Comments for the Record

Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination

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Introduction and Summary

The Federal Communications Commission (FCC) plays an important role in promoting the deployment of high-bandwidth Internet connectivity to all Americans. Congress tapped the agency to explore current inequities in broadband access and issue rules to alleviate them.[1] As the FCC considers different approaches to promoting equal access and facilitating digital discrimination in this NPRM,[2] the agency should carefully focus on the specific directives from Congress as well as practically approach the issue to promote access and investment in networks. This is a critical opportunity for the FCC to address the digital divide, and it can take major, positive steps while also allowing businesses to continue to grow and operate as intended.

In achieving this goal, however, the FCC is bound by the text of the statute and the directives from Congress. To that end, the FCC should adopt a disparate treatment standard based on the intent of the provider for preventing digital discrimination. This standard best complies with the direction from Congress, while also promoting the goals of the statute: facilitating equal access. Regardless of the standard the FCC adopts, it should provide clear guidelines and affirmative defenses for firms to ensure that they can comply with the law. Further, the FCC should remain the sole enforcement mechanism for complaints. Finally, the FCC should focus on access alone when reviewing complaints, but still work to promote adoption through its existing authority.

The FCC Should Use a Disparate Treatment Standard for Digital Discrimination

Congress directed the FCC to facilitate equal access to broadband Internet access service (BIAS), taking into account the issues of technical and economic feasibility presented by that objective, including preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.[3] When designing rules to prevent digital discrimination, the FCC should target those instances when broadband providers intentionally discriminate rather than when deployment results in a disparate impact.[4] This approach would best adhere to the text of the statute and relevant case, as well as maximize the future investment in broadband networks.

A Disparate Treatment Standard Best Adheres to the Text of the Statute and Relevant Case Law

The FCC implements the statute as directed by Congress and cannot go beyond the authority granted to it. As the statute makes clear, Congress meant for the FCC to facilitate equal access to broadband, but the specific direction to prevent digital discrimination focuses only on the intent of the providers.

Specifically, the language referring to digital discrimination does not have the same prohibitions as other civil

rights statutes that allow for disparate impact analysis, nor does it refer to the consequences of the actions, but instead focuses on the mindset of the actor. Antidiscrimination laws "must be construed to encompass disparate-impact claims when their text refers to consequences of actions and not just to the mindset of the actors."[5] When statutes refer to the intent of actors alone, the statute is best read to address when the actors intentionally engage in some prohibited conduct.

Section 1754(b) grants the FCC the authority to adopt rules to facilitate equal access, leaving it up to the agency to utilize different tools to achieve that goal.[6] As TechFreedom explains, "facilitate" is the key term in the statute.[7] Facilitate in this context means to make easier or help bring about equal access to broadband.[8] Congress, however, specifically included one tool available to the FCC to achieve that goal: "preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin."[9]

This starkly differs from traditional civil rights statutes that specifically prohibit some form of discrimination. While one tool to help facilitate equal access is a prohibition on digital discrimination, the statute is written so that this prevention of digital discrimination is simply one means of facilitating equal access. In other words, the prevention of digital discrimination is not tethered to the congressional direction to facilitate equal access.

If Congress intended for the FCC to use a disparate impact standard, Congress would have designed the statute to ensure that Americans have equal access to broadband regardless of income level, race, ethnicity, color, religion or national origin. For example, in *Griggs v. Duke Power Co.*,[10] the statute prohibiting an employer to "fail or refuse to hire or discharge, or otherwise to discriminate any individual with respect to his compensation, terms, conditions, or privileges of employment of employment because of such individual's race, color, religion, sex, or national origin…."[11] As the Court explained, the language of that statute clearly focuses on effects: If conduct results in discrimination, it violates the law.[12] In contrast, Section 60506 uses its existing authority to facilitate equal access, with preventing digital discrimination simply as one tool for doing so.[13] The statute lacks the type of broad language referencing effects that must be present for a disparate impact standard to apply, and therefore the FCC must utilize an intent standard when preventing digital discrimination.

