

**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
IN RESPONSE TO
FURTHER NOTICE OF PROPOSED RULEMAKING**

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EXECUTIVE SUMMARY

Yet again, there remains no evidence showing any pattern of digital discrimination meriting regulation. Evidence of past discrimination elsewhere in the economy or structural forms of bias in American society cannot justify broadband regulation without a clear statement from Congress—not 350 words in an appropriations bill numbering over 1,000 pages.

Establishing an Office of Civil Rights at the FCC would be a precipitous move. Its supposed authorizing language bears little resemblance to the textual foundations of parallel offices elsewhere in the executive agencies, whose portfolios consist mainly of enforcing equal employment opportunity laws within the agency and ensuring federal grant programs are implemented free of discrimination.

This unsound textual basis also yields a seemingly inadvertent gap which would potentially shield a future FCC civil rights office from any congressional oversight. The broad, general questions of the present FNPRM do little to help establish the appropriate metes and bounds of the office's authority. If it intends to rule on questions of disparate impact, those hoped-for rulings risk never being made, as pending court cases bear significantly on the authority of any executive agency on that matter.

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TechFreedom, pursuant to Sections 1.4 and 1.405 of the Commission’s rules,¹ hereby files these Comments in response to the Further Notice of Proposed Rulemaking (FNPRM), issued by the Commission in the above-referenced proceeding as part of the Report and Order and Further Notice of Proposed Rulemaking, released November 20, 2023.² TechFreedom submits the following comments related to the issue of whether the FCC should create a new Office of Civil Rights at this time and as part of this proceeding.

I. Introduction

In the FNPRM, the Commission attempts to take the next step in converting the fewer than 350 words of Section 60506, contained in a 1,039-page appropriations bill³ with zero

¹ 47 C.F.R. §§ 1.4 & 1.405.

² Prevention and Elimination of Digital Discrimination, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69, 89 Fed. Reg. 6477 (Nov. 20, 2023). <https://docs.fcc.gov/public/attachments/FCC-23-100A1.pdf> (“FNPRM”). The Report and Order portion of that document is hereinafter referred to as the “Section 60506 Report and Order”.

³ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60506(b), 135 Stat. 429 (2021) (codified at 47 U.S.C. § 1754) (Infrastructure Act).

legislative history, into a full-blown civil rights statute. Chair Rosenworcel made her position clear: “Like I said at the start, Section 60506 is a big deal. It is the first bipartisan civil rights law focused on the digital age.”⁴ But is it? Can an agency simply declare something as a “civil right,” or does that power rest solely with Congress? Does Section 60506 create an entirely new civil rights law warranting the creation of an Office of Civil Rights within the FCC? The FCC has managed to interpret and enforce the provisions in the Communications Act for 90 years without the need for an Office of Civil Rights. This includes Section 1 of the Communications Act, which states the agency’s purpose: “to make available, so far as possible,” a “rapid, efficient, Nation-wide” wire and radio communication service with adequate facilities “to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.”⁵ If the need for an FCC Office of Civil Rights is for enforcement of a disparate impact regulatory regime, that rationale will fall if appellants in the Eighth Circuit appeal prevail in their claims that the Section 60506 Report and Order raises major questions that only Congress can answer with specific statutory language.⁶

⁴ See Statement of Chairwoman Rosenworcel, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 at 23, Report and Order and Further Notice of Proposed Rulemaking (Nov. 2023), <https://docs.fcc.gov/public/attachments/DOC-398477A2.pdf>.

⁵ 47 U.S.C. § 151. See also Section 60506 Report & Order ¶ 6.

⁶ See *Minnesota Telecom Alliance v. Fed. Commc’ns Comm’n*, No. 24-1179 (8th Cir. filed Feb. 9, 2024). See also Comments of TechFreedom in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, at 34-35 (Feb. 21, 2023), <https://techfreedom.org/wp-content/uploads/2023/02/TechFreedom-Comments-on-FCC-Nondiscrimination-NPRM-2.21.23.pdf>; Comments of USTelecom in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, 1-2 (Sept. 28, 2023), <https://www.ustelecom.org/wp->

II. Establishing a New Office of Civil Rights Is Ill-Advised at This Time

The plain language makes clear that Section 60506 was intended as a disparate treatment statute.⁷ The Section 60506 Report and Order finds that none exists:

Based on the record before us, we do not expect to encounter many instances of intentional discrimination with respect to deployment and network upgrades, as there is little or no evidence in the legislative history of section 60506 or the record of this proceeding indicating that intentional discrimination by industry participants based on the listed characteristics substantially contributes to disparities in access to broadband internet service across the Nation.⁸

Under this reading of the statute, therefore, there would be no need for an OCR. But the Section 60506 Report and Order did not stop at disparate treatment, instead concluding that

content/uploads/2023/09/2023.9.28-USTelecom-Ex-Parte-GN-Docket-No-22-69.pdf; Comments of AT&T in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, 15 (May 16, 2022), <https://www.fcc.gov/ecfs/document/1051658098229/1>.

