November 7, 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:

As the Commission concludes its efforts to adopt rules to "facilitate equal access" for all Americans,[1] (2) adopt rules to prevent "digital discrimination,"[2] and (3) adopt rules that identify the "necessary steps for the Commission[] to take to eliminate" digital discrimination,[3] the Digital Progress Institute continues to believe that the Commission should make targeted changes to its *Draft Order* to clarify unclear language and improve the *Draft Order*'s odds of surviving judicial review.

In its previous submission, the Institute argued that the Commission should make clear the scope of covered entities and make conforming changes to its rules to that effect, strike the word "genuine" from its rules and provide further guidance on what constitutes economic and technical feasibility, and reconsider its attempt to impose forfeitures without clear congressional authorization to do so.[4] In this letter, the Institute explores other aspects of the *Draft Order*, including the need to squarely address controlling Supreme Court precedent and the importance of the mediation process the Commission is setting up.[5] As before, we recognize the significant task that Congress has placed before the Commission in this rulemaking and appreciate the efforts of staff to faithfully implement the bipartisan Infrastructure Investment and Jobs Act.

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[1] Infrastructure Investment and Jobs Act, P. Law 117-58, § 60506(b) (2011).

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

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

[4] Letter from Joel Thayer, President, Digital Progress Institute, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69 (Oct. 31, 2023).

[5] 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.

First, the Commission should substantially review and expand its discussion of Supreme Court precedent with respect to imposing a disparate impact standard. Confined to just five paragraphs of a 221-paragraph order,[6] that discussion rightly highlights that the *Inclusive Communities* decision is likely to control in this case.[7] Of note, after the *Inclusive Communities* court identified the results-based language reviewed in *Griggs*[8] ("or otherwise discriminate" and "or otherwise adversely affect") and *Smith*[9] ("or otherwise adversely affect"), it said that the phrase "otherwise make unavailable" in the Fair Housing Act was "of central importance to" the court's finding of disparate-impact liability.[10] Although the *Draft Order* appears to acknowledge this language in paragraphs 43 and 44, a more fulsome discussion of how Section 60506 contains similar results-based language would strengthen the Commission's legal position.[11]

A recent *ex parte* by Public Knowledge highlights another important part of the *Inclusive Communities* case that the Commission should consider. In that *ex parte*, Public Knowledge urges the Commission to adopt "clarifying language" about how it will approach economic feasibility with respect to the "expected return on investment" and "competition."[12] We caution against adopting such a clarification. The *Inclusive Communities* court wrote that:

> disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.'[13]

The Commission is already on thin legal ice here given its decision to reject considerations of profitability[14] or business judgment[15] in evaluating disparate impact, and broadband associations

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[6] *Draft Order*, paras. 39, 43-44, 49-50.

[7] *Id.* (citing *Texas Department of Housing and Comm'ty Affairs v. Inclusive Communities Project*, 576 U.S. 519 (2015)).

[8] *Inclusive Communities*, 576 U.S. at 530-32 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

[9] *Id.* at 532-33 (*Smith v. City of Jackson*, 544 U.S. 228 (2005)).

[10] *Id.* at 534.

[11] The public *Draft Order* only contains two sentences addressing this point: The first acknowledges that "Congress did not repeat the results-based language that appears" elsewhere; the second references statutory purpose (covered by the next section of the *Draft Order*) and then mentions only two statutory terms ("equal access" and "equal opportunity") and cites two comments for its support. A more thorough and direct rebuttal is likely necessary if the Commission is to prevail in court.

[12] Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69 at 2-3 (Nov. 1, 2023) (Public Knowledge *Ex Parte*).

[13] *Inclusive Communities*, 576 U.S. at 534 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009)).

[14] *Draft Order*, para. 58.

[15] *Draft Order*, para. 73.

have already flagged this specific issue as a grounds for appeal.[16] Accordingly, the Commission should review its discussion of economic and technical feasibility to ensure it fully comports with the *Inclusive Communities* standard (adding examples of feasibility and infeasibility as previously suggested by the Digital Progress Institute would help). And it should eschew arguments like this one from Public Knowledge that would require the Commission to ignore the actual expected rate of return in an area or the actual impact competition would have on an operator's decision-making so that "regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."

