

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF TECHFREEDOM

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TechFreedom hereby files these Comments in response to the Notice of Inquiry (NOI), released March 17, 2022.¹ The NOI was issued in response to Section 60506 of the 2021 Infrastructure Act.² In response, TechFreedom submits:

INTRODUCTION AND SUMMARY

In the Telecommunications Act of 1996, Congress declared it the FCC’s mission to “make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, rapid, efficient,

¹ Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (Mar. 17, 2022) (“NOI”). The NOI set the comment date as May 16, 2022, and reply comment date as June 20, 2022. These reply comments are timely filed.

² Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (Infrastructure Act). Section 60506 of the Infrastructure Act is codified at 47 U.S.C. § 1754, Digital Discrimination (hereinafter “Section 60506”).

Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”³ Yet some Americans still lag behind in their ability to benefit from the Digital Revolution. The Infrastructure Investment and Jobs Act of 2021 attempts to close that gap by appropriating \$65 billion for broadband deployment and access. Section 60506 requires the Commission to play an active role in ensuring that these efforts, and others already administered by the FCC, will “facilitate equal access to broadband.” There are other things the Commission could do to help it and other agencies achieve that goal, such as ensuring that its broadband maps and complaint process accurately measure disparate impacts.

TechFreedom applauds the use of a Notice of Inquiry to fully consider that question before issuing draft rules in a Notice of Proposed Rulemaking. This inquiry must begin with Section 60506’s text. The Commission asks whether Section 60506 authorizes a new, more general kind of anti-discrimination regulation, but unlike federal civil rights statutes, Section 60506 never prohibits discrimination. If Congress had intended to write a new federal civil rights law governing broadband, it would have explicitly prohibited “digital discrimination.” Instead, Section 60506 commands the FCC only to “*facilitate* equal access . . . including . . . preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.” The use of the word “preventing” is no substitute for an explicit prohibition on discrimination; rather, this clause means that the FCC may, in crafting

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. § 151).

prophylactic rules to prevent future harms, consider only evidence of intent, not disparate impact.

Moreover, if Congress had intended to empower the FCC to fundamentally change regulation of how broadband companies build out their networks, lawmakers would not have done so without generating legislative history via an amendment offered on the Senate floor to a bill that had already passed the House and that is almost entirely about funding, as its title suggests, “infrastructure investment.” As the Supreme Court has made clear in interpreting such provisions, “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”⁴

The Commission must address several other critical questions. First, the statute requires that the Commission do more to examine technical and economic feasibility than would normally be required of administrative agencies. The Commission would help broadband providers achieve the goal of equal access by enumerating the factors it will assess in considering feasibility of deployment. Second, the statute defines “equal access” in terms of a “given area.” Third, Native American lands, patchwork land ownership rights, and even railroad tracks may present costly and difficult legal obstacles to building out broadband infrastructure that in no way reflect a provider’s intent to discriminate. Fourth, complaints of digital discrimination from members of the public must be carefully vetted to prevent bots and other forms of abuse, including but not limited to complaints from individuals who are not even potentially served by a provider against whom they would

⁴ Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 468 (2001).

issue a complaint. Finally, the Commission should remember that introducing new rules will inevitably introduce new compliance costs, and these may further reduce affordability to already underserved populations.

In crafting rules under Section 60506, the Commission should focus on four things: (1) directing funding to areas that lack equal access, (2) ensuring that the Commission can measure both disparate impacts and discriminatory intent, (3) channeling complaints into large-scale analysis that can inform any further action to facilitate equal access, and (4) avoiding imposing unnecessary costs, which will ultimately be borne by consumers themselves and which could frustrate the goal of equal access.

I. About TechFreedom

TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. We seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. We have long engaged in debates over broadband deployment.⁵

⁵ See, e.g., comments of James E. Dunstan, Berin Szóka & Corbin Barthold, In the Matter of Report on the Future of the Universal Service Fund, WT Docket No. 21-476 (Jan. 18, 2022), <https://techfreedom.org/wp-content/uploads/2022/01/TF-Comments-USF-NOI-1-18-22.pdf>

II. TechFreedom Applauds the Commission for Beginning This Proceeding with a Notice of Inquiry Rather Than a Notice of Proposed Rulemaking

TechFreedom has long urged the FCC not to issue an NPRM in the “asking questions” stage of a proceeding. So we applaud the Commission for issuing this NOI rather than jumping directly to an NPRM.⁶ Whatever discretion the Commission enjoys under the Administrative Procedure Act⁷ to configure its rulemaking process, the longstanding pattern—under chairs of both parties—of jumping directly to an NPRM without an NOI often leads to a situation of “ready, fire, aim!”⁸ The Commission cannot fully understand the most important, most complex issues without the basic comments to be produced by an NOI. If the Commission attempts to include draft rules in the NPRM, those rules often rest on significant misunderstanding. If, absent sufficient information, the Commission does not include draft

⁶ See TechFreedom, Comments on Expanding Flexible Use of the 12.2-12.7 GHz Band, WT Docket No. 20-443 (July 7, 2021), <http://techfreedom.org/wp-content/uploads/2021/05/TF-Comments-12-GHz-NPRM-4-7-21.pdf>; TechFreedom & The International Center for Law & Economics, Reply Comments on Modernizing the E-rate Program for Schools and Libraries at 4, n.8, WC Docket No. 13-184 (Nov. 7, 2013), http://docs.techfreedom.org/E_Rate_Reply_Comments.pdf (“the FCC should have issued a Notice of Inquiry before issuing this NPRM for precisely this reason—a mistake the FCC all too often makes, frequently putting the Commission in the awkward position of being on the verge of rulemaking without first properly exploring the facts on the ground. This is the worst kind of putting the cart before the horse.”).

