International
Center for
Law & Economics

October 12, 2023

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

**Re: *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination,* GN Docket No. 22-69**

Dear Ms. Dortch:

We write to offer our thoughts in response to the National Telecommunications and Information Administration's (NTIA) recently submitted comments to the Federal Communications Commission (FCC) in response to the notice of proposed rulemaking (NPRM) in this matter. Among its recommendations, the NTIA proposes that the FCC:[1]

1. Adopt a disparate-impact standard to define "digital discrimination of access;" and

2. Subject a "broad range" of service characteristics to digital-discrimination rules, including pricing, promotional conditions, terms of service, and quality of service.

We urge the FCC to reject both of these recommendations. As we note in a recent International Center for Law & Economics (ICLE) issue brief, a disparate-impact approach would likely run afoul of the U.S. Supreme Court's tests for when such an approach is appropriate.[2] In addition, the NTIA's recommendation to use digital-discrimination rules to regulate prices and quality of service

[1] *Ex Parte Comments of the National Telecommunications and Information Administration, In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (Oct. 6, 2023), *available at* https://www.ntia.gov/sites/default/files/publications/ntia_digital_discrimination_ex_parte_comment_10.6.23.pdf at 3 and 8.

[2] Eric Fruits & Kristian Stout, *The Income Conundrum: Intent and Effects Analysis of Digital Discrimination*, INT'L. CTR. FOR L. & ECON. (Nov. 14, 2022), *available at* https://laweconcenter.org/wp-content/uploads/2022/11/The-Income-Conundrum-Intent-and-Effects-Analysis-of-Digital-Discrimination.pdf; *see also* Eric Fruits, Kristian Stout, & Ben Sperry, *ICLE Reply Comments on Prevention and Elimination of Digital Discrimination, Notice of Proposed Rulemaking, In the Matter of Implementing the Infrastructure, Investment, and Jobs Act: Prevention and Elimination of Digital Discrimination*, No. 22-69, at Part III (Apr. 20, 2023), https://laweconcenter.org/resources/icle-reply-comments-on-prevention-and-elimination-of-digital-discrimination.

would subject broadband-internet providers to rate regulation that the FCC has historically said it eschews.

### A. Section 60506 Does Not Support Disparate Impact Analysis

Section 60506 of the Infrastructure Investment and Jobs Act (IIJA) requires the FCC to adopt final rules facilitating equal access to broadband internet:

> [T]he Commission shall adopt final rules to facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility presented by that objective, including … preventing digital discrimination of access ***based on*** income level, race, ethnicity, color, religion, or national origin; and… identifying necessary steps for the Commissions to take to eliminate discrimination …[3]

The U.S. Supreme Court has established tests governing when it is appropriate to conduct an effects-based "disparate impact" analysis in the context of discrimination law. First, the presence of language like "otherwise make unavailable" is critical to construing a statute as demanding an effects-based analysis.[4] Such phrases, the Court found, "refer[] to the consequences of an action rather than the actor's intent." Second, the structure of a statute's language matters:

> The relevant statutory phrases … play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all [of these] statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus ***signaling a shift in emphasis from an actor's intent to the consequences of his actions***.[5]

Thus, as Section 60506 was drafted without "results-oriented language" and instead frames the prohibition against digital discrimination as "based on income level, race, ethnicity, color, religion, or national origin," this would put the rule squarely within the realm of prohibitions on intentional discrimination. That is, to be discriminatory, the conduct in question must have been made intentionally because of the protected characteristic. Mere statistical correlation between outcomes and protected characteristics is insufficient to demonstrate discrimination under Section 60506.

### B. Broadband Rate Regulation Is at Odds With Longstanding FCC Policy

The FCC has for years been explicit about its apprehension to impose direct rate regulation on broadband-internet providers. Obama-era FCC Chair Tom Wheeler promised to forebear from rate regulation under the 2015 Open Internet Order (OIO), declaring "we are not trying to regulate

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[3] 47 U.S.C. § 1754 (emphasis added).

[4] *Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 534.

