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Via Electronic Submission

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

Re: Proposed Rule, Federal Communications Commission; Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (88 Fed. Reg. 3,681-3,704, January 20, 2023)

Dear Ms. Dortch:

The U.S. Chamber of Commerce's ("the Chamber") Chamber Technology Engagement Center ("C_TEC") appreciates the opportunity to submit comments on the Federal Communications Commission's ("the Commission") Notice of Proposed Rulemaking in the above referenced proceeding ("NPRM"), which will inform the Commission's implementation of Section 60506 of the Infrastructure Investment and Jobs Act ("IIJA").[1]

Closing the digital divide is essential to ensure that millions of Americans benefit from a digital 21st century economy. The private sector is the leader in providing cutting edge internet-based services to Americans as well as investing tens of billions annually in building broadband networks.[2] This private investment is paying off, with widespread, competitive high-speed internet available to 95% of Americans. Even as consumers have been facing significant price increases due to inflation, broadband prices are decreasing, making internet connectivity more affordable.[3]

The record does not support the claim that internet service providers ("providers"), or others in the internet ecosystem, are engaging in any form of digital

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[1] In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Notice of Proposed Rulemaking, FCC-22-69 (rel. Jan. 20, 2023) (NPRM).
[2] *See* AT&T comments at 1, In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Notice of Inquiry, FCC-22-69 (rel. March 17, 2022) (Notice).
[3] *See* AT&T comments at 8 (citing research that "[despite inflation, [broadband] prices continue to fall—by 7.5% for the most popular wireline broadband services between 2020 and 2021 and by 2.3% for the highest-speed services").

discrimination.[4] Consequently, as the Commission develops rules to implement the equal access requirement, the Chamber urges the Commission to maintain its historically light touch regulatory framework for broadband to facilitate continued private sector investment in broadband networks. We are concerned that many of the questions raised in the NPRM, as well as the comments to the preceding *Notice of Inquiry* submitted by some advocacy groups, indicate that the Commission may be considering significantly expanding the scope of Section 60506's stated policy goal of equal access to open the door to novel enforcement tools. And in doing so, this would lead to significant regulatory overreach and be inconsistent with congressional intent.

I. Appropriately Scope the Definition of Digital Discrimination

The Commission seeks comment on a wide range of questions to inform the scope of covered services, covered entities, and categories of protected individuals and classes. The Chamber urges the Commission to answer these questions with due attention to the fact that Congress is focused at most on intentional discrimination by providers in the provision of broadband internet access service. And Congress specifically applied this provision to the *deployment* of broadband, so the Commission should reject proposals to open the door to broadband rate regulation or, for that matter, any regulations other than those targeted at preventing digital discrimination of access to broadband service.

II. The Commission Should Pursue A Framework Based On Supporting The IIJA's Broadband Programs And Promoting Transparency, Consistent With Its Limited Grant Of Authority Under Section 60506

Section 60506 does not authorize the Commission to create and enforce new, punitive non-discrimination rules. Unlike a traditional civil-rights statute (like Title VII or the Age Discrimination in Employment Act), Section 60506 does not make it "unlawful" for certain covered parties to discriminate or expressly "prohibit[]" certain enumerated practices.[5] Indeed, Congress did not specifically prohibit *any* conduct under Section 60506. Rather, the main charge of Section 60506 directs the Commission to "facilitate equal access" to broadband.[6] The Commission should not read this language as authorization to create and enforce new liability rules on providers out of whole cloth—an interpretation that would raise significant concerns under both the non-delegation and major questions doctrine. Rather, reflecting Section 60506's inclusion within the IIJA, which created $65 billion in broadband deployment and affordability programs, the Commission should adopt rules aimed at

[4] *See* ITIF Notice comments at 2-3; NCTA Notice comments at 8.
[5] 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 623.
[6] 47 U.S.C. § 1754(b).

supporting these programs and promoting transparency, consistent with the statute's text and basic constitutional principles.

