIEF

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1051 (and consolidated cases)

MOZILLA CORPORATION, *et al.*, *Petitioners*,
v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

On Petitions for Review of an Order of the Federal Communications Commission

BRIEF OF PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

LAWRENCE J. SPIWAK
Phoenix Center for Advanced Legal and Economic Public Policy Studies
5335 Wisconsin Avenue, NW, Suite 440
Washington, DC 20015
(202) 274-0235
Counsel for Phoenix Center

October 18, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amici

Parties, Intervenors and Amici appearing before this Court are listed in the Petitioners' Brief and are incorporated by reference herein.

B. Ruling Under Review

The Phoenix Center for Advanced Legal and Economic Public Policy Studies files this brief as *amicus curiae* in support of the Respondents defending review of the final order of the Federal Communications Commission captioned *Restoring Internet Freedom*, DECLARATORY RULING, REPORT AND ORDER, AND ORDER, FCC 17-166, 33 FCC Rcd. 311 (rel. January 4, 2018) ("*Order*") (JA ___ *et seq.*).

C. Related Cases

This case has been consolidated with Case Nos. 18-1052, 18-1053, 18-1054, 18-1055, 18-1056, 18-1061, 18-1062, 18-1064, 18-1065, 18-1066, 18-1067, 18-1068, 18-1088, 18-1089 and 18-1105.

This case has not previously been before this Court or any other court. In the *Order* on review, the FCC rescinded the service classifications and rules upheld by this Court in *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) ("*USTelecom*"), *pets. for reh'g en banc denied*, 855 F.3d 381 (D.C. Cir. 2017), *pets. for cert. pending*. Seven petitions for *certiorari* seeking review of the *USTelecom* decision are now pending before the Supreme Court. *See Berninger v. FCC*, No. 17-498; *AT&T v. FCC*, No. 17-499; *Am. Cable Ass'n v. FCC*, No. 17-500; *CTIA—The Wireless Ass'n v. FCC*, No. 17- 501; *NCTA—The Internet & TV Ass'n v. FCC*, 17-502; *TechFreedom v. FCC*, No. 17-503; and *United States Telecom Ass'n v. FCC*, No. 17-504. The United States and several private parties have also filed suits in United States District Court seeking to enjoin a recently enacted California Internet regulation law on the ground that it is preempted by the *Order* on review here. *United States v. California*, No. 2:18-CV-02660 (E.D. Cal. filed Sept. 30,

2018); *American Cable Association, et al. v. Becerra,* No. 2:18-at-01552 (E.D. Cal. Filed October 3, 2018).

s/ *Lawrence J. Spiwak*

Lawrence J. Spiwak, Esq.
President and General Counsel
Phoenix Center for Advanced Legal and Economic Public Policy Studies
5335 Wisconsin Avenue, NW, Suite 440
Washington, D.C. 20015
Tel: (202) 274-0235

CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), counsel for the Phoenix Center hereby certifies that no other amicus brief of which they are aware relates to the subjects addressed herein. Moreover, as the Federal Communications Commission's extensive reliance upon the empirical investment analysis conducted by Phoenix Center Chief Economist Dr. George Ford is a major issue on appeal, the Phoenix Center, through counsel, certifies that filing a joint brief would not be practicable.

s/ *Lawrence J. Spiwak*

Lawrence J. Spiwak, Esq.
President and General Counsel
Phoenix Center for Advanced Legal and Economic Public Policy Studies
5335 Wisconsin Avenue, NW, Suite 440
Washington, D.C. 20015
Tel: (202) 274-0235

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Local Rule 26.1, the Phoenix Center for Advanced Legal & Economic Public Policy Studies submits the following corporate disclosure statement. The Phoenix Center is a non-profit 501(c)(3) non-stock corporation organized under the laws of Maryland. As such, the Phoenix Center has no parent companies and no one holds an ownership interest in the Phoenix Center.

s/ *Lawrence J. Spiwak*

Lawrence J. Spiwak, Esq.
President and General Counsel
Phoenix Center for Advanced Legal and Economic Public Policy Studies
5335 Wisconsin Avenue, NW, Suite 440
Washington, D.C. 20015
Tel: (202) 274-0235

CERTIFICATE REGARDING AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Phoenix Center certifies that no party's counsel authored this brief, in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the Phoenix Center contributed money that was intended to fund preparing or submitting the brief.

s/ *Lawrence J. Spiwak*

Lawrence J. Spiwak, Esq.
President and General Counsel
Phoenix Center for Advanced Legal and Economic Public Policy Studies
5335 Wisconsin Avenue, NW, Suite 440
Washington, D.C. 20015
Tel: (202) 274-0235

TABLE OF CONTENTS:

Page:

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES ii

CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING v

CORPORATE DISCLOSURE STATEMENTS vi

CERTIFICATE REGARDING AUTHORSHIP vii

TABLE OF AUTHORITIES x

GLOSSARY xvi

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Commission's Determination that Reclassification Deterred Investment Should be Accorded Deference 6

A. Because the FCC Misapplied the "Virtuous Circle" Theory a Reduction in Broadband Investment Was Inevitable 7

B. Empirical Questions Demand Empirical Answers 15

1. The Commission Was Correct to Reject Simple Comparisons of Changes in Short-Term Impacts to Capital Expenditures 16

2. The Commission Was Correct to Require a "Counterfactual" to Measure the Investment Effects of Reclassification and to Rely Heavily Upon the Empirical Analysis by Phoenix Center Chief Economist Dr. George Ford 18

a. Dr. Ford's Findings 19

b. Challenges to the Ford Study on Appeal 23

C. BSP Executives Did Not Tell an Inconsistent Investment Story 25

D. Conclusion 26

II. Broadband Internet Access Service is a Title I Service Subject to Exclusive Federal Jurisdiction 27

A. The FCC Did Not Abandon the Jurisdictional Field 28

B. Subjecting the Internet to a Hodgepodge of Different State Regulatory Regimes Would Stymie Infrastructure Investment 31

CONCLUSION 34

CERTIFICATE OF COMPLIANCE 35

CERTIFICATE OF SERVICE 36

TABLE OF AUTHORITIES:

Page(s):

CASES:

Arkansas Electric Coop. Corp. v. Arkansas Public Serviced Comm'n,
461 U.S. 375 (1983) 31

Business Roundtable v. SEC,
647 F.3d 1144 (D.C. Cir. 2011)..... 25

Charter Advanced Service v. Lange,
903 F.3d 715 (8th Cir. 2018) 30

Cotto Waxo Co. v. Williams,
46 F.3d 790 (8th Cir. 1995) 33

Encino Motorcars LLC v. Navarro,
136 S.Ct. 2117 (2016)..... 10

FCC v. Fox Television Stations,
556 U.S. 502 (2009)..... 10

NCTA v. Brand X,
545 U.S. 967 (2005) 7, 8

*USTelecom v. FCC,**
825 F.3d 674 (D.C. Cir. 2016), *pet. reh'g en banc denied*, 855 F.3d 381 (2017)..... 10, 11, 12, 14, 25, 26, 27

