U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

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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. 3681-3704 (January 20, 2023)

Dear Ms. Dortch:

The U.S. Chamber of Commerce's ("Chamber") Chamber Technology Engagement Center ("C_TEC") appreciates the opportunity to submit reply 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] A reasonable and limited regulatory framework by the Commission has been critical to enabling this success.

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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 Notice 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").

The record does not support the claim that internet service providers ("providers"), or other potential covered entities, are engaging in any form of digital discrimination.[4] Consequently, as the Commission implements Section 60506 to promote equal access to broadband services, the Chamber urges the Commission to maintain its reasonable and limited regulatory framework for broadband to facilitate continued private sector investment in broadband networks.

We remain concerned that many of the questions raised in the NPRM, as well as the comments to the NPRM submitted by some commenters, indicate that the Commission may address issues that pertain to closing the digital divide no matter how tangential to the text of Section 60506 and intent of Congress.[5] The Commission should reject these sweeping claims made in the record by these commenters and instead recognize Section 60506 is a narrowly tailored directive to the Commission that contains no enforcement mechanism nor allows for the promulgation of a complex regulatory regime that rivals Title II reclassification in its ambitions. Opting for a broad rule also raises significant constitutional and other legal concerns.[6]

I. The Commission Should Ensure Any Rules Adopted Are Lawful, Practical, and Facilitate the Objectives of Closing the Digital Divide

A key point of difference in the record is what standard, if any, the Commission should utilize in promulgating rules to facilitate equal access. Some commenters argue that the text and congressional intent indicate that the Commission should apply a disparate impact standard to evaluate claims of digital discrimination.[7] Others argue the Commission should instead adopt a disparate treatment standard.[8] The Chamber makes an alternative argument. The text of Section 60506 does not explicitly authorize the Commission to adopt *any* new liability rules on internet service providers or other covered entities given constitutional limitations under the non-delegation and major questions doctrines and the structure of Section 60506.[9]

A. The Adoption of A Disparate Impact Standard Is Unlawful And Should Be Rejected By the Commission

The Chamber strongly opposes the adoption of a disparate impact standard considering the adoption of such a standard is unlawful and inconsistent with

[4] ITIF Notice comments at 2-3; NCTA Notice comments at 8.
[5] *See generally*, Public Knowledge NPRM comments; Electronic Frontier Foundation NPRM comments.
[6] *See generally*, U.S. Chamber NPRM comments.
[7] Public Knowledge NPRM comments at 50.
[8] USTelecom NPRM comments at 21; NCTA NPRM comments at 19.
[9] U.S. Chamber NPRM comments at 4.

congressional intent, impractical for the Commission and covered entities, and would hinder the Commission's broader objectives of closing the digital divide. The Commission should reject calls in the record to adopt a disparate impact standard.

First, adopting a disparate impact standard would be inconsistent with congressional intent and thus 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 discrimination.[10] This argument is echoed by other stakeholders in the record who also note that Congress is familiar with the impact of such language given that the Supreme Court's decision in *Inclusive Communities* preceded the enactment of the IIJA by six years.[11]

Second, a disparate impact standard would be highly impractical for both the Commission and internet service providers. For the Commission, 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. Moreover, the complex nature of the disparate impact claims in other legal contexts would similarly require the Commission to utilize significant resources to evaluate the statistical evidence necessary to find a showing of discrimination.[12] Similarly, a disparate impact standard would be impractical for providers. Their deployment and other business decisions could get routinely challenged by litigious plaintiffs, which would chill new deployments and shift resources from areas such as capital investment and R&D to regulatory and legal compliance contrary to the objectives of the Biden administration.[13] In particular, if the Commission were to adopt rules that impose a complex and prescriptive regulatory regime, as some in the record argue (but which the statute clearly does *not* authorize), this dynamic would be exacerbated further.[14] Unwarranted challenges would contribute to a new layer of regulatory and legal uncertainty on top of other challenges such as permitting requirements and other federal, state, and local regulatory requirements.

Third, a disparate impact standard would undermine a key goal of the IIJA, which is to address deployment gaps through federal investments to leverage private

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[10] *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").

[11] US Telecom NPRM Comments at 23.

[12] *Id.* at 29.

[13] *Id.* at 34-35.

[14] Leadership Conference on Civil and Human Rights NPRM Comments at 5.

sector investment in unserved and underserved areas. As noted in the preceding paragraph, disparate impact liability would chill deployment decisions by internet service providers.[15] If Congress believed that the trade-off between deployment and utilizing a disparate impact standard was appropriate, they would have specifically directed the Commission to adopt such a standard. Instead, Section 60506 provides no such authority, and even a perceived inference of such authority is overridden by broader congressional intent in the IIJA to spur broadband deployment.

B. At Most, the Commission Should Only Consider Pursuing an Intent-Based Framework and Should Recognize Clear Constitutional Limitations

Many commenters argue that instead of a disparate impact standard, the Commission should adopt a disparate treatment standard---an intent-based framework.[16] The Chamber believes that, if the Commission concludes that Congress authorized any new liability rules (which, as described in our opening comments, we do not believe Congress so authorized), it should at most implement an intent-based framework. Most importantly, the Commission must proceed cautiously and ensure it has sufficient legal authority for any of its actions to withstand judicial scrutiny.

II. Neither Section 60506 Nor Other Statutes Authorize Enforcement Mechanisms for Equal Access Rules

The plain language of Section 60506 does not prescribe any enforcement mechanism. In addition, given that Section 60506 was not incorporated into the Communications Act, the Commission's typical enforcement procedures are unavailable.[17] 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. Nor, as some commenters have suggested, does the Commission have any authority to prohibit or otherwise limit pre-dispute arbitration clauses in service contracts relating to digital discrimination claims.[18]

While some commenters note that Congress intended to authorize the creation of enforcement mechanisms even if they were not expressly granted, the Supreme Court has concluded otherwise.[19] Moreover, enforcement mechanisms tend to be highly debated in Congress and expressly provided in statute, so it would be extremely

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[15] US Telecom NPRM Comments at 34.
[16] USTelecom NPRM comments at 21; NCTA NPRM comments at 19.
[17] U.S. Chamber NPRM comments at 3.
[18] Leadership Conference on Civil Rights NPRM comments at 9.
[19] 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").

unusual that Congress would intend for enforcement mechanisms to be included in these rules without an express provision or any evidence that Congress intended that enforcement mechanisms are to be included – especially in light of the fact that several other sections of the IIJA do expressly include such enforcement mechanisms. If commenters seek an enforcement mechanism for any future digital discrimination rules, they must go to Congress to amend Section 60506, not to the Commission or another government agency.

III. The Commission Should Address Other Barriers to Broadband Deployment and Adoption in Tandem With This Rulemaking

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. The Commission should seek stakeholder input as to existing permitting barriers, as well as solutions to address those barriers.

IV. Conclusion

Thank you for considering our views on this NPRM. 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
Chamber Technology Engagement Center
U.S. Chamber of Commerce