Two, the Digital Progress Institute agrees with Public Knowledge that section 4(i) of the Communications Act is direct authority for the Commission to carry out its functions, including its responsibilities under section 60506 of the Infrastructure Investment and Jobs Act.[17] The Commission should revise its discussion of section 4(i) to excise any discussion of ancillary authority.[18]

Three, the Digital Progress Institute agrees with the National Urban League, the Black Women's Roundtable, the National Coalition on Black Civic Participation, and the National Council of Negro Women on the importance of the mediation process contained in the *Draft Order*.[19] As explained in the *Draft Order*, that voluntary mediation process would follow existing Commission procedures and could result in settlements binding on the parties.[20] Given the broad scope of covered entities contemplated by the *Draft Order*, we agree with these groups that mediation should not be limited to the complainant and only the covered entity identified by the complainant but also other covered entities that could make resolution of the complaint feasible such as landlords, right-of-way owners, pole owners, and local government officials involved in permitting or other related decisions. And we agree that the focus of the mediation process should be on finding practical solutions to facilitate equal access to the affected community. Incorporating these clarifications into the *Draft Order* would facilitate a more effective mediation policy for the Commission.

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[16] *See* Letter from Diana Eisner, Vice President, Policy & Advocacy, USTelecom, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69 at 1-2 (Nov. 3, 2023) ("Further, we discussed our concern that the Draft Order departs from decades of civil rights law and policy in the disparate impact framework it adopts. For example, the Draft Order places burdens of proof on providers that should be on the Commission; does not permit a provider to identify any substantial, legitimate business interest; and rejects allowing individual providers to exercise their own business judgment."); Letter from Pamela Arluk, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69 at 3 (Nov. 3, 2023) ("But the *Draft Order* incorrectly applies this standard in two important respects: (1) it mischaracterizes the burden-shifting framework described by the Supreme Court, and (2) available defenses should include any legitimate, nondiscriminatory business rationale, not just technical or economic infeasibility.").

[17] Public Knowledge *Ex Parte* at 3-4.

[18] *Draft Order*, para. 127 & note 408.

[19] Letter from National Urban League et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69 at 2 (Nov. 4, 2023); *see also* Letter from Rosa Mendoza, ALLvanza, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69 at 1 (Oct. 23, 2023) ("Part of the solution to digital discrimination complaints should involve engagement from all relevant stakeholders, so parties can collaborate to provide solutions that put more Latinos on the right side of the digital divide".).

[20] *Draft Order*, para. 145.

Nonetheless, we are concerned that the *Draft Order* may unduly limit the scope of when mediation may occur. The *Draft Order* recognizes that the "mediation process represents an alternative means of bringing speedy and effective resolution to disputes," and yet suggests that mediation may only start "prior to initiation of an Enforcement Bureau investigation."[21] We encourage the Commission to hold open the door for mediation even after an investigation starts as it may prove a more fruitful path to resolving some disputes than a formal enforcement action. Similarly, we urge the Commission to make clear that should a dispute be resolved through mediation, that fact will *always* be disclosed to the Enforcement Bureau's Investigations and Hearings Division even if the particular terms of the resolution are kept confidential.[22] Parties to a mediated resolution should not be forced to disclose confidential terms just to inform the Commission's investigators that a dispute has been settled (and the Enforcement Bureau's investigators should be allowed to consider the resolution of such a dispute even without knowledge of the precise terms).

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As before, 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 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
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[21] *Draft Order*, para. 145.

[22] *Cf. Draft Order*, para. 145 ("The parties to the mediation may agree, if they so choose, to disclose the terms of any resolution to the Enforcement Bureau's Investigations and Hearings Division, but will not be required to do so. If the parties choose to disclose the terms of the resolution to the Investigations and Hearings Division, the Enforcement Bureau will consider the terms and scope of the resolution in determining whether to initiate an investigation into the matters raised in the informal complaint.").