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Marlene H. Dortch, Secretary
The Federal Communications Commission
45 L. Street, N.E.
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 proposal to adopt rules to prohibit and eliminate digital discrimination of access based on an individual’s protected class. The focus of these ex parte comments is on Congress’s key directive that the Commission’s digital discrimination rules account for issues of “technical and economic feasibility.” An extensive list of additional publications by Free State Foundation scholars regarding various issues raised in the Commission’s digital discrimination proceeding is provided at the end of this filing.

In Section 60506(a) of the Infrastructure Investment and Jobs Act of 2021, Congress expressly stated that, in implementing the Commission's mandate to take steps to ensure that all Americans benefit from equal access, the agency must consider issues of “technical and economic feasibility”¹ Congress thereby dictated that broadband providers must remain free to make informed business judgments regarding matters such as the size of their investments

* 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).

in relation to the availability and cost of capital, the geographic reach of planned deployments by the provider and competitors, the cost of the underlying technologies employed considered for deployment, the timing of new deployments, and other similar considerations. They are all market-related factors affecting economic feasibility assessments.

The congressional requirement that economic feasibility factors be taken into account requires acknowledgement by the Commission that deployment and non-deployment decisions of broadband providers to certain locations routinely, and necessarily, involve business judgements that have absolutely nothing to do with invidious discrimination.² When confronted with a complaint alleging discrimination, in addition to the above considerations, “economic feasibility” is properly informed by factors such as: (1) whether a grant-making entity (say, in the BEAD context) delineates the deployment areas that are being subsidized; (2) whether the area subject to question is receiving, or is slated to receive, federal or state subsidized build-outs; (3) whether another provider is already providing service, or is slated to offer service, at comparable speeds and with comparable quality of service metrics; (4) regulatory or procedural requirements that increase costs prohibitively; and (5) whether the provider does not provide service in the complainant’s area using the technology the complainant prefers. As explained in FSF’s comments and reply comments,³ when broadband providers make deployment decisions based on economic feasibility reasons such as those above, the Act forbids the Commission from treating those decisions as wrongful.

Importantly, Section 60506’s requirement that the Commission’s rules account for issues of technical and economic feasibility should preclude any reading of the statute or agency rules that would impose liability on broadband providers simply because deployment to a given area may be deemed “possible” or because providers may be deemed “capable” of providing service in a given area. Imposing liability based on the mere possibility or capability of deploying broadband services to an area fails, as a matter of law, to allow for a proper accounting of individual facts and circumstances and non-discriminatory reasons for the broadband provider’s decisionmaking regarding economic feasibility. Therefore, application of an unintentional disparate impact standard would be inconsistent with the Infrastructure Act’s requirement that Commission rules take into account issues of economic and technical feasibility.⁴

Under a burden-shifting framework for adjudicating individual digital discrimination complaints,⁵ the Commission’s rules should specify that an individual’s alleged lack of equal access to a broadband Internet service provider’s service within a service area, by itself, does not constitute a prima facie case of digital discrimination. From Section 60506’s technical and economic feasibility requirement, along with the “based on” language found in the statute, it follows that something more than lack of equal access must be required to establish a prima facie case. A prima facie case should require a complaining party proffer at least some

² 47 U.S.C. § 1754(b).

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>.

⁴ See 47 U.S.C. § 1754(b).

⁵ See Notice, at ¶¶ 36, 66.

empirical evidence showing the lack of equal access is connected to the interested party's membership in a protected class and also to proffer at least some empirical evidence of the technical and economic feasibility of a broadband provider offering equal access in a given service area.