Verizon v. FCC,
740 F.3d 623 (D.C. Cir. 2014)..... 9, 10, 11, 29

** Authorities upon which we chiefly rely are marked with asterisks.*

STATUTES AND REGULATIONS:

Telecommunications Act of 1996, Pub. L. No. 104-104,
§ 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 1302) 9, 15

47 C.F.R. § 1.17 25

ADMINISTRATIVE MATERIALS:

2005 "Four Principles" Policy Statement,
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-157, POLICY STATEMENT, 20 FCC Rcd. 14986, 14987-88 (rel. September 23, 2005)..... 21

2010 Order,
In the Matter of Preserving the Open Internet, Broadband Industry Practices, FCC 10-201, REPORT AND ORDER, 25 FCC Rcd 17905, (rel. December 23, 2010)..... 9, 20

2015 Order,
Protecting and Promoting the Open Internet, FCC 15-24, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, 30 FCC Rcd 5601, 80 Fed. Reg. 19738 (rel. Mar. 12, 2015) ..... *passim*

BPL Reclassification Order,
United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, MEMORANDUM OPINION AND ORDER, 21 FCC Rcd. 13281, 13288, ¶ 11 (2006) 8

Cable Modem Reclassification Order,
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, DECLARATORY RULING AND NOTICE OF PROPOSED RULEMAKING, 17 FCC Rcd. 4798, 4832, ¶ 59 (2002), *aff'd, NCTA v. Brand X,* 545 U.S. 967 (2005) 8

Pulver Order,
In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service, FCC 04-27, MEMORANDUM OPINION AND ORDER, 19 FCC Rcd. 3307 (rel. February 19, 2004) 30

Wireless Reclassification Order,
In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, DECLARATORY RULING, 22 FCC Rcd. 5901, 5908-11, ¶¶ 18-28 (Mar. 23, 2007) 8

Wireline Broadband Reclassification Order,
Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers, REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING, 20 FCC Rcd. 14853, 14864, 14909-11, ¶ 15, ¶103-04 (2005) *aff'd sub nom. Time Warner Telecom, Inc. v. FCC,* 507 F.3d 205 (3rd Cir. 2007) 8

MISCELLANEOUS

Beard, T.R., Ford, G.S., Koutsky, T.M. and Spiwak, L.J., *Developing A National Wireless Regulatory Framework: A Law and Economics Approach,* 16 COMMLAW CONSPECTUS 391 (2008) (https://tinyurl.com/ycqj8ow2) 32

Brennan, T., *Is the Open Internet Order an "Economics-Free Zone"?* Free State Foundation (June 28, 2018) (https://tinyurl.com/z9wox4s) 13, 28

Ellig, J., *Internet Regulation at the FCC: No Longer "Economics-free" Zone,* THE HILL (December 12, 2017) (https://tinyurl.com/ych932hv) 26

Ford, G.S., *A Review of the Internet Association's Empirical Study on Network Neutrality and Investment,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-09 (July 24, 2017) (https://tinyurl.com/17-09Final) 24

Ford, G.S., *A Further Review of the Internet Association's Empirical Study on Network Neutrality and Investment,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-10 (August 14, 2017) (https://tinyurl.com/17-10Final) 24

Ford, G.S., *Bait-and-Switch—Or Why the FCC's "Virtuous Circle" Theory is Nonsense*, BLOOMBERG BNA (May 18, 2015) (https://tinyurl.com/ycvznt59) 12, 13, 17

Ford, G.S., *Below the Belt: A Review of Free Press and the Internet Association's Investment Claims,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-06 (June 20, 2017) (https://tinyurl.com/17-06Final) 16, 26

Ford, G.S., *Is the FCC's Regulatory Revival Deterring Infrastructure Investment?* BLOOMBERG BNA (November 15, 2015) (https://tinyurl.com/y7d7hmpx) 17, 20, 21

Ford, G.S., *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-02 (April 25, 2017) (https://tinyurl.com/17-02Final) 17, 19, 21

Ford, G.S., *Net Neutrality, Reclassification and Investment: A Further Analysis*, PHOENIX CENTER POLICY PERSPECTIVE NO. 17-03 (May 16, 2017) (https://tinyurl.com/17-03Final) 19

Ford, G.S., *Reclassification and Investment: An Analysis of Free Press' "It's Working" Report,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-04 (May 22, 2017) (https://tinyurl.com/17-04Final) 17, 23

Ford, G.S., *Reclassification and Investment: A Statistical Look at the 2016 Data,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-08 (July 13, 2017) (https://tinyurl.com/17-08Final) 17

Ford, G.S., *Regulation and Investment in the U.S. Telecommunications Industry,* APPLIED ECONOMICS 50:56 (2018) (https://tinyurl.com/y9g96g3w) 19

Ford, G.S. and Spiwak, L.J., *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service,* 67 FEDERAL COMMUNICATIONS LAW JOURNAL 1 (2015) (https://tinyurl.com/y8a5x7sy)..... 29

Ford, G.S. and Spiwak, L.J., *The Unpredictable FCC: Politicizing Communications Policy and its Threat to Broadband Investment,* PHOENIX CENTER POLICY PERSPECTIVE NO. 14-05 (October 14, 2014) (https://tinyurl.com/14-05Final) 20

Ford, G.S., Spiwak, L.J. and Stern, M., *The Broadband Credibility Gap,* 19 COMMLAW CONSPECTUS 75 (2010) (https://tinyurl.com/msnn4v7) 20

Genachowski, J., *The Third Way: A Narrowly Tailored Broadband Framework,* Federal Communications Commission (May 6, 2010).....9

Glazer, A., and McMillan, H., *Pricing by the Firm Under Regulatory Threat,* 107 QUARTERLY JOURNAL OF ECONOMICS 1089-1099 (1992)..... 18

Hooton, C., *An Empirical Investigation of the Impacts of Net Neutrality*, Internet Association (2017) (hereinafter "*IA Economic Report*") 23, 24

Imbens, G.W. and Wooldridge, J.M., *Recent Developments in the Econometrics of Program Evaluation,* JOURNAL OF ECONOMIC LITERATURE, 47, 5-86 (2009)..... 18

Katz, M.L., *Regulation: The Next 1000 Years,* in SIX DEGREES OF COMPETITION: CORRELATING REGULATION WITH THE TELECOMMUNICATIONS MARKETPLACE 27 (2000)..... 32