To "facilitate equal access" to broadband, the Commission must consider two objectives: "preventing digital discrimination of access based on" certain characteristics, and "identifying necessary steps for [it] to take to eliminate discrimination described in paragraph (1)."[7] An instruction to "facilitate" access is a far cry from empowering the Commission to impose new liability rules on providers or penalties tied to such liability. And the twin objectives to "prevent" and "identify" point toward taking measures to reduce discrimination in the future, not punish past conduct.

Moreover, Section 60506 does not contain any enforcement mechanisms. Instead, it provides that the Commission "shall revise its public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination."[8] But while the FCC's informal complaint process allows members of the public to report alleged violations of the Commission's rules, it does not automatically lead to enforcement.[9] Because Congress elected not to incorporate the relevant provisions of Section 60506 into the Communications Act, the FCC's usual enforcement remedies are unavailable here.[10] In addition, nowhere in the statute did Congress provide any indicia of authority for the Commission to establish rules to be enforced by state and local officials or a private right of action.[11] To the contrary, Section 60506 only authorizes the Commission to develop "model policies and best practices" which states and localities "can" adopt at their discretion.[12] This directive falls well short of authorizing the adoption of binding, enforceable rules by states and localities. Typically, Congress explicitly provides those authorities in statute if they intend to do so.[13] And where Congress declines to expressly incorporate enforcement mechanisms into a civil rights statute, the Supreme Court has concluded that such provisions are "intended to be hortatory, not mandatory."[14]

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[7] *Id.*

[8] 47 U.S.C. § 1754(e).

[9] *See* 47 U.S.C. § 208 ("[I]t shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."); 47 C.F.R. § 1.711, *et seq.* (discussing complaint procedures).

[10] 47 U.S.C. § 502 (authorizing fines for "any rule, regulation, restriction, or condition made or imposed by the Commission under authority *of this chapter*") (emphasis added).

[11] *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (rejecting private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act).

[12] 47 U.S.C. § 1754(d).

[13] *See, e.g.,* 47 U.S.C. §§ 206-207.

[14] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 22-24 (1981) (holding that certain "findings" in the statute, when viewed in the context of the more specific provisions of the Act, represent "general statements of federal policy, not newly created legal duties").

Other parts of Section 60506 confirm that it does not authorize new mandates on broadband providers and other potential covered entities. Subsection (c), for example, requires the FCC and Attorney General to engage in a review of "Federal policies" using the "findings in the record developed from the rulemaking under subsection (b)."[15] The term "Federal policies" suggests the use of agency procedures, guidance documents, or other informal tools at agencies' disposal.[16] Importantly, this provision does not contemplate the adoption of any new rules—let alone the unfunded universal service mandates contemplated by some of the questions posed by the NPRM. Subsection (d) similarly requires the FCC only to "develop model policies and best practices" for states and local governing bodies.[17] Neither (c) nor (d) grants the Commission authority to take any enforcement action if its recommendations are not followed.

The structure of the IIJA supports the plain reading of the text of Section 60506. Section 60506 was a late addition to the IIJA to a sprawling infrastructure statute that committed $65 billion to incentivize broadband deployment. Division F of the IIJA alone (which contains Section 60506) creates $42.5 billion in federal investments to promote and expand broadband deployment and adoption[18] and allocates $14 billion dedicated to low-income households.[19] Within this framework, it is most natural to read Congress's instruction to the FCC to "facilitate equal access" to ensure that this unprecedented amount of new federal broadband investments accomplishes its goal of expanding deployment and access in underserved communities. Given the amount of capital committed to accomplish this task, it would be incongruous for Congress to simultaneously authorize the FCC to adopt new civil-rights legislation wholesale, including authorization of unfunded deployment mandates or rate regulation.