⁷ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 551 et seq.).

⁸ See also *FCC Violates Basic Legal Principles in Rush to Regulate Set-Top Boxes*, TECHFREEDOM (Feb. 18, 2016), <https://techfreedom.org/fcc-violates-basic-legal-principles-in-rush-to/> (“This is simply the latest example of the FCC abusing the rulemaking process by bypassing the Notice of Inquiry ... Every time the FCC does this, it means the gun is already loaded, and ‘fact-finding’ is a mere formality.”).

rules in the NPRM, it compounds the problem by denying regulated parties an opportunity to provide specific input on specific proposals.

Chairwoman Rosenworcel expressed similar concerns regarding the NPRM that ultimately led to the 2015 Open Internet Order.⁹ “I would have done this differently. Before proceeding, I would have taken the time to understand the future[,]” and “taken time for more input.”¹⁰ For the same reasons, the FCC Process Reform Act, passed by the House in the 113th Congress, would generally require the FCC to issue a Notice of Inquiry prior to conducting a rulemaking.¹¹ The Commission should not await the passage of such legislation; It should begin following this practice now, and it deserves credit for doing so in this particular proceeding.

⁹ Open Internet Order, 30 FCC Rcd 5601 (7) (2015). Former Commissioner Pai wrote about the wisdom of conducting an NOI before an NPRM:

We simply ask a lot of questions about where things stand, which is typically what we would do in a Notice of Inquiry. While I of course support soliciting comment as we begin this journey, I think the better approach here would have been to ask for input on where we intend to go. The public is better served if attention can be focused on proposed rules, and the FCC’s ultimate decisions are better informed by direct, as opposed to general, public engagement.

Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269 (2012) (Statement of Chairman Pai).

¹⁰ Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, GN Docket No. 14-28 at 92 (May 15, 2014), <https://goo.gl/FlowH0> (Commissioner Rosenworcel, concurring).

¹¹ See Federal Communications Commission Process Reform Act of 2013, H.R. __, 113th Cong. § 13(a)(1)(A)(i)(I), <http://docs.house.gov/meetings/IF/IF16/20130724/101215/BILLS-113pih-FCCProcessReform.pdf>.

III. Parsing the Text of Section 60506 Makes Clear that the Statute Authorizes Much Less than the NOI Contemplates.

“Congress has written something,” Justice Elena Kagan has explained, “and your job truly is to read and interpret it, and that means staring at the words on the page.”¹² In a 2015 lecture about the legacy of Justice Antonin Scalia, Kagan explained that her former colleague “taught everybody how to do statutory interpretation differently . . . We are all textualists now. Justice [Stephen] Breyer might be a little bit of an outlier but even he, too, starts with the text.”¹³ The Commission, too, must start with the text—and stare at it.

Section 60506 commands the FCC to adopt rules. What, exactly, are those rules supposed to do? The key term in this provision is not “equal access” (the desired end) or “digital discrimination” (something to be avoided as part of that end) but “facilitate” (the means authorized for achieving that end). The plain meaning of that term is “to make easier” or “help bring about.”¹⁴ There is simply no instance in either the Communications Act or in civil rights laws of a commandment to “facilitate” empowering an agency to prohibit or regulate anything. Instead, facilitation is usually a matter of directing funding¹⁵ or, as we shall see, implementing some other prohibition.

¹² Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (quote begins at 9:26).

¹³ *Id.* at 8:21.

¹⁴ *Facilitate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/facilitate>.

¹⁵ *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, § 552 (1996) (encouraging media company is to create a technology fund “to facilitate the development of technology which would empower parents to block programming they deem inappropriate for their children”).

A. Section 60506 Differs Markedly from Federal Civil Rights Laws.

“Should we adopt rules that broadly and directly prohibit digital discrimination?”¹⁶ asks the Commission, and “should we adopt a rule prohibiting certain entities from engaging in digital discrimination of access based on the listed characteristics?”¹⁷ In effect, the Commission is asking whether Section 60506 is a new digital civil rights law. Plainly, it is not.

Federal civil rights laws vary in their precise wording but nonetheless follow a consistent formula. They all turn on unmistakably clear prohibitions on discrimination. Title VII of the Civil Rights Act of 1964,¹⁸ the Fair Housing Act (FHA) of 1968,¹⁹ and the Age Discrimination in Employment Act (ADEA) of 1975 all make it “unlawful” to discriminate “on the basis” of specified protected characteristics. Title IX of the Education Amendments of 1972 says no one “shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁰ The Americans with

¹⁶ NOI ¶ 30 (footnote omitted).

¹⁷ *Id.*

¹⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e-2(a)) (“It shall be an unlawful employment practice for an employer ... to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

¹⁹ 42 U.S.C. § 3605(a) (“It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”).

²⁰ 20 U.S.C. § 1681.

Disabilities Act (ADA) of 1990 provides that “[n]o covered entity shall discriminate ... on the basis of disability.”²¹ Each of these five laws also includes detailed provisions governing enforcement authorizing specific remedies.²²

Beyond mentioning “discrimination,” Section 60506 scarcely resembles these civil rights laws. Subsection 60506(a) makes it the policy of the United States that the Commission “take steps to ensure that all people of the United States benefit from equal access to broadband internet access service.” The term “equal access” is not defined with respect to any protected class; that reference comes later, with respect to a narrower concept: “digital discrimination.” Subsection 60506(b) requires the Commission to “adopt final rules to facilitate equal access to broadband internet access service.” Congress could have declared “digital discrimination” to be “unlawful” (like Title VII, the FHA, and ADEA) or ordered that no broadband internet access (BIAS) provider “shall discriminate” (like Title IX and the ADA), but it did neither. Subsection 60506(b) charges the Commission only with *facilitating* equal access. This includes:

- (1) *preventing* digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin; and
- (2) *identifying* necessary steps for the Commissions to take to *eliminate* discrimination described in paragraph (1).

