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

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

COMMENTS OF
THE FREE STATE FOUNDATION

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## I. Introduction and Summary

These comments are submitted in response to the Federal Communications Commission's proposed rulemaking to address digital discrimination of access to broadband Internet access service. In these comments, we urge the Commission to adopt an intent-based definition of digital discrimination of access to broadband services because it is consistent with the text of Section 60506 of the Infrastructure Investment and Jobs Act as well as relevant Supreme Court jurisprudence. An intent-based definition of digital discrimination is also supported by policy considerations in keeping with the statute's objective of facilitating equal access. By contrast, imposing liability on broadband Internet service providers (ISPs) by employing an unintentional disparate impact standard lacks support in the statutory text. And it would harm investment and deployment to hard-to-reach areas. Also, these comments emphasize other ways that the Commission should tailor its rules to ensure that they operate within the agency's delegated authority and serve the purpose of facilitating equal access.

[1] These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow and Director of Policy Studies. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

Section 60506(b) of the Infrastructure Investment and Jobs Act requires the Commission to adopt rules to facilitate equal access to broadband Internet services and to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." It also requires that the rules for facilitating equal access take into account "issues of technical and economic feasibility." Notably, the Commission's proceeding appears to have yielded zero evidence of intentional discrimination by ISPs in deploying broadband.

Indeed, there is affirmative evidence that digital discrimination, intentional or otherwise, is not occurring in the United States. Form 477 data and other reports indicate that well above 90% of Americans have access to fixed broadband services offering 25 Mbps/3 Mbps speeds, and an even higher percentage have access to 4G LTE or 5G mobile broadband. Broadband coverage percentages are particularly high in urban areas in which many non-White Americans reside.

Significantly, the broadband market's competitive conditions provide strong incentives for broadband ISPs to serve as many customers as they can. Broadband ISPs have obvious financial incentives to maximize returns on their investments by retaining and adding subscribers. The likelihood of broadband ISPs engaging in discrimination is low because such conduct would risk losing subscribers to rivals and inflict loss of goodwill.

Section 60506(b)'s requirement that the Commission adopt rules prohibiting digital discrimination "based on" protected group status as well as the absence of statutory catchall terms such as "results in" or "otherwise adversely affects" show that intent is a required element of a finding of digital discrimination. This reading of the law is consistent with Supreme Court precedents, such as *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015), in which the court found that similar statutory catchall terms

provided the basis for applying a disparate impact standard, or at least were sufficiently ambiguous to provide a basis for deferring to agency interpretations of those particular statutes. In this case, an intent-based standard is sufficient to address any alleged harms, including actions predicated upon facially neutral criteria that are, in fact, a pretense for invidious discrimination.

By contrast, the unintentional disparate impact definition of digital discrimination proposed by the Commission is inconsistent with the statute. If Congress had favored a consequentialist approach by authorizing unintentional disparate impact liability, it is highly unlikely it also would have included Section 60506's requirement that due regard be given to technical and economic feasibility of deployments. Moreover, unintentional disparate impact liability likely would chill investment and infrastructure buildout to difficult-to-reach areas because broadband ISPs might avoid deploying to areas with hidden risks of liability. Indeed, the Commission's ongoing effort to develop accurate broadband maps demonstrates that ascertaining who has access is difficult. The Commission should not make broadband ISPs shoulder difficulties that are beyond their knowledge or control under penalty of law.

But in the event that the Commission wrongly decides to adopt unintentional disparate impact liability, it must include "bright line" safe harbors. For example, the Commission should recognize safe harbors when broadband ISP deployments are made subject to government-restrictions or conditions beyond their control, including merger conditions, universal service requirements, and other broadband subsidy program requirements, as well as for discriminatory conduct by third parties. Particularly if it wrongly adopts unintentional disparate impact liability, the Commission also would increase unpredictability and arbitrariness in the applicability of its rules by referring to the agency's precedents applying Section 202(a)'s prohibition against "unreasonable discrimination." This should only be done if it is clearly acknowledged that ISPs,

as information services providers, are not subject to Title II. And in keeping with due process of law, the Commission must apply its rules on a prospective basis only.

The Commission should apply enforcement procedures that make a prerequisite for filing a complaint that a party first request equal access and give the provider an opportunity to meet that request within a reasonable time. Standing for filing complaints should be conferred only on real parties with interest in obtaining equal access. And the complaining party should bear the burden of proving digital discrimination through the proffering of actual evidence that shows not only lack of equal access, but membership in a protected class and discriminatory intent.