A Disparate Treatment Standard Would Best Balance the Goals of Facilitating Equal Access and Promoting Investment and Innovation in Broadband Networks

Facilitating equal access to broadband is necessarily an outgrowth of the larger deployment picture. If broadband providers invest more resources into deploying and maintaining broadband networks, more communities will have access to broadband as the networks are built out. As a baseline, the FCC should utilize its existing tools to lower risk and increase certainty for investing in future broadband networks.

The broadband industry has been doing its part. In 2021, providers invested more than $86 billion in capital expenditures, an 8.3 percent increase from the expenditures in 2020.[14] These expenditures have led to an expected 50 million additional households gaining access to fiber broadband in the coming years[15] and 250 million people having access to a baseline fixed wireless connection for home.[16] As long as the providers aren't intentionally discriminating against specific consumer groups, increased competition will inevitably drive more broadband options at higher speeds and lower costs for those currently without equal access. The FCC should ensure its regulations do not prevent this growth and competition.

Unfortunately, while well intended, a disparate impact standard will likely harm that investment, especially in areas that may need basic coverage. If any investment decision could have a disparate impact, deciding to build

out a network into a given community would come with additional risk. As previous Commission proceedings have highlighted, uncertainty and additional risks will negatively impact broadband investment.[17]

This is true even for areas lacking coverage or with limited options. For example, if a low-income community has a single broadband provider, and another provider enters the market, prices in that community will likely fall as the firms compete.[18] If a neighboring community with a lower income level (or otherwise with a larger makeup of a protected class) doesn't receive similar deployments, the FCC may find the company has violated the agency's rules. As a result, the provider may not make the initial investment into the first community at all, further limiting competition between providers and access to high-speed broadband at lower prices for consumers.

To the extent that some communities still lack broadband, the best solution is to provide certainty to providers. The FCC has the authority to continue its work on permitting reviewing for collocations[19] and pole attachments,[20] making both licensed and unlicensed spectrum available for commercial use, and limiting burdensome regulations. To the extent the FCC wants to address the digital divide, these tools provide the best solution.

If the FCC Adopts a Disparate Impact Standard, It Should Provide Clarity to Providers Regarding What Constitutes a Violation

As explained above, Congress clearly meant for the FCC to target intentional discrimination in the deployment of broadband services, and an intent-based approach best serves the goals of facilitating equal access to broadband. If, however, the FCC decides to impose a disparate impact standard, the FCC should make clear to providers which types of deployments and practices would violate that standard, as well as provide affirmative defenses. This legal certainty will be critical for providers to continue to invest in U.S. broadband networks.

Congress contemplated situations in which there are many factors that contribute deployment decisions. Section 60506 requires the FCC to consider "issues of technical and economic feasibility presented" by facilitating equal access when designing rules preventing digital discrimination.[21] Congress understood that these types of factors significantly affect deployment decisions, and not all deployment decisions that resulted in disparate impact should have been or even could be prevented by the FCC.

This is for good reason: Without certainty regarding the types of decision, broadband providers may simply choose to forgo deployments in areas with less potential return on investment as the risk of additional deployment could lead to liability. If the FCC clearly lays out the types of decisions that give rise to this liability, however, the potential risks to broadband providers are diminished and businesses can more confidently invest in their networks.

If the FCC decides to utilize a disparate impact standard for preventing digital discrimination, it should clearly define the types of deployment patterns that would give rise to liability, as well as provide broadband providers clear guidance on the types of affirmative defenses they can assert to show that the decisions were subject to the technological or economic feasibility of alternative decisions. For example, cable providers are required to build out and cover the geographic area of their franchise agreement with the state or local government. These geographic boundaries are set out and covered by the franchise agreement and govern the deployment decisions of the provider.[22] If a cable company is complying with the terms of a franchise agreement, the FCC should provide clarity that deployment decisions will not constitute digital discrimination or otherwise give rise to liability. Similarly, mobile networks are inherently limited by access to spectrum licenses from the FCC, and if

a provider lacks a license to operate in a given area, they cannot deploy there. While purchasing licenses is ultimately up to the carrier, bidding for licenses is competitive and a provider may not have the resources to outbid rivals. Therefore, the FCC should provide clarity that failing to provide coverage to an area where the provider lacks the licenses to operate will not lead to liability for the provider.

