Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

IMPLEMENTING THE INFRASTRUCTURE INVESTMENT AND JOBS ACT: PREVENTION AND ELIMINATION OF DIGITAL DISCRIMINATION	**)** **)** **)** **)**	**Docket No. 22-69**

REPLY COMMENTS OF

NTCA–THE RURAL BROADBAND ASSOCIATION

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SUMMARY

The record demonstrates that broadband access is available in equivalent measures without distinction based on the status of protected classes. Moreover, numerous Commission provisions both proscribe discriminatory actions and require affirmative build-out achievements. These standards jointly and individually continue to support growing deployment and increasing engagement with broadband across wide swathes of diverse communities. Findings of the Commission's Communications Equity and Diversity Council are consistent with independent data sources and affirm that the major obstacles to broadband adoption and engagement remain affordability and perceived relevance.

As the Commission promulgates rules in accordance with Section 60506, it is urged to limit applicability only to "intent-based" standards. In contrast, an "impact-based" standard of discrimination would be inconsistent with the language and intent of the statute. Applicability of rules must further be a prospective basis, only. Retroactive applicability would not only be inconsistent with overwhelming presumptions of law but would also conflict with the relationship of Section 60506 to the rest of the statute.

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To the Commission:

I. INTRODUCTION

NTCA–The Rural Broadband Association (NTCA) hereby submits reply comments in the above-captioned proceeding. NTCA's prior participation in the instant docket includes initial comments on both the *Notice of Inquiry* and the *Notice of Proposed Rulemaking* (*NPRM*).[1] Comments submitted by numerous parties on the instant *NPRM* raise important points that are consistent with positions presented by NTCA in initial comments. In these reply comments, NTCA submits:

1. The record indicates affirmatively that broadband access is available in equivalent measures without distinction based on the status of protected classes.

2. Not only would an "impact-based" standard of discrimination be inconsistent with the language and intent of the statute, but such an approach would chill investment and discourage upgrades where economically and technically feasible, particularly in high-cost rural areas where the business case for investment presents distinct challenges.

[1] *Comments of NTCA–The Rural Broadband Association* (May 16, 2022); *Comments of NTCA–The Rural Broadband Association* (Feb. 21, 2023).

3. Retroactive applicability would be inconsistent with overwhelming presumptions of law and moreover conflict with the relationship of Section 60506 to the rest of the Infrastructure Investment and Jobs Act (IIJA).

For these reasons, NTCA urges the Commission to implement Section 60506 in a surgical manner, specifically to (1) bridge instances that might not be addressed by other statutory or regulatory offerings; (2) direct its application to instances of intent-based discrimination, only; and (3) ensure that the statute is applied on a prospective, rather than a retroactive, basis.

II. DISCUSSION

A. THE STATUTE INSTRUCTS AN INTENT-BASED APPROACH.

1. The Statute Evinces Congressional Intent Toward Narrow Application.

Commenters in this proceeding debate several issues, including, *inter alia,* (i) whether Section 60506 is intended to prohibit impact-based or intent-based discrimination, and (ii) the scope of technical or economic infeasibility. Fortunately, the language of the statute, consistent with principles of statutory interpretation, provides clear guidance. By way of overview, the Infrastructure Investment and Jobs Act (IIJA)[2] is an integrated unit that incorporates several provisions aimed at expanding broadband deployment and adoption, including the Broadband Equity, Access, and Deployment (BEAD) program and the Affordable Connectivity Program (ACP). These various provisions, alongside Section 60506, manifest not simply a holistic vision of expansive access to broadband but establish avenues by which that vision can be reached. Provisions allowing funding to be used for broadband mapping assist definition of *where*

[2] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

broadband efforts must focus;[3] BEAD funding assists *deployments* of broadband networks in those spaces; and ACP aims to increase *affordability and adoption.* Section 60506 buttresses those efforts by adjuring the Commission to prevent discrimination "based on" certain enumerated protected classes. But the Commission's scope of activity in this regard must be viewed alongside and in coordination with standards established by other applicable laws, including relevant sections of the Communications Act. As noted by the Commission in the *NPRM,* numerous pre-existing provisions proscribe discriminatory actions.[4] Section 60506 must be interpreted to fill any gaps left by those other rules. Had Congress envisioned greater and more prescriptive directives, it would have preempted other laws that have similar aim. Congress is presumed to be aware of previously existing statutes when passing new legislation.[5] Accordingly, in the absence of preemption, it follows that the drafters of Section 60506 intended its provisions to target a discrete scope of actions not covered by existing rules, rather than set the stage for broad new structures as some commenters suggest.[6] To be sure, the canon of surplusage presumes that statutory directives are intended to "have real and substantial effect."[7] And Section 60506 must therefore be interpreted to have "real" effect. But in light of the fact that