⁷ See Comments of TechFreedom in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, 3 (May 16, 2022), <https://techfreedom.org/wp-content/uploads/2022/05/TechFreedom-Digital-Discrimination-NOI-Comments.pdf>; Reply Comments of TechFreedom in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, 10 (Apr. 20, 2023), <https://techfreedom.org/wp-content/uploads/2023/04/TechFreedom-Reply-Comments-FCC-Digital-Discrimination-4.20.23.pdf>.

⁸ Section 60506 Report & Order ¶ 38. See also *id.* ¶ 47 (“As noted above, 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.” (footnotes omitted)); *id.* ¶ 56 (“By commenters’ own admission, there is little to no evidence of intentional digital discrimination of access. The Commission is obligated to adhere to Congress’s mandate and adopt rules that address the problems that do exist rather than those that do not.” (footnotes omitted)); *id.* ¶ 65 (“And, as we have stated elsewhere, there is little or no evidence in the legislative history or in the record of this proceeding that intentional discrimination on *any* basis by industry participants contributes meaningfully to the digital divide in this country.” (emphasis in original)).

the rules must also prohibit disparate impact based on “correlating the digital divide with historic discrimination”⁹—that is, discrimination by analogy only.

The Section 60506 Report and Order declined to establish an Office of Civil Rights. “Finally, we decline at this time to establish an Office of Civil Rights within the Commission, as several commenters have urged us to do. We recognize the potential benefits of establishing such an office, however, and therefore seek further focused comment in the accompanying Further Notice of Proposed Rulemaking.”¹⁰ The single paragraph in the FNPRM asks many questions about whether the Commission should stand up this new office:

We seek further, focused comment on establishing an Office of Civil Rights, as both advocates and broadband service providers have urged. In particular, we seek comment on the potential benefits [of] establishing such an office. For example, would such an office be helpful in developing and maintaining the expertise to evaluate the effects of Commission policy initiatives on historically marginalized communities? Could it assist in determining when prohibited discrimination has occurred and aid in developing remedies for such discrimination? Might it help in evaluating claims and possible patterns of digital discrimination of access? And could it aid in monitoring informal complaints alleging digital discrimination of access and other forms of prohibited discrimination, as well as in the mediation process we have outlined in the Order? Why or why not? What other benefits might be associated with establishing an Office of Civil Rights? For example, could it work with broadband service providers to proactively mitigate potential

⁹ *Id.* ¶ 45 (“Some commenters in this proceeding argue, directly or indirectly, that “digital discrimination” does not exist. But those arguments are belied by Congress’s findings in the Infrastructure Act and the record compiled in this proceeding correlating the digital divide with historical discrimination.” (footnotes omitted.). *See also* ¶ 9 (“These Commission actions help to ameliorate a digital divide that has underpinnings in the country’s historical segregation and redlining practices in housing.”); n. 15 (“Relying on historical research, data, and surveys, numerous commenters correlate inequities in broadband access to historically segregated housing patterns and discriminatory housing practices.”).

¹⁰ *Id.* ¶ 174 (footnote omitted).

instances of prohibited discrimination? Could such an office collaborate with broadband service providers and federal and state governments to develop broadband adoption and digital literacy skills training that could be used on a nationwide basis? Could such an office be employed to address other substantive Commission policy issues and processes beyond matters arising under section 60506? If so, what other issues might an Office of Civil Rights oversee or how could it support other bureaus and offices in the Commission? Finally, what are the potential challenges associated with establishing an Office of Civil Rights? How should the Commission address these challenges? What are the costs associated with establishing an Office of Civil Rights? How should the Commission structure and staff such an office? What other structural and organizational changes would be required to establish such an office?¹¹

As discussed below, this single paragraph fails to establish a cogent rationale for establishing an Office of Civil Rights, let alone provide any guidance as to the extent of the OCR's portfolio or what other restructuring would be required within the Commission.

A. The Questions Posed in the FNPRM Are Better Asked in a Broad Notice of Inquiry That Reaches Far Beyond Broadband

The gating question that the Commission should address is whether the call for establishing an Office of Civil Rights (OCR) is best done within the limited context of implementing Section 60506, or whether the role of the OCR will be broader, as the FNPRM implies. Those advocating for a formal OCR within the FCC point to other OCRs that exist in federal agencies.¹² A perusal of other agency OCRs, however, demonstrates that they differ greatly from what the FNPRM contemplates for two reasons (discussed more fully below):

¹¹ FNPRM ¶ 214 (footnotes omitted).

