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Spotlighting the FCC's Key Digital Discrimination Rulemaking

by

Randolph J. May *

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The Federal Communications Commission is fast approaching a November 15 statutory deadline to adopt rules prohibiting discrimination with respect to access to broadband Internet services. Given the importance of promoting ubiquitous access to Internet services, the Commission's "Digital Discrimination" rulemaking is, without doubt, one of most important items on the agency's agenda this year. On June 23, 2023, I was pleased to moderate a Federalist Society webinar titled "The FCC's Digital Discrimination Rulemaking: Facilitating Equal Access to Broadband Services." The panelists were Seth Cooper, Senior Fellow and Director of Policy Studies at the Free State Foundation; Harold Feld, Senior Vice President at Public Knowledge; and Clint Odom, Vice President, Strategic Alliances & External Affairs at T-Mobile.

Considering the importance of this FCC proceeding, it's worthwhile recapping highlights from the webinar. The panelists addressed key legal issues, including: whether the FCC has the authority to impose liability on broadband providers based on unintentional disparate impact or only upon a showing of intentional discrimination; how the agency should take into account technological and economic feasibility of providing equal access; the impact on innovation and

investment under different potential formulations of the agency's rules; and the types of processes the Commission should employ for considering digital discrimination complaints.

Section 60506 of the Infrastructure Investment and Jobs Act of 2021 requires the FCC 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 defines "equal access" as "the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions," and it requires the rules to take into account "issues of technical and economic feasibility." And Commission is directed to revise its complaint process to accept complaints alleging digital discrimination.

Seth Cooper suggested there are three reasons why the Infrastructure Act should be read to authorize the FCC to adopt rules barring only intentional digital discrimination, but not rules authorizing a discrimination finding based on a disparate impact standard. First, the statute's use of the term "technologically and economically feasible" is a direction to consider factors pertinent to providers' deployment decisions, not naked end-result deployment figures. Second, the words "based on" in Section 60506 are significant because relevant judicial precedents define "based on" to mean "foundation" or "source"—words relating to reasons why a decisionmaker acted, not the end results of the decision.

Third, and most significant, is Section 60506's lack of any "catchall" terms that prohibit any discriminatory act that "results in" or "otherwise adversely effects" members of protected classes. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015), the Supreme Court determined that the "otherwise adversely affects" and similar language in housing and other antidiscrimination statutes supports adoption of a disparate impact standard. But the Infrastructure Acts lack any such catchall terms.

Harold Feld contended Section 60506 does give the FCC authority to bar digital discrimination based on disparate impact. According to Mr. Feld, Section 60506 is an "anti-cherry picking" prohibition no different from antidiscrimination provisions governing other forms of communications subject to FCC regulation. In his view, Section 60506 is consistent with a tradition of Communications Act provisions ensuring service in market failure situations resulting from a low return on investment or prejudice. Section 202(a) of the Communications Act prohibiting "unjust or unreasonable discrimination" and Section 541(a)(3) prohibiting cable operators from discriminating based on income were offered as examples of other "anti-cherry picking" discrimination provisions governing communications services.

Furthermore, Mr. Feld contended Section 60656's "equal access" requirement means every provider has a responsibility to avoid digital discrimination. And the FCC should not rely on "safe harbors" from liability in considering discrimination complaints, but instead should look to the "totality of the circumstances" in case-by-case adjudications. Moreover, the Commission's complaint process should accept complaints from local government and organizations on behalf of their members.

Clint Odom argued that some advocates in the tech realm want to draw what he called a false analogy between "redlining" as traditionally understood—the pernicious conduct some banks and governments used to keep racial minorities confined to certain areas—and so-called "digital redlining." Mr. Odom contended the FCC must acknowledge the differences between instances of pernicious redlining and claims of digital discrimination because failing to do so would be tacitly to admit the federal government has been asleep at the switch. The FCC has had the authority to entertain complaints alleging digital discrimination, but it has never done so. Congress has had the opportunity to conduct fact-finding and hearings on digital discrimination, it but hasn't done so. Contrary to the years-long fact-finding that preceded enactment of the fair housing, age discrimination, and employment laws, Mr. Odom said, Section 60506's legislative history is remarkably thin. There is no common legal or jurisdictional heritage between consideration of discrimination complaints in those traditional civil rights contexts and digital discrimination.

Finally, Mr. Odom suggested it's probable a Supreme Court majority would now determine, even in the contexts of fair housing or employment laws, that a finding of prohibited discrimination requires intentional acts. Thus, he fears that, if the FCC were now to adopt a disparate impact liability standard, the FCC's digital discrimination rules, based on a statute accompanied by little fact-finding, could result in the Supreme Court rejecting the disparate impact liability standard, not just in the communications services space, but also in housing, finance, employment, and other areas.

The intent of this piece is to offer highlights from the webinar. For more on these points and others, check out "The FCC's Digital Discrimination Rulemaking: Facilitating Equal Access to Broadband Services."

* Randolph J. May is President of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. *Spotlighting the FCC's Key Digital Discrimination Rulemaking* was published in *The Federalist Society Blog* on September 15, 2023.