[3] *See,* IIJA § 60102(f)(3), permitting subgrant funding to be used for data collection, broadband mapping, and planning.

[4] NPRM at para. 4.

[5] *See, i.e., Miles v. Apex Marine Corps,* 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.")

[6] *See, i.e.,* Comments of Free Press at 16-17 (suggesting pricing regulations); Comments of the People of the State of California and the California Public Utilities Commission at 9, 10 (arguing, against statutory language that "the definition of 'digital discrimination of access' should not include technical and economic infeasibilities"); Comments of Next Century Cities, Consumer Reports, Access Humboldt, The Center for Rural Strategies, and National Consumer Law Center at 15, 16 (advocating creation of a fund supported by "punitive" monetary fines).

[7] *Stone v. INS,* 514 U.S. 386, 397 (1995). *See, also, Babbitt, Secretary of the Interior, et al., v. Sweet Home Chapter of Communities for Greater Oregon.,* 515 U.S. 687, 698 (1995), *citing Mackey v. Lanier Collection Agency and Service, Inc.* 486 U.S. 825, 837 (1988) ("[A] reluctance to treat statutory terms as surplusage" favored interpreting the word "harm" in the statute to include indirect actions).

Section 60506 does not preempt other laws, that effect must be limited only to spaces that pre-existing regulations do not reach.

2. Section 60506 Prohibits Intentional Discrimination Against Protected Classes and Does Not Make Unlawful Different Levels of Access that Arise from Technical or Economic Reasons.

NTCA established in initial comments that the language of Section 60506 limits its application to intent-based harms and does not make unlawful disparate levels of access that arise due to technical or economic infeasibility.[8] This conclusion is supported by numerous commenters in the docket. The Free State Foundation explains that the statutory language prohibiting discrimination "based on" the subject's inclusion in a protected class indicates clearly that the statute is intended to prohibit only intent-based discrimination.[9] AT&T agrees, noting that Congress intended to prohibit discrimination "on the ground of" defined criteria.[10] AT&T further explains that the statute's inclusion of both (i) subscriber income and (ii) economic feasibility for the provider acknowledged implicitly that legitimate decisions can affect protected classes, but would not be considered unlawful.[11] For example, a company may find that projected take rates and anticipated revenues in certain areas may not justify investment.[12] Those deployment policies, based on objective revenue goals, would affect wealthier consumers in that area, as well. In those instances, a "deployment policy cannot be said to 'cause' prohibited

[8] Comments of NTCA at 12-14 (Feb. 21, 2023).

[9] Comments of Free State Foundation at 2, 9.

[10] Comments of AT&T at 16 (internal citation omitted).

[11] Comments of AT&T at 18.

[12] Comments of AT&T at 18, 19.

disparities for those purposes if it in fact treats protected groups at as well as well as unprotected groups *within its overall geographic ambit."*[13]

Inductively, Section 60506 is clear that it prohibits discrimination (a) "based on" the subject's inclusion in a protected class that is (b) divorced from concerns of technical or economic infeasibility. Stated differently, Section 60506 is triggered when a provider *intends* to discriminate against a subscriber *because of* the subscriber's inclusion in a protected class. This is the *sine qua non* of intent-based discrimination. By way of contrast, AT&T notes that even if a disparate impact approach were adopted, it would require substantial guardrails, admonishing that even "racial imbalance does not, without more, establish a *prima facie* case of disparate impact."[14] Americans for Tax Reform and Liberty offer a cogent example in this regard that helps illustrate the difference between impact-based and intent-based discrimination: "For example, limiting Spanish-language customer service hours to a short period on Sunday morning when the Hispanic residents of one of the towns are known to be in church."[15] But were the company to limit *all* customer service hours to that window, or if the company could demonstrate that retaining Spanish-speaking customer service representatives outside those hours was neither technically nor economically feasible, then the disparate impact does not fit within the intent-based boundaries of the statute because there is no intent to harm the protected class. To demonstrate intent-based discrimination, the plaintiff must show that policies are artificial, unnecessary, or arbitrary.[16] Given (i) the clear exemption in the statute for disparities arising out

[13] Comments of AT&T at 7 (emphasis in original).

