



Before the
Federal Communications Commission
Washington, D.C. 20024

**Comments of the
Competitive Enterprise Institute**

In the Matter of)
)
Federal Communications Commission) FCC-22-98
) GN Docket No. 22-69
)
Preventing Digital Discrimination)
Noticed of Proposed Rulemaking)

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Introduction. On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit the following reply comments in response to the Federal Communications Commission’s (FCC) notice of proposed rulemaking (NPRM) and request for reply comments regarding the proposed regulation on digital discrimination of access.¹ Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization focusing on regulatory policy from a pro-market perspective. CEI experts research and advocate policies to boost American technological innovation and economic competitiveness through technology and regulatory policy reforms related to telecommunications and broadband policy, spectrum policy, and other issues.

CEI shares the FCC’s concerns in preventing digital discrimination and supporting a free and dynamic Internet. In our initial comments, we outline the legal case against reading the statute to recommend the FCC employ a disparate impact analysis. We conclude:

[T]he Infrastructure Investment and Jobs Act cannot be read to support disparate impact analysis. It does not use the “discriminate ... because of ...” language that all statutes that permit disparate impact analysis have used. Instead, this statute’s “based on” phrase refers directly to the mindset of the actors and requires their decisions to be based on protected characteristics to find fault. The Supreme Court has already interpreted this language to exclude disparate impact analysis. Finally, the policy goals of the statute are contrary to the disparate impact analysis the Commission has suggested. For these reasons, the Commission should instead issue regulations that confine

¹ Federal Communications Commission, Notice of Proposed Rulemaking in the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, December 22, 2022, <https://www.fcc.gov/fcc-announces-comment-due-dates-preventing-digital-discrimination-nprm>.

the statute’s application to wrongful decisions by regulated entities, based on one or more of the protected characteristics listed in the statute, not to provide service.²

In these reply comments we address the harmful consequences of adopting misguided rules to prohibit digital discrimination.

Every rule must attempt to implement the purpose of the legislation on which it is based. This rule attempts to implement the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, § 60506 (2021) (codified at 47 U.S.C. § 1754). It is intended to expand broadband access to more Americans. The rules the FCC implements under it should mirror that same goal. But if the FCC adopts an effects-based “disparate impact” test in evaluating broadband providers’ deployment decisions, that expansion may stop, contrary to legislative intent. Considering income level as a protected class muddies the water of also-protected considerations of technical and economic feasibility in the statute.

Inherent tension in including “income level” as a protected class and also allowing for “issues of technical and economic feasibility.” Section 60506 requires both that “income level, race, ethnicity, color, religion or national origin” not be used to deny broadband access and also that the FCC take “into account the issues of technical and economic feasibility presented” when evaluating providers’ decisions. The only protected characteristic potentially in conflict with economic considerations is the income level of

² Devin Watkins and Ryan Nabil, “Comments to Federal Communications Commission on Preventing Digital Discrimination Notice of Proposed Rulemaking,” FCC-22-98 GN Docket No. 22-69, Competitive Enterprise Institute, February 20, 2023, https://cei.org/wp-content/uploads/2023/02/Competitive-Enterprise-Institute_Digital-Discrimination-of-Access-GN-22-69-FINAL.pdf.

potential customers. Herein lies the tension for the FCC in evaluating the presence of digital discrimination in the future.

Mistaking legitimate and legal economic considerations for digital discrimination would impair efforts to expand broadband access to more Americans. While the statute may be contradictory, the harmful unintended consequences of falsely attributing discriminatory behavior to economic analysis is crystal clear. Looking at disparate impacts to assign liability, instead of proof of discriminatory intent, risks categorizing rational business decisions as prohibited. That may very well produce false positives for discriminatory behavior and cause providers to waste limited resources defending themselves against false accusations. That will entail money that could have been used more productively in broadband deployment.

Providers are operating in the reality of scarcity, trade-offs, and profit motives. There are technical, geographical, regulatory, and economic realities they must consider when prioritizing investment decisions. The FCC should not turn a blind eye to the economic realities of broadband deployment. Well-meaning efforts to discover discriminatory behavior risks wasting billions of dollars of tax payer monies and failing to provide as many Americans as possible to access to broadband. Other factors exist, and may better explain differences in broadband access.

The empirical evidence does not recommend the FCC bias itself in favor of attributing economic decisions to digital discrimination. As T. Randolph Beard and George S. Ford admit in their 2022 economic analysis, *Digital Discrimination: Fiber Availability and Speeds by*

Race and Income, quantifying “digital discrimination” is very challenging.³ But the FCC should be reassured that the authors find “there is no evidence of digital discrimination on income levels” when digital discrimination is defined as “present when differences in some relevant outcomes exists across communities *when the profitability of serving the communities is equal.*” The authors “find no evidence of systemic or meaningful digital discrimination with respect to fiber deployment or download speeds.”

Access and affordability are different things. The FCC’s rules should reflect that while reducing government-created impediments to deployment. The statute directs efforts toward increased *access*, not *adoption* of broadband services. This is an important distinction that helps to avoid wasting resources. According to a recent report from the non-profit group Education Superhighway:

Approximately 28.2 million of the 122.8 million households in the United States do not have high-speed broadband. The historical narrative has been that these households are unconnected because they do not have access to highspeed Internet infrastructure. However, the reality is that 18 million of these households, home to 47 million people, are simply offline because they cannot afford an available Internet connection.⁴

³ George S. Ford and Thomas Randolph Beard, “Digital Discrimination: Fiber Availability and Speeds by Race and Income,” September 2022, <https://ssrn.com/abstract=4251570> or <http://dx.doi.org/10.2139/ssrn.4251570>.

⁴ Education Superhighway, “No Home Left Offline: Bridging the Broadband Affordability Gap,” (2021), <https://www.educationsuperhighway.org/no-home-left-offline/>.

This means that 10.2 million people lack broadband access, not 28.2 million. The remaining 18 million have access to broadband infrastructure, but might need financial assistance to afford it, or do not want it. That is a different set of considerations than availability alone. Other factors, including age, education levels, and hardware ownership, may intersect with income level, but provide a more complete picture of broadband adoption decisions than income alone.⁵ This, in turn, may suggest different policy prescriptions, like offering benefit programs from already-allocated government funds or internet service providers' low-income programs.

Last year's report on preventing digital discrimination from the Communications Equity and Diversity Council (CEDC) recommended clearing away of state and local regulatory underbrush that impedes deployment.⁶ The report urges governments to be helpful with public property and public rights-of-way to "remove these regulatory barriers to accelerate and encourage continued investment in broadband infrastructure deployment." States must be proactive in shortening permitting timelines and reducing associated fees.

Conclusion. Just as the aforementioned CEDC report declined to recommend adopting a disparate impact standard, so too should the FCC decline to adopt one. It should instead focus its rules and complaint process exclusively on intentional harm. This, along with

⁵ Eric Fruits and Kristian Stout, "The Income Conundrum: Intent and Effects Analysis of Digital Discrimination," International Center for Law and Economics, *Issue Brief* 2022-11-14, p. 10, <https://laweconcenter.org/resources/the-income-conundrum-intent-and-effects-analysis-of-digital-discrimination/>.

⁶ Working Groups of the Communications Equity and Diversity Council, "Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity," November 7, 2022, pp. 34-35, <https://www.fcc.gov/sites/default/files/cedc-digital-discrimination-report-110722.pdf>.

reducing or eliminating local and state permitting costs and delays will best serve Congress' statutory intent: to bring more broadband access to more Americans.