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November 6, 2023

Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

**RE: Written Ex Parte Comments - In the Matter of Implementing the
Infrastructure Investment and Jobs Act, Prevention and Elimination of Digital
Discrimination, GN Docket No. 22–69**

The Free State Foundation* offers these ex parte comments regarding the Commission’s draft Report and Order and Further Notice of Proposed Rulemaking in the above-referenced Digital Discrimination proceeding. The focus of these ex parte comments is on the draft Report and Order’s definition of “economic feasibility” to implement Congress’s express requirement in Section 60506(a) of the Infrastructure Investment and Jobs Act of 2021 that the Commission take into account issues of “technical and economic feasibility”¹ in evaluating claims of discrimination. And, even more specifically, these ex parte comments focus on an ex parte submission by Public Knowledge dated November 1, 2023.²

Regrettably, as explained below, the draft Report and Order defines “economic feasibility” in a way that will induce, if not require, the Commission to conduct old-fashioned public utility style rate cases, including rate of return determinations, akin to the ones found in the FCC’s case books back in the 60s, 70s, and 80s. And akin to those thousands of public utility rate

* These ex parte 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. They do not necessarily represent the views of others associated with the Free State Foundation, a nonpartisan, non-profit free market-oriented think tank.

¹ 47 U.S.C. § 1754(a).

² Ex Parte Submission of Public Knowledge, November 1, 2023, at: <https://www.fcc.gov/ecfs/document/1101203899700/1>.

case decisions of the state public utility commissions. Public Knowledge’s November 1 ex parte is even more troublesome because, by making the agency’s rate case decision-making task even more complicated, the “clarification” sought by Public Knowledge would further destroy the Commission’s ability to comply with the congressional direction to consider “economic feasibility.” The suggested “clarification” language would render the task of evaluating “economic feasibility” even less practically implementable, especially within any reasonable timeframe, than the already problematic test proposed in the draft Report and Order.

The Free State Foundation has submitted comments and reply comments in this proceeding demonstrating that, in considering allegations of digital discrimination, the Commission lacks the statutory authority to adopt an unintentional disparate impact standard as opposed to an intentional discrimination standard.³ Those arguments won’t be repeated here. If the Commission nevertheless proceeds to adopt the disparate impact standard, it is of utmost importance, as a matter of sound policy, that the agency interprets the “economic feasibility” requirement in a way that, seemingly by design, does not further deter investment in new broadband facilities – which, after all, is the objective of Congress and Commission. And it is of utmost importance that the economic feasibility requirement be interpreted in a way that is practically implementable on a reasonable timely basis.

Here is paragraph 71 from the Report and Order draft:

We define an “economically feasible” policy or practice to mean one that is “reasonably achievable as evidenced by prior success by covered entities under similar circumstances or demonstrated new economic conditions clearly indicating that the policy or practice in question may reasonably be adopted, implemented, and utilized.” We again use the language of the Commission’s definition of “technically feasible” in section 54.5 as a baseline because anchoring economic feasibility in past industry practice will provide guidance to allow all interested stakeholders to gauge what is or is not economically feasible. **Factors for analyzing economic feasibility of a policy or practice include, but are not limited to, projected income, projected expenses, net income, expected return on investment, competition, cash flow, market trends, and working capital requirements, and the standards under which such calculations are determined.** A policy or practice will be considered economically feasible if relevant economic variables fall within acceptable ranges based on past industry practice. Determining economic feasibility thus requires a comparative analysis that accounts for past and present industry practices and new economic conditions that might, in some circumstances, require variances from such historical ranges. (emphasis added, footnotes omitted).

And here is “clarifying language” which Public Knowledge asks the Commission to add:

³ Comments of the Free State Foundation, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (February 21, 2023), at: <https://freestatefoundation.org/wp-content/uploads/2023/02/FSF-Comments-%E2%80%93-Prevention-and-Elimination-of-Digital-Discrimination-022123.pdf>. Also available at: <https://www.fcc.gov/ecfs/search/search-filings/filing/102212765029016>.

We clarify that when we consider an appropriate rate of return, we will not do so simply on the basis of the rate of return for the area where the alleged discrimination takes place. The record demonstrates precisely this problem. Because rates of return are lower for low-income areas, ISPs generally underinvest in these communities or avoid them completely. **Rather, we will look to the expected rate of return for similarly situated areas that do not have the suspect classification. For example, in an urban area claiming discrimination based on low-income, we will compare low-income areas and average income areas with similar population densities, cost of deployment, and other relevant characteristics that impact rate of return exclusive of the income of the residents.** We assume that even if the expected rate of return for the specific low-income neighborhood may be low or require longer than usual to recoup investment, this is precisely the situation that Congress intended us to address by including "low- income" as a protected characteristic. (emphasis added).