²¹ 42 U.S.C. § 12112 (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”).

²² 42 U.S.C. §§ 2000e-5, 3612, 12117; 20 U.S.C. § 1682.

What does “prevent” mean here? The word appears in none of the sections of major civil rights laws’ prohibitions of discrimination. It appears only in one of their *enforcement* provisions: Under Title VII, the Equal Employment Opportunity Commission “is empowered . . . to prevent any person from engaging in any unlawful employment practice as set forth in” 42 U.S.C. § 2000e-2(a).²³ Plainly, that provision is not a prohibition; rather, it specifies the means of enforcement of the statute’s explicit prohibition: *ex ante* rulemaking rather than purely *ex post* enforcement. This is apparent from the meaning of the word “prevent”: “to keep from happening or existing.”²⁴ Paragraph 60506(b)(1) clearly serves the same purpose: it says the Commission may do something about potential future discrimination. It does not say *what* the Commission may do; subsection 60506(b) answers that question clearly: nothing more than “facilitate[ing] equal access.”

Paragraph 60506(b)(2) certainly implies something stronger than “prevention” by using the word “eliminate,” which means “to put an end to or get rid of.”²⁵ But where paragraph 60506(b)(1) says “facilitation” includes “preventing digital discrimination,” paragraph 60506(b)(2) says “facilitation” includes “*identifying* necessary steps for the Commissions to take to eliminate discrimination.” The use of the word “eliminate” in this context clearly does not change the overall meaning of the statute: Section 60506 still lacks any clear prohibition on digital discrimination, the most essential aspect of any civil rights law. Nor does this provision create new authority for the Commission; rather, it encourages

²³ 42 U.S.C. § 2000e-5(a).

²⁴ *Prevent*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prevent>.

²⁵ *Eliminate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/eliminate>.

the Commission to assess how it might use its existing authority and perhaps to propose new authority that it might need in requests to Congress.

B. Section 60506 Was Added as an Afterthought to Infrastructure Investment Legislation.

That Section 60506 differs fundamentally from any federal civil rights law is also strongly suggested by its history. Each of those laws was landmark legislation enacted with great fanfare, or after much controversy, and was the result of lengthy congressional consideration, debate, and careful drafting. By contrast, Section 60506 was quite literally an afterthought: an ancillary provision added with no discussion whatsoever to the largest infrastructure investment bill in American history. It is an isolated provision about “facilitating” in a bill about spending. When the House approved the Infrastructure Act (H.R. 3684) and referred it to the Senate, the bill did not contain Section 60506 or any other discussion of digital discrimination. Thus, the meaning of this provision is not addressed in any of the legislative history generated by the House. Section 60506 was added by the Senate as part of a comprehensive amendment replacing the House text,²⁶ but without generating any legislative history whatsoever.

Section 60506 appears to draw upon language in the Anti Digital Redlining Act of 2021 (H.R.4875), a bill introduced by representative Yvette Clarke two days before Section 60506 was added to the Senate bill by an amendment made on the Senate floor. Staring at the text of her bill can tell us only so much: the Clarke bill never became law, indeed it never

²⁶ 167 CONG. REC. S5247 (daily ed. Aug. 1, 2021).

received a hearing or the support even of a single cosponsor. But it might tell us something about what Congress did *not* intend Section 60506 to mean.

One of the Clarke bill's purposes was to "empower and require the Federal Communications Commission to identify what constitutes digital redlining, and . . . to enact regulations designed to eliminate digital redlining."²⁷ Section 3 of that bill required the Commission first to initiate an inquiry on broadband deployment and potential digital redlining. Section 4 then requires the Commission to promulgate rules to "prevent discrimination of access based on income level, race, color, religion, or national origin."²⁸ Section 60506 appears to borrow the "identify" concept from Section 2(b)'s purpose statement and Section 3's inquiry, and the "prevention" concept from Section 4. But Section 60506 says nothing about remedies or enforcement whatsoever. Again, it speaks only of "facilitation," not sanction. By contrast, Section 6 authorizes the Commission to "issue an order to remedy a violation of a rule issued pursuant to section 4," including—in addition to "[a]ny other relief or penalty authorized under this Act"—orders to provide service, orders to require interconnection to other ISP's willing to provide service, and orders to compel any "party not subject to the jurisdiction of the Commission to provide access to any physical premises, wiring, or facility."

The Clarke bill also differs from civil rights law in that it contains no explicit prohibition on discrimination. Yet it does at least clearly authorize robust FCC

²⁷ Anti Digital Redlining Act of 2021, H.R. 4875, 117th Cong. § 2(b)(2) (2021), <https://www.congress.gov/bill/117th-congress/house-bill/4875/text>.

²⁸ *Id.* § 4(a)(2).

enforcement—Something section 60506 does not do. Whatever her bill might have it intended to do, it can tell us a little more than that Congress (perhaps) drew upon concepts from a more robust bill that was much more clearly about FCC enforcement and made those concepts subordinate to a mandate to “facilitate.”

