October 31, 2023

By Electronic Filing

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

Re: GN Docket No. 22-69

Dear Ms. Dortch:

The Digital Progress Institute welcomed the passage of the bipartisan Infrastructure Investment and Jobs Act, the single largest federal effort to close the digital divide to date, wherein Congress declared that "all people of the United States [should] benefit from equal access to broadband internet access service."[1] The Digital Progress Institute has also supported the work of the Commission to complete this rulemaking in a timely manner to adopt rules to "facilitate equal access" for all Americans,[2] (2) adopt rules to prevent "digital discrimination,"[3] and (3) adopt rules that identify the "necessary steps for the Commission[] to take to eliminate" digital discrimination.[4]

We recognize that the Commission is facing an enormous task: interpreting new, rather complex statutory language that uses slightly different phrasings in different places that all appeared to revolve around similar concepts. And we appreciate the work of the Commission to date to reconcile this language with a workable policy framework.

That said, we are concerned that some of the decisions made in the draft *Order*[5] may result in unintended negative consequences for the American consumers that the Infrastructure

[1] Infrastructure Investment and Jobs Act, P. Law 117-58, § 60506(a)(3) (2021).

[2] Infrastructure Investment and Jobs Act, § 60506(b).

[3] Infrastructure Investment and Jobs Act, § 60506(b)(1).

[4] Infrastructure Investment and Jobs Act, § 60506(b)(2).

[5] *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Draft Report and Order and Further Notice of Proposed Rulemaking, FCC-CIRC2311-01 (rel. Oct. 25, 2023) ("*Order*").

Investment and Jobs Act is intended to protect and that other aspects of the proposal stray from the statutory text, opening up these rules to needless legal challenge.[6]

One, we agree with the Commission that the entities covered by its digital discrimination rules must go beyond broadband Internet access service providers. Specifically, we agree with the Commission that the Infrastructure Investment and Jobs Act does not itself define the class of entities covered by the Commission's rules and instead gives the Commission a broad mandate to "adopt final rules to facilitate equal access to broadband internet access service."[7] We agree, for example, with the Commission and the Lawyers' Committee for Civil Rights Under Law that a landlord restricting broadband buildout within an apartment building or a shopping center would diminish the "equal access" of tenants to competitive broadband options and thus within the scope of the Commission's rules.[8] And we agree that a local government, acting as a rights-of-way manager or franchise regulator, may similarly restrict the "equal access" of local residents and businesses and thus should be within the scope of the Commission's rules.[9]

We specifically agree that the term for those covered should be "covered entity," not "covered person," to make clear that government entities, and not just persons (including municipalities), are covered by the rule. Indeed, as the draft *Order* puts it: "any entity that meaningfully affects access to broadband internet service is subject to our digital discrimination of access rules."[10] As such, and based on the Commission's discussion in the *Order*, we read the Commission as intending to cover pole and conduit owners, such as railroads, electric cooperatives, local governments, state governments, Tribal governments, and the federal government, who deny timely access to poles or conduits or impose terms and conditions on attachers that have the effect of digital discrimination. We read the Commission as intending to cover government permitting offices, whether local, state, Tribal, or federal (such as the National Park Service), who do not timely process requests or impose unreasonable fees or delay on broadband builders that have the effect of digital discrimination. And we read the Commission as intending to cover other government entities (federal or otherwise) whose policies or practices who slow broadband deployment or increase its costs and thus result in digital discrimination.[11]

Nonetheless, we are concerned with two aspects of the rules on this front. First, we are concerned that the definition of "covered entity" may be too narrow by limiting itself to "entities *that provide services* that facilitate and affect consumer access"[12] rather than just "entities that facilitate and affect consumer access." For example, a railroad pole owner no doubt facilitates and affects consumer access to broadband, but it may argue that it does not offer or provide any

[6] For purposes of this *ex parte*, we take as given the proposed decisions to impose liability for both disparate treatment and disparate impact and to expand the scope of the rules to include pricing decisions without weighing in on either controversy.

[7] Infrastructure Investment and Jobs Act, § 60506(b).

[8] *Order* para. 87; Lawyers' Committee for Civil Rights Under Law Comments at 31-32.

[9] *Order* para. 88.

[10] *Order* para. 88.

[11] On this front, the Commission should clarify whether its rules impose an affirmative obligation on a government entity, such as a library or county government, to allow wireless attachments to the side of a government building itself unless doing so is not technically or economically feasible.

