Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination	)	GN Docket No. 22-69

REPLY COMMENTS OF JEFFREY WESTLING[1]

I. Introduction and Summary

The record demonstrates strong support among all parties to achieve the goals of preventing digital discrimination and facilitating equal access to broadband services. As the Commission evaluates the different arguments in the record on how to achieve these goals, it should carefully consider the balance between facilitating equal access and preventing digital discrimination. Going too far in the pursuit of the latter (e.g., by adopting a disparate impact standard) could have negative consequences for facilitating equal access, such as reducing investment in buildout and raising prices.

These reply comments address just two arguments made in the record. Both are critical to a successful regulatory regime. First, despite suggestions to the contrary, Section 60506 is not a broad grant of authority that allows the Commission to impose sweeping, utility-style regulations or universal service obligations on broadband providers.[2] Second, though some argue the Commission should wait, the Commission should establish clear safe harbors for broadband providers.[3]

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[1] Jeffrey Westling is the Director for Technology & Innovation Policy at the American Action Forum. These comments represent the views of Jeffrey Westling and not the views of the American Action Forum, which takes no formal positions as an organization.

[2] *See* Comments of Free Press, GN Docket No. 22-69 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/102211504317983/1.

[3] Comments of Public Knowledge, Benton Institute for Broadband and Society, and Electronic Privacy Information Center, GN Docket No. 22-69 (Feb. 21, 2023) ("Comments of Public Knowledge et al."), https://www.fcc.gov/ecfs/document/10221096795641/1.

While the record is rife with debate on what successful prohibitions on digital discrimination could look like, these two aspects of the debate will have a significant impact on the eventual outcome of this proceeding and the impact Commission rules will have.

II. Section 50605 Is Not a Broad Grant of Authority

Some commenters in the record argue that Section 60506 gives the Commission "very broad authority to enact the rules it deems necessary to facilitate equal access to broadband service."[4] As Free Press explains, "[i]n the absence of any legislative history, the Commission has no choice but to interpret the law before it as it is written…."[5] On the contrary, the law as written does not grant the Commission broad authority to impose regulations Congress never delegated to it.

Section 60506 establishes equal access as a policy goal, not a mandate. First, the terms Congress uses regarding digital access are "facilitate" and "promote."[6] The terms direct the agency to use its existing tools to make equal access a policy goal but does not grant broad authority to make equal access a requirement. Instead, the only specific direction Congress gave the FCC was to prohibit digital discrimination based on income level, race, ethnicity, color, religion, or national origin. This directive serves the policy goal of facilitating equal access, but again the policy goal is not a direct grant of authority. As TechFreedom explains "[t]rue, the term 'equal access' is defined in terms of 'opportunity,' but such opportunities are a policy end to be 'promoted' or 'facilitated': 'equal access' is clearly the object the verbs 'facilitating' and 'promoting.' Unsurprisingly, the definition of 'equal access' falls among two other statement[s] of policy' in Subsection 60506(a).'"[7]

[4] Comments of Free Press at p. 11.
[5] *Id*.
[6] 47 U.S.C. § 1754(b)-(c).
[7] Comments of TechFreedom, GN Docket No. 22-69 p. 12 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10222163901358/1.

The Commission clearly has some rulemaking authority in this provision, and some courts have found similar provisions to be grants of regulatory authority when used as ancillary authority.[8] The best reading of the statute, however, is that the Commission should use its existing tools to target those goals, outside of the specific grant of authority to make digital discrimination illegal.

If the Commission attempts to use the statute as a broad grant of authority to target goals by requiring "universal service" or otherwise treat broadband as a regulated utility, it will almost certainly run afoul of the major questions doctrine. In *West Virginia v. EPA*, the court explained that "there are 'extraordinary cases' in which the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic or political significance' of that assertion, provide 'reason to hesitate before concluding that Congress' meant to confer such authority."[9] Requiring universal service obligations, or otherwise imposing price controls to facilitate equal access, is exactly the type of regulatory overreach about which the Court is concerned.[10]

In context, the prohibition of digital discrimination is a minor portion of the congressional goal of facilitating equal access. Instead, Congress' main tool for facilitating equal access was the Broadband Equity, Access and Deployment Program.[11] This program provides $42.5 billion for broadband deployment, targeting unserved areas that lack any access to broadband.[12] Of note, Congress delegated

[8] For example, Section 706(a) directs the Commission to "encourage the deployment … of advanced telecommunications capability … by utilizing … price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or regulating methods that remove barriers to infrastructure investment." The DC Circuit found that the legislative history, as well as the limiting principles in the specific provision, support a reading that the provision does grant the Commission ancillary authority to promulgate rules governing broadband deployment.

[9] West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587, 2608 (2022), https://scholar.google.com/scholar_case?case=13324396663598051112&hl=en&as_sdt=20006.