When the Commission asks if it “should . . . adopt a rule prohibiting certain entities from engaging in digital discrimination of access based on the listed characteristics,”²⁹ and other such questions, it is essentially asking whether it can interpret section 60506 to do what the Clarke bill would have: micromanage how broadband providers deploy and offer service, right down to the rates they charge. “But Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”³⁰ Indeed, the Supreme Court has already recognized rate regulation as just such an elephant.³¹ Changing the nature of broadband regulation could have enormous consequences, given that broadband providers have consistently made the largest capital expenditure in the United States of any industry sector for decades, totaling \$79.4 billion in 2020 and \$1.9 trillion since 1996.³² “We expect,” the Supreme Court has declared, “Congress to speak clearly if it wishes to assign to an agency decisions of vast

²⁹ *Id.*

³⁰ *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. at 468.

³¹ *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion”).

³² USTelecom, *2020 Broadband Capex Report*, <https://ustelecom.org/wp-content/uploads/2021/09/USTelecom-2020-Broadband-Capex-Report.pdf>

‘economic and political significance.’”³³ Interpretating “facilitate” to mean, in effect, “prohibit” would clearly implicate the major questions doctrine as developed by the Supreme Court.³⁴

C. Section 60506 Authorizes Only Discriminatory Intent Analysis for “Prevention”

The NOI asks “should we establish a ‘discriminatory effects’ or disparate impact test? As an initial matter, is such an approach permissible under subsection 60506?”³⁵ While Section 60506 is fundamentally different from the civil rights laws in authorizing only “facilitation” rather than prohibition, we can learn something about how the Commission is to assess *when* it may properly “facilitate equal access” from how courts have interpreted civil rights laws.

Under 60506(b), the Commission must “adopt final rules to facilitate equal access” to BIAS.³⁶ The term “equal access” means “the equal opportunity to subscribe to an offered service.”³⁷ By contrast, 60506(b)(1) says this includes “preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.” These two provisions turn on different things: what the FCC may “facilitate” in general is the “opportunity” available to consumers, while what the FCC may “facilitate” in “preventing

³³ Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014).

³⁴ See, e.g., King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (“Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”).

³⁵ NOI ¶ 22.

³⁶ Infrastructure Act § 60506(b).

³⁷ *Id.* § 60506(a)(2).

digital discrimination” turns on the basis for broadband providers’ decisions about providing service. This distinction is a familiar one from civil rights law. As the Supreme Court recently noted: “Together, *Griggs* [applying Title VII] and the plurality in *Smith* [involving the ADEA] instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.”³⁸ Thus, the “opportunity” inherent in 60506(b)’s concept of “equal access” may be measured in terms of disparate impact, but 60506(b)(1)’s concept of “digital discrimination”—the basis for any “preventing” future effects on “equal access”—must be proven by evidence of discriminatory intent, not disparate impact.

D. The Commission Should Enumerate Factors for Assessing the “Technical and Economic Feasibility” of Broadband Deployment

Subsection 60506(b) commands the Commission to “issue rules to facilitate equal access to broadband internet access service, *taking into account the issues of technical and economic feasibility* presented by that objective.” “How,” the Commission asks, “are we obligated to take any such [issues] into account?”³⁹ Congress must have intended this term to mean something more than the usual standard of “reasoned decision making” applicable

³⁸ Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2518 (2015).

³⁹ NOI ¶ 19.

to administrative actions.⁴⁰ The question is how the Commission should satisfy this heightened burden.

The Commission considered similar issues in its 2011 data roaming order, which required any “facilities-based provider of commercial mobile data services ... to offer roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations,” including, most notably, that:

it is reasonable for a provider not to offer a data roaming arrangement where it is not technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider’s network necessary to accommodate roaming for such data service are not economically reasonable.⁴¹

The rule was challenged for imposing common carriage obligations on non-common carriers, but the DC circuit upheld it, noting that the Commission had “built into the ‘commercially reasonable’ standard considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market.”⁴² In part, that decision rested upon the 16-factor test articulated in the rule for assessing the reasonableness of a refusal to offer data roaming.⁴³ The deployment and provision of broadband service to retail consumers is

⁴⁰ *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (recognizing that the APA “establishes a scheme of ‘reasoned decisionmaking’” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983))).

⁴¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile data services*, 26 F.C.C.R. 5411, ¶¶ 1, 36 (2011) (“*Data Roaming Order*”).

⁴² *Cellco Partnership v. Fed. Comm’n*, 700 F.3d 534, 548 (D.C. Cir. 2012).

⁴³ *Id.*

not directly analogous to the wholesale relationships at issue in the data roaming rule, but at least three of the factors in that order would apply here:

- the impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality; ...
- events or circumstances beyond either provider’s control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage; and ...
- other special or extenuating circumstances.⁴⁴

While the other factors in that order may not be directly applicable here, the Commission should follow the Data Roaming Order in explaining how it will assess “technical and economic feasibility.” Doing so will have the added advantage of ensuring that whatever rules the Commission may issue do not depend on the regulatory classification of BIAS: if the Commission leaves adequate “flexibility for providers to respond to the competitive forces at play” in the broadband market, the courts should decide that any rules it may issue in this proceeding can be applied to BIAS even if it is classified as a Title I information service—as it is now, and as it surely will be the next Republican-led FCC. Furthering the goal of equal access will not be served by crafting rules that are subject to legal challenge and need to be rewritten after changes in control of the FCC.

⁴⁴ *Data Roaming Order* ¶ 86.