Spiwak, L.J., *The "Clicktivist" In Chief,* THE HILL (November 12, 2014) (https://tinyurl.com/k7uccpg)..... 10

Spiwak, L.J., *USTelecom and its Aftermath,* PHOENIX CENTER POLICY BULLETIN NO. 42 (June 2017) (https://tinyurl.com/PCPB42Final), *forthcoming* FEDERAL COMMUNICATIONS LAW JOURNAL (Fall 2018)..... 29

Tummarello, K., *FCC Revives Net Neutrality,* THE HILL (February 19, 2014) (https://tinyurl.com/y9wdy58n)..... 20

Wheeler, T., Remarks at Silicon Flatirons Center, Boulder, Colorado (February 9, 2015) 11

GLOSSARY:

Order	*Restoring Internet Freedom*, DECLARATORY RULING, REPORT AND ORDER, AND ORDER, FCC 17-166, 33 FCC Rcd. 311 (rel. January 4, 2018).
2010 Order	*In the Matter of Preserving the Open Internet, Broadband Industry Practices*, FCC 10-201, 25 FCC Rcd 17905, REPORT AND ORDER (rel. December 23, 2010).
2015 Order	*Protecting and Promoting the Open Internet,* FCC 15-24, 80 Fed. Reg. 19738, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER (rel. Mar. 12, 2015).
Agency, Commission, FCC, or Respondent	Federal Communications Commission
BSP	Broadband Service Provider
Edge Provider or "Edge"	Any individual or entity who provides content, services, and applications over the Internet for consumption by end users (e.g., Google, Netflix).
Title I	Title I of the Communications Act of 1934.
Title II	Title II of the Communications Act of 1934.
USTelecom v. FCC or USTelecom	825 F.3d 674 (D.C. Cir. 2016), *pet. reh'g en banc denied*, 855 F.3d 381 (2017).
Verizon v. FCC or *Verizon*	740 F.3d 623 (D.C. Cir. 2014).

INTEREST OF AMICUS CURIAE:

The Phoenix Center is a non-profit 501(c)(3) research organization that studies the law and economics of the digital age. For nearly fifteen years, the Phoenix Center has authored numerous pieces of scholarly research about the Open Internet debate, many of which have been published in leading academic journals.[1] Moreover, because the Federal Communications Commission placed extensive reliance upon the empirical investment analysis conducted by Phoenix Center Chief Economist Dr. George Ford to determine that reclassification has harmed broadband infrastructure investment in the *Order* under review, the veracity of Dr. Ford's analysis has become a major issue on appeal. The Phoenix Center, therefore, has an established interest in the outcome of this proceeding and believes that its perspective on the issues will assist the Court in resolving this case.

[1] For a full list of the Phoenix Center's extensive academic publications on this issue, *see:* http://www.phoenix-center.org/rt1.html.

SUMMARY OF ARGUMENT:

The heavy-handed common carrier regulations designed in the 1930's for the old "Ma Bell" monopoly under Title II of the Communications Act are unsuited to the Internet, serving as an impediment to the development and deployment of high-speed Internet services. Consequently, for nearly twenty years, there was bi-partisan consensus at the Federal Communications Commission that broadband Internet access—regardless of the delivery platform—should be classified as a lightly-regulated "information" service under Title I of the Act. In 2015, faced with substantial political pressure (including significant pressure from the White House) to regulate the Internet aggressively, the Commission reversed course and reclassified broadband Internet access as a common carrier "telecommunications" service under Title II—a decision this Court upheld in *USTelecom v. FCC*, granting the regulatory agency substantial deference. Faced with compelling new evidence of the profound and adverse effects of reclassification, the current Commission has now reversed the 2015 decision and returned broadband Internet access to "light touch" oversight under Title I, hoping to restore investment incentives in the broadband sector. Once again, this Court should accord the Commission's decision deference.

It is established law that an administrative agency may change policy direction so long as it provides a reasoned explanation for doing so. In both the *Order* and in its brief, the Commission sets forth a detailed legal analysis demonstrating why it is appropriate—consistent with the Supreme Court's holding in *Brand X*—to return the classification of broadband Internet access back to a Title I information service. As the Commission also explains, while this legal analysis is sufficient grounds alone upon which to base its classification decision, the economics also "reinforce that conclusion."

Without question, the economics of the Internet ecosystem are complex. And, as this Court readily admits, it sits as "a panel of generalist judges", not as a "panel of referees on a professional economics journal." Accordingly, to help aid the Court, the purpose of this amicus brief is to walk through and explain the Commission's analysis of the investment effects of the 2015 reclassification decision in detail. We also speak briefly to the issue of pre-emption.

First, though central to its 2015 reclassification decision, we explain that while the Commission's description of the virtuous circle theory of investment in the *2015 Order* may be correct, the Commission's *application* of this theory was entirely flawed. As we demonstrate, the fact that broadband

networks and the applications that run over them are complements provides no reasoned basis for regulatory intervention. Complementary products and services are ubiquitous in the economy. For this reason, a truly "virtuous circle" belies the need for government intervention. (After all, what part of virtue needs to be regulated?) Faced with this logical reality, the Commission in the *2015 Order* was therefore forced to engage in analytical gymnastics and factual slight-of-hand to justify its heavy-handed regulation. Given the Commission's blatant disregard of the economics, it is little surprise that the Government's intervention into this otherwise "virtuous" circle in 2015 led to a reduction in infrastructure investment. The only outstanding question is by how much?

Second, because empirical questions demand empirical answers, we demonstrate why the Commission in the *Order* was correct to reject attempts to show the investment effects of reclassification using simple, short-run comparisons of capital expenditures made by both sides of this dispute. Instead, consistent with sound empirical practice, the Commission demanded a "counterfactual" analysis—that is, in quantifying the effects of reclassification, the Commission rightly sought out research that addressed directly the two most relevant questions: (1) *what would infrastructure investment had been "but for" the regulatory intervention (the*

"counterfactual")?; and (2) *when did the investment decisions made by the regulated firms begin to reflect the regulatory risks of reclassification (the "treatment date")?* In the end, the Commission relied on the empirical analysis conducted by Phoenix Center Chief Economist Dr. George Ford, which was the only study to employ properly a counterfactual framework, including an analysis of when the regulated firms began to incorporate the new regulatory risks into their investment decisions. This work, subsequently published in a peer-reviewed academic journal, found that capital spending in telecommunications began to decline relative to expectations soon after reclassification was first proposed in 2010. Plainly, whether capital spending rose or fell between 2014 and 2016 is immaterial after acknowledging the fact investment was already more than 20% below expectations at that time.