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

[11] NTIA, *Broadband Equity Access and Deployment Program, Notice of Funding Opportunity* (May 2022), https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf.

[12] "Broadband Equity, Access, and Deployment (BEAD) Program," NTIA (last visited Mar. 31, 2023), https://broadbandusa.ntia.doc.gov/taxonomy/term/158/broadband-equity-access-and-deployment-bead-program.

this program to the National Telecommunications and Information Administration in the Department of Commerce, not the FCC. If Congress wanted to use Section 60506 as an all-encompassing authority that allows the FCC to use any tool it sees fit to facilitate equal access, it would have made the directive explicit.

Instead, some commenters suggest that this provision is a broad mandate on the FCC to impose a wide range of obligations, including those that treat broadband as a common carrier.[13] The Commission has, in the past, relied on provisions largely focused on policies such as Section 706 to issue rules regulating broadband service. Even when courts found such provisions to grant the Commission authority, the provisions don't grant the Commission authority to regulate broadband as a common carrier absent reclassification as such. If the Commission attempts to use this authority to regulate broadband as a common carrier without reclassification, it will certainly fail.

Even with reclassification, the major questions doctrine as laid out by the Supreme Court in *West Virginia v. EPA* casts doubt on the use of provisions such as Section 706 and Section 60505 as a broad grant of authority. Imposing requirements such as universal service or rate regulation necessarily lowers potential revenue, and as potential revenue decreases, broadband providers would likewise have less incentive to invest in expanding and improving coverage for their users. A study from 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.[14] If Congress wanted to make a regulatory change to broadband with such a significant impact, it would certainly make that decision clear.

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[13] For example, Free press argues that "unreasonable discrimination in price is perhaps the most impactful and measurable way to harm end users." However, price regulation can only be applied by the Commission to common carriers, and thus any regulation targeting the price that a service is offered would treat broadband as a common carrier. Comments of Free Press at 16.

[14] Dr. George S. Ford, "Net Neutrality, Reclassification and Investment: A Counterfactual Analysis," *Phoenix Center Perspectives* p. 10 (April 25, 2017), https://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf.

To the extent that Section 60506 is a grant of rulemaking authority, the rules must only relate to the process of reviewing complaints about digital discrimination and what types of conduct constitute intentional digital discrimination. It does not grant broad rulemaking authority to transform the regulatory regime governing broadband deployment to achieve the policy goal of facilitating equal access.

III. The Commission Should Establish Clear Safe Harbors in Cases That Deployment Decisions Are Not Based on Protected Criteria

Other commenters argue that the Commission shouldn't provide clear safe harbors for broadband providers, arguing that such safe harbors would provide "a blueprint on how to avoid liability for continuing to bypass exactly those communities and households Congress determined should not be bypassed any longer."[15] To support this argument, Public Knowledge argues that "the Commission lacks an evidentiary record that would allow it to identify circumstances which, if met, would strongly correlate with a lack of digital discrimination and thus a lack of liability."[16] On the contrary, there is significant evidence highlighting both a lack of digital discrimination as well as specific situations in which digital discrimination would be presumptively unlikely.

First, the limited empirical analysis which has looked at digital discrimination suggests that there is no systematic digital discrimination, and safe harbors would therefore be appropriate as the Commission develops its rules. For example, the Phoenix Center conducted an analysis using the following definition for digital discrimination:

> *Under a definition of digital discrimination as difference in the deployment of and / or the quality, terms, and conditions of access to broadband services that are not explained by differences in the profitability of serving the difference areas, but instead reflect the non-economic decisions to underserve protected classes in a manner that*

[15] Comments of Public Knowledge et al. at 46.
[16] *Id*. at 47.

> *cause adverse or negative consequences to some relevant outcome across communities when the profitability of serving the communities is equal.*[17]

The Phoenix Center study looks primarily at the fiber deployment and broadband speeds, as fiber is just one means of deploying broadband and speeds can serve as a secondary metric for evaluating discrimination. Separating economic factors from race and income, the study finds no meaningful evidence of digital discrimination in either race or income for fiber deployments of download speeds. This is largely because profit maximizing firms will not forgo profits.

Because there is a lack of systematic digital discrimination, the Commission should establish clear safe harbors where profitability is largely impossible. When a wireless firm offers coverage but doesn't have the capacity in an area where it lacks operating rights, the only option for upgrading that network may be to purchase additional licenses. Considering the costs of doing so at auction alone can be prohibitive, and engaging in the secondary market is largely restricted by Commission rules,[18] a wireless provider often simply cannot expand coverage. Establishing a safe harbor that allows a firm to show it lacks the spectrum assets to expand coverage will have no impact on actual discrimination, while providing legal certainty to providers that purchasing licenses and expanding coverage will not lead to a violation of the digital discrimination rules.