A. The Definition of “Given Area” is Key to the Analysis of Digital Discrimination

Section 60506 defines “equal access” in the availability of broadband service within a “given area.”⁴⁵ The NOI asks how the Commission should define “given area”:

Does the different word choice signify that this refers to something other than “the service area of a provider of such service” used elsewhere in this subsection? If so, how should we construe the “given area” in which the “equal opportunity to subscribe” is called for? What unit of geography would provide appropriate granularity and be easy to match with other data? Should we interpret the phrase in such a manner that it would track established geographical lines, such as city, county, and state boundaries or general demographic data such as U.S. Census statistical areas? Or should we define the “given area” in some way tied to the provision of broadband, such as the service area of a provider?⁴⁶

How the FCC defines “given area” is critical in determining whether “digital discrimination” exists; and to effectuating the limiting principle of “technical and economic feasibility.”

TechFreedom submits that the “given area” for analysis should include two factors:

- 1) Whether the area in question is within the service area of a provider; and
- 2) Whether there are other geographic or regulatory factors that impact the ability of a provider to provide service to the area in question.

The second factor would build upon one of the factors in the data roaming rule.⁴⁷ For example, a cable company that provides broadband service certainly cannot be accused of “digital discrimination” in failing to provide broadband service beyond its cable franchise

⁴⁵ Infrastructure Act § 60506 (a)(2) (“the term ‘equal access,’ for purposes of this section, means the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions”).

⁴⁶ NOI ¶ 17 (footnotes omitted).

⁴⁷ *See supra* at 16.

area, even if that franchise area is directly adjacent to an area lacking service. No broadband provider can provide service to area in which it has no authority to build.

Similarly, natural geographic barriers must be taken into account. A provider may be authorized to serve areas within a community which it simply cannot reach, because, for example, a substantial river bisects the community, or a mountain ridge within the authorized service area makes reaching parts of that community economically infeasible to reach. The Commission should take heed of what it said in 2007 regarding Section 621 of the Communications Act and local franchising authority (LFA) demands for build-out requirements for competitive cable systems:

Accordingly, we find that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates. For example, absent other factors, it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone. It also would seem unreasonable to require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service. It also would seem unreasonable, absent other factors, to require more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator; or requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve. We note, however, it would seem reasonable for an LFA in establishing build-out requirements to consider the new entrant's market penetration. It would also seem reasonable for an LFA to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.

Some other practices that seem unreasonable include requiring the new entrant to build out and provide service to buildings or developments to which the new entrant cannot obtain access on reasonable terms; requiring the new entrant to build out to certain areas or customers that the entrant cannot reach using standard technical solutions; and requiring the new entrant to build out

and provide service to areas where it cannot obtain reasonable access to and use of the public rights of way.⁴⁸

How can build-out requirements be “unreasonable” under Section 621 but now be considered evidence of digital discrimination? Any analysis of digital discrimination, and certainly any rules adopted in the future, must take into account the Commission’s prior recognition that requiring build-out to certain areas is “unreasonable,” and not “digital discrimination.” To do otherwise would be arbitrary and capricious.

Finally, in defining “given area,” the FCC must consider man-made impediments to deployment. For example, broadband providers have spent decades attempting to ease restrictions and the cost and time involved in acquiring the rights to cross railroad tracks. While the term “living on the wrong side of the tracks,” has many negative connotations, in real life, it has often been nearly impossible for a broadband provider to reach neighborhoods on the other side of the railroad tracks from its existing plant. This problem dates back over a hundred years, to when railroads obtained title to real property in exchange for extending the rail network in America.⁴⁹ They then use this ownership to either delay or extract huge fees from other operators seeking to cross the tracks. For example,

Garden Valley Telephone wanted to install fiber to their [Fosston’s] city hall. In order to do it, they would have to parallel railroad tracks for a couple of blocks and cross the railroad at one point. The bill from the railroad to do this

⁴⁸ Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 5101, ¶¶ 89-90 (2007).

⁴⁹ See Lisa Gonzalez, *All Aboard for Reformed Railroad Right-of-Way Crossing Rules*, COMMUNITY NETWORKS (July 19, 2019), <https://muninetworks.org/content/all-aboard-reformed-minnesota-railroad-right-way-crossing-rules>.

on an annual basis for 20 years was going to come to \$72,000... And they were in the public right-of-way the whole route.⁵⁰

A number of states have passed laws attempting to standardize both the fees and the timelines for such access requests, but creative railroads have circumvented some state laws by assigning the rights to sell easements to third parties that do not qualify as “utilities” for purposes of the statute, or the party seeking access was not protected under the state statute because it was not a public utility.⁵¹ NTCA has brought this problem to the Commission’s attention several times in the *Accelerating Wireline Broadband Deployment* proceeding.⁵² In 2017, NTCA stated:

NTCA members report that these fees and the terms and conditions of their access to railroad crossings and rights-of-way for the purposes of installing broadband infrastructure often operate as a top barrier to broadband deployment. . . Worst of all, fees of thousands of dollars and delays of several weeks or even months can ensue for work (e.g., boring under a railroad right-of-way for the purpose of installing fiber) that is complete in a matter of hours.⁵³

NTCA filed updated comments in the same proceeding in 2018:

One NTCA member received a request from a business for a fiber broadband connection lacking one currently. Providing the connection to the potential

⁵⁰ *Id.*

⁵¹ *See, e.g.,* Hawkeye Land Company v. Iowa Utilities Board, 847 N.W.2d 199 (Iowa 2014) (Iowa statute not applicable when the broadband provider was found not to be a “public utility” seeking access under the statute).

⁵² *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket 17-84 (2020).