Also, the Commission should decline to incorporate unintentional disparate impact liability in the state and local model policies and best practices that it proposes to develop. Instead, the Commission should focus proactively on ways for state and local governments, ISPs, and local communities to identify unserved or underserved areas and help get them connected. And the Commission should recommend that states and local governments take steps to accelerate deployment, including by reducing permit approval time lags as well as by eliminating any other procedural and other impediments to constructing broadband infrastructure.

## II. Evidence of Non-Discrimination and Statutory Objectives Should Frame the Commission's Adoption of Digital Discrimination Rules

### A. There Is Evidence of Non-Discrimination in Broadband Internet Access Services

Context is necessary as the Commission considers adopting rules as required by Section 60506 of the Infrastructure Act. Importantly, there is affirmative evidence that digital discrimination, intentional or otherwise, is not occurring in the United States.

An analysis by former FCC Chief Economist Glenn Woroch of Form 477 data regarding census-block-level wireline deployment indicates that, as of the end of 2020, the percentage of households with access to broadband service offerings at 100 Mbps/20 Mbps was 93.8% for non-

White households compared with 88.8% for White households.[2] As of that same date, wireline broadband service at 100 Mbps/20 Mbps was available almost equally to households above and below the Federal Poverty Guidelines, with 90.5% availability for households above the line compared to 89.5% of households below the line.[3]

Indeed, Form 477 data cited in the Commission's *2022 Communications Marketplace Report* indicates that, as of December 2021, 98.2% of the U.S. population lived in areas with access to broadband services offering speeds of at least 25 Mbps/3 Mbps.[4] And 99.5% of the population living in urban areas had similar access.[5] Broadband coverage almost certainly has improved since the end of 2021 and will continue to improve in 2023 and beyond, as broadband ISP recipients of Rural Digital Opportunity Fund (RDOF) subsidy grants are readying new buildouts – likely including to even more rural areas where the business case for network buildout previously had been perceived as lacking.

Additionally, the accessibility of wireless broadband Internet services to nearly all Americans constitutes strong evidence of non-discrimination. According to data cited in the Commission's *2022 Communications Marketplace Report*, by the end of 2021, about 99.7% of Americans had access to 4G LTE wireless broadband services, and 94.5% had access to three or more competing providers.[6] And it has been estimated that the overall rate of nationwide 5G network deployment by the three major mobile broadband ISPs – AT&T, T-Mobile, and Verizon

[2] Declaration of Glenn Woroch, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Docket No. 22-69 (June 30, 2022), at 7 (attached to Reply Comments of AT&T, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Docket No. 22-69 (June 30, 2022)).
[3] *Id*.
[4] FCC, Communications Marketplace Report, *2022 Communications Marketplace Report*, GN Docket 22-203 (released December 30, 2022), at ¶ 341 (Fig. III.A.1a).
[5] *2022 Communications Marketplace Report*, GN Docket 22-69, at ¶ 341 (Fig. III.A.1a).
[6] *2022 Communications Marketplace Report*, GN Docket 22-69, at ¶ 147 (Fig. II.B.37).

– is 42% faster than 4G networks.[7] Indeed, T-Mobile announced in January 2023 that its Extended Range 5G service covers 323 million Americans, or more than 95% of the population,[8] and it plans to expand 5G coverage to 99% of the population by 2026.[9] And T-Mobile, for example, reports that its brands currently serve 95% of Black consumers, 96% of Hispanic consumers, and 98% of Asian consumers nationwide.[10]

Significantly, the broadband market's competitive conditions provide strong incentives for broadband ISPs to serve as many customers as they can. Annual capital investments in network facilities by broadband ISPs are enormous, with USTelecom reporting $86 billion in broadband provider capex in 2021,[11] and CTIA reporting nearly $35 billion in capex by wireless providers last year.[12] And investment also was strong in 2022, as AT&T spent $19.6 billion, Charter Communications $9.4 billion, Comcast $10.6 billion, and Verizon $20.3 billion – each increasing their capex totals from the year before.[13] Thus, broadband ISPs have obvious financial incentives to maximize returns on their investments by retaining existing subscribers and by adding new subscribers. In today's competitive market environment, dangers of foregone revenue opportunities, reduced market share vis-à-vis market rivals, and massive loss of goodwill significantly diminish the possibility that a broadband ISP would even contemplate engaging in discriminatory practices.