Third, we point out that the Commission was correct to reject Petitioners' and their supporting Intervenors' argument that the Commission ignored statements by BSP executives to their investors that reclassification would not adversely affect their investment decisions. As the Commission correctly found, again citing Dr. Ford, it was Petitioners and their supporting Intervenors who were not telling the whole story by using "highly selective quotations that ignore other statements to investors that imply the opposite."

Finally, we look briefly into the complex issue of pre-emption. As we show, the Commission's decision not to impose price regulation on the Internet is not the analytical equivalent of a deliberate decision on behalf of the Agency to abdicate its jurisdiction over Title I services altogether. If anything, the Commission's decision was a laudable act of de-regulatory precision. Accordingly, because the Commission very much retains its oversight authority over Title I services—indeed, the fact that the Commission instituted a transparency rule is *prima facie* evidence that the Agency did not abdicate its jurisdiction—states may not try step in to fill a jurisdictional void that does not exist. We also demonstrate that the adverse economic consequences of having providers of a national service comply with a patchwork of different state rules—some of which may even go farther than the national rules—are very real and, as such, pre-emption is warranted.

ARGUMENT:

I. The Commission's Determination that Reclassification Deterred Investment Should be Accorded Deference

In both the *Order* and in its brief, the Commission sets forth a detailed legal analysis demonstrating why it is appropriate to return the classification of broadband Internet access back to a Title I "information" service—a

classification upheld by the Supreme Court in *NCTA v. Brand X*, 545 U.S. 967 (2005). As the Commission also explains, while this legal analysis is sufficient grounds alone upon which to base its classification decision, the economics also "reinforce that conclusion." *Order* at ¶ 86 (JA at __). Indeed, with the benefit of compelling new evidence—including empirical economic analyses based on the modern statistical methods of impact analysis, statements by former FCC officials, and company statements that Title II deters investment—the current Commission reasonably concluded that the *2015 Order's* claims that reclassification would not harm broadband infrastructure investment were patently false. *See, e.g., Order* at ¶ 92 (JA at __) ("evidence in the record that indicates that Title II adversely affected broadband investment."). To help aid the Court, in the following sections we walk through the economics to show why the current Commission's conclusion in the *Order* is entitled to deference.

A. *Because the FCC Misapplied the "Virtuous Circle" Theory a Reduction in Broadband Investment Was Inevitable*

Recognizing that the heavy-handed common carrier regulations designed in the 1930's for the old "Ma Bell" monopoly under Title II of the Communications Act would be an impediment to the development and deployment of high-speed Internet services, for nearly twenty years there was

bi-partisan consensus at the Commission that broadband Internet access—regardless of the delivery platform—should be classified as a lightly-regulated "information" service under Title I of the Act. *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* DECLARATORY RULING AND NOTICE OF PROPOSED RULEMAKING, 17 FCC Rcd. 4798, 4832, ¶ 59 (2002) (*Cable Modem Reclassification Order*), *aff'd, NCTA v. Brand X,* 545 U.S. 967 (2005); *Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers,* REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING, 20 FCC Rcd. 14853, 14864, 14909-11, ¶ 15, ¶103-04 (2005) (*Wireline Broadband Reclassification Order*), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC,* 507 F.3d 205 (3rd Cir. 2007); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks,* DECLARATORY RULING, 22 FCC Rcd. 5901, 5908-11, ¶¶ 18-28 (Mar. 23, 2007) (*Wireless Reclassification Order*); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service,* MEMORANDUM

OPINION AND ORDER, 21 FCC Rcd. 13281, 13288, ¶ 11 (2006) (*BPL Reclassification Order*).

In 2010, this bipartisan consensus turned to partisan bickering. In search of a legal foundation for a more expansive regulatory agenda, FCC Chairman Julius Genachowski threatened to abandon bipartisan precedent by classifying broadband Internet access as a common carrier "telecommunications" service under Title II, despite acknowledging that such "[h]eavy-handed prescriptive regulation can chill investment." *See* J. Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework,* Federal Communications Commission (May 6, 2010) at p. 2. Investors recoiled at the proposal and the stock prices of the broadband providers plummeted. Financial analysts also warned of slowed investment in the sector. *See* discussion Section I.B.2.a. *infra* and citations therein. Faced with the seemingly inevitable consequences, the Commission relented and did not reclassify. Instead, the Commission decided to adopt its *2010 Order* under Section 706—rules which this Court ultimately struck down in *Verizon v. FCC,* 740 F.3d 623 (D.C. Cir. 2014).

Notwithstanding, this Court in *Verizon* provided the Commission a legal "roadmap" under which it could proceed without reclassification. Yet,

faced with substantial political pressure—including a very public goading from the White House—the Commission in 2015 went for the "nuclear" option and imposed legacy Title II common carrier regulation on the Internet. *See, e.g., USTelecom v. FCC,* 855 F3d 381, 394 (2017) (Brown, J. *dissenting from denial of pet. for reh'g en banc*) ("When the FCC followed the *Verizon* 'roadmap' to implement 'net neutrality' principles without heavy-handed regulation of Internet access, the Obama administration intervened. Through covert and overt measures, FCC was pressured into rejecting this decades-long, light-touch consensus in favor of regulating the Internet like a public utility.") (citations omitted); L.J. Spiwak, *The "Clicktivist" In Chief,* THE HILL (November 12, 2014). Despite a momentous turn from long-standing policy, this Court upheld that decision in *USTelecom v. FCC,* 825 F.3d 674, (D.C. Cir. 2016), *pet. reh'g en banc denied*, 855 F.3d 381 (2017).

It is established law that an administrative agency may change policy directions so long as it provides a reasoned explanation for doing so. *See, e.g., FCC v. Fox Television Stations,* 556 U.S. 502, 515-16 (2009); *Encino Motorcars LLC v. Navarro,* 136 S.Ct. 2117, 2125-26 (2016). In the case of the decision to reclassify in 2015, the Agency's primary economic justification was the "virtuous circle" theory of investment. Under the Commission's "virtuous circle" theory, "Internet openness ... spurs

investment and development by edge providers, which leads to increased end-user demand for broadband access, which leads to increased investment in broadband network infrastructure and technologies, which in turns leads to further innovation and development by edge providers." *See USTelecom,* 825 F.3d at 694, *citing Verizon v. FCC,* 740 F.3d at 634. Thus, reasoned the Commission, the benefits of the "openness" provided by the *2015 Order* would outweigh the purported costs of reclassification. *2015 Order* at ¶ 410 (JA at __).