⁵³ NTCA–The Rural Broadband Association, Comment on *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* at 16, WC Docket 17-84 (June 17, 2014), <https://www.neca.org/docs/default-source/wwpdf/public/61517ntca2.pdf>.

customer involved the underground installation of fiber in a public ROW adjacent to a state highway that at one point intersected with the railroad crossing at issue. The railroad quoted fees of nearly \$20,000, which was composed of more than \$10,000 for the permit once it was issued, a separate upfront application fee, an “engineer mobilization” fee, and a “flagging/observer” fee; the railroad also required the broadband provider to purchase insurance at a cost of nearly \$2,000.

These fees as quoted by the railroad did not include any of the construction fees that the broadband provider was also required to incur. When the business customer balked at the special construction cost associated with such fees and a local economic development coordinator intervened, the railroad reduced its quote by several thousand dollars. The boring of the fiber was completed in one day, traversing a grand total of 15 feet under the railroad crossing and emerging on the other side also in the public ROW.

Such fees are common in NTCA members’ experience. Also common are delays of several months for boring under railroad crossings—and similar to the example discussed above this is typically for work that begins and ends in the public right-of-way, never touches railroad property, and is completed in an hour. Yet certain state and local property laws grant railroads the ability to act as “gatekeepers” and hold up providers for increasingly outrageous fees that waste precious and limited resources.⁵⁴

Other regulatory or man-made burdens frustrate deployment. As the FCC has long noted, the cost of deploying broadband to Native American reservations is far higher than in other parts of the country because of the status of Indian lands, and the difficulty of navigating rights-of-way in “checkerboard” areas combining trust lands, fee lands, and other

⁵⁴ NTCA–The Rural Broadband Association, Comments on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket 17-84 (Nov. 9, 2018), <https://www.fcc.gov/ecfs/file/download/11.9.18%20NTCA%20Opp%20to%20PFRs%2017-84%20and%2017-79%20FINAL.pdf?folder=1109832904697>.

land statuses.⁵⁵ The delays in acquiring such ROWs can take months, if not years, sometimes destroying the business case for deployment. This can be true even if the reservation in question directly abuts urban areas.

Before accusing a broadband provider of engaging in “digital discrimination” (a serious and socially charged accusation), and in analyzing complaints filed under any new rules, the Commission must honestly examine whether the lack of service is based on factors that have no relation to the protected classifications of “income level, race, ethnicity, color, religion, or national origin.” Indeed, if lack of service is driven by significant geographic or regulatory constraints on deployment, the Commission should end the inquiry, even if there is some evidence of disparate impact.⁵⁶ The civil rights laws all recognize some form of “business necessity” defense to disparate impact claims⁵⁷—and so must the Commission.

⁵⁵ See FCC, Report on Broadband Deployment in Indian Country, Pursuant to the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018 at 2 (May 2019), <https://www.fcc.gov/document/report-broadband-deployment-indian-country> (“Given that carriers must undertake significantly higher costs to construct broadband networks in remote, isolated areas, the lack of density in rural Tribal areas appears to have a negative effect on broadband deployment”); *id.* at 10 (“to address the higher costs that legacy carriers typically face in serving Tribal lands, the Commission substantially increased the amount of operating costs that can be recovered by carriers that predominantly serve Tribal lands”) (citing Connect America Fund, Report and Order, 33 FCC Rcd 3602, 3602-03 ¶ 5 (2018)). See generally, Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, WT Docket No. 11-40 (Mar. 3, 2011), <https://www.fcc.gov/document/improving-communications-services-native-nations-promoting-greater>.

⁵⁶ See NOI ¶ 22 (“should we establish a ‘discriminatory effects’ or disparate impact test?”).

⁵⁷ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522-23 (2015).

Rather than blaming broadband providers for disparate impacts due to causes beyond their control, the Commission should instead use proceedings like *Accelerating Wireline Broadband Deployment* to address the root causes of such disparities. This would be yet another way to “facilitate” equal access to broadband.

B. The NOI Buries the Key Issue of Defining “Digital Discrimination”

Several assumptions in the NOI rest upon no actual data. Any one of these assumptions could easily derail this proceeding. The NOI *assumes* that digital discrimination exists, and may be widespread, without fully defining what “digital discrimination” even means. After asking for comments on multiple definitions,⁵⁸ not until paragraph 21 does the NOI ask the fundamental question:

We seek comment on what “digital discrimination” means. In light of the provided definition of “equal access” in paragraph (a)(2) and reference to that concept in (b), should we understand digital discrimination to be a lack of equal access to broadband based on one of the listed characteristics? Or is there a broader way to construe this language that is supported by subsection 60506?⁵⁹

Whether there is actual evidence of digital discrimination, and whether such evidence is widespread, are the key factual issues in this proceeding. In a California PUC proceeding investigating “redlining,” for example, AT&T submitted evidence showing that its fiber deployment in the state was not meaningfully correlated with the percentage of households

⁵⁸ See NOI ¶ 11 (asking how to define “equal access”); NOI ¶ 12 (asking how to define “equal opportunity to subscribe”); NOI ¶ 13 (asking how to define “comparability”); NOI ¶ 15 (asking how to define “comparable terms and conditions”); NOI ¶ 17 (asking how to define “given area”); NOI ¶ 18 (asking how to define “facilitate”); NOI ¶ 19 (asking how to define “technical and economic feasibility”).

