



October 13, 2023

VIA ECFS

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

Re: Notice of Ex Parte Presentation
*Implementing the Infrastructure Investment and Jobs Act: Prevention and
Elimination of Digital Discrimination*; GN Docket No. 22-69

Dear Ms. Dortch:

The Federal Communications Commission (FCC) is approaching its November 15 deadline for final rulemaking on the Infrastructure Investment and Jobs Act (IIJA) section 60505 covering digital discrimination for broadband access.¹ On October 10, the National Telecommunications and Information Administration (NTIA) filed an ex parte supporting a disparate impact definition of digital discrimination, which would hold internet service providers (ISPs) liable for uneven distribution along protected-class lines rather than limiting such liability to intentional acts of discrimination.² As stated in our comments on the FCC's Notice of Proposed Rulemaking (NPRM) on the implementation of the IIJA, it is clear that disparate impact does not align with Congress' intent for the IIJA, that there is an issue of false positives resulting from a disparate impact standard.³ The resulting unnecessary risks to

¹ "Infrastructure Investment and Jobs Act," Public Law 117-58, Nov. 15, 2021,

<https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>.

² "Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination: Ex Parte Comments of the National Telecommunications and Information Administration," National Telecommunications Information Administration, GN Docket No. 22-69, October 6, 2023, <https://www.ntia.gov/fcc-filing/2023/implementing-infrastructure-investment-and-jobs-act-prevention-and-elimination>.

³ "Comments of the American Consumer Institute," Federal Communications Commission, GN Docket No. 22-69, Notice of Proposed Rulemaking (NPRM) In the Matter of Implementing the Infrastructure Investment and Jobs Act:

broadband investments would hinder development. The NITA has also asserted that the Broadband Equity, Access, and Deployment (BEAD) Program should be presumed compliant with a disparate impact standard despite concerns from ISPs. Finally, the NITA made statements erroneously implying that disparate discrimination would include price regulation, which is not supported by Congress and could result in supply constraints.

A disparate impact standard raises three primary concerns, though other organizations have also pointed out concerns not mentioned here.

Firstly, it is not apparent that Congress intended to implement a disparate impact standard when approving section 60506 of the IIJA. The bill's language implies that the FCC should focus on discrimination in future implementation, not past conduct.⁴ The Free State Foundation points out that an impact standard usually includes words like "results in" or "otherwise adversely affects," no such language is used in the bill's text, implying an intentional discrimination standard.⁵

Secondly, the issue of falsely classifying ordinary and even necessary behavior as potentially discriminatory is perhaps inherent to a disparate standard. An example laid out by the American Enterprise Institute is discriminating against different borrowers based on credit rating, which is a necessary part of discerning risk on loans and could disproportionately affect people of color.⁶ Efforts to curtail this infringe on the ability of private companies to make wise and risk-based investments, which are core components of maximizing development and minimizing costs.

Thirdly, the definition of discrimination that focuses on racial disparity obfuscates other underlying issues that better explain differences in broadband connectivity, namely income and adoption. A study by the Information Technology & Innovation Foundation revealed that income was highly influential in determining the level of connectivity, while race was not.⁷

Eliminating of Digital Discrimination, Federal Communications Commission, April 2023, <https://www.theamericanconsumer.org/wp-content/uploads/2023/04/ACI-NPRM-Filing-FINAL.pdf>.

⁴ "Infrastructure Investment and Jobs Act," Public Law 117-58, Nov. 15, 2021, <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>.

⁵ Randolph J. May and Seth L. Cooper, "FCC Should Rely on Pro-Deployment Actions to Avoid Digital Discrimination," Free State Foundation, November 30, 2022, <https://freestatefoundation.org/wp-content/uploads/2022/11/FCC-Should-Rely-on-Pro-Deployment-Actions-to-Avoid-Digital-Discrimination-113022.pdf>.

⁶ Daniel Lyons, "What Do We Mean When We Say Digital Discrimination," American Enterprise Institute, December 14, 2022, <https://www.aei.org/technology-and-innovation/what-do-we-mean-when-we-say-digital-discrimination/#:~:text=We%20propose%20to%20adopt%20a,technical%20and%20For%20economic%20infeasibility>.

⁷ Joe Kane and Jessica Dine, "Broadband Myths: Do ISPs Engage in 'Digital Redlining?'" Information Technology & Innovation Foundation, April 2022, <https://www2.itif.org/2022-broadband-myths-redlining.pdf>.

Likewise, the Bipartisan Policy Center found that many minority communities in urban areas had high levels of broadband access but low rates of broadband adoption.⁸ An infrastructure reductionist approach to disparate connectivity might result in "overbuilding" instead of addressing root causes in adoption.