[5] *Id.* at 534-535 [emphasis added].

rates."[6] Last month, in a speech announcing the FCC's proposal to regulate broadband internet under Title II of the Communications Act, Chair Jessica Rosenworcel was emphatic: "They say this is a stalking horse for rate regulation. Nope. No how, no way."[7]

And yet, the NTIA recommends precisely that: a stalking horse for rate regulation under the guise of preventing digital discrimination: "Without addressing pricing as a possible source of discrimination, the Commission will be hard pressed to meet its statutory mandate to prevent digital discrimination of access."[8] Indeed, in addition to prices, the NTIA recommends addressing promotions, as well as terms of service and quality of service—both of which are inextricably intertwined with pricing. Section 60506 is explicit that the FCC must "tak[e] into account the issues of technical and economic feasibility" in addressing digital discrimination. The NTIA, however, appears to suggest ignoring that mandate.[9]

### C. The Problem With De Facto Rate Regulation

In a competitive market, prices allow for the successful coordination of supply and demand, and the market price reflects both consumer demand and the costs of production. Of course, for those on the demand side of the equation, the price of a good or service is a cost to them, and they would prefer falling prices to rising prices. For suppliers, the price represents the revenue from selling the good or service, and they would prefer rising prices to falling prices.

Due to this inherent tension, there is a natural inclination on the part of both consumers and producers to seek government intervention in the competitive process to either halt or slow price changes. The most obvious way the government can intervene is through rate regulation, such as price controls. It is well known and widely accepted that price controls can make both consumers and sellers worse off.[10] Consequently, policymakers often pitch policies to control prices under another name (*e.g.*, "second-generation rent relief" instead of "rent control") or introduce policies that are not explicit price controls. These *de facto* rate regulations (*e.g.*, quality-of-service mandates) have substantially the same effects as direct price controls.

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[6] Tom Wheeler, *Hearing on FCC Reauthorization: Oversight of the Commission*, U.S. HOUSE ENERGY AND COMMERCE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY, (Mar. 19, 2015), https://www.govinfo.gov/content/pkg/CHRG-114hhrg95817/html/CHRG-114hhrg95817.htm.

[7] *FCC Chair Rosenworcel on Reinstating Net Neutrality Rules*, C-SPan (Sep. 26, 2023), https://www.c-span.org/video/?530731-1/fcc-chair-rosenworcel-reinstating-net-neutrality-rule.

[8] *Supra* note 1, at 10.

[9] *Id.* ("Congress set out a specific list of demographic groups protected by this statute, including … racial and ethnic minorities (who as previously noted are disproportionately likely to live in ***environments where networks are costlier to maintain***, among other challenges).") [emphasis added].

[10] *See, e.g.*, N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS, 4th ed., Thomson South-Western (2007); PAUL KRUGMAN & ROBIN WELLS, ECONOMICS, 6th ed., MacMillan (2021); STEVEN A. GREENLAW & DAVID SHAPIRO, PRINCIPLES OF MICROECONOMICS 2nd ed., OpenStax (2017).

For example, some agricultural products are subject to "marketing orders," which are legal cartels than can dictate the price and quality of produce.[11] Consider an apple market subject to a marketing order that specifies fresh apples must be of a certain shape and size, such that only large, round apples can be sold as fresh produce.

Consumers presumably prefer large apples to small apples and prefer round apples to misshapen apples. Thus, the order that only large, round apples can be sold as fresh has the effect of increasing/shifting the demand curve. Consumers would be willing to pay more for the seemingly better fruit, and they'd be willing to buy more. But the order also increases the cost to apple growers. They have to find a way to dispose of their smaller or misshapen apples, perhaps by making apple sauce or juicing the fruit. They also incur higher costs of managing their crop to produce more of the higher-quality fruit. This has the effect of decreasing/shifting the supply curve for fresh fruit. Growers will supply less fruit at a higher cost.

Combining the effects from both the shift in supply and the shift in demand shows that the marketing order unambiguously results in a higher price for apples. What is not known, however, is whether more or fewer apples are sold. That will depend on the elasticities of demand and supply. Because the order results in a higher price, however, it has created a *de facto* price floor without explicitly setting one. Consumers are not aware that they are paying a higher price, because they do not know what type of fruit would otherwise be available, and at what price, absent the quality restrictions.