Similarly, cable franchises have strict buildout requirements in their franchise agreement with state and local governments.[19] These requirements largely address coverage in all areas of the franchise, and the provider may lack the ability to provide service outside those areas. Because a franchise comes with oversight from the franchising authority, the chance that a firm would discriminate is minimal. Even if the Commission decides to use a disparate impact standard, the regulatory nature of franchises should

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[17] T. Randolph Beard & George S. Ford, "Digital Discrimination: Fiber Availability and Speeds by Race and Income," Phoenix Center Policy Paper Number 58 p. 5 (September 2022), https://phoenix-center.org/pcpp/PCPP58Final.pdf.
[18] *See generally* Comments of the R Street Institute, WT Docket No. 19-38 (May 19, 2019), https://www.rstreet.org/outreach/comments-on-partitioning-disaggregation-and-leasing-of-spectrum/.
[19] Comments of Jeffrey Westling, GN Docket No. 22-69, p. 6 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221826900877/1.

alleviate concerns of digital discrimination, and therefore a safe harbor is appropriate for the geographic boundaries of the cable franchise.

Beyond these two examples, commenters have highlighted other potential safe harbors that would provide legal certainty to providers and would strongly correlate with a lack of concern about discrimination:

- Compliance with existing obligations for USF, federal, state, and local broadband deployment support[20]
- Areas that are subject to unreasonable state or local permitting, historical preservation laws, or other unreasonable barriers to entry[21]
- Areas that lack proper poles to attach telecommunications infrastructure[22]
- The provider has met or exceeded any applicable buildout requirements on its wireless license[23]

Some commenters suggest the Commission should not establish safe harbors at this point to allow for more flexible enforcement and find evidence of scenarios where a safe harbor may be justified in the future.[24] This ignores the purpose of a safe harbor. Without legal certainty, broadband providers, large and small, will be forced to navigate the potential review of their deployment decisions. And with

[20] Congress used buildout subsidies through programs like BEAD as the main strategy for facilitating equal access in the IIJA. The digital discrimination provisions were a tangential part of this to address those situations where a community should have coverage, but providers intentionally discriminated against that community. To the extent that a provider complies with the buildout obligations designed by the relevant regulator, the potential for intentional discrimination is minimal and a safe harbor is appropriate. *See* Comments of CTIA, GN Docket No. 22-69 p. 24 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221924502851/1.

[21] As explained above, digital discrimination occurs primarily when deployment decisions are not due to a difference in lack of profitability. There has been significant research in recent years highlighting how local permitting review, right-of-way access, zoning laws, and other administrative processes can impose significant barriers to broadband deployment. To the extent that these factors significantly impact potential profit due to high costs of deployment, the Commission should establish a safe harbor for those areas without shot clocks and fee caps on permitting review and access to infrastructure. Comments of CTIA at p. 25.

[22] Pole attachments remain a significant challenge for many providers attempting to reach rural areas, and pole replacements in particular can significantly raise costs or outright restrict deployment into certain areas. Due to these high-costs, the Commission could establish a safe harbor for areas subject to high-pole access rates (such as those areas with municipally owned poles not subject to Commission regulation) or have poles not suitable for broadband deployment and must be replaced. Comments of NCTA, GN Docket No. 22-69, p. 29 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022108466107/1.

[23] Much the same with a cable franchise, wireless providers often have buildout requirements attached to their license to operate. So long as the wireless provider complies with those buildout requirements, as set by the Commission, the provider be in compliance with Commission rules on digital discrimination. Comments of T-Mobile, GN Docket No. 22-69 p. 30 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022132797714/1.

[24] Comments of Public Knowledge et al. at 47.

that uncertainty comes risk, potentially limiting investment outright. If Commission rules lack clarity, that will severely hinder the larger goal of facilitating equal access.

Further, providing safe harbors such as those outlined above would not tie the hands of the Commission moving forward. If the Commission establishes a safe harbor now, but evidence begins to suggest that digital discrimination is still occurring, the Commission can always remove that safe harbor. To do so, it wouldn't need to show that removing the safe harbor is a better policy than having the safe harbor, but simply that a lack of a safe harbor is a reasonable interpretation of the statute.[25] If anything, providing safe harbors up front is a better policy to continue encouraging the deployment of services while collecting data on the types of situations that actually give rise to digital discrimination.

IV. Conclusion

Preventing digital discrimination and facilitating equal access to broadband are critical goals for the FCC, and the transformative power of broadband connectivity can drastically improve the lives of Americans. The Commission must ensure that the rules to prevent digital discrimination support the larger goal of facilitating equal access, and not use this proceeding as a tool for regulatory overreach. By staying laser focused on preventing digital discrimination, as well as utilizing its existing authority to facilitate the deployment of broadband services, the Commission can meet the directive of Congress and ensure no one remains on the wrong side of the digital divide.

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[25] *See* Fox v. FCC, 556 U.S. 502 (2009).