[14] Comments of AT&T at 20, *quoting Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 576 U.S. 519, 542 (2015) (internal citation omitted).

[15] Comments of Americans for Tax Reform and Digital Liberty at 3.

[16] Comments of AT&T at 25.

of technical or economic feasibility, (ii) the language of the statute stipulating that wrongful actions must be "based on" the subject's inclusion in a protected class, and (iii) the construction of the statute that lacks the type of clause ordinarily associated with impact-based standards,[17] an impact-based standard interpretation of Section 60506 should not be imposed.

The record is replete with overwhelming demonstrations of the extent to which, and reasons why, economic feasibility plays a determinative role in broadband deployment. Parties with practical experience deploying and operating networks and delivering services on an ongoing basis explain the impact of projected take rates; loop lengths; terrain; third-party demands such as pole attachments or historic preservation surveys; and other factors on deployment strategies.[18] Equally compelling are the examples shared by Free Press, which engages specific discussion of such aspects as projected take rates for urban FTTH deployments, internal rate of return (IRR), cash flow estimates, and investment cycles. Free Press concludes, "Because ILECs need to achieve take rates between 35 and 40 percent within a 5 to 10 year time period to generate a positive IRR, they are likely to favor FTTH deployments in in areas where they expect take rates to be highest, relative to deployment costs."[19] Without engaging the accuracy of estimated timelines, IRR, or take rate projections (especially as they may vary between urban and rural areas), NTCA suggests that these observations confirm the positions of providers that legitimate economic business decisions inform deployment. In offering an example of reasons that might underlie disparate impacts, AT&T describes how loop lengths

[17] *See, i.e.,* Comments of Verizon at 14-16.

[18] *See, i.e.,* Comments of ACA at 9, 10, 22; Comments of AT&T at 4, 5; Comments of NCTA at 11, 29; Comments of NTCA at 15-19; Comments of USTelecom at 12; Comments of Verizon, Appendix A.

[19] Comments of Free Press at 23-25.

affect DSL upgrades. "To the extent that phenomenon has a disparate impact on different groups, it is the result of physics, not of any wrongdoing by these companies."[20]

The recognition of economic factors from stakeholders of all kinds affirms Congressional recognition that disparate deployment based on economic feasibility is not unlawful. As ACA notes, "Technical and economic feasibility are integral to the statutory scheme."[21] In fact, rendering unlawful disparate deployments that result from economic infeasibility would effectively "impose compulsory 'build out requirements,' unaccompanied by any guarantee of a return on investment, 'as a model for addressing' unintended disparities in broadband deployment."[22] Put another way, it is difficult, if not impossible, to discern the import of Congress taking care to include technical and economic feasibility within the law if sheer impact rather than specific intent (which would necessarily include considerations of such feasibility) were meant to govern.

3. The Record Demonstrates that Providers Neither Deploy nor Decline to Deploy on the Basis of Subscriber Inclusion in a Protected Class.

Comments in this proceeding confirm that providers neither deploy nor decline to deploy on the basis of subscribers' inclusion in a protected class. In the first instance, the record lacks concrete evidence of adjudicated, fact-finding proceedings that concluded with a finding of unlawful discrimination on the part of a provider. More telling, however, is data from multiple sources demonstrating equivalent deployment across protected classes. Free Press explains, "Congress enacted Section 60506 against [the] backdrop of allegations of redlining . . ."[23] But

[20] Comments of AT&T at 35.

[21] Comments of ACA at 19.

[22] Comments of AT&T at 11.

[23] Comments of Free Press at 9.

this is the salient point – *allegations* of redlining rather than established instances of so-called redlining. Free Press continues to explain that Section 60506 differs from a 2021 bill that,[24]

> would have required the Commission to first conduct an inquiry that would enable it to fully understand where and why certain ISPs are engaging in differential deployment, before proceeding to rules that required ISPs to universally deploy within a geographic area (determined by the Commission), unless granted an exemption.