These are just a couple of examples, but they provide some insight as to why providers may deploy broadband in a manner that connects some communities and not others. Clear guidance to providers for these types of situations will limit potential risk and maximize broadband investment while still achieving the agency's directive of preventing digital discrimination.

The FCC Must Stay Within the Authority Congress Granted to It

While it may be tempting for the FCC to attempt to seize additional authority from the provisions of the act, the Supreme Court has made clear that Congress doesn't hide elephants in mouseholes.[23] When developing and enforcing rules, the FCC is bound by the authority Congress granted to it, and exceeding the authority will inevitably result in legal challenges and further uncertainty for providers.

For example, the FCC may be tempted to broadly interpret Section 50506 to impose buildout requirements or rate regulation disguised as protections against digital discrimination, whether that be through ex ante rules or ex post enforcement standards through the complaint process. Such regulation of broadband providers would exceed the authority Congress granted to it, both in the Communications Act and Section 60506.

The D.C. Circuit explained in the *Verizon* that the FCC cannot treat broadband providers as a common carrier without classifying the service as a Title II telecommunications service.[24] Clearly, any kind of rate regulation would inevitably treat broadband providers as common carriers and run afoul of the decision. And while buildout requirements often apply to broadband providers, these usually stem from franchising requirements or specific service rules associated with spectrum auctions.

If Congress desired to grant the FCC additional authority, it could have done so and made such a grant of authority clear. The Supreme Court recently clarified the major questions doctrine which requires clear congressional authority for regulations dealing with an issue of major economic or political significance.[25] As Justice Kavanaugh has laid out, common carrier regulation of broadband providers clearly reaches these threshold requirements.[26] Such regulations would lower potential revenue, and as potential revenue decreases, broadband providers would likewise have less incentive to invest in expanding and improving coverage for their users. For example, the Phoenix Center found that the threat of reclassification alone lowered investment by around $32–40 billion annually, with the total cost of the FCC reclassification in 2015 amounting to about a year's worth of total investment.[27] The investment numbers also cause significant effects downstream: Services such as 4K video and Zoom calling need significant bandwidth, and real-time applications, such as online gaming, require very low latency to ensure that lag from the signal origin to the signal receipt does not limit the functionality of the application. Network reliability can also be the difference between life and death, and if broadband providers lack a financial incentive to continually expand coverage and improve the quality of their services, public safety applications may not run as smoothly as they otherwise would. Common carrier regulation of broadband directly impacts these applications and functionalities.

With the significance of common carrier regulation of broadband, Congress must clearly delegate the authority to impose such regulation to the FCC.[28] In the context of reclassification, it is unclear that Congress granted that authority. This proceeding goes beyond even that analysis, however, as the FCC isn't proposing to

reclassify broadband as a Title II service. Instead, it is implementing one directive: to facilitate equal access. If Congress intended Section 60506 to be a broad grant of authority to the FCC, it would have made this explicitly clear. Without that kind of clear grant of authority, the FCC must only promulgate rules under its existing authority to help meet those goals. The agency cannot go beyond that authority to impose rate regulation or broad connectivity requirements that some have advocated for in this docket.

Notably, this also goes well beyond the promulgation of rules and into ex post enforcement through the complaint process envisioned by Congress. If the FCC continues to respond to complaints and hold providers liable for employment decisions that don't conform with the FCC's preferences, for failing to offer broadband at specific prices, or for myriad other perceived violations, the FCC will still be regulating broadband providers as common carriers. If Congress meant for this outcome, it would be explicit and not hide the grant of authority in such a small statute.