Similarly, broadband quality-of-service mandates simultaneously increase demand while increasing costs. Were all other things held constant, the result would be a higher price for broadband. What is not known, however, is whether more or fewer households will subscribe to broadband. That will depend on the elasticities of demand and supply. Because the mandate results in a higher price, however, it has created a *de facto* price floor without explicitly setting one. Consumers are not aware that they are paying a higher price because they do not know what quality of service would otherwise be available—and at what price—absent the quality-of-service mandate.

A recent ICLE issue brief explores in detail how these sorts of terms-of-service and quality-of-service mandates often amount to *de facto* rate regulation.[12] Sadly, we have seen many recent attempts—including by the NTIA itself—to introduce these sorts of *de facto* rate regulations:

- The NTIA's notice of funding opportunity (NOFO) under the Broadband Equity, Access, and Deployment (BEAD) program requires each participating U.S. state or territory to include a "middle-class affordability plan to ensure that ***all*** consumers have access to

[11] *See* Darren Filson, Edward Keen, Eric Fruits, & Thomas Borcherding, *Market Power and Cartel Formation: Theory and an Empirical Test*, 44 J. L. & ECON. 465 (2001).

[12] Eric Fruits & Geoffrey A. Manne, *Quack Attack: De Facto Rate Regulation in Telecommunications*, INT'L. CTR. FOR L. & ECON. (Mar. 30, 2023), available at https://laweconcenter.org/wp-content/uploads/2023/03/De-Facto-Rate-Reg-Final-1.pdf.

***affordable*** high-speed internet" (emphasis in original).[13] The NOFO specifies a price ("affordable"); a quantity ("all middle-class households"); and imposes a quality mandate ("high-speed").

- In its third and fourth funding rounds, the U.S. Department of Agriculture's ReConnect Loan and Grant Program included provision of a "low-cost option" as a point criteria in award decisions. It also included a requirement that projects must provide broadband access at speeds of at least 100/100 Mbps (*i.e.*, 100 Mbps symmetrical speed).

- The FCC's 2015 Open Internet Order outright prohibited "paid prioritization"—that is, seeking payments for network utilization from edge providers like Google, Facebook, and Netflix—while casting suspicion on other pricing schemes under its Internet Conduct Standard.

Moreover, as we note in our *Income Conundrum* issue brief, the evaluation of digital-discrimination claims based on income level can yield highly complicated analyses due to income's correlation with a host of factors, both protected (*e.g.*, race and national origin) and unprotected (*e.g.*, home-computer ownership). Adoption of Section 60506 rules that do not recognize this "income conundrum" will invite costly and time-consuming disparate-impact litigation that alleges digital discrimination, both where no such discrimination exists and where it is excused by economic-feasibility considerations. Even worse, regulatory interventions on price, quality of service, and terms of service would extend this damage further by creating *de facto* utility regulation on providers that completely distorts investment incentives.

### D. Conclusion

The FCC must be cautious when promulgating rules under Section 60506. In particular, the commission should adopt an intent-based discriminatory-treatment standard, rather than one that opens the doors to disparate-impact claims. And FCC rules should articulate a presumption of nondiscrimination, in which allegations of digital discrimination must be demonstrated, rather than a presumption of discrimination that must be rebutted for each deployment, service, and pricing decision.

If the commission has good evidence of intentional discrimination in the deployment of broadband, it has a role to play in preventing it. But without strong, compelling evidence of intentional discrimination, the FCC will run the risk of a constitutional challenge to its rules and waste scarce resources chasing bogeymen.

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[13] *Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program*, NTIA-BEAD-2022, NTIA (May 2022), *available at* https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf (note that the IIJA itself did not include this requirement, but it was added by NTIA as part of the NOFO process; thus, it is unclear the extent to which this represents a valid requirement by NTIA under the BEAD program).

Above all, the FCC should resist calls to engage in rate regulation, either through direct intervention on broadband prices or through interventions on quality of service or terms of service. The longstanding policy to avoid rate regulation has been an important factor leading to increased broadband deployment in the United States.