Here, too, is a salient point that must inform the Commission approach in this proceeding: It appears that there is no commonly accepted understanding of differential deployment. Even the Commission's Communications Equity and Diversity Council (CEDC) found that the major barriers to broadband inclusion are affordability and perceived relevance – but not discrimination. Moreover, even for providers that avail themselves of funding programs that demand deployment benchmarks within the service area, those milestones are spread over time. This approach recognizes, as does Section 60506, the economic and technical realities that affect the progression of deployment. Finally, for all providers, legitimate business reasons inform market actions, and the current proceeding does not produce record evidence that ISPs have declined to deploy "based on" an individual or community's inclusion in a protected class.

Free Press notes that paucity of a legislative history informing Section 60506.[25] This, too, informs the challenge of creating guidelines to prevent an undefined harm, as the statute exhorts the Commission to prevent injuries that were neither quantified nor documented in the relevant legislative or agency proceedings. This leads to a syllogism that cannot be ignored: Congress directed the Commission to prevent discrimination. There is scant evidence of discrimination

[24] Comments of Free Press at 9.

[25] Comments of Free Press at 10.

occurring under current regulations. Hence, there is no need to "add on" to current regulations except to the discrete scope defined by Section 60506.

Initial comments reveal a lack of evidence of intentional discrimination against protected classes. In fact, areas that lack deployment are typically those with insufficient population density to justify investment – the very areas targeted for crucial BEAD funding by the IIJA.[26] Even where commenters cite the comprehensive work of the CEDC, they acknowledge the predominant findings of that advisory board – to increase avenues toward affordability, to promote digital literacy, and to increase access to devices.[27] And yet these are disconnected from allegations of intentional discrimination against protected classes. Rather, they are rooted in the same barriers cited by NTCA and others, including cost to deploy, user affordability, and perceived relevance.

AT&T and Free Press cite former FCC Chief Economist Glenn Woroch, who finds that availability rates for 100/20 Mbps service for Census-based "white" and "non-white" households, and for households above and below the poverty line, do not differ meaningfully.[28] NCTA provided data demonstrating at most a 1.1% difference in deployments based on income (ranging from 97.7% to 99.8%).[29] These findings were consistent across racial demographics of African American, Hispanic/Latino, and Asian American populations.[30] ACA presented data that

[26] Comments of Americans for Tax Reform and Digital Liberty at 1.

[27] *See,* Comments of the American Library Association at 8, 9; Comments of National Urban League, National Action Network, Coalition of Black Civic Participation, Black Women's Roundtable at 5, 6, 7; Comments of the Texas Coalition of Cities for Utility Issues and the Cities of Boston, Massachusetts, and Portland, Oregon, at 3. *See, also,* Comments of the Greenling Institute at 4; Comments of National Digital Inclusion Alliance and Common Sense Media at 3.

[28] Comments of AT&T at 8; Comments of Free State Foundation at 4.

[29] Comments of NCTA at 5.

[30] Comments of NCTA at 6, 7.

shows no significant differences in deployment in areas that have different levels of median income.[31] These patterns are consistent among rural and urban areas and are consistent across enumerated racial categories. In short, there is "no evidence of discrimination based on race/ethnicity."[32]

The CEDC report echoes these findings, identifying affordability as a critical element in broadband parity. The report notes, "research also shows that income is correlated to the availability and adoption of the internet."[33] The CEDC explains, "[s]ome studies indicate that disparities are exacerbated by the combination of neighborhood and income effects. For example, neighborhoods with high poverty rates are sometimes found to have slower broadband speeds."[34] And yet while the report presents allegations of "digital redlining," the report does not present any record of an adjudicated proceeding in which discriminatory practices aimed at protected classes were found. In the first of two cases presented in the report, the City of New York accused Verizon of "not fulfilling its commitments under a cable franchise agreement." But the report explains that "the lawsuit filed by the City of New York in 2017 did not advance any claims of discrimination under the cable franchise agreement or otherwise."[35] The other example presented by the CEDC report is a petition that was ultimately dismissed by the Commission in response to a joint motion for withdrawal by the parties. The report explains that the petition "made allegations that the ISP did not equally invest in their wireline broadband infrastructure

[31] Comments of ACA at 11.