As the threat to infrastructure investment posed by heavy-handed, prescriptive regulations was well-established—a threat even conceded by regulators, *see, e.g.,* Genachowski, *supra*; Remarks of FCC Chairman Tom Wheeler, Silicon Flatirons Center, Boulder, Colorado (February 9, 2015) at p. 5 (Title II would impair the ability of "network operators to receive a return on their investment")—on appeal of the *2015 Order* several parties challenged the rules on the grounds that the Commission's finding that reclassification would not suppress broadband investment was arbitrary and capricious. *See USTelecom,* 825 F.3d at 707. At the time, however, the evidence was preliminary at best, forcing this Court to reject those arguments and grant deference to the prognostications of the administrative agency. As this Court noted:

> In reviewing these conclusions, we ask not whether they "are correct or are the ones that we would reach on our own, but only whether they are reasonable." Moreover, "[a]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable." The Commission has satisfied this highly deferential standard. *Id.* (citations omitted.)

But despite this Court's deference to the Commission's prognostications in *USTelecom*, the 2015 decision to reclassify was based on pure speculation and has been shown to have had neither sound theoretical nor empirical support. G.S Ford, *Bait-And-Switch—Or Why the FCC's Virtuous Circle Theory is Nonsense,* BLOOMBERG BNA (2015) (JA at __). Indeed, it speaks volumes when the Agency's own Chief Economist at the time the *2015 Order* was crafted, Professor Tim Brennan, publicly conceded that the *2015 Order* was constructed in an "economics-free zone." *See USTelecom,* 825 F.3d at 764 (Williams, J. concurring and dissenting) (citations omitted). For this reason, after a lengthy opportunity for notice and comment, the current Commission easily came to recognize that the previous Commission's application of the "virtuous circle" in the *2015 Order* "was at best only loosely based on the existing economics literature, in some cases contradicted peer reviewed economics literature, and included virtually no empirical evidence." *See Order* at ¶ 118 (JA at __) (citations omitted).

The fact that broadband networks and the applications that run over them are complements provides no reasoned basis for regulatory intervention. Complementary products and services are ubiquitous in the economy, and the FCC's "virtuous circle" argument contained no defect requiring a remedy. Indeed, the very title of the "virtuous circle" belies the need for government intervention: after all, *what part of virtue needs to be regulated*? Ford, *Bait-and-Switch, supra.* Faced with this logical conundrum, the Commission was forced to turn to analytical gymnastics and factual slight-of-hand to justify its heavy-handed regulation. For example, to square the circle, the Commission claimed that without regulatory control BSPs will "disrupt[] the virtuous cycle" by "reducing consumer demand" (*2015 Order* at ¶ 82; JA at __). This argument flies in the face of the economic logic of the virtuous circle theory—demand and profits are positively related. Profit-maximizing firms don't rationally take actions that reduce profits, including, in particular, reducing the demand for their own products and services. Ford, *Bait-and-Switch, id.* Worse, the Commission swept pertinent facts under the rug. As even the FCC's Chief Economist at the time observed, the Commission's use of the "virtuous circle" was "unsupported" by the evidence because "broadband providers had already largely adopted net neutrality" and that fact "would have undermined the necessity of regulation.") T. Brennan, *Is the Open*

Internet Order an "Economics-Free Zone"? Free State Foundation (June 28, 2018).

Put simply, the virtuous circle theory implies nothing more than demand complementarity between the edge and core, a nearly uncontestable logic, but this self-reinforcing relationship between the two argues *against* regulatory intervention—not for it—as demonstrated by the stunning advancements in Internet technology and adoption under years of "light touch" Title I oversight. The *2015 Order* abandoned the "virtuous circle" theory by justifying regulation as protection from firms operating against their own interests. No such protection is needed. In fact, the virtuous circle theory, as laid out by the Commission, suggests, if anything, that regulatory intervention will itself disrupt the virtuous flow, thereby reducing investment incentives. Given the Commission's blatant disregard of the economics, therefore, it is little surprise that the Government's intervention into this otherwise "virtuous" circle in 2015 reduced in infrastructure investment. *See USTelecom,* 825 F.3d at 756 (Williams, J. concurring and dissenting) ("In short, the [2015] Order's probable direct effect on investment in broadband seems unambiguously negative.") The only outstanding question is by how much?

B. *Empirical Questions Demand Empirical Answers*

Although the current Commission has now ruled that Section 706 is hortatory and provides no source of independent jurisdictional authority, *see 2015 Order* at ¶ 267 *et seq.* (JA at __), the Agency nonetheless recognizes that Section 706(a) provides "a general, ongoing exhortation for the Commission to encourage deployment of advanced telecommunications capability" (*Order* at ¶ 270, fn. 995 (JA at __)), which, under the plain terms of the statute, includes, *inter alia,* an obligation to "remove barriers to infrastructure investment." *See* 47 U.S.C. § 1302(a). Petitioners claim that the *2015 Order* did not reduce infrastructure investment; Respondents argue that it did. As empirical questions demand empirical answers, we explain below why the current Commission was correct in the *Order* to reject the simplistic comparisons of capital expenditures made by both sides of the dispute and instead to focus properly on the *"counterfactual"*—that is, *what would investment had been "but for" reclassification?* In particular, we discuss why the Commission was correct to rely heavily on the empirical counterfactual analysis conducted by Phoenix Center Chief Economist Dr. George Ford demonstrating that investment declined post-reclassification relative to expectations.

1. *The Commission Was Correct to Reject Simple Comparisons of Changes in Short-Term Impacts to Capital Expenditures*

Petitioners' and their supporting Intervenors' central investment argument on appeal is that the Commission placed too much reliance on calculations made by economist Hal Singer and by Michael Horney of the Free State Foundation—both purporting to show a decline in cap-ex investment after the *2015 Order*—and gave insufficient credence to calculations by Derek Turner of Free Press, which purported to show that capital expenses increased post-reclassification. *See, e.g.,* Petitioners' Brief at 68-69; Intervenors Brief at 20-24. The Commission did no such thing. In the *Order*, the Agency explicitly and unequivocally refused to rely on *all* of the simplistic comparisons of capital expenditures immediately before and after the reclassification decision made by both sides of the debate.

