Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination	)	GN Docket No. 22-69

COMMENTS OF
THE FREE STATE FOUNDATION*

I. Introduction and Summary

These comments are submitted in response to the Commission's further notice of proposed rulemaking to address digital discrimination of access to broadband Internet services. The Commission's proposal to impose reporting and internal compliance program requirements as well as its proposed creation of a Civil Rights Office to police digital discrimination would compound legal problems with the digital discrimination rules adopted by the Commission in its November 2023 Order. Furthermore, the Commission's proposal would not help consumers but instead increase costs on consumers and add to regulatory uncertainties for broadband Internet service providers (ISPs) that are likely to inhibit investment in network upgrades and new deployments. This is especially so when considered in conjunction with the Commission's unwise and legally problematic proposal to impose public utility regulation on ISPs in the Title II reclassification proceeding.

Section 60506(b) of the Infrastructure Investment and Jobs Act requires the Commission to facilitate equal access to broadband Internet services by adopting rules to prevent digital

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

discrimination of access "based on income level, race, ethnicity, color, religion, or national origin." In this proceeding to implement Section 60506, the Commission has not identified any actual instances of digital discrimination. The agency's November 2023 Order admitted "there is little or no evidence in the legislative history of the Infrastructure Act or the record of this proceeding that impediments to broadband internet access service are the result of intentional discrimination based on the criteria set forth in the statute." Moreover, the Order does not identify any specific instances of unintentional discrimination based on protected class membership. But there is abundant record evidence that network capabilities are improving and that access is expanding in a timely manner to previously underserved and unserved Americans.

The Commission's proposal would exacerbate the problem of the agency's lack of lawful authority for its digital discrimination regulation and enforcement apparatus. The proposed reporting and internal compliance program requirements would grow the thicket of regulatory burdens imposed on ISPs, thereby rendering the major questions doctrine problem posed by the November 2023 Order even more significant than it is already. As explained by the Supreme Court in *West Virginia v. EPA* (2023), there are certain "extraordinary cases" involving decisions of such "political and economic significance" that a "clear congressional authorization" by Congress is required for the agency to exercise the powers it claims. Section 60506 does not contain clear congressional authorization for redrawing the regulatory landscape of broadband services. The more onerous the restrictions and obligations that the Commission imposes regarding the details of deploying and providing broadband services, the more likely that such rules would be considered of vast political and economic significance.

Given that the Commission has not demonstrated any existing problem of digital discrimination, its proposal to impose new requirements on ISPs and increase bureaucracy would

not materially benefit consumers. Instead, the proposal would likely have the effect of increasing costs for consumers. Initial and cumulative costs to ISPs for complying with those periodic requirements are likely to be recouped from paying subscribers. Those costs include not only the compilation and organization of data for public reporting but also initial time and labor for ISPs to sift or redact proprietary information, including trade secrets and know-how.

The legal uncertainties inherent in the Commission's digital discrimination regulatory regime also pose numerous quandaries for ISPs attempting to comply with the proposed reporting and internal compliance requirements. The November 2023 Order established pervasive oversight over every aspect of broadband ISP business that conceivably could be claimed to bear on differential outcomes in access anywhere. The open-ended nature of the regulatory regime established under the Order makes it unclear as to all of what constitutes digital discrimination of access. These regulatory uncertainties are likely to make compliance with reporting and internal compliance program requirements extremely difficult for ISPs, as they will likely be unable, or encounter difficulty, to understand what is expected or prohibited and predict whether their past or planned future decisions will be found to be compliant if challenged.

Furthermore, the proposal to subject ISPs' future deployment plans to scrutiny and potential liability is likely to hamper investment in network upgrades or new deployments. Under the proposal, ISPs are subject to disparate impact liability based on claims that "pending" or "planned" projects, if carried out, could be conjectured to result in differential outcomes for members of protected classes in some area for some time. This is likely to have a chilling effect on ISPs' business, making them averse to forward-looking planning.

The Commission has not demonstrated the need for a new Office of Civil Rights. The office likely would be unjustifiably predisposed to view digital discrimination as pervasive, despite the Commission not having identified any specific instances of it. The Commission, as it is currently organized, should be able to address any alleged instances of discrimination.