¹² See, e.g., Lawyers' Committee for Civil Rights Under Law Comments at 40 (citing *Civil Rights Offices of Federal Agencies*, DEP'T OF JUST., <https://www.justice.gov/crt/fcs/Agency-OCR-Offices>).

(1) Those agencies cite to substantial statutory authority when they established their OCRs; and/or (2) those OCRs mainly deal with either internal employment matters (Title VII-type authority), or the administration and enforcement of nondiscrimination requirements in federal grant funding (Title VI-type authority).

If the Commission envisions a new Office of Civil Rights that mirrors those of other agencies, this docket is not the right place to establish one, and doing so may be prone to legal challenge. If the Commission is serious about the need for an OCR, it should begin a whole new proceeding to explore the efficacy of such a substantial change in direction of the FCC. Moreover, the broad questions asked in the FNPRM make clear that this new docket should begin with a Notice of Inquiry, not a Notice of Proposed Rulemaking.

This FNPRM has all the hallmarks of an NOI, not an FNPRM. It asks fourteen broad questions, but proposes no draft rules or specific guidelines for what an OCR would do at the FCC.¹³ TechFreedom has long urged the FCC not to issue an NPRM when the agency is just at the “asking questions” stage in a proceeding.¹⁴ This is simply the latest example of the Commission issuing a FNPRM instead of an NOI, and in this case, doing so in a narrow proceeding which likely will not elicit comment from all affected stakeholders. Whatever discretion the Commission might enjoy under the Administrative Procedure Act¹⁵ to

¹³ See, e.g., Revising Spectrum Sharing Rules for Non-Geostationary Orbit, Fixed-Satellite Service Systems, Report and Order and Further Notice of Proposed Rulemaking, 88 Fed. Reg. 40142, FCC 23-29, ¶ 40 (released April 21, 2023) (to be codified at 47 C.F.R. § 25) (where ten distinct questions are asked).

¹⁴ See, e.g., Comments of TechFreedom on Expanding Flexible Use of the 12.2-12.7 GHz Band, WT Docket No. 20-443, 4 (May 7, 2021), <https://techfreedom.org/wp-content/uploads/2021/05/TF-Comments-12-GHz-NPRM-4-7-21.pdf>.

¹⁵ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 551 *et seq.*).

configure its rulemaking process and internal structure, this pattern denies interested parties adequate opportunity to shape the FCC's proposal.¹⁶

Former FCC Chair 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.¹⁷

Chair Rosenworcel had similar concerns regarding the NPRM that led to the 2015 Open Internet Order:¹⁸ "I would have done this differently. Before proceeding, I would have taken the time to understand the future" and "taken time for more input."¹⁹ For the same reasons, the FCC Process Reform Act, which commanded such broad bipartisan support that it passed the House in the 113th Congress on a voice vote, would generally have required the FCC to

¹⁶ 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.").

¹⁷ See Concurring Statement of Chairman Pai, Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269, Notice of Proposed Rulemaking (Sept. 2012), https://transition.fcc.gov/ftp/Daily_Releases/Daily_Business/2012/db0928/DOC-316480A6.doc.

¹⁸ Protecting and Promoting the Open Internet, Report and Order, 30 FCC Rcd 5601, 80 Fed. Reg. 19737 (Feb. 26, 2015), https://docs.fcc.gov/public/attachments/FCC-15-24A1_Rcd.pdf.

¹⁹ See Concurring Statement of Commissioner Rosenworcel, Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, GN Docket No. 14-28, at 92 (May 2014), <https://docs.fcc.gov/public/attachments/FCC-14-61A1.pdf>.

issue a Notice of Inquiry prior to conducting a rulemaking.²⁰ And as stated above, the FCC looks to stand up a new office with substantial power, based solely on the 214th paragraph of an FNPRM that deals only with broadband deployment. That's the wrong way to get full stakeholder input into this question.

B. The 14 Questions Posed in the FNPRM Fail to Articulate the Metes and Bounds of What an Office of Civil Rights Would Do

Those arguing for the establishment of an OCR within the FCC wish to imbue it with broad powers over future agency activities, pointing to similar OCRs in other federal agencies.²¹ And while the questions asked at paragraph 214 of the FNPRM are broad,²² they may not effectively address the powers some wish to place within a new OCR. Instead, the Commission should begin by exploring the overall role of the OCR. Specifically, the

²⁰ See Federal Communications Commission Process Reform Act of 2013, H.R. 3675, 113th Cong. § 13(a)(1)(A)(i)(I), <http://docs.house.gov/meetings/IF/IF16/20130724/101215/BILLS-113pih-FCCProcessReform.pdf>.