One of us (Randolph May) has extensive experience litigating telephone rate cases before public utility commissions in the 80s and 90s, and involvement in various FCC rate case matters as Assistant and Associate General Counsel at the Commission from 1978 – 1981, as well as having served as Chair of the ABA’s Section of Administrative Law and Regulatory Practice, and its Ratemaking Committee. But one does not need to be an expert in public utility regulation, or have personal experience, to understand that the draft Report and Order’s proposed “economic feasibility” definition will encourage, if not require, the Commission to conduct traditional rate case proceedings, including determining the rate of return component of such cases. This is because, referring to Paragraph 71 in the draft, “projected income, projected expenses, net income, expected return on investment,” are the key components of every rate case.

While these factors the Commission proposes to examine are offered in connection with determining “economic feasibility,” it should be clear to the commissioners and to the public that, if adopted, the agency necessarily will be required to engage in the same type of extensive fact-specific analysis, based on an examination of the same type of often contradictory evidence, in which it would engage if it were determining the “reasonableness” of rates of Internet service providers. It’s not evident that the commissioners have thought through how difficult, as a practical matter, it will be to perform the economic feasibility/rate case analysis in a way that comports with fundamental due process. It is very likely that evidence relating to “projected income, projected expenses, net income, expected return on investment” [Paragraph 71] will be contested. For example, “expected return on investment” necessitates assessing predictions regarding future interest rates (i.e., the cost of capital.) That is why proceedings involving those factors most often are conducted as trial-type hearings.

With the foregoing in mind, it is easy to discern how Public Knowledge’s suggested “clarification” would render the Commission’s task even more difficult and practically impossible. Piled on top of the analysis that the draft would require the Commission to undertake, PK wants to overlay the requirement that the Commission look at “similarly situated areas” that do not have a suspect classification. PK adds: “For example, in an urban area claiming discrimination based on low-income, we will compare low-income areas and average income areas with similar population densities, cost of deployment, and other relevant characteristics that impact rate of return exclusive of the income of the residents.”

There is no doubt whatsoever that there will be disputes among parties regarding what constitutes a “similarly situated area” with “similar population densities, cost of deployment, and other relevant characteristics,” all characteristics PK says impact rate of return – a key determinant that must be considered. It is fanciful to think that these matters can be resolved fairly, consistent with due process, without some form of adjudicative time-consuming evidentiary hearing, especially when questions regarding “similarity” must first be resolved.

Now, it should be abundantly clear that if the Commission adopts the disparate impact standard and proposes implementing the “economic feasibility” evaluation using the analysis suggested in Paragraph 71 that, for all practical purposes, it will be required to undertake a complex, time-consuming old-fashioned utility rate case, including determining a rate of return on investment. And if the Commission were to adopt Public Knowledge’s suggested “clarification,” it would be required to conduct an even more materially complex, time-consuming rate case, including, as PK concedes, “expected return on investment.”

In considering draft Paragraph 71, PK’s November 1 ex parte, and this submission, the Commission would do well to remember the admonition of William Kennard, President Clinton’s FCC Chairman, back in 1999, when he said: "I have been there on the telephone side. . . [I]f we have the hope of facilitating a market-based solution here, we should do it, because the alternative is to go to the telephone world, a world that we are trying to deregulate and just pick up this whole morass of regulation and dump it wholesale on [Internet providers]. That is not good for America."

Whether intentionally or not, the draft Report and Order indicates that the present Commission, needlessly, is about to dump the “whole morass of regulation” on Internet service providers. And PK would dump even more morass “wholesale” on top of that. The draft’s approach to defining the “economic feasibility” standard is misguided. PK’s suggested “clarification” is doubly misguided. As former Chairman Kennard might say: Neither is good for America.

It is entirely possible, and surely preferable, including for those in the classes Section 60506 seeks to protect, for the Commission to adopt rules that go in a different direction. In an ex parte submission dated October 20, 2023,⁴ we explained how the Commission can adopt rules that comport with Congress’s direction to prevent digital discrimination and properly consider “economic feasibility,” while not requiring the agency to engage in complicated, time-consuming rate cases, involving rate of return assessments, and almost certainly involving controverted evidentiary submissions.

⁴ Ex Parte Submission of Public Knowledge, November 1, 2023, at: <https://www.fcc.gov/ecfs/document/1020860425340/1>.

We urge the Commission to act consistent with the views expressed herein.

In accordance with Section 1.1206 of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact us at (301) 984-8253.

Respectfully submitted,

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CC: Chairman Jessica Rosenworcel and all FCC Commissioners