[12] Draft rule 16.2(d).

"services" that do so. Second, to the extent the Commission believes it can imposes forfeitures for violations (more on that later), it should recognize that current rule 1.80(a) only applies to violations by "persons" not all covered entities.[13] Accordingly, the draft rule should be amended to replace "person" with "entity" in section 1.80(a).

Two, we agree with the draft rules that "technical and economic feasibility"[14] may be assessed by "prior success by covered entities under similar circumstances" and that the definitions must account for new situations as well.[15] We agree that a case-by-case approach is to some extent necessary because it would be impossible, if not impractical, for the Commission to spell out precisely what is feasible or not in every given situation.[16] And we agree that the "bare assertion[]" of a covered entity should not be enough to establish technical or economic infeasibility.[17]

That said, we believe several amendments to this section would strengthen the Commission's approach. *For one*, we believe the Commission should strike the word "genuine" from its draft rules.[18] That term does not appear in the statute, opening the Commission to needless litigation. What is more, that term is not necessary to weed out the "bare assertions" of a covered entity since the Commission makes clear elsewhere that such an issue must be demonstrated by a preponderance of the evidence.[19] And to the extent that term is intended to weed our "justifications created after the fact,"[20] it creates an impossible standard for any covered entity to meet with respect to allegations of discrimination impact. Unlike cases of disparate treatment (in which case an after-the-fact justification is just a post-hoc rationalization for intentional discrimination), there is no pointed decision to discriminate in the context of a disparate impact claim and any adoption of a facially neutral policy is likely to be premised on the business judgment of the covered entity—in other words, any analysis of economic and technical feasibility with respect to differential impact *must be* after the fact.[21]

For another, we believe the Commission would better prepare covered entities and possible complainants for a case-by-case approach to determining technical and economic feasibility if the *Order* included a few examples of the cases in which a practice were or were not feasible.

For example, just as the Commission has recognized that a landlord can affect "equal access,"[22] it should make clear that if a landlord prevents a broadband provider from accessing a

---

[13] 47 C.F.R. § 1.80(a) ("*Persons* against whom and violations for which a forfeiture may be assessed. A forfeiture may be assessed against any *person* found to have . . . ." (emphasis added)).

[14] *Order* paras. 60-62, 66-79.

[15] *Order* paras. 70, 71.

[16] Draft rule 16.5(e).

[17] *Order* para. 62.

[18] *Order* para. 62; Draft rules 16.2, 16.3, 16.5.

[19] *Order* para. 79; Draft rule 16.5(d).

[20] *Order* para. 62.

[21] For example, a broadband provider decides not to provide service to several houses located up a cliff from its existing network because it does not appear profitable. If that decision resulted in a prohibited differential impact and was now shown to be technically or economically infeasible, it would be absurd to find liability because the provider had not conducted that analysis *before* making its initial decision.

[22] *See Order* para. 87.

multi-tenant building by denying the request for access, failing to respond to such a request, failing to offer commercially reasonable terms, or requiring an exorbitant payment for access, then buildout to the tenants of that building would be technically or economically infeasible for the broadband provider. Similarly, if a pole owner not subject to federal pole attachment rules (or state rules with substantially similar rights to access and pricing) prevents the timely buildout on such poles (or demands exorbitant rates for such access),[23] the Commission should make clear that deployment by a broadband provider to consumers in that area would be technically or economically infeasible. Or if any government entity (whether local, state, Tribal, or federal) administers any rules (such as local franchising laws, permitting or licensing laws, historic preservation or environmental laws, or zoning and construction regulations) that make deploying broadband prohibitively expensive or prevent timely deployment, the Commission should make clear that deployment by a broadband provider to consumers in that area would be technically or economically infeasible. Or if the owner of a right of way (such as the owner, government or otherwise, of a highway, waterway, railroad, or other crossing) responds to a request for access by denying the request for access, failing to respond to such a request, failing to offer commercially reasonable terms, or requiring an exorbitant payment for access, the Commission should make clear that deployment in that area is technically or economically infeasible. Or if the scope or terms of a deployment are defined by a government contract or funding program, the Commission should make clear that deployment beyond the scope of that program (or with differing terms and conditions) will generally be considered technically and economically infeasible (because such contracts or funding programs presumably only fund areas where deployment is infeasible without such a contract or funding program).[24]