²¹ See Section 60506 Report & Order ¶ 174 n.553. See also Lawyers' Committee for Civil Rights Under Law Comments at 40 ("An OCR will create a focal point for Commission expertise and stakeholder engagement on digital discrimination and many other civil rights issues."); Leadership Conference on Civil and Human Rights et al. Comments at 8 ("An Office of Civil Rights must be multi-functional, like civil rights offices within other agencies."); National Urban League et al. Comments at 9 ("[I]t remains imperative that an Office of Civil Rights is established at the FCC to address both the prevention and elimination of digital discrimination as well as broader communications equity issues."); Public Knowledge et al. Comments at 6-7 ("[T]he Office of Civil Rights could serve many functions, including enforcing civil rights policies and regulations (such as the rules the FCC will adopt as part of this proceeding).").

²² See, e.g., "Could it assist in determining when prohibited discrimination has occurred and aid in developing remedies for such discrimination? Might it help in evaluating claims and possible patterns of digital discrimination of access? And could it aid in monitoring informal complaints alleging digital discrimination of access and other forms of prohibited discrimination, as well as in the mediation process we have outlined in the Order? Why or why not?" FNPRM ¶ 214.

Commission should articulate exactly what statutes, rules, and policies, the OCR will oversee, and whether that oversight will include enforcement of Commission rules.

1. Other Federal Offices of Civil Rights Have Clear Statutory Underpinnings

The other OCRs cited by supporters²³ all rest on much clearer statutory authority than Section 60506 provides. For example, the Department of Transportation’s Office of Civil Rights cites at least 50 statutes²⁴ that it claims provide the basis for its work to “enforce[] civil rights laws and regulations, which prohibit workplace discrimination on the basis of race, color, national origin, sex, disability, religion, age, genetic information, equal pay compensation, and reprisal in employment and the provision of government services.”²⁵ Among the statutes cited is 49 U.S.C. § 47123, which states:

The Secretary of Transportation shall take affirmative action to ensure that an individual is not excluded because of race, creed, color, national origin, or sex from participating in an activity carried out with money received under a grant under this subchapter. The Secretary shall prescribe regulations necessary to carry out this section. The regulations shall be similar to those in effect under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.). This section is in addition to title VI of the Act.²⁶

²³ *Civil Rights Offices Of Federal Agencies*, U.S. DEP’T OF JUST. (2023), <https://www.justice.gov/crt/fcs/Agency-OCR-Offices> (last visited Mar 4, 2024).

²⁴ *U.S. Codes*, U.S. DEP’T TRANSP., <https://www.transportation.gov/civil-rights/civil-rights-library/us-codes> (last visited Mar. 1, 2024).

²⁵ *Departmental Office of Civil Rights*, U.S. DEP’T TRANSP., <https://www.transportation.gov/civil-rights> (last visited Mar. 1, 2024).

²⁶ 49 U.S.C. § 47123 (1994). Note that Congress clearly created a civil rights law in this provision, referencing Title VI of the Civil Right Act directly. Had Congress intended Section 60506 to have the same import as Section 47123 of the transportation code, it could have done the same thing.

The Department of Transportation Office of Civil Rights can point to additional statutory bases within Title 49 (where transportation laws are grouped) for its work,²⁷ including Sections 47113,²⁸ 47017,²⁹ 41705,³⁰ 31105,³¹ 5332,³² 5310,³³ and 306.³⁴ All of these statutes have long and rich legislative histories indicating Congress intended them to act as civil rights laws. Other agencies that have created an internal Office of Civil Rights can also point to extensive statutory bases for their operations. For example, and this is not an

²⁷ See *U.S. Codes*, U.S. DEP'T TRANSP., <https://www.transportation.gov/civil-rights/civil-rights-library/us-codes>.

²⁸ Minority and Disadvantaged Business Participation, 49 U.S.C. § 47113. *See id.*

²⁹ Project Grant Applications Approval Conditional on Assurances of Airport Operations, 49 U.S.C. § 47017. *See supra* note 27 (“The Secretary of Transportation may approve a project grant application for an airport development project only if the airport will be available for public use on reasonable conditions and without unjust discrimination.”).

³⁰ 49 U.S.C. § 41705. *See supra* note 27 (“In providing air transportation, an air carrier may not discriminate against an otherwise qualified individual on the following grounds: a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.”).

³¹ 49 U.S.C. § 31105. *See supra* note 27 (“Motor Carrier Whistle Blower Protection. Employee Protection from Termination by Employer.”).