The record in this proceeding makes clear that it is wholly improper to measure the investment effects of reclassification using pedantic calculations of investment effects just before and just after a Commission order. *See, e.g., Ford, Virtuous Circle, supra* (JA at __); G.S. Ford, *Below the Belt: A Review of Free Press and the Internet Association's Investment Claims,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-06 (June 20, 2017) (JA at __); G.S. Ford,

Reclassification and Investment: An Analysis of Free Press' "It's Working" Report, PHOENIX CENTER POLICY PERSPECTIVE NO. 17-04 (May 22, 2017) (JA at __); *see also* G.S. Ford, *Reclassification and Investment: A Statistical Look at the 2016 Data,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-08 (July 13, 2017) (JA at __); G.S. Ford, *Is the FCC's Regulatory Revival Deterring Infrastructure Investment?,* BLOOMBERG BNA (November 15, 2015) (JA at __). Indeed, whether capital expenditures rise or fall says nothing about the investment effect of a regulatory intervention. Singer and the Free State Foundation argue investment fell and Turner of Free Press argues investment rose, but what is the investment level to which these increases and decreases are being established? In effect, the benchmark is last year's investment, but capital expenditures rise and fall each year for a host of reasons of which regulation is only one. Ford, *Bait-and-Switch, supra.* As the Agency itself recognized, simple short-term comparisons of capital spending trends "can only be regarded as suggestive, since they fail to control for other factors that may affect investment …." *Order* at ¶ 92 (JA at __). Instead, the Commission properly determined that measuring the investment effect of a regulation requires reference to a *"counterfactual"*—that is, *what would investment had been "but for" the regulatory intervention? See Order* at ¶ 93 (JA at __); G.S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual*

Analysis, PHOENIX CENTER POLICY PERSPECTIVE NO. 17-02 (April 25, 2017) (JA at __). The need for a counterfactual is obvious enough and a central feature of modern impact analysis. *See, e.g.,* G.W. Imbens and J.M. Wooldridge, *Recent Developments in the Econometrics of Program Evaluation,* JOURNAL OF ECONOMIC LITERATURE, 47, 5-86 (2009). The Commission was therefore correct to discount the simplistic comparisons of capital expenditures and this Court should as well.

2. *The Commission Was Correct to Require a "Counterfactual" to Measure the Investment Effects of Reclassification and to Rely Heavily Upon the Empirical Analysis by Phoenix Center Chief Economist Dr. George Ford*

A company's infrastructure spending can be observed in its financial documents. What cannot be observed is what the company would have spent under a different set of conditions, including different regulatory regimes. Yet, it is exactly this comparison that is required to quantify the impact of a regulatory action or its threat. *See, e.g.,* Imbens and Wooldridge, *supra*; A. Glazer, H. McMillan, *Pricing by the Firm Under Regulatory Threat,* 107 QUARTERLY JOURNAL OF ECONOMICS 1089-1099 (1992). As the Commission recognized in the *Order,* "methodologies designed to estimate impacts relative to a counterfactual tend to provide more convincing evidence of

causal impacts of Title II classification." *Order* at ¶ 93 (JA at __). For this reason, the Commission placed heavy reliance on the empirical analysis performed by Phoenix Center Chief Economist Dr. George Ford.[2]

a. *Dr. Ford's Findings*

To quantify investment effects, Ford's first step was to establish a "treatment date." Treatment dates are easily chosen for surprises, but not for the dreadfully long regulatory process. As it turns out, empirical evidence provides a clear indicator as to when reclassification became embedded in the financial decisions of the industry and investors: On May 6, 2010, Chairman Julius Genachowski and his General Counsel Austin Schlick released statements outlining a path to reclassifying broadband as a Title II telecommunications service. The announcement caught investors by surprise; an economic event study conducted at the time demonstrates clearly that the

---

[2] *See* Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis, supra* (JA at __). Additional analysis of a more limited definition of investment confirmed Ford's earlier work. *See* G.S. Ford, *Net Neutrality, Reclassification and Investment: A Further Analysis,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-03 (May 16, 2017) (JA at __) (finding that investment in equipment and property would have been $20 billion more "but for" reclassification). A combination of these papers has just been published in APPLIED ECONOMICS, a peer-reviewed economics journal. G.S. Ford, *Regulation and Investment in the U.S. Telecommunications Industry,* APPLIED ECONOMICS 50:56 (2018).

stock prices of broadband providers fell by about 10% in the immediate days following the announcement. *See* G.S. Ford, L.J. Spiwak and M. Stern, *The Broadband Credibility Gap,* 19 COMMLAW CONSPECTUS 75, 108 (2010). Moreover, despite its actions in the *2010 Order*, the Commission nonetheless held open a regulatory proceeding proposing reclassification, leading then-Commissioner Ajit Pai to observe in 2014 (before the reclassification decision the next year) that "the specter of Title II reclassification hovers ominously in the background." K. Tummarello, *FCC Revives Net Neutrality,* THE HILL (February 19, 2014).

Between Chairman Genachowski's broaching the subject of reclassification in 2010 until the time Chairman Tom Wheeler formally made that change 2015, industry insiders knew that reclassification was a viable, perhaps probable, policy outcome for broadband Internet services. *See, e.g.,* G.S. Ford, *Is the FCC's Regulatory Revival Deterring Infrastructure Investment? supra*; G.S. Ford and L.J. Spiwak, *The Unpredictable FCC: Politicizing Communications Policy and its Threat to Broadband Investment,* PHOENIX CENTER POLICY PERSPECTIVE NO. 14-05 (October 14, 2014). As Wall Street investment analysts acknowledged, by the time the FCC formally got around to reclassifying in 2015, Title II was already baked into most

network operators' investment decisions.[3] *See Ford, Regulatory Revival, id.,* and citations therein.

With the treatment date of Title II properly established, using modern econometric methods, publicly-available data, and a battery of robustness checks, Ford found sizable investment effects from reclassification. Between 2011 and 2015 (the last year data were available), telecommunications investment differed from the counterfactual by between 20% and 30%, or about $30 to $40 billion annually. Ford's counterfactual analysis indicated that the U.S. was due an investment boom in telecommunications following the recession of 2008; a boom apparently foreclosed by the Commission's proposals to impose Title II regulation on broadband services. Notably, Ford also found no decline in investment following the release of the FCC's "Four Principles" to promote an Open Internet in 2005,[4] suggesting it is

---

[3] Ford's event study and subsequent two counterfactual investment analyses, taken together with these Wall Street analyst reactions, therefore provide an empirical answer to Petitioners' rhetorical question to this Court: "Why did the BIAS providers' stock prices not fall with the *2015 Order,* adopted in February 2015?" Petitioners' Brief at pp. 69-70.

[4] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* FCC 05-157, POLICY STATEMENT, 20 FCC Rcd. 14986, 14987-88 (rel. September 23, 2005) at ¶¶ 4-5.

reclassification—and not Net Neutrality principles—that is reducing investment. Ford, *Net Neutrality, Reclassification and Investment, supra*.