Conversely, and because the Commission has made clear its intention to apply its digital discrimination rules to all covered entities that meaningfully affect access to broadband—including landlords, pole owners, government entities, and right-of-way owners—the Commission should make clear that it will enforce its rules against these entities where their conduct results in digital discrimination. And the Commission should make clear that terms and practices that delay deployment, unnecessarily increase the cost of deployment, or otherwise effectively prohibit the deployment of broadband are, by definition, not technically and economically required. For example, numerous pole owners in approximately half of the states are subject to the Commission's pole attachment rules—and the Commission should make clear that applying those same terms and conditions to other pole owners is technically and economically feasible. Similarly, the Commission has previously reviewed the varying permitting rules and fees charged by numerous municipalities[25]—the Commission should make clear that applying the same terms and conditions of broadband-facilitating municipalities is technically and economically feasible in the broadband-blocking municipalities.

---

[23] *Cf. Order* para. 88 (declining to exempt municipalities from the ambit of the rules based on their roles as right-of-way managers or franchise regulators).

[24] *See Order* para. 77 & n.239.

[25] *See, e.g.*, *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act*, WT Docket No. 19-250, RM-11849, Report and Order, FCC 20-153 (2020).

Finally, the Commission should make clear what it means by the phrase "similar circumstances" in its definitions.[26] The Commission should make clear, for example, that the second or third broadband provider in an area does not face the same circumstances as the first, since there may be technical constraints on how many providers can deploy in a given area and a second or third broadband provider is likely to be at a distinct economic disadvantage from a first mover.[27] In a related vein, the Commission should clarify that similar circumstances take into account existing infrastructure and infrastructure access—so that if an area does not have the poles or pole space or conduits or other infrastructure normally available for a wireline build, it will not be compared to an area with such appropriate infrastructure—and that similar circumstances take into account occupancy rates in an area—so that an area whose occupancy varies significantly with the season will not constitute "similar circumstances" to an area where occupancy is high and stable.

For yet another, we urge the Commission to clarify that a complainant or the Enforcement Bureau must take technical or economic feasibility into account when alleging a violation of its digital discrimination rules. Given the Commission's definition of "digital discrimination of access" to only target "policies or practices[] not justified by genuine issues of technical or economic feasibility,"[28] it makes little sense to allow a complaint or start an investigation without any analysis whatsoever of feasibility (or any allegation that such a policy or practice was not justified by issues of technical or economic feasibility). And given the Commission's decision to define such feasibility with references to prior conduct in similar circumstances, the burden on the complainant or the Enforcement Bureau may not be high. Such a requirement would then give the covered entity—whether a broadband provider, a government entity, or otherwise—some view of the "prior conduct in similar circumstances" that their practice is being compared to. Otherwise, the covered entity is shooting in the dark and forced to prove a negative: that no prior conduct in similar circumstances has ever occurred. What is more, the Commission's comparison of this proceeding to the satellite context is inapt; because feasibility is defined based on similarity to other circumstances, the covered provider is almost by definition less likely to have "access to the necessary information" than in the satellite context.[29]

Three, we are concerned that the Commission is needlessly creating a significant litigation risk by including forfeitures among its enforcement tools rather than pushing that question to the Further Notice and confining enforcement for now to letters of inquiry and remedial orders.

First, the Commission does not identify a single section of the Infrastructure Investment and Jobs Act or the Communications Act that explicitly authorizes forfeitures for the violation of

---

[26] *Order* paras. 70, 71.

[27] For example, the first broadband provider in an apartment building may have broad access to deploy the inside wiring needed to connect each apartment whereas a landlord may decline to allow a second or third provider to do such work. Similarly, the first broadband provider in a new build may be able to install inside wiring before the walls go up whereas a second or third broadband provider cannot do so. Even more basically, a first broadband provider might assume an 80% take rate in deploying in a particular area, whereas a second broadband provider (or a third) would have to calculate take rates at a fraction of the first in determining whether such a build is economical.

[28] Draft rule 16.2(g); *see also* Draft rule 16.3(b) (incorporating issues of technical or economic feasibility into the definition of prohibited conduct).