³² 49 U.S.C. § 5332. *See supra* note 27 (“This law provides for nondiscrimination within mass transportation, to include facilities as well as transportation modes.”).

³³ 49 U.S.C. § 5310. *See supra* note 27 (“The Secretary of Transportation may make grants and loans to state and local government authorities to help provide mass transportation service planned, designed, and carried out to meet the special needs of elderly individuals and individuals with disabilities.”).

³⁴ 49 U.S.C. § 306. *See supra* note 27 (“A person in the United States may not be excluded from participating in, be denied the benefits of, or be subject to discrimination under, a project, program, or activity because of race, color, national origin, or sex when any part of the project, program, or activity is financed through financial assistance.”).

exhaustive list, such agencies include the Department of Education,³⁵ Department of Health and Human Services,³⁶ Housing and Urban Development,³⁷ and the Environmental Protection Agency.³⁸

³⁵ See *Office for Civil Rights*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Mar. 4, 2024) (“The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; sex discrimination is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and age discrimination is prohibited by the Age Discrimination Act of 1975. These civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive U.S. Department of Education funds. Areas covered may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment. OCR also has responsibilities under Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination by public entities, whether or not they receive federal financial assistance). To view OCR’s guidance please visit the Policy Guidance Portal. In addition, as of January 8, 2002, OCR enforces the Boy Scouts of America Equal Access Act (Section 9525 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001). Under the Boy Scouts of America Equal Access Act, no public elementary school or State or local education agency that provides an opportunity for one or more outside youth or community groups to meet on school premises or in school facilities before or after school hours shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in Title 36 of the United States Code as a patriotic society.”).

³⁶ See *Laws and Regulations Enforced by OCR*, U.S. DEP'T HEALTH AND HUM. SERVICES, <https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/laws/index.html> (last visited Mar. 1, 2024) (“Section 504 of the Rehabilitation Act of 1973, as amended (29 USC § 794), prohibits discrimination against otherwise qualified individuals on the basis of disability in programs and activities receiving financial assistance from HHS or programs or activities conducted by HHS.”). Additional statutory bases include Titles VI and XVI of the Public Health Service Act, Sections 1553 and 1557 of the Patient Protection and Affordable Care Act, among others.

In sharp contrast, the FNPRM fails completely to articulate where Congress has told the FCC to enforce civil rights laws, other than to claim that Section 60506 is similar in scope to the clear civil rights laws enforced by other agencies. This seems indeed a “wafer-thin reed”³⁹ on which to stand up a new office within the FCC.

2. Other OCRs Predominately Enforce Internal EEO Obligations or Ensure Nondiscrimination in Federal Funding Programs

Other federal agency OCRs describe their tasks as policing internal equal employment opportunity enforcement (Title VII of the Civil Rights Act) and ensuring that federal grant programs are administered free of discrimination (Title VI of the Civil Rights Act).⁴⁰ The

³⁷ See *Fair Housing and Related Laws*, U.S. DEP’T HOUS. AND URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_and_related_law (last visited Mar. 4, 2024) (citing 12 statutes and six Executive Orders), including Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), the Americans with Disabilities Act, and the Architectural Barriers Act of 1968.

³⁸ *Title VI and Environmental Justice*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice> (last visited Mar. 4, 2024) (citing Title VI of the Civil Rights Act and Executive Order 12898).

³⁹ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

⁴⁰ See, e.g., *Office of the Assistant Attorney General for Civil Rights*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/oascr/home> (“OASCR ensures compliance with applicable laws, regulations, and policies for USDA customers and employees regardless of race, color, national origin, sex (including gender identity and expression), religion, age, disability, sexual orientation, marital or familial status, political beliefs, parental status, protected genetic information, or because all or part of an individual’s income is derived from any public assistance program.”); *Office of Civil Rights*, U.S. DEP’T OF INTERIOR, <https://www.doi.gov/pmb/eo/public-civil-rights> (“No person in the United States shall, on the grounds of race, color, national origin, age or disability be subjected to unlawful discrimination under any program or activity conducted by or which receives Federal financial assistance from the Department of the Interior. Discrimination includes: denial of services, aids, or benefits; provision of different service or in a different manner; and segregation or separate treatment.”); *Civil Rights FAQs for Applicants and Grantees*, NAT’L ENDOWMENT FOR THE ARTS, <https://www.arts.gov/about/civil-rights-office/applicants-recipients-of-federal-financial->

FNPRM fails to state a need for an OCR to ensure the Title VII employment rights of FCC employees. Is the FCC staff currently in danger of being discriminated against in employment? Nor does the FNPRM point to any FCC monetary programs over which the new OCR would provide Title VI enforcement. Instead, paragraph 214 makes clear that the main role of the OCR would be enforcement of the disparate impact digital discrimination rules.⁴¹ In this way, the FCC's OCR would look and function very differently from other agency civil rights offices.