The American Consumer Institute's comments on this proceeding provided a statistical test on census data, demonstrating that, because of demographic clustering by age, race, and income, census block areas were often statistically different.⁹ Therefore, if an ISP were to invest in any one census block before investing in any other block, because of demographic clustering, they would appear to be discriminating based on race, age, or income. To avoid this, ISPs would be better served not to invest in broadband services for fear of being sued.

There are also compliance concerns regarding implementing a disparate impact standard and the functionality of BEAD programs. T-Mobile USA, Inc. points out this concern over compliance in their comments on the NPRM in question, stating,

"Vague and overbroad rules prohibiting practices that "differentially impact consumers' access" would introduce uncertainty about how providers may deploy or upgrade their networks, what services they may offer, what terms and conditions they may offer, and potentially other aspects of their operations. At a minimum, this uncertainty would increase providers' costs associated with regulatory compliance and oversight, shifting resources away from—and possibly delaying—new deployments and service offerings."¹⁰

This is in concurrence with previous comments, which posit that uncertainty regarding the effects of broadband development could result in slower production or even forfeiture of some new projects. Differential treatment is the preferred standard to better protect the speedy development of broadband infrastructure in line with the mission of BEAD programs across the country. Under such, instances of wrongful discrimination can be investigated and handled according to the law without jeopardizing well-intentioned broadband projects.

⁸ Alex Trollip, "Understanding the Urban Digital Divide," Bipartisan Policy Center, March 5, 2021, <https://bipartisanpolicy.org/blog/urban-broadband-blog/>.

⁹ Comments of the American Consumer Institute," Federal Communications Commission, GN Docket No. 22-69, Notice of Proposed Rulemaking (NPRM) In the Matter of Implementing the Infrastructure Investment and Jobs Act: Eliminating of Digital Discrimination, Federal Communications Commission, April 2023, <https://www.theamericanconsumer.org/wp-content/uploads/2023/04/ACI-NPRM-Filing-FINAL.pdf>.

¹⁰ "Comments of T-Mobile USA. Inc.," Federal Communications Commission, GN Docket No. 22-69, Notice of Proposed Rulemaking (NPRM) In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, February 21, 2023, <https://www.fcc.gov/ecfs/document/1022132797714/1>.

Additionally, the BEAD program may need more compliance with a disparate impact standard due to its bidding processes.¹¹ To service unserved and underserved communities, BEAD programs allow ISPs to bid for the change to develop specific locations through the program. As such, ISPs have no control over which bids are selected and which locations end up receiving their service. The results could be a distribution that needs to adequately service protected communities and be interpreted through disparate impact as discriminatory. If so, ISPs may see the program as an added risk and altogether too prone to liability. The victims will be the communities that disparate impact is meant to protect, as broadband development will most certainly slow down.

Finally, the NTIA suggests that pricing should be subject to a disparate impact standard as well and puts forward the idea that this was the intent of Congress, stating, "the Commission should recognize, as it suggests in the NPRM, that a broad range of service characteristics should be subject to digital discrimination rules. These include quality of service (e.g., speed, latency, and reliability), terms of service, promotional conditions, and pricing."

In their comments, Verizon has pointed out to the FCC that if Congress intended price regulation to be included in the "terms and conditions," they would have stated so explicitly instead of relying on dubious interpretations.¹² In Verizon's comments, it is argued that regulation of rates, and thus prices, is consistently derided as contrary to Congress' mandate to develop broadband by the Commission's admission.¹³ To interpret the FCC's rulemaking powers that were not explicitly granted would be a disservice to Congressional intent.

Congress did not intend for section 60506 of the IIA to require a disparate impact standard in determining instances of broadband access discrimination. To say otherwise puts the implementation of BEAD programs at odds with the performance of section 60506. The resulting uncertainty from a disparate impact standard would hamper the development of programs like BEAD, which aim to advance access to high-speed broadband to unserved and underserved communities.¹⁴

¹¹ "AT&T's Comments to FCC Digital Discrimination Rulemaking," Federal Communications Commission, GN Docket No. 22-69, Notice of Proposed Rulemaking (NPRM) In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, May 16, 2022, <https://www.documentcloud.org/documents/22056686-atts-comments-to-fcc-digital-discrimination-rulemaking>.

¹² "Reply Comments of Verizon," Federal Communications Commission, GN Docket No. 22-69, Notice of Proposed Rulemaking (NPRM) In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, April 20, 2023, <https://www.fcc.gov/ecfs/document/104201536411882/1>.

¹³ Roger Wicker, "Questions for the Record Jessica Rosenworcel Federal Communications Commission," February 20, 2022, <https://perma.cc/TXL6-93KN>.

¹⁴ Public Law, 47 USC § 1702(a)(1).

In closing, the FCC must work to enable market investment and deployment of broadband services, but it must do so without becoming a barrier to that which it aims to promote.

Respectfully,

Steve Pociask
President and CEO
The American Consumer Institute