To fulfill Section 60506's mandate to facilitate equal access for members of protected classes, the Commission should use its broadband maps and other data to identify specific areas where protected class members lack equal access and target them with subsidies to close the gaps. The agency has undertaken an extensive and costly process to develop broadband maps, and it is reasonable to make use of its maps to address any instances of unequal access.

II. There Is No Evidence of Digital Discrimination, but There Is Evidence of Market Competition and Continuing Improvements in Network Capabilities and Access

Section 60506(b) of the Infrastructure Investment and Jobs Act requires the Commission to adopt rules to facilitate equal access to broadband Internet services by "preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin."[1] It also requires that the rules for facilitating equal access take into account "the issues of technical and economic feasibility presented by that objective."[2] Notably, in its November 2023 Order implementing Section 60506, the Commission conceded that intentional digital discrimination by ISPs is non-existent.[3] The Order identified no specific areas or instances of digital discrimination resulting from unintentional disparate impact.

[1] 47 U.S.C. § 1754(b)(1).
[2] 47 U.S.C. § 1754(b).
[3] *See* Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, Report and Order and Further Notice of Proposed Rulemaking ("Order" or "FNPRM") (released November 20, 2023), at ¶¶ 47, 56.

There is ample evidence that the broadband market is competitive and that network upgrades and new deployments are being timely rolled out to provide access to Americans of all classifications.[4] The broadband market is dynamic, with private-market financed fiber buildouts, DOCSIS 3.1 and 4.0 upgrades, and 5G-enabled fixed wireless access (FWA) rollouts significantly increasing connectivity, capabilities, and choices for consumers.[5] Subsidies allocated for broadband deployment through the $20.4 billion Rural Digital Opportunity Fund (RDOF) Program, the $42.5 billion Broadband Equity, Access, and Deployment (BEAD) Program, and other programs are now being spent or will soon be spent on infrastructure upgrades and deployments. Completion of subsidized deployments under those programs should be expected to significantly improve access to unserved and underserved Americans, also benefiting members of classes protected under Section 60506.

Despite the lack of concrete findings of actual digital discrimination and language in the Act and Supreme Court case law supporting an intent-based definition of digital discrimination of access,[6] by its November 2023 Order the Commission decided to impose liability on broadband Internet service providers (ISPs) under an unintentional disparate impact standard.[7] The Commission's November 2023 Order subjects to scrutiny nearly any aspect of broadband network operations to disparate impact liability. Enforcement procedures adopted by the

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[4] *See, e.g.*, Comments of the Free State Foundation, *See* 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.

[5] *See, e.g.*, Seth L. Cooper, "FCC's Ignoring Broadband Competition," *Perspectives from FSF Scholars*, Vol. 19, No. 7 (February 22, 2024) (citing multiple sources identifying pro-competitive trends) at: https://freestatefoundation.org/wp-content/uploads/2024/02/The-FCCs-Ignoring-Broadband-Competition-022224.pdf.

[6] *See, e.g.*, Comments of the Free State Foundation, GN Docket No. 22-69, at 10-11 (discussing Smith v. City of Jackson, 544 U.S. 228 (2005) and Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015).

[7] *See* Order, at ¶¶ 47, 56.

Commission appear to make it burdensome for ISPs to demonstrate or justify their policies and actions to the agency based on "issues of technical and economic feasibility." Additionally, the Commission's Order is legally suspect on major questions and administrative procedural grounds, and it is subject to legal challenges that are pending before the U.S. Court of Appeals for the Eighth Circuit.[8]