If Congress did in fact authorize the FCC to adopt whatever new non-discrimination mandates it deemed appropriate, that decision would likely violate the non-delegation doctrine. "The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials."[20] This doctrine allows agencies to fill gaps in federal statutes "as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed

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[15] 47 U.S.C. § 1754(c).
[16] *Cf.* 5 U.S.C. § 552(a) (distinguishing between policies and rules).
[17] 42 U.S.C. § 1754(d).
[18] *See* 47 U.S.C. § 1702(b)(2).
[19] 47 U.S.C. § 1752(b) (Affordable Connectivity Program); 135 Stat. 1382 (detailing general appropriations to the FCC, including $14.2 billion for the "Affordable Connectivity Fund").
[20] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

to conform.'"[21] Here no such "intelligible principle" exists, because Congress did not require the FCC to take any specific action *at all*.[22] Rather, Congress (on this overbroad reading of the statute) would have left to agency discretion such fundamental legislative questions as (1) whether the FCC should impose any mandates on providers and others in the internet ecosystem (since the statute does not), (2) what policies and practices should be prohibited, (3) who should be subject to any prohibition, (4) what burdens of proof should apply, and (5) how the statute should be enforced. It would be difficult to imagine a more wide-ranging inquiry into how to handle a public-policy problem.

Even if the NPRM's broad interpretation did not constitute a violation of the non-delegation doctrine, the same separation of powers concerns counsel strongly in favor of a narrow reading of Section 60506 under the rubric of the "major-questions doctrine." A federal agency violates this doctrine when it "assert[s] highly consequential power beyond what Congress could reasonably be understood to have granted."[23] The Supreme Court has made clear that "[a]gencies have only those powers given to them by Congress," and if Congress intends to assign a major policy decision to an agency, it is expected to "speak clearly," especially when assigning an agency decisions of "vast economic and political significance."[24] Indeed, courts have struck down agency action that, although based on a "colorable textual" foundation,[25] creates unprecedented effects on the economy[26] or transforms an agency's jurisdiction or mission.[27]

Here, Congress has not spoken clearly enough to authorize the FCC to create, for the first time, unfunded mandates on broadband providers that exceed any that either Congress or the Commission has deemed appropriate in the past—from disparate-impact liability to universal service mandates to price regulation.

The FCC should instead consider an approach that complies with the statutory text, avoids significant constitutional issues, and focuses the Commission's efforts in

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[21] *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (citation omitted).
[22] *See Jarkesy v. S.E.C.*, 34 F.4th 446, 461–62 (5th Cir. 2022) (finding that Congress had failed to provide the SEC with an intelligible principle and explaining that the last time the Supreme Court "consider[ed] such an open-ended delegation of legislative power, it concluded that Congress had acted unconstitutionally" (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405–06 (1935)).
[23] *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).
[24] *Id.* at 2608 (quotation omitted); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).
[25] *W. Virginia*, 142 S. Ct. at 2609.
[26] *See, e.g.*, *Nat'l Fed. Of Independent Business*, 142 S. Ct. at 665 (work-place vaccination mandate); *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (eviction moratorium).
[27] *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 320 (2014) (greenhouse gas emissions); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (cigarettes).

areas where it can move the needle to close the remaining digital divide. That approach could focus on quality control of federal broadband programs the FCC administers and transparency. For example, the FCC could adopt rules to target waste, fraud, and abuse in the new grant programs authorized by the Act, thus helping to "facilitate equal access" to broadband by ensuring that the allocated funds reach the underserved areas that need it most. Respecting transparency, the Commission could make use of informal consumer complaints, in addition to other efforts like the Broadband Data Collection (BDC) program, to highlight any broadband deployment disparities. And the Commission could modify its new maps to reflect where federal subsidies are funding highspeed broadband buildout, thereby allowing all stakeholders to identify communities still left behind. The complaint database could also serve as a basis for referrals in appropriate cases to relevant consumer-protection or civil-rights agencies. And the information collected would both inform the FCC and Attorney General's review of federal policies (as mandated by subsection (c)) and allow the FCC to report to Congress on any additional authority it might need to combat alleged digital discrimination.

III. At Most, the Commission Should Pursue an Intent-Based Framework

Rules facilitating equal access should at most focus on intentional discrimination by providers, to the extent it exists and can be proven through concrete and credible evidence.[28] The Commission seeks comment on whether they should adopt a disparate impact standard, disparate treatment standard, or both. The Chamber strongly opposes the adoption of a disparate impact standard and believes the Commission should only utilize a definition of digital discrimination based on disparate treatment for the following reasons.

