Perspectives from FSF Scholars
November 28, 2023
Vol. 18, No. 51

The FCC's Digital Discrimination Order: An Overreach in Pursuit of a Worthy Goal

by

Randolph J. May *

The Federalist Society Blog
November 27, 2023

In the introduction I prepared for moderating a Federalist Society podcast held on June 23, 2023, I said: "Given the importance of widespread access to broadband services, the 'Digital Discrimination' proceeding is one of the most important items on the FCC's agenda." On November 15, on the congressionally mandated deadline contained in Section 60506 of the Infrastructure Investment and Jobs Act of 2021, the Federal Communications Commission adopted rules intended to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." The Infrastructure Act also directed the FCC, in formulating the rules, to take into account "issues of technical and economic feasibility" the internet service providers confront in achieving that objective.

I wasn't wrong about the FCC's action being one of the most consequential agency actions of the year. As it turns out, it's consequential largely in troubling ways. The objective of preventing discrimination in access to internet services is certainly worthy, and, if done properly, achievable

in a way that does not make it more difficult to accomplish other worthy goals, such as encouraging continued investment in advanced broadband networks and innovative applications. But the FCC's order is one of the most far-reaching unwarranted power grabs in the agency's history. Indeed, in a dissenting statement, Republican FCC Commissioner Brendan Carr declared that the new rules create "a framework that gives the FCC a nearly limitless power to veto private sector decisions," and, for the first time ever, gives "the federal government a roving mandate to micromanage nearly every aspect of how the Internet functions."

That's strong language, but a review of the lengthy FCC order – and its unusually expansive language – shows it's not hyperbolic.

At the outset, it's important to have in mind that the FCC itself found *"little or no evidence in the legislative history of section 60506 or the record of this proceeding indicating that intentional discrimination by industry participants based on the listed characteristics substantially contributes to disparities in access to broadband Internet service across the nation." And in comments submitted for the record, the Biden Administration's own National Telecommunications and Information Administration declared that "documented evidence of disparate treatment in this area is nearly non-existent."*

Rather than using the lack of evidence of intentional disparate treatment as a point of departure for establishing a targeted workable framework for preventing any digital discrimination that may occur in the future, the Commission opted, perversely, to use it as a rationale for embarking on a significant expansion of agency power. The foundation upon which the agency's majority constructs this power grab is the adoption of an unintentional "disparate impact" standard for determining whether discrimination has occurred, rather than an intentional discrimination standard.

Based on existing judicial precedent, courts may well find this choice to be a shaky foundation. First, the statute states that the rules should prohibit digital discrimination "based on" protected categories of persons. This "based on" language focuses on the reasons for deployment decisions, not the end results.

Second, unlike other antidiscrimination statutes, the Infrastructure Act lacks any "catchall" terms, such as references to actions 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 "catchall" terms indicate Congress may have intended to impose disparate impact liability.

Third, the statute requires that the antidiscrimination rules adopted consider "issues of technical and economic feasibility," a requirement that appears inconsistent with disparate impact liability's sole concern with raw outcomes.

Having chosen the disparate impact liability standard, the Commission's order goes to extraordinary lengths to weaponize it against internet service providers. Here I can only provide a few examples from the more than 100-page order. Supposedly to ensure it can remedy any conceivable disparate impact regarding access to internet services, the Commission claims the

power to regulate virtually all aspects of internet providers' policies and practices, including deployment, network reliability, network maintenance, equipment distributed to customers, pricing, promotional discounts, latency, customer service, language options, credit checks, and advertising. As astonishing, the Commission claims the power to regulate the policies and practices of landlords, banks, construction firms, unions, advertising agencies, and other business sectors that somehow may have contributed to a disparate impact.

The order declares that, for internet providers and for those other firms that are now targets for imposing disparate impact liability, the list of policies and practices which the agency claims the right to examine is non-exhaustive. In the interest of what it says is preserving "flexibility," the FCC refers to "the long tail of intangible variables" that can't be foreseen as a justification for placing no tangible limits on the power it asserts to regulate virtually all operations of the businesses within its sights.

And disturbingly, the Commission interprets the requirement that it consider "economic feasibility" as a defense to imposing liability in a way that necessarily will invite utility-style rate regulation of internet providers' services. The Commission will examine "projected income, projected expenses, net income, expected return on investment," all key contested components of traditional drawn-out utility rate proceedings.

Again, the goal of preventing digital discrimination is worthy. But the means of achieving that goal matter. The Commission could have adopted the disparate treatment standard, and made clear that it would be enforced rigorously, along with reaffirming its intent to pursue other actions to facilitate more rapid deployment of broadband facilities in areas that are unserved or underserved. Instead, by adopting the disparate impact standard, and indicating that it likely will be interpreted to impose liability in the broadest possible fashion, I fear the agency's action will deter overall investment and innovation with respect to internet services. This will hurt not only those the FCC professes it wants to help, but all Americans.

* 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. *The FCC's Digital Discrimination Order: An Overreach in Pursuit of a Worthy Goal* was published in *The Federalist Society Blog* on November 27, 2023.