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[7] *See* Comments of CTIA, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Docket No. 22-69 GN Docket No. 22-69 (June 30, 2022), at 4.
[8] T-Mobile, Press Release: "T-Mobile Kicks Off 2023 as the Nationwide Network Leader" (January 17, 2023), at: https://www.t-mobile.com/news/network/t-mobile-kicks-off-2023-as-network-leader.
[9] Comments of T-Mobile USA, Inc., Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (May 16, 2022), at 3-4.
[10] Comments of T-Mobile USA, Inc., GN Docket No. 22-69, at 4.
[11] US Telecom, "2021 Broadband Capex Report," (July 18), available at: https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf.
[12] CTIA, "2022 Annual Survey Highlights" (September 13, 2022), at 3, available at: https://api.ctia.org/wp-content/uploads/2022/09/2022-Annual-Survey.pdf.
[13] Masha Abarinova, "Here's where major U.S. wireline operators stand on capex," FierceTelecom (February 8, 2023), at: https://www.fiercetelecom.com/telecom/heres-where-major-us-wireline-operators-stand-capex-20222023.

Furthermore, many broadband ISPs are participants in universal service and other subsidy programs intended to expand access, including to low-income persons. And ISPs do not have a historical record characterized by invidious discriminatory practices. Many fixed and mobile broadband ISPs have long offered telecommunications services that were subject to non-discrimination requirements under Title II of the Communications Act.[14] Unsurprisingly, comments filed in response to the Commission's *Notice of Inquiry* in this proceeding yielded no specific allegations of intentional discrimination in deploying infrastructure and offering broadband services. Similarly, the report by the Commission-chartered Communications Equity and Diversity Council (CEDC) included no findings or evidence of any such intentional discrimination by broadband ISPs.[15]

**B. The Statute Emphasizes Facilitating Equal Access to Comparable Services**

Additional context for the Commission's adoption of rules pursuant to Section 60506 comes from its language. The text indicates that its primary purpose is to facilitate equal access to broadband services rather than subject broadband providers to a phalanx of regulatory controls and penalties to reverse an existing problem. The Statement of Policy contained in Section 60506(a) states that U.S. policy is that, "insofar as technically and economically feasible," "subscribers should benefit from equal access to broadband internet access within a service area."[16] And the statute defines "equal access" to mean "equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service

[14] *See* 47 U.S.C. §202(a).
[15] *See* Appendix B: Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity, Submitted to the Federal Communications Commission by the Working Groups of the Communications Equity and Diversity Council, Adopted November 7, 2022). *See also* Reply Comments of Public Knowledge, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Docket No. 22-69 (June 30, 2022), at 7.
[16] 47 U.S.C. §1754(a)(1).

metrics in a given area, for comparable terms and conditions."[17] Section 60506 charges the Commission to take steps to ensure that subscribers benefit from equal access, "taking into account issues of technological and economic feasibility presented by that objective."[18] Thus, Section 60506's directive to adopt rules aimed at preventing and eliminating "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin"[19] is not the end objective of the statute but a means for furthering the objective of facilitating equal access.

Accordingly, the statute's objective is best furthered not by rules that would impose liability for digital discrimination of broadband access in the most expansive ways conceivable. Instead, the Commission's rules should be calibrated to account for the financial, geographic, technological, and other challenges of providing service and preventing and eliminating discrimination in a manner that will best ensure that all subscribers have equal opportunity to gain access. To that end, the Commission's rules should target digital discrimination only where it unmistakably can be proven to exist and where the facts show that such discrimination cannot be excused by financial, geographical, technological, or other factors.

### C. The Commission Should Use Financial Incentives and Remove Regulatory Barriers to Fill Deployment Gaps

In keeping with Section 60506's primary purpose in ensuring that all people of the U.S. benefit from equal access to broadband Internet access services, the Commission should supplement its rules for preventing and eliminating intentional digital discrimination of access with financial incentives to fill any discoverable deployment gaps. (Of course, Congress has appropriated hundreds of billions of dollars through the Infrastructure Act and other various

[17] 47 U.S.C. §1754(a)(2).
[18] 47 U.S.C. §1754(b).
[19] 47 U.S.C. §1754(b)(1).

federal programs to do just that.) For areas where there are deployment disparities, targeted subsidies should be used to overcome any technical or economic barriers to broadband deployment and ensure equal access for all. Subsidies targeted to fill any identified gaps in broadband access or adoption should be part of a broader market-oriented policy framework that promotes continued strong infrastructure investment and removal of regulatory barriers to deployment.