⁵⁹ NOI ¶ 21 (footnotes omitted).

either being below the poverty line or being white rather than non-white.⁶⁰ Indeed, non-white households were more likely to have access to fiber, which likely reflects the concentration of nonwhite populations in cities where fiber deployment is more feasible than in rural areas:

Table 1. AT&T Fiber Deployments Since 2016¹⁸

Filing Period	% of Households in AT&T's CA Wireline Footprint With AT&T Fiber	% of Households in AT&T's CA Wireline Footprint Below the Poverty Line with AT&T Fiber	% of Households in AT&T's CA Wireline Footprint Above the Poverty Line with AT&T Fiber	% of Households in AT&T's CA Wireline Footprint Designated by Census as "White" with AT&T Fiber	% of Households in AT&T's CA Wireline Footprint Designated by Census as "Non-White" with AT&T Fiber
Dec-16	4.21%	3.37%	4.33%	4.19%	4.23%
Dec-17	11.45%	10.20%	11.62%	10.47%	12.36%
Dec-18	19.03%	18.24%	19.14%	16.91%	21.04%
Dec-19	24.19%	23.86%	24.23%	21.95%	26.32%
Dec-20	25.15%	24.91%	25.19%	22.91%	27.28%
% Change 2016-2020	496.86%	638.97%	481.40%	446.39%	544.61%

While this chart is not complete in that it lacks several of the protected classes covered by section 60506, it does illustrate the kind of data that might provide a first approximation of “unequal access.” This is the kind of market-wide data analysis the Commission should be focused on, rather than anecdotal complaints.

⁶⁰ AT&T, Comments on Order Instituting Rulemaking Regarding Broadband Infrastructure Deployment and to Support Service Providers in the State of California, CA PUC Docket R20-09-001 at 12 (July 2, 2021), <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M390/K891/390891232.PDF>.

IV. What the Commission *Should* Do under Section 60506.

In crafting rules under Section 60506, the Commission should focus on four things: (1) directing funding to areas that lack equal access, (2) ensuring that the Commission can measure both disparate impacts and discriminatory intent, (3) channeling complaints into large-scale analysis that can inform any further action to facilitate equal access, and (4) avoiding imposing unnecessary costs, which will ultimately be borne by consumers themselves and which could frustrate the goal of equal access.

C. Focus on Directing Funding to Areas That Lack Equal Access

Most obviously, Subsection 60506(b) requires the Commission to implement, or assist in implementing, the parts of the Infrastructure Act concerning investment in broadband in ways that “facilitate equal access.” Title I of Division F directs “broadband grants” to unserved locations, underserved locations, and eligible community anchor institutions.⁶¹ For example, Title I specifically directs the FCC to provide technical support for the Broadband Equity, Access, and Deployment Program, to submit to Congress a report on improving the Commission’s effectiveness in achieving the universal service goals for broadband, and to establish an online mapping tool to provide an overview of the overall geographic footprint of each broadband infrastructure deployment project funded by the Federal Government. In each of these tasks, the Commission will have an opportunity to direct broadband grants towards areas that might currently lack equal access. Section 60506 commands the Commission to adopt rules towards that end. Title II extends COVID-related

⁶¹ Infrastructure Act § 60506(b).

subsidies for broadband deployment to serve underserved tribes.⁶² Title V extends the Emergency Broadband Benefit beyond the emergency period related to COVID-19 and directs the FCC to promote, administer, monitor, and collect data on the program.⁶³ These programs provide the Commission additional opportunities to help achieve “equal access.”

Other provisions of Division F of the Act establish a consultative or advisory role for the SEC in how other agencies spend money,⁶⁴ but here, too, the FCC can help to inform that investment and direct it towards the goal of equal access. Section 60506(b) does not limit the FCC’s role in facilitation to spending authorized under the Act itself. The FCC currently administers other subsidy programs. It would be appropriate for rules issued under section 60506 to direct these programs towards the goal of equal access as well—because this would also qualify as “facilitation.”

D. Ensure that the Commission Can Measure Both Disparate Impacts and Intent

First, the Commission should inquire about potential means that are “technically and economically feasible” for detecting discriminatory intent in broadband deployment. In

⁶² *Id.* § 60201.

⁶³ *Id.* § 60502.

⁶⁴ Title III establishes the State Digital Equity Capacity Grand Program within the Department of Commerce, geared towards promoting digital equity, supporting digital inclusion activities, and building capacity for adoption of broadband by States. Title IV directs the Assistant Secretary of Commerce for Communications and Information at NTIA to award middle-mile grants in order to encourage the expansion and extension of middle-mile infrastructure and promote broadband connection resiliency. Title VI directs the FCC and Secretary of Labor to establish an interagency working group to develop recommendations regarding the workforce needs of the telecommunications industry and to issue guidance on how States can address these workforce needs.

assessing the need for such transparency into decision making about deployment, the Commission should first assess how likely it is that such discrimination is actually occurring.

Second, the Commission must ensure that its broadband maps are technically capable of accurately reflecting variability in broadband access along lines of “income level, race, ethnicity, color, religion, or national origin.”⁶⁵ Finally, and relatedly, the Commission should ensure that its complaint process creates data that can be fed into its maps to accurately reflect reports of unequal access or digital discrimination.

E. Any New Rules Cannot Weaponize the FCC’s Complaint System

Whether rules issued under section 60506 are, in fact, “economically feasible” will depend, more than anything else, on the procedure the Commission creates to address complaints. The NOI asks whether new complaint procedures to meet the statutory requirement that the Commission “revise its public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination.”⁶⁶ The NOI further asks:

Apart from the Commission’s existing informal consumer complaint process, should we establish an alternative complaint process for violations of any rules we adopt to prevent digital discrimination? Many anti-discrimination laws and frameworks enable individuals to bring individualized complaints. Would such a scheme be practicable and desirable in the context of digital discrimination at issue here? How would it work, what would be the requirements to make a successful claim, and what remedies would be available to individuals who make a successful claim? Is there an existing alternative complaint process that the Commission could look to in developing a process for accepting complaints related to digital discrimination? Should

⁶⁵ *Id.* § 60506(b)(1).