The FCC Should Handle All Complaints from Those Seeking Access to Broadband

The FCC has long handled consumer complaints regarding quality of communications services and has the experience, staff, and expertise to successfully navigate consumer complaints. The NPRM raises the question of whether the agency should allow state and local enforcement, and potentially allow consumers to seek a private right of action under the law. This would be an inefficient approach.[29]

An influx of litigation and administrative proceedings can limit resources for further broadband deployment. When a firm must defend a lawsuit or undergo an administrative proceeding, it is very costly to compile evidence, file briefs, and hire consultants.[30] While these costs are a part of doing business, allowing states and local governments to bring their own actions compounds these costs, which only rise as different standards are established in different states.[31] If individual citizens can bring their own litigation, the number of cases will rise exponentially, and the merits of each individual case will vary much more significantly than if the FCC reviewed consumer complaints and better filtered out the meritless complaints. Therefore, the FCC should remain the sole venue for bringing action under the law.

The Commission Should Focus on Access to Broadband When Evaluating Complaints

The FCC asks whether it should consider policies and practices related to broadband access such as "marketing or advertising, service provision, network, maintenance, and customer service, service provider use of algorithms to make decisions about deployment and other aspects of providing internet service, and privacy and security practices."[32] Even beyond the scope of the prohibition on digital discrimination, the FCC should narrowly focus on access to broadband when reviewing complaints or designing rules related to equal access.

As explained above, the FCC is bound by the authority granted by Congress, and Section 60506 doesn't grant the agency widespread authority to regulate every aspect of broadband deployment. Equal access, as defined by the statute, means the "equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality metrics in a given area for comparable terms and conditions."[33] Congress designed the statute intentionally: If a consumer cannot access broadband services, they will fall behind those who can. Instead of focusing on unrelated aspects of broadband service, Congress directed the FCC to ensure that those Americans who want broadband can get it, and regulating all aspects of broadband to "facilitate equal access" goes far beyond what Congress intended.

At the same time, focusing entirely on access misses a major point of the discussion. While beyond the scope of

this proceeding, the FCC should continue to explore why many individuals can access broadband, and with the variety of subsidy programs afford broadband, but still choose not to subscribe. As the Phoenix Center has explained, interest remains a major barrier to broadband adoption,[34] and targeting this interest gap could be a worthwhile avenue for the FCC. When doing so, however, the agency should be careful not to impose burdensome obligations or legal risks on broadband providers, as this could impact investment in broadband deployment.

Conclusion

This proceeding presents the FCC with an important opportunity to improve access to broadband. The agency should narrowly focus on the goals outlined by Congress and not extend beyond the authority granted to it, however. To achieve that goal, the FCC's best path forward is to target cases in which providers intentionally discriminate against a protected class of users, and then use its existing authority to facilitate the deployment of broadband to more communities.

[1] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, § 60506 (2021) (codified at 47 U.S.C. § 1754).

[2] *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Proposed Rulemaking (Dec. 22, 2022) (NPRM), https://www.fcc.gov/document/fcc-takes-next-steps-combat-digital-discrimination-0.

[3] 47 U.S.C. 1754(b)(1).

[4] Comments of Jeffrey Westling, In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (May 16, 2022), https://www.fcc.gov/ecfs/document/1051644595239/1.

[5] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys, 576 U.S. 519, 533 (2015).

[6] 47 U.S.C. 1754(b)(1).

[7] Comments of TechFreedom, In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 p. 7 (Ma7 16th, 2022), https://techfreedom.org/wp-content/uploads/2022/05/TechFreedom-Digital-Discrimination-NOI-Comments.pdf.

[8] *Id*.

[9] 47 U.S.C. 1754(b)(1).

[10] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[11] 42 U.S.C. § 2000e-2(a).

[12] Griggs v. Duke Power Co., 401 U. S. 424 (1971).

[13] 47 U.S.C. § 1754.