## III. The FCC Should Adopt an Intent-Based Definition of Digital Discrimination of Access and Reject Unintentional Disparate Impact Liability

The FCC should adopt an intent-based definition of "digital discrimination of access," such as the second part of the definition proposed in the Notice; namely: "policies or practices, not justified by genuine issues of technical or economic feasibility, that are intended to differentially impact consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin."[20]

The text of the Infrastructure Act requires an intent-based definitional standard for digital discrimination. Section 60506(b) authorizes the Commission to adopt rules that prevent digital discrimination "based on" the specific categories of income level, race, ethnicity, religion, or natural origin.[21] The Infrastructure Act's inclusion of the words "based on" in connection with suspect or prohibited classifications and – most significantly for purposes of statutory interpretation – the absence of any broader catchall terms such as "results in" or "otherwise adversely effects" indicates that proof of intent is a necessary element of any successful claim of "digital discrimination."

[20] Notice, at ¶ 13.
[21] Infrastructure Act, § 60506(b); 47 U.S.C. § 1754(b).

### A. Inclusive Communities Project and Other Judicial Precedents Support an Intent-Based Definition of Digital Discrimination

The Supreme Court's reasoning in cases interpreting civil rights statutes supports an intent-based understanding of digital discrimination under Section 60506. The Court's jurisprudence expressly recognizes that Congress's inclusion of such catchall terms in anti-discrimination laws like Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), and the Fair Housing Act (FHA) means that those statutes are directed to the consequences of actions and not to actors' state of mind. In *Smith v. City of Jackson* (2005),[22] a plurality of the Court emphasized that Title VII and the ADEA include language "prohibit[ing] such actions that 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's' race or age."[23] For that reason, the Court found those statutes authorized the use of an unintentional disparate impact standard, or at least are sufficiently ambiguous that they provide a basis for deferring to the interpretation of the agency administering the statutes.[24]

The Court reaffirmed this position in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015):

> Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions.[25]

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[22] 544 U.S. 228 (2005).
[23] 544 U. S. 228, 235 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)) (emphasis added).
[24] *See* 544 U.S. 243-247 (Scalia, J., concurring in part and concurring in the judgment); *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 576 U.S. 519, 582 (2015) (Alito, J., dissenting) (discussing the *Smith* plurality and describing the ADEA's "otherwise prohibited" language as "*essential*" to Justice Scalia's "controlling opinion" in *Smith*") (emphasis in the original).
[25] 576 U.S. 519, 534-535.

Moreover, in *Inclusive Communities Project*, the Court concluded that Congress was aware of the judicial precedents regarding catchall terms and disparate impact liability when it enacted amendments to the FHA.[26] Congress undoubtedly also was aware of *Inclusive Communities Project* when it enacted the Infrastructure Act and declined to include in the statute any such catchall terminology. As a result, Section 60506 should be understood as conferring no authority on the Commission to adopt an unintentional disparate impact standard for digital discrimination in broadband deployment.

### B. Statutory Language Regarding Technical and Economic Feasibility of Equal Access Further Supports an Intent-Based Definition of Digital Discrimination

Section 60506's requirement that the Commission's rules "tak[e] into account the issues of technical and economic feasibility when" adopting rules to prevent digital discrimination should be understood as recognition that broadband ISPs routinely make decisions to not deploy broadband services to certain locations for business reasons that have nothing to do with invidious discrimination.[27] When broadband ISPs make deployment decisions because of technical and economic feasibility reasons, the Commission's rules should not treat those decisions as wrongful.

Application of an unintentional disparate impact standard would be at odds with the Infrastructure Act's requirement that Commission rules take into account the issues of technical and economic feasibility.[28] If Congress had favored a consequentialist approach by establishing unintentional disparate impact liability, it is almost inconceivable that it also would have required that due regard be given to business judgments about network deployments based on

[26] 576 U.S. at 536.
[27] 47 U.S.C. § 1754(b).
[28] *See* 47 U.S.C. § 1754(b).

costs, demand, and return on investment as well as geographical, technological, and other complex factors bearing on whether a provider can feasibly provide a given area with access. But Congress did require the Commission's rules to recognize that broadband ISPs must take all such factors into account in making determinations about whether, when, and how to deploy services. And this dictates an intent-based standard for digital discrimination, not one based on unintended disparate impact effects.

### C. An Intent-Based Definition of Digital Discrimination Is Consistent With the BEAD Program

Also, an unintentional disparate impact standard is inconsistent with the implementation of subsidy awards under the Infrastructure Act's Broadband Equity, Access, and Deployment (BEAD) Program. Under the BEAD Program, states – and not broadband ISPs – are responsible for making specific subsidy subgrant awards to broadband ISPs. Those awards are made in light of the Act's priorities, particularly regarding deployment to unserved areas, which are most likely to be rural areas. Thus, broadband ISPs do not have authority over which of their proposed projects will receive funding approval. Undoubtedly, the decisions by states – as well as other factors outside of a broadband ISP's control, including the local infrastructure siting prohibitions or well-known unreasonable permitting delays – likely will have significant impact on broadband access outcomes in service areas. Those factors make application of an unintentional disparate impact liability standard against broadband ISPs' deployment efforts particularly unjustified.