⁶⁶ NOI ¶ 34, quoting Section 60506(e).

we establish a dedicated ombudsperson to use alternative dispute resolution to facilitate resolution of such complaints?⁶⁷

There are certainly ways that the FCC could “revise” its public complaint system⁶⁸ to accommodate complaints alleging digital discrimination. The Internet complaint form⁶⁹ already has a pull-down box called “availability.” There could be an added category (with an appropriate description) for “digital discrimination.” The form should ask complainants provide their address, if their claim involve an inability to purchase broadband service from their location, and information corresponding to the protected classes covered by Section 60506.⁷⁰ The specifics of this can be worked out during the pendency of this proceeding.

How the Commission vets these complaints, however, goes to the core of the Commission’s question: “would [an individual complaint] scheme be practicable and desirable in the context of digital discrimination at issue here? How would it work, what would be the requirements to make a successful claim, and what remedies would be available to individuals who make a successful claim?”⁷¹ In the context of a claim of digital discrimination based on a lack of access to service, it would be virtually impossible for the

⁶⁷ *Id.* ¶ 36.

⁶⁸ See *Consumer Complaint Center*, FCC, <https://consumercomplaints.fcc.gov/hc/en-us>.

⁶⁹ See *Consumer Inquiries and Complaint Center: Internet Complaint*, FCC, https://consumercomplaints.fcc.gov/hc/en-us/requests/new?ticket_form_id=38824.

⁷⁰ This, of course, raises privacy issues which the Commission will have to address in crafting its revised complaint procedures, and providing a specific address would require divulging personal information (and may lead many consumers to choose to not file a complaint for fear of this information being released).

⁷¹ NOI ¶ 36.

FCC to merely forward each individual complaint on to broadband providers. How would the FCC even identify which provider(s) might be engaging in digital discrimination? One could imagine a complaint process tied into the FCC's broadband maps, but even that would be prone to costly and time-consuming errors. If an individual were to identify an area served by multiple providers, which one would receive the complaint? What if the map location is outside the identified service area of any provider, what then?

Such a haphazard approach to complaints could easily be weaponized against broadband providers to tie them up with hundreds of thousands of complaints. Will it be possible to "bot" the complaint system the same way that the FCC's Electronic Comment Filing System (ECFS) has been infiltrated with fake filings?⁷² Conversely, would requiring complainants to verify their identities and file complaints under penalty of perjury scare off consumers with legitimate complaints?

The potential for weaponizing the complaint process will grow significantly if the Commission, as the NOI contemplates, reads into Section 60506 a prohibition on discrimination that plainly is not there. Will we see threats of shake-downs against broadband providers akin to what's happened with the Telephone Consumer Privacy Act

⁷² See *Joint Hearing Before the Permanent Subcomm. on Investigations & the Subcomm. on Regul. Affs. & Mgmt. of the Comm. on Homeland & Governmental Affs.* At 2, 116 Cong. (2019) (Staff Report, Abuses of the Federal Notice-And-Comment Rulemaking Process), <https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf> ("Most federal agencies lack appropriate processes to address allegations that people have submitted comments under fraudulent identities. Recent reports demonstrate that individuals are using false identities to submit comments.").

(TCPA)?⁷³ Only by carefully considering these questions can the Commission avoid opening the floodgates of frivolous administrative litigation—and thus satisfy Section 60506(b)'s statutory commandment of “taking into account the issues of technical and economic feasibility presented by th[e] objective” of “facilitat[ing] equal access to broadband internet access service.”

F. Rules Add Costs, Which May Further Reduce Affordability

On the one hand, the NOI asks whether the Commission can interpret Section 60506 to equate an individual's inability to afford a particular broadband service with a denial of equal access.⁷⁴ Yet in assessing the types of rules that might combat digital discrimination, the NOI provides a laundry list of conditions it could impose on broadband providers to combat digital discrimination. “Further, would requiring entities to do particular acts, such as obligations regarding dissemination of service offerings, or subjecting them to recordkeeping and reporting rules and audits be sufficient and effective in this context? Are there other specific obligations that the Commission should or could require?”⁷⁵ The

⁷³ See *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform, (Aug. 31, 2017), <https://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits>.

⁷⁴ NOI ¶ 15 (“Subsection 60506 does not list affordability as a factor for assessing a provider's equal access obligation. Nevertheless, we seek comment on whether the Commission is required or permitted to take into account the affordability of terms and conditions. For example, while a service provider's terms and conditions may be identical across an area, rates might nevertheless be prohibitively expensive for some in that area. Does equal access, as defined in subsection 60506, require that rates be not only comparable but also affordable?”).

⁷⁵ NOI ¶ 31.

Commission must be aware, however, of the impact of these regulatory compliance costs on broadband affordability. Increased regulatory compliance costs are ultimately passed on to consumers as higher rates, which could push more consumers into the category of being denied equal access because they can no longer afford broadband. How would the Commission respond—by layering on even more regulations that impose still further costs on broadband providers, which costs are again passed on to consumers? The destructive cycle of such a regulatory approach should be obvious—and avoided.

CONCLUSION

The Commission has started this proceeding on the right foot: asking for input on how to draft rules. In the same spirit, it should focus on crafting rules that clearly comport with the text of Section 60506. Attempting to exceed the authority conferred by the plain text of that provision will only embroil the Commission in needless and protracted litigation; it will not serve Congress’s goal of “facilitating equal access to broadband Internet access service.”

Respectfully submitted,

_____/s/_____

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