The Commission was impressed. Dedicating a full two pages in the *Order* to discuss Ford's empirical analysis, the Commission took great pains both to examine Ford's methodology and to consider numerous challenges to his findings. *See, e.g., Order* at ¶¶ 95-98 (JA at __). After review, the Commission found those critiques baseless and that Ford's counterfactual analysis to be a "reliable indicator of the direction of the change in investment" and, "[a]t the very least, the study suggests that news of impending Title II regulation is associated with a reduction in ISP investment over a multi-year period." *Order* at ¶ 95 (JA at __). If anything, noted the Commission, "Ford's negative result for investment was understated." *Id.* at ¶ 96 (JA at __). Materially, unlike the simplistic comparisons of capital expenditures appropriately rejected by the Commission discussed in Section I.B.1 *supra*, Ford's sophisticated empirical analysis was subsequently published in a peer-reviewed economics journal, indicating that it satisfied modern professional standards. *Supra* n. 1.

b. *Challenges to the Ford Study on Appeal*

During the rulemaking proceeding before the Commission, Intervenors attempted to challenge Dr. Ford's analysis by offering a critique authored by Christopher Hooton entitled *An Empirical Investigation of the Impacts of Net Neutrality* (hereinafter "*IA Economic Report*") (JA at __). On appeal, Intervenors essentially raise the same challenges to Ford's analysis as they did before the Commission. *See* Intervenors' Brief at 24-25, *citing IA Economic Report* (JA at __).[5] However, such criticisms are as unpersuasive now as they were then. As the Commission observed in the *Order*, several obvious errors led it to discount the *IA Economic Report's* findings.

For example, the Commission found that the *IA Economic Report's* estimation of the impact of events in both 2010 and 2015 relied "partially on forecast rather than actual data, which likely lessens the possibility of finding

---

[5] Despite spending a significant portion of their brief arguing that the Commission's investment analysis was wrong, Petitioners nonetheless deliberately chose to omit any reference to Ford's empirical counterfactual analysis (along with the Commission's extensive examination, and ultimate reliance upon, thereof). *See, e.g.,* Petitioner Brief at pp. 68-71. Such an omission is not surprising, however, given Ford's thorough dismantling of Free Press's pedantic and erroneous investment analysis. *See* Ford, *Reclassification and Investment: An Analysis of Free Press' "It's Working" Report, supra.*

an effect of Title II on investment." *Order* at ¶ 97 (JA at __). Indeed, the *IA Economic Report's* estimates the investment effects of Title II regulation using data through 2020, which included four years of data from time that has yet to even manifest (even today). Where did this data come from? Translating this "econo-speak" for the Court: *the author of the IA Economic Report's made up his data*, a practice that appeared repeatedly throughout the *IA Economic Report*. Ford, *id.* Investment data extrapolated from historical trends does not and cannot change in response to regulatory action. *See* G.S. Ford, *A Review of the Internet Association's Empirical Study on Network Neutrality and Investment,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-09 (July 24, 2017); G.S. Ford, *A Further Review of the Internet Association's Empirical Study on Network Neutrality and Investment,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-10 (August 14, 2017) (JA at __). Given the *IA Economic Report's* analytical chicanery, it should come as no surprise that the Agency (politely) found that the use of such a flawed analysis "is unlikely to yield reliable results." *Order, id.*

In light of the thoroughness of the Agency's investment analysis in the *Order*, it strains credulity for the Petitioners and their supporting Intervenors to argue that the Commission either relied upon insufficient empirical data or selectively relied on a study whose defects it purportedly ignored. *See*

Petitioners' Brief at 73 (*citing Business Roundtable v. SEC,* 647 F.3d 1144, 1151 (D.C. Cir. 2011)); Intervenors' Brief at 18. Consistent with precedent, therefore, the Commission's thorough analysis that reclassification hurt infrastructure investment is entitled to deference. *USTelecom, supra*.

C. *BSP Executives Did Not Tell an Inconsistent Investment Story*

Both Petitioners and their supporting Intervenors argue that the Commission ignored statements by BSP executives to their investors that reclassification would not adversely affect their investment decisions. *See* Petitioners' Brief at 69; Intervenors' Brief at 21-22. Implied in this argument is the notion that these BSPs executives have perpetuated a fraud upon the Commission—that is, as it is illegal for publicly-traded companies to make mis-statements to investors, making contrary statements to the Commission that reclassification would reduce investment is, by definition, lying to the FCC in violation of the Agency's rules. *See, e.g.,* 47 C.F.R. § 1.17 – Truthful Statements to the Commission. However, after a thorough review of the record, the Commission found that it was Petitioners and their supporting Intervenors who were not telling the whole story. As the Commission observed, Petitioners' and Intervenors' claims that "corporate officers' statements to investors prove that Title II has increased investment *use highly*

selective quotations that ignore other statements to investors that imply the opposite." *Order* at ¶ 102 (JA at __) (*emphasis supplied and citing* G.S. Ford, *Below the Belt: A Review of Free Press and the Internet Association's Investment Claims,* PHOENIX CENTER POLICY PERSPECTIVE NO. 17-06 (June 20, 2017)) (JA at __). Accordingly, this Court should reject such specious claims.

D. *Conclusion*

Learning from the "economics-free zone" experience of *2015 Order*, the current Commission took great pains to raise the level of analytical rigor in constructing the *Order*. *See, e.g.,* J. Ellig, *Internet Regulation at the FCC: No Longer "Economics-free" Zone,* THE HILL (December 12, 2017) (noting that, among other things, the *Order* cites 35 peer-reviewed economics journal articles, versus just six in the *2015 Order*); *see also* Brennan, *Is the Open Internet Order an "Economics-Free Zone"?, supra* (conceding that many of the studies the FCC did cite in the *2015 Order* were "irrelevant"). And so while this Court admits that it does "not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority" *USTelecom,* 825 F3d at 697 (citations

omitted), it is important for this Court to recognize that the primary economic analysis upon which the Commission relied in the *Order*—the analysis by Dr. Ford—was in fact embraced by a "panel of referees on a professional economics journal." *See supra* n. 1.

Accordingly, if the politically-motivated *2015 Order* warranted deference—a decision the Commission's own Chief Economist at the time both described as being crafted in an "economics-free zone" and also conceded lacked a shred of empirical or theoretical support—then the Commission's *2018 Order*—which carefully parsed the empirical evidence on capital spending and properly referenced some 35 peer-reviewed journal articles from the economics literature—should be accorded the same, if not greater, deference. A regulatory agency should face no hurdle in rectifying the poor decisions of its past. Following this Court's reasoning in *USTelecom*, therefore, the Commission's new finding that reclassification adversely reduced broadband infrastructure investment should be accorded deference.

II. Broadband Internet Access Service is a Title I Service Subject to Exclusive Federal Jurisdiction

In the *Order,* the Commission concluded that "regulation of broadband Internet access service should be governed principally by a uniform set of

federal regulations, rather than by a patchwork that includes separate state and local requirements." *Order* at ¶ 194 (JA at __). As such, the Commission preempted "any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order." *Order* at ¶ 195 (JA at __). In the following sections, we demonstrate why the Commission was correct in this decision.