### D. An Intent-Based Definition Will Be Effective in Preventing and Eliminating Any Digital Discrimination That Actually Exists

Importantly, an intent-based standard is sufficiently robust to address any alleged harms through case-by-case adjudication by the Commission. Intentional discrimination encompasses

not only overtly discriminatory actions, but also actions that are predicated upon facially neutral criteria that are, in fact, only a pretense or ruse to cover for willful, invidious discrimination.[29]

## IV. Aside From Lack of Authority, There Are Many Good Policy Reasons Not to Adopt an Unintentional Disparate Impact Definition

### A. Unintentional Disparate Impact Liability Will Chill Investment and Deployment, Particularly for Areas Difficult to Serve

Aside from considerations of statutory authority, there are policy reasons why the Commission should reject a disparate impact definition of digital discrimination of access. New rules that would make broadband ISPs liable for unintentional disparate impact will potentially chill infrastructure upgrades and deployments to challenging geographical areas in order to avoid legal risks that could result from their unintended failure to provide equal access to all protected classes in a given area, including resident members of protected classes that the broadband ISP may be totally unaware of.

### B. Unintentional Disparate Impact Liability Leads to Unjust Results, Particularly When the Federal Government Does Not Know Who Has Equal Access to Broadband

Any Commission rules imposing unintentional disparate impact liability would result in penalizing a broadband ISP that never knowingly did anything wrong. Also, rules imposing unintentional disparate impact liability would result in penalizing a broadband ISP that made good faith efforts to ensure equal access for all subscribers in a given area, but came up short because of incomplete knowledge of geographic or demographic data, or mere inadvertence or mistake.

Unintentional disparate impact liability is particularly ill-suited for digital discrimination of access because not even the FCC or any other federal or state agency even knows where

[29] *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

broadband Internet access services are available and at what service levels. The Commission currently is undertaking the arduous and difficult task of developing broadband maps that provide accurate, up-to-date information about where broadband services are available or not. But the Commission – not because of lack of effort – has not yet completed broadband maps that it can rely on with any confidence for policymaking purposes. The complexity and time-consuming nature of generating broadband maps demonstrates the difficulty of accurately assessing the broadband deployment that is necessary to make reliable judgments about disparities. In view of the difficulties in accurately ascertaining broadband access, it would be particularly unjust for the Commission to impose liability on broadband ISPs for unintended disparities in access in a given area.

### C. If the Commission Wrongly Imposes Unintentional Disparate Impact Liability, It Must Include "Bright Line" Safe Harbors

Prospective Commission rules reflecting an intent-based definition of digital discrimination would be supported by the statutory language and case law as well as being most consonant with the purpose of facilitating deployment and ensuring equal access opportunity for all subscribers. But in the event that the Commission decides to adopt the unintentional disparate impact definition of digital discrimination proposed in the Notice,[30] its proposal would be less objectionable and less counterproductive if it includes a set of "bright line" safe harbors,[31] in accord with the statute's requirement that the Commission's rules take into account justifications on the basis of technical and economic feasibility.

When broadband ISPs undertake specific deployments in compliance with government requirements, it would be unjust thereafter to subject those same providers to unintentional

[30] Notice, at ¶ 13.
[31] *See* Notice, at ¶ 35.

disparate impact liability. Accordingly, broadband providers should receive bright line safe harbor from unintentional disparate impact liability in the following situations:

- When broadband ISPs act in reliance on Commission-enforced merger conditions.[32]
- When broadband ISPs act in reliance on state public utility commission-enforced merger conditions.
- When broadband ISPs offer service in reliance on requirements for participation in federally-administered broadband deployment subsidy programs, including universal service, the ACP program, and the BEAD Program.[33]
- When broadband ISPs offer service in reliance on requirements for participation in state-administered broadband deployment subsidy programs, including state universal service programs.
- When broadband ISPs are acting in compliance with the terms of state or local franchising agreements to provide broadband Internet services to a given area.
- When the alleged discriminatory conduct involves a given area that is outside of a broadband ISP's state or local franchise area.
- When a wireless broadband ISP does not have a spectrum license to provide service in a given area or lacks sufficient spectrum to provide a particular level service in a given area.
- When a broadband ISP has been denied local permitting authority to deploy facilities to a given area, or been significantly delayed by local permit processing delays and related litigation.
- When the alleged discriminatory conduct takes place while the broadband ISP is subject to a bankruptcy plan or trusteeship.
- When the alleged discriminatory conduct is by third parties that are outside the control and supervision of broadband ISPs.[34]

There are likely other scenarios in which bright line safe harbors should apply, and thus the above list should not be deemed exhaustive.