The Commission is proposing to compound the November 2023 Order's legal and policy problems by imposing additional regulatory burdens on ISPs in the form of reporting and compliance requirements and oversight by a new bureaucratic apparatus. The agency's proposal would require ISPs to annually report their recent broadband investments in each state and territory.[9] The reports would require specific details about deployments, upgrades, and maintenance projects, including the descriptions of the nature of those projects, housing units affected, geographic areas and census tracts, and "narrative descriptions" about project goals.[10] It also would require ISPs to adopt and maintain "a formal internal compliance program designed to ensure regular assessment of whether and how the provider's policies and practices impede equal access to broadband internal access services in its service area."[11] Under the proposal, such internal evaluations would be required to include demographic analyses of provider policies and practices as well as for "pending" and "planned" projects.[12] Relatedly, the proposal seeks comment on requiring ISPs to designate internal compliance officers and committees as well as

[8] *See* United States Judicial Panel on Multidistrict Litigation, *In Re: Federal Communications Commission, in the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Report and Order, and Further Notice of Proposed Rulemaking, FCC 23-100, Released November 20, 2023*, MCP No. 177, Consolidation Order (February 9, 2024), at: https://docs.fcc.gov/public/attachments/DOC-400457A1.pdf.
[9] FNPRM, at ¶ 184.
[10] *See* FNPRM, at ¶¶ 184-191.
[11] See FNPRM, at ¶ 200.
[12] FNPRM, at ¶ 208.

required training on agency rules.[13] Additionally, the Commission's proposal would establish an Office of Civil Rights within the Commission to police against digital discrimination,[14] despite no concrete showing in the November 2023 Order that such a problem exists. The Commission should not adopt its proposal.

III. The Commission's Proposal Adds to the Legal Problems With the Digital Discrimination Rules Imposed in the November 2023 Order

The Commission's proposed reporting and compliance requirements appear to compound the problem of the agency's lack of lawful authority for its digital discrimination regulation and enforcement apparatus. The proposed reporting and internal compliance program requirements grow the thicket of regulatory burdens on ISPs, thereby heightening the major question problem posed by the November 2023 Order. As explained by the Supreme Court in *West Virginia v. EPA* (2023), the doctrine holds that there are certain "extraordinary cases" involving decisions of such "political and economic significance" that a "clear congressional authorization" by Congress is required for the agency to exercise the powers that it claims.[15] But Section 60506 does not contain clear congressional authorization for the Commission to redraw the regulatory landscape of broadband Internet services. The broader the extent to which the Commission's rules impose liability on ISPs and the more onerous the restrictions and obligations they impose on the details of deploying and providing broadband services, the more likely it is that such rules would be of vast political and economic significance.

[13] FNPRM, at ¶¶ 203, 204.
[14] FNPRM, at ¶ 214.
[15] *West Virgina v. EPA*, 142 S.Ct. 2587 (June 30, 2022), Slip Op. at 24 (internal cite omitted).

IV. The Proposed Reporting and Internal Compliance Requirements Will Not Benefit Consumers but Instead Will Likely Increase Costs for Consumers and Increase Uncertainties for Broadband Providers and Disincentivize Investment

The Commission's proposed reporting and internal compliance requirements are unjustified from a policy standpoint. Consumers will not materially benefit from those requirements because they are aimed at a problem that has not been shown to exist. As the Commission's November 2023 Order concedes, "there is little or no evidence in the legislative history of the Infrastructure Act or the record of this proceeding that impediments to broadband internet access service are the result of intentional discrimination based on the criteria set forth in the statute."[16] The Order identifies no geographic area or community that is being denied equal access unintentionally based on residents' membership in protected classes. Digital discrimination of access against potential subscribers would run counter to existing economic incentives of broadband ISPs to deploy broadband networks wherever there is a business case for it or wherever subsidies make it feasible. The Commission's proposal unreasonably skips over the absence of evidence of digital discrimination on the way to imposing additional regulatory requirements to "smoke out" proof of an unreal problem.[17]

The Commission's Notice relies on a bad analogy for its proposed reporting and compliance requirements. It cites the reporting requirements it imposed on voice providers regarding robocalls as a precedent for its proposal.[18] But there is a significant disanalogy between digital discrimination of access and robocalls. Unlike digital discrimination, robocalls are a pervasive demonstrable and economically harmful problem caused by third parties, primarily engaged in fraudulent activity and originating overseas. The problem of robocalls is

[16] Order, at ¶ 47. *See also, e.g., id*. at ¶ 56 ("By commenters' own admission, there is little to no evidence of intentional digital discrimination of access").
[17] *See* FNPRM, at ¶¶ 179, 209.
[18] *See* FNPRM, at ¶ 179.

acknowledged, if not experienced, by voice providers and subscribers alike. Robocalls are irrelevant to broadband access and any reliance on those analogies is misplaced and misleading.