3. Will the Office of Civil Rights Displace Existing FCC Offices?

One of the glaring omissions from the FNPRM paragraph 214 discussion is an analysis of how the office would fit into the overall structure of the FCC. Yes, paragraph 214 asks,

assistance/what-we-do/FAQs (“The National Endowment for the Arts, a federal agency that provide Federal financial assistance, is responsible for the administration, compliance, and enforcement of the nondiscrimination laws and regulations that covers programs and activities receiving assistance.”); *Office of Civil Rights & Diversity*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/about/offices/management/civil-rights-and-diversity> (“The mission of the Office of Civil Rights and Equal Employment Opportunity (OCRE) is to ensure that equality, fairness and equal employment opportunity in employment are realized for all Department of the Treasury employees and applicants for employment.”); *Civil Rights*, U.S. DEP’T OF ENERGY, <https://www.energy.gov/justice/civil-rights> (The office “[e]nsures prompt, fair, and equal treatment of all DOE employees, stakeholders, and beneficiaries of federal financial assistance related to the execution of the Department of Energy’s mission.”); *Office of Equal Rights*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/about/offices/equal-rights> (“The Office of Equal Rights serves the Agency and the Nation by supporting a discrimination-free work place and equal access to FEMA programs and services, for all disaster survivors. OER manages the Equal Employment Opportunity (EEO) administrative process, affirmative employment program, reasonable accommodations for people with disabilities, and enforcement of Federal civil rights laws.”).

⁴¹ FNPRM ¶ 214 (“Could it assist in determining when prohibited discrimination has occurred and aid in developing remedies for such discrimination? Might it help in evaluating claims and possible patterns of digital discrimination of access? And could it aid in monitoring informal complaints alleging digital discrimination of access and other forms of prohibited discrimination, as well as in the mediation process we have outlined in the Order?”).

“how could it support other bureaus and offices in the Commission?”⁴² But that is the extent of the FNPRM’s analysis. What happens, for example, to the Communications Equity and Diversity Council? The Section 60506 Report and Order includes an 87-page report from the Council, entitled “Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity.”⁴³ Will the OCR displace the Communications Equity and Diversity Council? Will there be a need for both?

Even more troublesome, given the role of other federal agency OCRs in enforcing Title VII of the Civil Rights Act, will the OCR displace the current FCC Enforcement Bureau’s EEO Office?⁴⁴ That office has been tasked for decades with enforcing the Commission’s equal employment opportunity rules.⁴⁵ Will those roles be shifted over to the OCR? If so, as mentioned above, the decision to stand up a new FCC OCR should be considered in the context of a much wider rulemaking and should seek comment from broadcast and MVPD stakeholders, who have spent millions of dollars building systems to comply with the rules and respond to Enforcement Bureau audits and other inquiries regarding their employment practices.

⁴² *Id.*

⁴³ Section 60506 Report & Order, Appendix D.

⁴⁴ *Equal Employment Opportunity*, FED. COMM’NS COMM’N, <https://www.fcc.gov/enforcement/equal-employment-opportunity> (last visited Mar. 4, 2024).

⁴⁵ *See, e.g.*, Equal Employment Opportunities, 47 C.F.R. § 73.2080 *et seq.*; Annual Employment Report, 47 C.F.R. § 73.3612; Equal Employment Opportunity Requirements, 47 C.F.R. § 76.71-79 & 76.1702; Annual Employment Report, 47 C.F.R. § 76.1802. *See generally* *Equal Employment Opportunity Rules*, FED. COMM’NS COMM’N, <https://www.fcc.gov/enforcement/eb-eeo/equal-employment-opportunity-rules> (last visited Mar. 4, 2024).

Finally, while the Section 60506 Report and Order vests vast new powers in the Enforcement Bureau (including investigations, mediations, rendering advisory opinions, and issuing fines),⁴⁶ paragraph 214 appears to indicate that the Commission will change course