Moreover, the bright line safe harbors should confer immunity on broadband ISPs for unintentional disparate impact claims – or, at the very least, a presumption of non-discrimination should apply when the safe harbor conditions are satisfied.[35] Unintentional disparate impact liability conceivably could result even when providers never act with wrongful intent or when

[32] *See* Notice, at ¶ 36.
[33] *See* Notice, at ¶ 36.
[34] *See* Notice, at ¶ 36.
[35] *See* Notice, at ¶ 34.

they act entirely in good faith. The safe harbors acknowledge circumstances in which broadband ISPs should not be deemed liable for any unintended disparate impact because their deployment decisions or practices were or are in some way proscribed or directed by government or other actors or because of factors outside of their control. In these instances, it is exceedingly unlikely that any discriminatory conduct was involved. Additionally, recognition of bright line safe harbors should not exclude the opportunity for broadband ISPs to make individualized showings, on a case-by-case basis, that their challenged deployment decisions were based on technical and economic feasibility considerations. Each broadband ISP faces circumstances unique to their own business and potential deployment opportunities in different service areas, and they must be allowed to present evidence of those circumstances to justify their conduct.

## V. Additional Definitional Clarifications Would Improve the Knowability and Predictability of the Commission's Rules and Help Ensure Compliance

### A. The Commission Should Refer to the Agency's Precedents Regarding "Unreasonable Discrimination"

The hundreds of questions posed by the Commission's Notice regarding the scope and implications of its forthcoming digital discrimination rules indicates that there is the potential for significant uncertainty and arbitrariness as to what the rules will or will not require. Such questions include, among many others, considerations about "comparable speeds, capacities, latency, and other quality of service metrics," as well as "comparable terms and conditions" of service.[36] The potential for legal uncertainty, and consequently arbitrary and capricious decision-making violating due process, is increased because the Commission has no prior history enforcing rules barring digital discrimination of access.

[36] *See* Notice, at ¶ 33 (quoting 47 U.S.C. §1754(a)(2)).

For the Commission's rules to satisfy basic due process of law, the rules must enable broadband ISPs to know in advance what those requirements are and what they must do to satisfy them. The Commission can reduce legal uncertainty and avoid arbitrariness in enforcement by drawing on the agency's precedents applying Section 202(a)'s prohibition against "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service" or to "make or give any undue or unreasonable preference or advantage to any particular person or class of persons."[37] Although broadband Internet access services properly are classified as Title I information services rather than Title II telecommunications services, the Commission's case law regarding "unreasonable" discrimination provides guidance developed in a context of mass market retail communications services. Thus, even though ISPs are not subject to Title II, for the specific purpose of considering digital discrimination, the Commission's precedents under Section 202(a) are likely to be adaptable and relevant to consideration of complaints regarding digital discrimination. By contrast, civil rights statutes addressed to topics such as housing and employment are much less adaptable and relevant to broadband deployment.

### B. The Statute Expressly Defines the Protected Class and Provides No Basis for Expanding It to Persons Not Explicitly Identified by Congress

The Commission should not seek to expand the classes intended to be protected by the statute.[38] Section 60506 specifies that the Commission's rules are intended to prohibit digital discrimination of access that is "based on income level, race, ethnicity, color, religion, or national origin."[39] Although the statute states that the Commission is directed to adopt rules to facilitate equal access "including" by (1) preventing digital discrimination based on the

[37] 47 U.S.C. § 202(a).
[38] *See* Notice, at ¶ 42-43.
[39] 47 USC § 1754(b)(1).

specifically delineated categories, the provision concludes with "and" (2) "identifying necessary steps to eliminate discrimination" based on those delineated categories.[40] The statute's language is specific, not open-ended in its scope, and thus the text provides no basis for expanding its coverage to other groups. Had Congress intended for the Commission's rules to sweep in other classes or categories of persons, it would have said so.