First, the adoption of a disparate impact standard would naturally encompass a wide range of potential outcomes and factors that are outside the control of providers.[29] Broadband providers make deployment decisions based on neutral factors that impact cost and demand, such as terrain, household density, building access, and the competitive landscape of a given area (e.g., what service competitors might already offer).

Second, utilizing a disparate impact standard would be inconsistent with Congressional intent and exceed the Commission's authority under the IIJA. The Supreme Court has consistently held that language such as *"based on"* and *"because of"* indicate a legislative intention to condition liability on evidence of intentional

[28] *See* US Telecom Notice comments at 13.
[29] *See* Public Knowledge Notice comments at 21-22.

discrimination.[30] Moreover, if authorized by Congress, the Supreme Court has repeatedly recognized that disparate impact liability is unusual and must be encompassed with appropriate guardrails. That is not to say that Congress did not recognize that action was needed to close the remaining digital divide. But Congress chose to address remaining, unintended broadband disparities *not through* unfunded deployment mandates or prescriptive rate regulation, but by appropriating $65 billion for broadband deployment, affordability, and adoption–-to tip the business case and induce private investors to use the combination of federal investment and their own private capital to close the digital divide for all.

Third, a disparate impact standard would be highly impractical for the Commission to administer. Such a standard would open the door to regulatory second guessing of deployment decisions made by competitors with different capital structures, different lines of business (wireline, wireless, satellite or a combination thereof), and different plans on how best to compete. Private industry and competition have delivered highspeed Internet to the vast majority of Americans. The Commission should defer to Congress's intent to address any remaining disparities through federal broadband programs.

Fourth, a disparate impact standard would chill competition and deployment, and put Section 60506 on a collision course with other IIJA provisions.[31] Broadband providers would be loathe to spend the billions necessary to deliver highspeed broadband to particular areas, including unserved areas, if they were faced with potential liability for failing to deliver it everywhere. That result would undermine the purpose of the IIJA.

Rather, the Commission should adopt a tailored and intent-based framework to prevent and eliminate digital discrimination of access.[32] This approach is consistent with the plain language of the underlying statute and with the overarching purpose of the IIJA, which is to close the digital divide through widespread broadband deployment and dedicated funding for broadband adoption.[33]

IV. The Commission Should Address Other Barriers to Broadband Deployment and Adoption

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[30] *See*, e.g., Univ of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013) ("'[B]ecause of' means 'based on' and … 'based on' indicates a but-for causal relationship."); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (claims that an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin" require "[p]roof of discriminatory motive").

[31] *See* AT&T Notice comments at 17.

[32] *See* US Telecom Notice comments at 11.

[33] *See* AT&T Notice comments at 17.

The Commission seeks comment on other proposals to promote broadband infrastructure deployment to address digital discrimination. Ensuring that all Americans have access to high-speed broadband internet is a broad and multifaceted effort. The Commission should prioritize addressing other barriers to broadband deployment and adoption, specifically the Affordable Connectivity Program and broadband permitting.

First, the Commission should focus on the fact that the Affordable Connectivity Program ("ACP") is expected to run out of funds sometime in the next year, and should prioritize working with Congress to ensure that the ACP is extended. ACP in combination with private sector efforts, such as the broadband plans providers offer to low-income households, have made substantial strides in ensuring internet affordability for millions of Americans, and so the Commission should partner with relevant stakeholders to ensure the longevity of the ACP through additional appropriations.

Second, reducing the costs of deployment through permitting reform can serve as an important tool to help ensure equal access. The Chamber urges the Commission to review existing permitting and regulatory barriers that inhibit wireline and wireless deployment.[34] The Commission should seek stakeholder input as to existing permitting barriers, as well as solutions to address those barriers.

V. Conclusion

The Chamber appreciates the Commission for considering our views on this NPRM and we look forward to collaborating on the equal access rulemaking moving forward. If you have any questions, please reach out to Matt Furlow, Policy Director at C_TEC, at mfurlow@uschamber.com.

Sincerely,

Jordan Crenshaw
Vice President
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[34] *Id. at* 20; T-Mobile Notice comments at 15.