ITIF argued in an amicus brief that strong public policy justifications supported the FCC’s change of course in its Restoring Internet Freedom order.

Strong public policy justifications supported the FCC’s change of course in its RIF Order. The RIF Order reduces barriers to investment in broadband infrastructure and promotes innovation both in the provision of broadband services and throughout the broader Internet system by (1) restoring the light-touch regulation of BIAS as an “information service” under Title I of the Telecommunications Act of 1996 (the “Act”) rather than as a “common carrier” service under Title II of the Act, (2) rejecting bright-line conduct rules related to potentially beneficial network practices, and (3) preempting inconsistent state and local regulation.

Available evidence, including analysis conducted by ITIF, suggests that the temporary Title II classification of broadband providers depressed investment. This decline likely arose from the uncertainty created by the FCC’s sweeping change to the fundamental regulatory structure for BIAS in 2015, combined with concern about a potential slide into even more onerous common carrier regulations, including price controls which the FCC could have, but chose not to impose in its Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (the “Title II Order”).

Fears of a decline in aggregate broadband investment following the Title II Order appear to have been borne out: Basic analysis of BIAS providers’ financial documents indicate reduced investment after the Title II Order.4 In the public policy debate surrounding the impact of the Title II Order, ITIF compared conflicting analyses of investment data, seeking to explain the disparate findings of a fairly simple empirical question—was investment up or down after Title II?5 ITIF found that, with
a modest attempt to control for unrelated capital expenditures (such as excluding the construction of a mobile network in Mexico), the numbers could be reconciled.6 ITIF estimated a two to three percent decline in investment after the Title II Order.7

This investment decline may, of course, have been due to a multiplicity of factors, and the more important, if more difficult to answer, policy question is what investment would have been “but for” the imposition of Title II. Nevertheless, this rare decline in U.S. broadband investment, which was unprecedented outside of a recession, provides strong support for the policy correction set out in the RIF Order.

The Title II Order also unnecessarily stifled innovation. The common carrier designation and strict conduct rules set out in the Title II Order likely undermined the ability of BIAS providers to compete and differentiate their services generally. The overly restrictive ban on paid prioritization also diminished the ability of service providers to offer guaranteed levels of performance, potentially restricting the development of applications delivering services that impose greater demands on broadband networks. Prioritization can be implemented such that it dramatically improves the functionality of some applications without detrimentally impacting the perceived performance of others. A case-by-case analysis of prioritization practices, informed by antitrust principles, such as that implemented by the RIF Order, would better encourage innovation in real-time applications while protecting against abuses of the technology. See RIF Order ¶¶ 148-153.

In addition, the RIF Order’s preemption of inconsistent state-level regulation is sound public policy and necessary to ensure that the benefits of the RIF Order’s light touch regulatory framework—i.e., increased investment and innovation—accrue to consumers. A uniform federal framework (1) reduces regulatory complexity, (2) avoids a patchwork of inconsistent or even conflicting state laws with requirements that may be difficult or impossible to comply with, (3) provides predictability to both BIAS providers and their customers, and (4) promotes competition by reducing barriers to entry associated with the high cost of complying with parallel regulatory frameworks. Moreover, the technological framework of the Internet is less reliant on local infrastructure than predecessor telephone networks, further undermining a traditional rationale for state jurisdiction in the telecommunications space and further justifying preemption of state-by-state regulation of BIAS.

For all of these reasons, the Court should reject Petitioners’ challenges to the RIF Order.