[29] *See Order* para. 78.

its digital discrimination rules. Neither section 60506 of the Infrastructure Investment and Jobs Act nor sections 1, 2, 4(i), 4(j), and 303(r) of the Communications Act mention forfeitures.[30] In contrast, Congress has made the imposition of forfeitures explicit elsewhere. Section 503, for example, is explicitly titled "Forfeitures." Sections 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), and 386 all state that violators shall "forfeit to the United States" some amount of funds, sections 227(e)(5) and 634(f) state that violators "shall be liable to the United States for a forfeiture penalty," and section 511(a) states that violators shall be "subject to a fine." Each of these sections outlining forfeiture penalties establishes a methodology for calculating the maximum forfeiture, and the collection of these forfeitures is made clear by section 504 of the Communications Act, which prescribes where forfeitures should be deposited ("the Treasury of the United States"), who may prosecute the collection of such forfeitures ("the various United States attorneys, under the direction of the Attorney General"), and who must pay for such prosecutions ("from the appropriation of the expenses of the courts of the United States"). That section 504 also prescribes the remission and mitigation of forfeitures by the Commission. It would be surpassing strange for Congress to take such care and impose such explicit limits on forfeitures in all these cases but give the Commission free rein to impose forfeitures of any size on any covered entity with no one authorized to collect them under section 60506 of the Infrastructure Investment and Jobs Act.

Second, in a similar vein, the draft *Order* does not appear to work through its approach to forfeitures. For example, the draft rules simply insert a violation of the digital discrimination rules into section 1.80(a) of the Commission's rules. Based on the remaining language in that regulation, a covered entity that is a cable television operator would be subject to forfeitures of up to $59,316 for each violation, a covered entity that is a common carrier would be subject to forfeitures of up to $237,268 per violation, and other covered entities would be subject to forfeitures of up to $23,727.[31] The Commission offers no explanation whatsoever for these variations in this context. In a similar vein, that regulation would require a citation be issued to most covered entities before imposing a forfeiture, but not covered entities that hold a license, permit, certificate, or other authorization issued by the Commission. Again, the draft *Order* offers no reasoning for this distinction.

Third, the draft *Order* fails to recognize that even without forfeitures, it could effectively enforce its digital discrimination rules. *For one*, the draft *Order* apparently recognizes its authority to issue "remedial orders"—i.e., orders to require a covered entity to end a digitally discriminatory practice.[32] *For another*, the Commission apparently recognizes that section 4(i) of the Communications Act generally gives its authority to issue such orders.[33] And while reading that section to encompass a free-wheeling forfeiture authority would appear inconsistent with the strictures that Congress has elsewhere placed on the Commission's forfeiture authority, it comports

[30] *Order* para. 219 (listing out the authority of the Commission to adopt these rules). Notably, the draft *Order* does not claim any authority from sections 503 or 504 of the Communications Act to enforce the digital discrimination rules—and rightfully so as those provisions only cover violations of the Communications Act itself and not the Infrastructure Investment and Jobs Act.

[31] 47 C.F.R. § 1.80(b)(1), (2), (9).

[32] *Order* para. 119.

[33] *Order* para. 127; Communications Act § 4(i) ("The Commission may perform any and all acts, make such rules and regulations, and *issue such orders*, not inconsistent with this Act, as may be necessary in the execution of its functions." (emphasis added)).

with a more narrow authority to require a covered entity to end (or "eliminate") a digitally discriminatory policy or practice. *For yet another*, the draft *Order* nonetheless appears to ignore this authority to issue remedial orders when addressing arguments about its forfeiture authority, claiming that some commenters contend the Commission lacks *any* authority to enforce digital discrimination rules when those commenters instead simply target the Commission's forfeiture authority.[34] Putting up and taking down a straw man without addressing the actual arguments of commenters leaves the Commission unnecessarily vulnerable to judicial review for arbitrary and capricious decision-making.

* * *

Again, the Digital Progress Institute appreciates the work of the Commission in carrying out the difficult task of interpreting this complex and reticulated statutory framework. We recognize that there are numerous arguments in the record covering the more controversial topics of this proceeding. We hope these targeted comments will aid the Commission in addressing the less-discussed issues in a manner that promotes good policy and is legally sustainable.

Sincerely,

/s/ Joel Thayer
Joel Thayer
President
The Digital Progress Institute

cc:
Priscilla Delgado Argeris
Ramesh Nagarajan
Elizabeth Cuttner
Lauren Garry
Justin Faulb
Marco Peraza
Hayley Steffen

[34] *See Order* paras. 122-24. For example, the draft *Order* states "there would be little point for Congress to direct the Commission to accept complaints of digital discrimination of access if we lacked *any* of our traditional powers to act on them" and then reasons that Congress thus must have meant for the Commission to have *all* of its traditional enforcement powers (including forfeiture authority) in this context. *See Order* para. 122.