### C. The Commission's Rules Should Apply Prospectively Only

It also is a matter of due process of law that the Commission apply its rules on a prospective basis only, and not attempt to apply them retroactively. As the Supreme Court has recognized, it is "[a] fundamental principle in our legal system… that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[41] It is obvious that broadband ISPs never had fair notice about the requirements of the Commission's pending digital discrimination rules when they made prior decisions about broadband deployments, and thus retroactive application of its rules would violate due process. Moreover, retroactive application of the Commission's digital discrimination rules would be contrary to the court's cannons of statutory construction. As the court declared in *Greene v. U.S.* (1964):

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not the past . . . (and) a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be . . . the manifest intention of the legislature.[42]

The court has stated that "[s]tatutes are disfavored as retroactive when their application 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or

[40] 47 USC § 1754(b)(1)-(2).
[41] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).
[42] 376 U.S. 149, 160 (1964) (internal quotation omitted).

impose new duties with respect to transactions already completed.'"[43] Indeed, as the court wrote in *Landgraf v. USI Film Products* (1994):

> Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[44]

Accordingly, the law disfavors retroactive application of Section 60506, which provides no clear intent that the Commission's digital discrimination rules are to be applied to past deployment-related conduct. Section 60506's requirement that the Commission "eliminate" digital discrimination of access does not amount to clear intent or constitute evidence that Congress addressed the merits and demerits of imposing retroactive liability.[45] The Commission's task to "eliminate" digital discrimination is to be accomplished by carrying out the objective of facilitating equal access and by prospectively barring such discrimination (to the extent it actually exists). Imposing liability on broadband ISPs for digital discrimination – especially for unintentional disparate impact liability – would burden the property and due process rights of broadband ISPs who had good reason to expect that their infrastructure buildout decisions were lawful when they were made. The Commission's digital discrimination rules should therefore be applied on a prospective basis only.

[43] *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)).
[44] 511 U.S. 244, 272–273 (quoted in *AT&T Corp. v. Hulteen*, 556 U.S. 701, 713 (2009)).
[45] *See* Notice, at ¶ 92.

## VI. The Commission Should Adopt Reasonable Procedural and Enforcement Provisions

### A. The Commission Should Establish Prerequisites to Filing Complaints

The Commission's rules should require a complaining party to show an affirmative denial of equal access to a member of a protected class, and they should require that the ISP be given an initial opportunity, after notice, to meet that demand. Accordingly, the Commission should set some threshold requirements or prerequisites for parties seeking to file a digital discrimination complaint and obtain relief from the agency. Prior to filing an actual complaint, the would-be complaining party should be required to request access from the broadband ISP that provides services in the area in which the complaining party resides. Such a request should constitute a notice period – say, 60 days – in which the broadband ISP can: (1) provide the requested or comparable service; (2) offer a service that is nearly comparable on an interim basis of between 30 and 90 days until comparable services can be provided; or (3) provide the party with an individualized explanation for why their request for service was denied. Following the party's request for access to broadband service and expiration of the notice period, and regardless of the broadband ISPs' response, the party would be eligible to file a complaint alleging digital discrimination of access.

### B. Only Parties With a Direct Interest in Obtaining Equal Access to Broadband Services Should Have Standing to File Complaints

The Commission should rely on its procedural rules for informal and formal complaints – adapted where necessary – for complaints alleging digital discrimination of access.[46] For formal complaints of digital discrimination, the Commission should adhere to its standing rules requiring complainants to allege that they have suffered an injury-in-fact traceable in a concrete

[46] See 47 USC § 1754(e).

way to the alleged wrongful conduct and that the requested relief would redress the injury. In other words, formal complaints should be limited to parties that have an actual interest in obtaining access to broadband Internet services. There is no compelling reason for the Commission to alter its formal complaint procedures for those with no direct concrete interest in obtaining broadband access in a given area.[47]

### C. Parties Complaining About Lack of Equal Access Should Bear the Burden of Proving Discrimination

Importantly, parties filing informal or formal complaints alleging they have been harmed by digital discrimination of access should bear the burden of proving they lack equal access to broadband and that they have been intentionally denied equal access. Presuming that the Commission adopts a burden-shifting framework for adjudicating individual complaints, such as the *McDonnell Douglas* framework,[48] the Commission's rules should specify that an individual's lack of equal access to broadband service within a service area, by itself, does not constitute a prima facie case of digital discrimination. From Section 60506's requirement that the Commission's rules "tak[e] into account the issues of technical and economic feasibility" of providing equal access to broadband services as well as its requirement that those rules prevent and eliminate digital discrimination of access "based on income level, race, ethnicity, color, religion, or national origin," it follows that something more than lack of equal access must be required to establish a prima facie case of discrimination. In order to establish a prima facie case of digital discrimination, the complaining party should be required to proffer evidence showing the technical and economic feasibility of a broadband ISP providing equal access in that service area. Additionally, the complaining party should be required to proffer evidence that the alleged

[47] *See* Notice, at ¶¶ 52-54.
[48] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); Notice, at ¶¶ 36, 66.

lack of equal access was intentionally caused by the broadband ISP based on the complaining party's membership in one of the protected groups or classes. And in order to constitute a prima facie case of disparate impact, the complaining party also should be required to present actual evidence alleging that persons within a given service area who do belong to the protected group or class but who are similarly situated actually have access. And pursuant to such a burden-shifting framework, once a complaining party establishes a prima facie case of digital discrimination, the broadband ISPs then would be able to proffer evidence to overcome that burden and shift it back to the complaining party.

