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FCC "Digital Discrimination" Rules Should Steer Clear of Burdensome Regulation

by

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The massive 1036-page Infrastructure Investment and Jobs Act, signed into law by President Biden in November 2021, contains a one-page section requiring the Federal Communications Commission to adopt rules to facilitate equal access to broadband Internet services and to prevent "digital discrimination of access" that is "based on" a person's income level, race, ethnicity, color, religion, or national origin. By law, the agency must adopt these rules by this November 15.

The commission is currently considering comments from the public in response to the proposed rules, which were released in December 2022. It's widely acknowledged that the "digital discrimination" rulemaking is the most consequential proceeding on the agency's agenda.

By exercising proper regulatory restraint, the commission has an opportunity to adopt rules that will help close the increasingly rare remaining gaps in the availability of broadband Internet services, most of which are in sparsely inhabited rural areas. But there is a risk the agency will go too far by adopting rules that not only exceed its legal authority but that are also inconsistent with sound policy. If the agency chooses an overly zealous pro-regulatory approach, the result is likely to be less investment in new broadband facilities – and, therefore, a smaller reduction in remaining coverage gaps – than otherwise would be the case.

While we prefer to be optimistic the commission will not engage in regulatory overreach, as it so often does, the prospective confirmation of Anna Gomez as a new commissioner in the next few weeks will cement a 3-2 Democrat majority. Presumably, this will give FCC Chairman Jessica Rosenworcel the majority she needs if she wishes to adopt the most pro-regulatory positions.

The most significant question confronting the commission in the digital discrimination proceeding is whether to require a showing of *intentional* discrimination before imposing liability on broadband providers, or whether, instead, a showing of *unintentional* disparate impact suffices. The agency should target intentional actions. If it adopts a disparate impact, or "results," standard it necessarily will be creating an open-ended regulatory and liability regime that invites endless second-guessing, likely leading to penalties for good-faith business judgments regarding facilities deployment.

As for the agency's legal authority, there are three key reasons why the Infrastructure Act's text bars adoption of an unintentional disparate impact liability standard. First, the statute states that the rules should prohibit digital discrimination "based on" protected categories of persons. This "based on" language focuses on intent and the reasons for deployment decisions, not just end results.

Second, unlike other anti-discrimination statutes, the Infrastructure Act lacks any "catch-all" terms, such as references to Internet provider decisions that "result in" or "otherwise adversely affect" the protected categories of persons. Supreme Court decisions such as *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*. (2015) have held that such "catch-all" terms indicate Congress may have intended to impose disparate impact liability.

Third, the statute requires that the rules for facilitating equal access take into account "issues of technical and economic feasibility." A requirement that "feasibility" be considered is inconsistent with disparate impact liability's sole concern with raw outcomes.

Considering these reasons why the Infrastructure Act's text does not support adoption of an *unintentional* disparate impact liability standard, an attempt by the FCC to smuggle that standard into its forthcoming digital discrimination rules would create unknowable legal and financial risks for Internet providers. These heightened risks almost certainly would chill investment in broadband deployment in the remaining difficult-to-reach coverage gaps.

There is no sound policy reason for the commission to adopt such a risky disparate impact standard. There is virtually no record evidence showing intentional discrimination by Internet providers in deploying broadband services. Rather, there is affirmative evidence that "digital discrimination" is *not* occurring. The FCC's own data show that well above 90% of Americans have access to fixed-line and wireless broadband services, and the percentage is substantially higher in urban areas with high concentrations of minority and low-income households.

Furthermore, the broadband Internet market's increasingly competitive conditions provide strong financial incentives for providers to serve as many customers as they can to maximize returns on their investments. If any Internet providers engaged in invidious discrimination, they would forfeit customers – and revenues – to rivals and suffer loss of goodwill.

At bottom, legal certainty, market competition, and targeted subsidies to support facilities build-outs for the remaining unserved areas are far better spurs to equal access than the prospect of unknowable liability and arbitrary penalties. Indeed, it's worth remembering there is already more than $100 billion in the government subsidy pipeline to support new broadband facilities, and the private sector service providers have invested more than $2 trillion in broadband networks in the last two decades.

Therefore, consistent with the Infrastructure Act's text and the widely shared goal of ensuring that remaining broadband coverage gaps are closed as rapidly as possible, the commission should firmly reject burdensome, needless regulation in favor of a standard requiring a showing of intentional discrimination.

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