The proposed reporting and internal compliance requirements are likely to negatively impact subscribers, including members of protected classes. The initial and cumulative costs to ISPs of complying with those periodic requirements are likely to be recouped from paying subscribers. Those costs include not only the compilation and organization of data for public reporting but also initial time and labor for ISPs to sift or redact proprietary information, including trade secrets and know-how.

The legal uncertainties inherent in the Commission's digital discrimination regulatory regime also create uncertainties with the proposed reporting and internal compliance requirements. The November 2023 Order established pervasive oversight and control over every aspect of broadband ISP business that conceivably could be claimed to bear on differential outcomes in access anywhere. The open-ended nature of the regulatory regime established under the Order makes it unclear regarding what constitutes digital discrimination of access or what aspects of ISP business should be reported or internally analyzed. There also are serious uncertainties about the difficulty ISPs will face, under the Commission's complaint procedures, in being able to justify to the agency business judgments about how best to spend a limited supply of capital on network upgrades and deployments. Those business judgments also may be based on perceptions about services offered by competitors or based on trade secrets and confidential know-how. The Commission's rules contain no safe harbors that would help enable ISPs to know in advance what sort of conduct or policies are permissible and thereby comply with the rules. These uncertainties built into the Commission's rules are likely to make compliance with reporting and internal compliance program requirements difficult for ISPs, as

they will likely be unable to understand what is expected or prohibited and predict whether their past or planned future decisions will be found to be compliant if challenged.

Furthermore, the Commission's proposal to subject ISPs' future deployment plans to scrutiny and potential liability is likely to hamper investment in network upgrades or new deployments. Under the proposal, it appears that ISPs could be subject to potential disparate impact liability based on claims that "pending" or "planned" deployment, upgrade, and projects that, if carried out, could be projected or conjectured to result in differential outcomes for members of protected classes in some area for some time.[19] Business planning, which is essential to business enterprise, is often tentative and plans are subject to modification in light of further analysis, research, and other factors. But subjecting ISP future infrastructure upgrade and buildout plans to FCC reporting or internal requirements is likely to have a chilling effect on business judgment and internal deliberative processes of ISPs and make them averse to ambitious planning if it could subject them to liability under the Commission's digital discrimination regulatory enforcement regime.

V. The Proposed Civil Rights Office Would Not Benefit Consumers but Instead Increase Bureaucratic Control Over Broadband Networks

Given the Commission's seeming focus on expanded oversight and scrutiny over internal business dealings rather than on directly expanding actual network connectivity to end-users, the proposed rulemaking is just another government agency power grab. This quest for agency power is embodied not only in the Commission's proposed reporting and internal compliance program requirements but its proposal to establish an office of Civil Rights to police digital discrimination that has not been demonstrated to exist. The Commission is able and ought to be willing to address any actual problems of digital discrimination. By itself, establishing a new

[19] *See* NPRM, at ¶¶ 169, 179-180, 208.

office won't expand or speed up deployment. Creating a new bureaucratic institution dedicated to digital discrimination presents the likelihood that the office would be mistakenly predisposed to view digital discrimination of access as pervasive when the Commission has not identified any specific instances of its occurrence.

VI. Instead of Adopting Its Proposal, the Commission Should Identify Any Areas Where Access Is Unequal and Target Those Areas With Subsidies

There is a less bureaucratic and more effective way to fulfill Section 60506's mandate to facilitate equal access: The Commission should use its broadband maps and other public data to identify gaps in service and service quality and direct subsidies to specific areas and communities where protected class members lack equal access. The Commission has undertaken an extensive and costly process to develop its broadband maps, and it is more reasonable for the agency to make use of its maps to police any instances of digital discrimination.

VII. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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