Additionally, in the event that the complaining party presents a prima facie case of digital discrimination of access, the Commission's rules must permit the broadband provider to rebut that prima facie case by presenting evidence that its deployment-related policy or decision was based on non-discriminatory reasons, including reasons involving economic feasibility. The Commission's rules should recognize that a broadband provider's deployment to a given area may be economically infeasible if the provider submits evidence that its challenged policy was based on the fact that area is already served entirely or almost entirely by a competing provider that offers comparable services and terms. Also, once a broadband provider proffers a rebuttal based on non-discriminatory reasons, including technical and economic feasibility factors, the complaining party then should bear the burden of overcoming such a rebuttal to satisfy the elements of the digital discrimination claim.

Furthermore, as the Free State Foundation explained in its comments, in order to comply with the congressional directive to account for economic and technical feasibility issues, the Commission should issue a set of strong "bright line" safe harbors from liability for alleged digital discrimination of access.⁶ A showing that a broadband provider's policies and decisions regarding deployment fall within such a safe harbor should be deemed conclusive proof that the provider did not engage in intentional discrimination and that the provider is not liable for unintended disparate impact because its deployment decisions or practices were made for non-discriminatory reasons. Or, at the very least, a provider that meets one or more safe harbors should receive a rebuttable presumption of non-discrimination.⁷

The following infeasibility circumstances should provide a "safe harbor" from intentional and unintentional discrimination claims:

- When broadband providers rely on federal and state-enforced merger conditions.⁸
- When broadband providers offer service based on guidelines for participating in federal and state-administered broadband deployment subsidy programs, including universal service, the ACP program, and the BEAD Program.⁹
- When broadband providers act in compliance with the terms of state or local franchising agreements.
- When the alleged discriminatory conduct involves a given area that is outside of a broadband provider's state or local franchise area.
- When a wireless broadband provider lacks access to spectrum to provide service or a particular level of service in a given area.
- When a broadband provider has been denied approval, or has been delayed in receiving approval, from local permitting authorities to deploy facilities to a given area, including denials or delays related to litigation involving permitting approval.

⁶ See Comments of the Free State Foundation, at 14-16. Notice, at ¶ 35.

⁷ See Notice, at ¶ 34.

⁸ See Notice, at ¶ 36.

⁹ See Notice, at ¶ 36.

- When the alleged discriminatory conduct takes place while the broadband provider is subject to a bankruptcy plan or trusteeship.
- When the alleged discriminatory conduct is undertaken by third parties outside the control and supervision of broadband providers.¹⁰
- When deploying to an area is prevented or rendered uneconomical due to the high cost of attachments, including when high numbers of attachments would be needed.
- When a broadband provider's non-deployment decision is based on the economic infeasibility of overbuilding and competing against government-owned networks.¹¹

For the foregoing reasons, the Commission should adopt rules in accordance with the views expressed herein regarding Section 60506's requirement that the agency take into account economic and technical feasibility in connection with its deployment provisions.

Respectfully submitted,

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¹⁰ See Notice, at ¶ 36.

¹¹ See Tianjiu Zuo and Michelle Connolly, Impact of Municipal and Cooperative Internet Provision on Broadband Entry and Competition (September 29, 2022), at: <https://ssrn.com/abstract=4178663>.

Further Readings

Seth L. Cooper, "[FCC Rules Should Focus on Intentional Digital Discrimination Only](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 43 (October 3, 2023).

Randolph J. May "[Spotlighting the FCC's Key Digital Discrimination Rulemaking](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 37 (September 15, 2023).

Randolph J. May and Seth L. Cooper, "[FCC 'Digital Discrimination' Rules Should Steer Clear of Burdensome Regulation](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 33 (August 16, 2023).

[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).

[Reply Comments of the Free State Foundation](#), Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (April 20, 2023).

Randolph J. May and Seth L. Cooper, "[FCC Should Rely on Pro-Deployment Actions to Avoid Digital Discrimination](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 60 (November 30, 2022).

Randolph J. May and Seth L. Cooper, "[The FCC Should Reject a Disparate Impact Standard: Targeted Subsidies Should Be Used to Address Deployment Gaps](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 60 (October 14, 2022).