[14] Jonathan Spalter, "America's Broadband Providers Invested $86 B In Networks in 2021," USTelecom (July 18, 2022), https://www.ustelecom.org/2021-infrastructure-investment/

[15] Ibid.

[16] Linda Hardesty, "AT&T has over 500,000 fixed wireless subs, but its focused on fiber," *Fierce Wireless* (Feb 4, 2022), https://www.fiercewireless.com/wireless/att-has-over-500000-fixed-wireless-subs-its-focused-fiber.

[17] For example, following the Open Internet Order, ISPs were 7.17% less likely to enter a census block during nay 6-month period from June 2015 to December 2016 than from June 2010 to December 2014. Dane Bourcy Burkholder & Chin Jie Lim, "Regulatory Uncertainty: The Impact of the 2015 Open Internet Order on Broadband Infrastructure Investment," *Honors Thesis at The Trinity College of Duke University* p. 37 (Apr. 18.2018), https://sites.duke.edu/djepapers/files/2019/11/daneburkholder_chinjielim-dje.pdf.

[18] Dan Mahoney and Greg Rafert, "Broadband Competition Helps to Drive Lower Prices and Faster Download Speeds for U.S. Residential Consumers," *Analysis Group* (November 2016), https://www.analysisgroup.com/uploadedfiles/content/insights/publishing/broadband_competition_report_november_20 .

[19] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79 et al., Declaratory Ruling 33 FCC Rcd 9088 (Sept. 27, 2018), https://www.fcc.gov/document/fcc-facilitates-wireless-infrastructure-deployment-5g.

[20] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking (Mar. 18, 2022), https://www.fcc.gov/document/fcc-seeks-comment-resolving-disputes-over-pole-replacement-costs.

[21] 47 U.S.C. § 1754(b).

[22] The Cable Franchising Authority of State and Local Governments and the Communications Act, *Congressional Research Service* (January 3, 2020), https://crsreports.congress.gov/product/pdf/R/R46147.

[23] Whitman v. American Trucking Associations, 531 US 457, 468 (2001), https://supreme.justia.com/cases/federal/us/531/457/#tab-opinion-1960847.

[24] *See* Verizon v. FCC, No. 11-1355 (D.C. Cir. 2014), https://www.fcc.gov/document/verizon-court-opinion.

[25] *See West Virginia v. Environmental Protection Agency*, No. 20-1530 (2022), https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

[26] U.S. Telecom v. FCC, No. 15-1063 (D.C. Cir. 2017) (Kavanaugh Dissenting), https://law.justia.com/cases/federal/appellate-courts/cadc/15-1063/15-1063-2016-06-14.html.

[27] George S. Ford, "Net Neutrality, Reclassification and Investment: A Counterfactual Analysis," *Phoenix Center Perspectives*

(Apr. 25, 2017), https://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf.

[28] Jeffrey Westling, "West Virginia v. EPA and the Future of Net Neutrality," *American Action Forum Insight* (Aug. 23, 2022), https://www.americanactionforum.org/insight/west-virginia-v-epa-and-the-future-of-net-neutrality/.

[29] NPRM at ¶¶ 76-77.

[30] For example, tech platforms defending lawsuits related to content moderation even if granted summary judgment can exceed $150,000. "Section 230: Cost Report," *Engine* https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c6c5649e2c483b67d518293/1550603849958/Sect
.

[31] For example, an ITIF report found that a patchwork of state privacy laws could impose out-of-state costs of over $100 billion annually. Daniel Castro et al., "The Looming Cost of a Patchwork of State Privacy Laws," *ITIF* (Jan. 24, 2022), https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws/.

[32] NPRM at ¶ 31.

[33] 47 U.S.C. § 1754(a)(2).

[34] Press Release, "New Government Data Confirms That Relevance and Not Price is the Primary Reason For Lack of Broadband In the Home," *Phoenix Center* (June 9, 2022), www.phoenix-center.org/perspectives/Perspective22-03PressReleaseFinal.pdf.