⁴⁶ Section 60506 Report & Order ¶ 113 (“As the Commission takes seriously its enforcement obligations, we direct the Enforcement Bureau, in coordination with the Consumer Governmental Affairs Bureau and the Wireline Competition Bureau, to expeditiously investigate potential violations and enforce our rules using the Commission’s traditional enforcement mechanisms.”); ¶ 131 (“Rule 0.111 will now reflect the Enforcement Bureau’s direction to investigate claims of digital discrimination of access and make recommendations as to potential violations and penalties.”); ¶ 144 (“As noted above, in order effectively to identify and combat potential violations of digital discrimination of access, the Enforcement Bureau will evaluate information provided to the Commission through the dedicated digital discrimination of access informal complaint pathway or through communications from state, local, or Tribal governments. The Enforcement Bureau, in coordination with the Consumer and Governmental Affairs Bureau, will review this information on a monthly basis and examine trends and geographic or demographic clusters, among other things, in the informal complaint filings to determine whether there is possible discrimination of access based on income level, race, ethnicity, color, religion, or national origin. Relevant evidence pertaining to purported differences in the covered elements of service will be especially probative. Where there is credible evidence suggesting that persons in a protected group were treated differently as the result of a policy or practice, the Enforcement Bureau, in its discretion, will use its authority to conduct investigations; issue Letters of Inquiry and subpoenas; conduct audits; inspect licenses and/or facilities; and collect information. Further, the Enforcement Bureau will use the full range of its enforcement options to enforce compliance, including the possibility of forfeiture penalties.” (footnote omitted)); ¶ 145 (Enforcement Bureau in charge of mediation proceedings); ¶ 147 (“Under the process we adopt today, any covered entity may request an advisory opinion regarding the permissibility of its own policies and practices affecting access to broadband internet access service. The Commission hereby delegates to the Enforcement Bureau the authority to receive such requests and issue such advisory opinions, and we direct the Enforcement Bureau to coordinate closely with other Bureaus and Offices regarding such advisory opinions. The Enforcement Bureau will have discretion to determine whether to issue an advisory opinion in response to a particular request or group of requests and will inform each requesting entity, in writing, whether the Bureau plans to issue an advisory opinion regarding the matter in question. The Enforcement Bureau shall decline to issue an advisory opinion if the relevant policy or practice is the subject of a pending government investigation or proceeding.” (footnotes omitted)).

and vest enforcement in the OCR.⁴⁷ Will creating a new OCR require the Commission to rewrite the enforcement provisions of the new digital discrimination rules before the ink is even dry? The sheer amount of rule and order rewriting that would have to occur if the OCR is granted the powers envisioned in paragraph 214 of the FNPRM is staggering.

4. An Office of Civil Rights Will Ultimately Be Funded through Regulatory Fees, Which Are Passed Along to Consumers

Unlike other federal agencies with OCRs that are funded through the general appropriations process, the FCC is unique, in that its budget is funded through licensing and regulatory fees paid by its licensees.⁴⁸ This has two distinct impacts on this discussion. First, because Congress does not directly fund the FCC,⁴⁹ it lacks the “power of the purse” to oversee operations of the Commission, including a new Office of Civil Rights. If Congress

⁴⁷ FNPRM ¶ 214 (“Could it assist in determining when prohibited discrimination has occurred and aid in developing remedies for such discrimination? Might it help in evaluating claims and possible patterns of digital discrimination of access? And could it aid in monitoring informal complaints alleging digital discrimination of access and other forms of prohibited discrimination, as well as in the mediation process we have outlined in the Order?”).

⁴⁸ Assessment and Collection of Regulatory Fees for Fiscal Year 2023, FCC 23-66, ¶ 3 (Aug. 10, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-66A1.pdf>.

⁴⁹ While Congress ostensibly approves the FCC’s budget and has occasionally held oversight hearings related to the FCC budget, *see, e.g., Oversight of FCC Budget and Management: Hearing Before the Subcomm. on Commc’ns & Tech. of the H. Comm. on Energy & Com.*, 113th Cong. (Sept. 17, 2014), <https://www.congress.gov/event/113th-congress/house-event/LC30864/text>, the budgets of the FCC submits have traditionally been adopted by Congress with virtually no changes. *See* FED. COMM’NS COMM’N, 2024 BUDGET ESTIMATES TO CONGRESS (Mar. 2023), <https://www.fcc.gov/document/fy-2024-congressional-budget-justification>.

were to conclude that the Commission was exceeding its statutory authority in implementing Section 60506, it would have difficulty cutting off funding to the Commission, or to the OCR.⁵⁰

Second, paragraph 214 asks the question “What are the costs associated with establishing an Office of Civil Rights?”⁵¹ But the FNPRM doesn’t ask the follow-on question of who would pay for staffing the OCR. Presumably the cost of the OCR would be apportioned across regulatory fee payers, based on the “benefit” each licensee receives from the office, in line with FCC practice elsewhere.⁵² How the Commission makes this assessment would largely depend on the overall role of the OCR, as discussed above. Thus, how the Commission defines what the OCR will do has a direct financial impact on Commission licensees. And as everyone knows, regulated entities do not absorb these costs; they pass them along to their customers. Ultimately, it is consumers themselves who bear the cost of the FCC’s activities. The Commission needs to consider that standing up an OCR will ultimately translate into

⁵⁰ While Congress rarely uses its “power of the purse” as an oversight tool, it has happened. When the Federal Trade Commission attempt to limit advertising to children in 1978, for example, Congress defunded the entire agency. As an FTC 2004 Staff Report described the situation:

The children’s advertising proceeding was toxic to the Commission as an institution. Congress allowed the agency’s funding to lapse, and the agency was literally shut down for a brief time. The FTC’s other important law enforcement functions were left in tatters. Newspapers ran stories showing FTC attorneys packing their active investigational files in boxes for storage, and entire industries sought restriction of, or even outright exemptions from, the agency’s authority.