## VII. The Commission Should Adopt State and Local Model Policies and Best Practices That Will Promote Deployment and Remove Obstacles to Infrastructure Buildout

Section 60506(d) of the Infrastructure Act requires the FCC to "develop model policies and best practices that can be adopted by the States and local governments to ensure that broadband ISPs do not engage in digital discrimination."[49] The report by the Commission-chartered Communications Equity and Diversity Council (CEDC) offers some insights and approaches that the Commission should adopt as it carries out its required task of developing those model policies and best practices.

### A. The Commission Should Not Recommend That State and Local Governments Impose Unintentional Disparate Impact Liability on Broadband Deployment Decisions

A key takeaway from the CEDC's report is that the existing problem of unserved or underserved Americans is not an intentional discrimination problem. The CEDC's report, which was based on interviews it conducted, found that there is a persistent digital divide in America concerning access to affordable, reliable, high-speed broadband services. Another finding is that

[49] 47 USC § 1754(d).

"[t]he digital divide disproportionately affects communities of color, lower-income areas, and rural areas."[50] However, this apparent divide does not appear to have been directly caused by discriminatory motives, as CEDC's report included no findings or evidence of any intentional discrimination by broadband ISPs in deploying infrastructure and offering broadband services.

Notably, CEDC's report did not include any recommendation regarding whether states or local governments should hold ISPs legally liable for broadband deployment decisions that unintentionally may result in disparate outcomes for protected groups. Instead, it cited various views about the meaning of digital discrimination that were expressed by different interviewees. The Commission should not make unintentional disparate impact liability part of its model policies or best practices for states and local governments. Although Commissioners, CEDC members, or stakeholders certainly are entitled to express their opinions, which may be helpful in identifying particular areas of concern, it is the direction of Congress as set forth in the law that must define "digital discrimination."

### B. The Commission Should Recommend That State and Local Governments Host Periodic Meetings and Broadband Availability Assessments

The CEDC report includes some sensible recommendations that the Commission ought to adopt for model policies and best practices for states and local governments to prevent digital discrimination in broadband deployment and access. For example, the Commission should recommend that state and local leaders – with cooperation from ISPs and community members – periodically assess where reliable high-speed broadband service is available. As the CEDC report explained, the goal of periodic assessments would be "to help identify unserved, underserved, and served areas and effectively direct funds and infrastructure towards areas that

[50] Notice, at pg. 90 (Appendix B).

need the most support for the deployment of broadband services."[51] Similarly, the Commission should recommend that regular meetings be held by and among ISPs with stakeholders such as community leaders, labor organizations, and faith-based organizations to identify unserved and underserved areas and households as well as to develop solutions to overcome barriers to access.

### C. The Commission Should Recommend That State and Local Governments Promote Deployment Via Management of Public Property and Rights-of-Way

Additionally, the Commission should adopt the CEDC's report recommendation that states and local governments ensure non-discrimination and promote broadband deployment through the exercise of their powers in managing public property, including public rights-of-way. As the report acknowledged, "[b]roadband providers and community partners can face several delays and obstacles along the deployment journey,"[52] including difficulties in acquiring access rights for deploying infrastructure. The Commission should recommend that state and local governments "take the necessary actions to remove these regulatory barriers to accelerate and encourage continued investment in broadband infrastructure deployment."[53]

### D. The Commission Should Recommend Reforms to Reduce Regulatory Burdens and Streamline Permitting Processes

As the Commission has recognized in many other proceedings, local permit approval processes and related regulations have inhibited deployments by driving up costs of deploying broadband facilities and delaying their construction. Although the Commission has adopted reforms that are helpful in removing regulatory obstacles and streamlining permit approvals for new and upgraded infrastructure, states have broader constitutional and statutory authority to shorten permit processing timelines and reduce permitting fees. More timely and less expensive

[51] Notice, at pg. 96 (Appendix B).
[52] Notice, at pg. 149 (Appendix B).
[53] Notice, at pg. 149 (Appendix B).

permitting processes will help ensure that the billions of dollars allocated to connect unserved and underserved Americans under the Infrastructure Act and other subsidy programs will be effective in closing any remaining digital divides.

**VIII. Conclusion**

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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