**Before the**

**Federal Communications Commission**

**Washington, D.C. 20554**

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| In the Matter of  Restoring Internet Freedom | **)**  **)**  **)** | WC Docket No. 17-108 |

REPLY COMMENT

**Introduction**

The BroadBand Institute of California (BBIC) respectfully submits the following comments in the above referenced docket. The current rules constitute a reasoned response to the courts’ rulings. The current rules have not discouraged ISP investment, nor have they adversely affected minority and low-income access to the internet. It is the loss of the current rules and of Lifeline funding that is likely to diminish internet access.

**Statement Of Interest**

The BroadBand Institute of California (BBIC) is a law and public policy institute at the Santa Clara University School of Law engaging in research and education in the areas of technology regulation and public policy.

1. **The FCC’s Current Rules Constitute A Reasoned Response To The Courts’ Rulings**

The Commission’s reclassification of broadband internet access service providers (BIASPs) as providers of telecommunication services pursuant to Title II correctly followed precedent established by the Courts in *Brand X* and *Verizon.[[1]](#footnote-1)* The question of whether the Commission had the authority to classify BIASPs as information or telecommunication service providers first surfaced as an issue following the 2002 Declaratory Ruling.[[2]](#footnote-2) In that ruling, the Commission determined the provision of broadband Internet access was an information service. In 2005, the Supreme Court reversed the Ninth Circuit’s decision that cable modem service was a telecommunications service rather than an information service and upheld the Declaratory Ruling in *Brand X*. The Court held that the word “offering” in the Communications Act’s definitions of “telecommunications service” and “information service” are ambiguous, and that the Commission’s finding that cable modem service is a functionally integrated information service was a permissible, though perhaps not the best, interpretation of the Act.[[3]](#footnote-3) The current *Order* simply employs the same authority to interpret the existing ambiguity in light of changed circumstances. As a result of the Commission’s updated analysis,[[4]](#footnote-4) the Commission determined that BIASPs currently offer end-users a telecommunications service.

Reclassifying BIASPs as providers of telecommunications services under Title II, was the appropriate method for applying open and transparent rules to the Internet.

# A Reliance On Section 706 Is Misplaced

Members of the current Commission have suggested that the Commission could have achieved its goal of an open and transparent Internet without subjecting BIASPs to the “legal uncertainty” of Title II by utilizing the Commission’s general authority under Section 706. This argument has already been tried by the Commission and rejected by the Court in *Verizon*. In *Verizon*, the Court explained the Commission’s proposed anti-blocking, anti-discrimination and anti-throttling open Internet rules were *per se* common carriage regulations.[[5]](#footnote-5) Although the *Verizon* Court found many of the Commission’s motivations for applying common carriage regulations to BIASPs justified by the record below, ultimately application of *per se* common carriage regulation to service providers not classified as common carriers contravened the 1996 Act and thus was impermissible.[[6]](#footnote-6) Based on the Verizon court’s holding the Commission rightly concluded that reclassification was a necessary predicate to application of the open internet rules to BIASPs.

# Title II Regulation Does Not Deter Continued Investment In Broadband Infrastructure, Despite Comments To The Contrary

The current Commission suggests that the open internet rules are likely to cause a reduction in investment in broadband networks. Further, that the diminution of investment may in turn undermine broadband adoption by economically disadvantaged individuals and households that are disproportionately but not predominantly people of color.

In adopting the rules, the previous Commission took care to account for the tremendous investment associated with the expansion of Internet infrastructure. Among other things, the Commission expressly eschewed the future use of prescriptive, industry-wide rate regulation and forbore from application of 27 provisions of Title II of the Communications Act and over 700 Commission rules and regulations.[[7]](#footnote-7) The Commission made clear that its “light-touch” regulatory framework allows consumers to continue to enjoy unfettered access to the Internet over fixed and mobile broadband connections, and gives innovators the ability to access hundreds of millions of consumers, while network operators continue to reap the benefits of their investments.

Title II regulation has not deterred continued investment in broadband infrastructure, despite assertions to the contrary. “[N]ot a single publicly traded US ISP has told its investors (or the SEC) that Title II negatively impacted its own investments”[[8]](#footnote-8) Title II hasn’t hurt network investment, according to the ISPs themselves.[[9]](#footnote-9) Moreover, it is not the application of Title II but the loss of net neutrality rules and Lifeline that are feared likely to reduce minority and low income internet access.[[10]](#footnote-10) For these reasons, there is no need to repeal or replace the current rules.



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1. *Verizon v. F.C.C.,* 740 F.3d 623 (D.C. Cir. 2014) [↑](#footnote-ref-1)
2. Declaratory Ruling and Notice of Proposed Rulemaking, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd 4798 (2002). [↑](#footnote-ref-2)
3. *Brand X Internet Services,* 545 U.S. 981. [↑](#footnote-ref-3)
4. *Infra* (Section B). [↑](#footnote-ref-4)
5. *Verizon*, 740 F.3d 658. [↑](#footnote-ref-5)
6. *Id*. at 650 [↑](#footnote-ref-6)
7. *Id*. at ¶ -15-24. [↑](#footnote-ref-7)
8. https://arstechnica.com/information-technology/2017/05/title-ii-hasnt-hurt-network-investment-according-to-the-isps-themselves/ [↑](#footnote-ref-8)
9. https://consumerist.com/2016/02/09/did-net-neutrality-kill-broadband-investment-like-comcast-att-verizon-said-it-would/ [↑](#footnote-ref-9)
10. <http://www.laweekly.com/news/the-end-of-net-neutrality-could-be-bad-for-heavily-minority-cities-like-los-angeles-8168043>; http://[www.cnet.com/news/do-isps-pay-minorities-to-oppose-net-neutrality/](http://www.cnet.com/news/do-isps-pay-minorities-to-oppose-net-neutrality/); <https://openmedia.org/en/net-neutrality-worth-upholding>; https://consumerist.com/2016/02/09/did-net-neutrality-kill-broadband-investment-like-comcast-att-verizon-said-it-would/ [↑](#footnote-ref-10)