FED. TRADE COMM’N, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf.

⁵¹ FNPRM ¶ 214.

⁵² Comments of TechFreedom in the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2021, MD Docket No. 21-190, at 2-3, 5 (Oct. 21, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/TechFreedom-Comments-on-Regulatory-Fees.pdf>.

higher broadband fees for the very classes of individuals who may still need access to affordable broadband.

C. If the OCR Will Have a Role in Enforcing a Disparate Impact Regulatory Regime, the Commission Should Wait for the Courts

Ultimately, it appears that the Commission wants to create an OCR to assist, at least, in enforcing the disparate impact rules it adopted in the Section 60506 Report and Order.⁵³ An OCR would have little purpose, if any, related to Section 60506 were the Commission to have adopted a disparate treatment regime, given, as noted above, “there is little or no evidence in the legislative history of section 60506 or the record of this proceeding indicating that intentional discrimination by industry participants based on the listed characteristics substantially contributes to disparities in access to broadband internet service across the Nation.”⁵⁴

If the reason for establishing this new office is to implement the disparate impact regime, that rationale will evaporate if the Eighth Circuit overturns the Section 60506 Report and Order. Given the strong arguments made in the record that Section 60506’s language

⁵³ FNPRM ¶ 214 (“Could it assist in determining when prohibited discrimination has occurred and aid in developing remedies for such discrimination? Might it help in evaluating claims and possible patterns of digital discrimination of access? And could it aid in monitoring informal complaints alleging digital discrimination of access and other forms of prohibited discrimination, as well as in the mediation process we have outlined in the Order? Why or why not? What other benefits might be associated with establishing an Office of Civil Rights? For example, could it work with broadband service providers to proactively mitigate potential instances of prohibited discrimination?”).

⁵⁴ Section 60506 Report & Order ¶ 38.

allows only for disparate treatment rules,⁵⁵ the Commission should wait to see whether it prevails on appeal before expending the effort needed to establish a wholly new office within the FCC. These new burdens on industry may turn out to be founded on quicksand.

III. Conclusion

Chair Rosenworcel summed up how hard it is for the FCC to reorganize and establish new offices. In standing up the new Space Bureau in 2023, she said:

What I have learned is that reorganizing a federal agency is not for the faint of heart. It requires everything from Commission orders to reviews by the Office of Management and Budget, to Congressional approvals, to union negotiations.⁵⁶

Consolidating the FCC's oversight of space frequency allocation and licensing into a single unit seems far easier than standing up an Office of Civil Rights, whose portfolios would cut across every other bureau and office within the FCC. The FNPRM fails to articulate how creating a new OCR would be simpler than consolidating space regulation into a new Bureau.

⁵⁵ See Comments of TechFreedom in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, 3 (May 16, 2022), <https://techfreedom.org/wp-content/uploads/2022/05/TechFreedom-Digital-Discrimination-NOI-Comments.pdf>; Reply Comments of TechFreedom in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, 10 (Apr. 20, 2023), <https://techfreedom.org/wp-content/uploads/2023/04/TechFreedom-Reply-Comments-FCC-Digital-Discrimination-4.20.23.pdf>; Comments of USTelecom in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, 1-2 (Sept. 28, 2023), <https://www.ustelecom.org/wp-content/uploads/2023/09/2023.9.28-USTelecom-Ex-Parte-GN-Docket-No-22-69.pdf>; Comments of AT&T in the Matter of Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, 15 (May 16, 2022), <https://www.fcc.gov/ecfs/document/1051658098229/1>.

⁵⁶ See Fed. Comm'n's Comm'n, *Launch of FCC Office of International Affairs and Space Bureau*, YOUTUBE (Apr. 11, 2023), <https://youtu.be/bXwjDPKa-2o?si=7fmg9frW9Pq-lQ7c&t=310>.

Given the many questions that remain unanswered—indeed unasked—the Commission should refrain from moving forward with creating an Office of Civil Rights at this time.

Respectfully submitted,

_____/s/____

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