A. *The FCC Did Not Abandon the Jurisdictional Field*

On appeal, Petitioners and their supporting Intervenors argue, *inter alia,* that because the FCC has essentially abandoned the regulatory field, the Agency has no grounds to preempt state actions to regulate broadband Internet access. For example, Government Petitioners argue that an "agency that deems itself to lack authority to regulate a particular practice altogether cannot rely on the same absence of authority to preempt state regulation." Government Petitioners' Brief at 39. Similarly, the supporting Intervenors hyperbolically argue that "[f]or the first time ever, the Commission's majority, over two dissents, renounced all Commission over sight over ISP

practices and eliminated all substantive net neutrality conduct protections." Intervenors' Brief at p. 7. Both claims have no basis in fact.

As this Court—and ultimately the Commission—has recognized, the central pillars of the *2015 Order*—i.e., the "no paid prioritization" rule and the "no blocking" rule—amounted to nothing more than "zero price" rate regulation. *See Verizon,* 740 F.3d at 657 (such rules were intended to "bar providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of $0."); *Verizon,* Silberman J. Dissenting, 740 F.3d at 668 (with intent, the Commission's rules establish "a regulated price of zero."); *Order* at ¶ 101 (JA at __) (the *2015 Order* "imposed price regulation with its ban on paid prioritization arrangements, which mandated that ISPs charge edge providers a zero price."); *see also* G.S Ford and L.J. Spiwak, *Tariffing Internet Termination,* 67 FEDERAL COMMUNICATIONS LAW JOURNAL 1 (2015) (JA at __); L.J. Spiwak, *USTelecom and its Aftermath,* PHOENIX CENTER POLICY BULLETIN NO. 42 (June 2017) (JA at __), *forthcoming* FEDERAL COMMUNICATIONS LAW JOURNAL (Fall 2018). However, it is quite a stretch to argue that the Commission's decision not to impose price regulation on the Internet is the analytical equivalent of a deliberate decision to abdicate its jurisdiction over Title I services altogether.

To illustrate the point, this Court need only to look at the Commission's treatment of Voice over Internet Protocol or "VoIP" services. Going back over almost fifteen years, the Commission made the deliberate decision not to impose legacy Title II common carrier regulations upon this service; instead, it opted for a "light touch" approach under Title I. However, the fact that the Commission declined to impose price and other legacy common carrier regulations on VoIP did not *a fortiori* mean that the Commission abrogated its jurisdiction over the service. To the contrary, the Commission unequivocally maintained then—just as it maintains now—that Title I services were an interstate service subject to exclusive Federal jurisdiction and, as such, state regulations on such services are preempted. *See, e.g., In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service,* FCC 04-27, MEMORANDUM OPINION AND ORDER, 19 FCC Rcd. 3307 (rel. February 19, 2004). This ruling has been the cornerstone of U.S. telecom policy for over a decade and this pre-emption principle was recently reaffirmed by the Eighth Circuit in *Charter Advanced Service v. Lange*, 903 F.3d 715 (8th Cir. 2018) (VoIP is a Title I information service and "[p]reemption of state regulation … is therefore warranted"). Accordingly, the Commission's decision not to impose price regulation on broadband

Internet access in the *Order* was not an act of regulatory abdication of is responsibilities under Title I; instead, the Commission's decision was a laudable act of de-regulatory precision.[6] Thus, as the Commission very much retains its oversight authority over Title I services, states may not try step in to fill a jurisdictional void that does not exist. *Cf., Arkansas Electric Coop. Corp. v. Arkansas Public Serviced Comm'n,* 461 U.S. 375, 383 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un* regulated, and in that event would have as much pre-emptive force as a decision to regulate.") (emphasis in original).

B. *Subjecting the Internet to a Hodgepodge of Different State Regulatory Regimes Would Stymie Infrastructure Investment*

In the *Order,* the Commission concluded that regulation of broadband Internet access service should be "governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements." *Order* at ¶ 194 (JA at __). And for good reason: as the

---

[6] The obvious fact that the Commission imposed a transparency rule in the *Order* also belies the argument that the Commission abandoned the regulatory field. *See Order* at ¶¶ 209 *et seq.* A transparency rule is clearly an act of regulatory oversight; not abdication.

Agency recognized, "allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates." *Id.*

Unsurprisingly, Petitioners and their supporting Intervenors are silent about the potential for a "Death by Fifty State Cuts" for the Internet. However, a 2008 paper published in COMMLAW CONSPECTUS explains that the adverse economic consequences of having providers of a national service comply with different state rules—some of which may even go farther than the national rules—are very real. *See* T.R. Beard, G.S. Ford, T.M. Koutsky and L.J. Spiwak, *Developing A National Wireless Regulatory Framework: A Law and Economics Approach,* 16 COMMLAW CONSPECTUS 391 (2008).

As the paper's economic model details, when state law applies to a product or service that is actually national in scope such as telecommunications or the Internet, even if each state acts with the purist of intentions to protect their respective constituents' interests, there is the risk of harmful conflicts in the rules as the states will inevitably vary in their legal regimes. As a result, there will be *extra-jurisdictional effects* of state-by-state regulation on a national service, making society worse off. To quote former

FCC Chief Economist Michael Katz on state-level business rules, "policies that make entry difficult in one geographic area may raise the overall cost of entering the industry and thus reduce the speed at which entry occurs in other areas." M.L. Katz, *Regulation: The Next 1000 Years,* in SIX DEGREES OF COMPETITION: CORRELATING REGULATION WITH THE TELECOMMUNICATIONS MARKETPLACE 27, 44 (2000). Accordingly, when state and local regulation can spill across borders, economics dictates that society is typically better off with a single national regulatory framework. For this reason, courts have not hesitated to hold that pre-emption is appropriate in the presence of "extra-jurisdictional" effects. *See, e.g., Cotto Waxo Co. v. Williams,* 46 F.3d 790, 793 (8th Cir. 1995) ("Under the Commerce Clause, a state regulation is per se invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state. The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders.") (citation omitted).

CONCLUSION:

For the reasons set forth herein, the Phoenix Center joins the Respondents in urging this Court to deny Petitioners' and their supporting Intervenors' petition for review.

Respectfully submitted,

s/ *Lawrence J. Spiwak*

Lawrence J. Spiwak, Esq.
President and General Counsel
Phoenix Center for Advanced Legal and Economic Public Policy Studies
5335 Wisconsin Avenue, NW
Suite 440
Washington, D.C. 20015
Tel: (202) 274-0235

Dated: October 18, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(e), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 6,337 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2016) used to prepare this brief.

/s/ *Lawrence J. Spiwak*

Lawrence J. Spiwak
October 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on October 18, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Lawrence J. Spiwak*

Lawrence J. Spiwak, Esq.
President and General Counsel
Phoenix Center for Advanced Legal and Economic Public Policy Studies
5335 Wisconsin Avenue, NW
Suite 440
Washington, D.C. 20015
Tel: (202) 274-0235