[32] Comments of ACA at 12-14.

[33] NPRM at p.85 (internal citation omitted).

[34] NPRM at p.86 (internal citations omitted).

[35] NPRM at p.87 and fn.39.

and did not provide comparable service between middle- and low-income neighborhoods . . . ."[36] And while the report notes the allegations, it does not present any evidence of disparate deployment strategies that were undertaken with an intent to harm a protected class. These factors underpin a critical aspect of the instant inquiry, namely, whether disparities in deployment and adoption arise out of unlawful discrimination. The report explains discrimination as,

> . . . the treatment or consideration of, or making a distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit. Discrimination can be the effect of some law or established practice that confers privileges on a certain class or denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap.[37]

And yet disparities rooted in ISP intentions to *per se* harm protected classes are not evident in the report. Indeed, where the report presents "Best Practices to Advance Digital Equity for State and Localities," all 13 recommendations focus on efforts to increase awareness and access among consumers and promotion of digital skills - but none propose measures that tie back to alleged *per se* discriminatory actions undertaken by providers.[38] NTCA accordingly reflects on the experiences of its members: (1)

[36] NPRM at p.87 and n.41.

[37] NPRM at p.91.

[38] NPRM at pp.99-105. The recommended best practices are: (1) Make low-cost broadband available to low-income households through government benefit programs, in combination with internet service providers' low income programs; (2) Build on the success of existing benefit programs that allow low-income households to apply a credit to internet service of their choice; (3) Raise awareness of connectivity programs for programs among eligible households; (4) Strengthen marketing and communications about available federal and state connectivity programs and other programs that target low-income and other unconnected members of a community; (5) Streamline the application process for government benefit programs referred to above; (6) Increase support and funding for organizations such as schools, nonprofits, and faith-based organizations to provide digital navigation assistance in communities they serve; (7) Fund, promote and leverage the use of digital navigators; (8) Stakeholders should encourage Congress to create a digital public service and engagement program (*e.g.,* digital navigators), which could conduct trainings and outreach in non-adopting communities; (9) Increase device access and participation; (10) Use public-private partnerships to facilitate remote learning and close the homework gap; (11) Ensure that members of

Increasing numbers of fiber deployments and increasing rates of subscriptions to higher capacity services;[39] (2) Robust participation in the ACP;[40] (3) Richly and increasingly diverse communities in rural spaces.[41] These demonstrate that properly implemented policies that address the cost of deployment and consumer affordability of service are key to easing disparate outcomes in deployment and adoption.

To be sure, disparate impacts may emerge – but they are not the *per se* results of unlawful discrimination. As Americans for Tax Reform and Digital Liberty note, "There are simply too many tangible variables that could otherwise explain disparate outcomes between these groups."[42] Free State Foundation arrives at similar conclusions, asserting the Commission should target discrimination "only where it unmistakably can be proven to exist and where the facts show that such discrimination cannot be excused by financial, geographical, technological, or other factors." [43]

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the community have safe spaces to access the internet; (12) Strengthen digital skilling efforts in underserved communities; (13) Encourage the creation of workforce development/training opportunities, focusing on historically unrepresented communities.

[39] *See,* Broadband/Internet Availability Survey Report, NTCA–The Rural Broadband Association, at 4-7, citing year-on-year increases in broadband connections and speed capabilities (2021) (https://www.ntca.org/sites/default/files/documents/2021-12/2021-broadband-survey-report-final-12-15-21.pdf) (visited Apr. 20, 2023).

[40] *Id.,* at 12, citing 77.8% of NTCA survey respondents participating in the ACP.

[41] *See,* Kenneth M. Johnson, Daniel T. Lichter, "Growing Racial Diversity in Rural America: Results from the 2020 Census," Carsey School of Public Policy, University of New Hampshire (Spring 2022); DW Rowlands and Hanna Love, "Mapping Rural America's Diversity and Demographic Change," Brookings Institute (Sep. 28, 2021) (https://www.brookings.edu/blog/the-avenue/2021/09/28/mapping-rural-americas-diversity-and-demographic-change/) (visited Apr. 20, 2023); "Rural America is More Diverse Than You Think," Housing Assistance Council (https://ruralhome.org/rural-america-is-more-diverse-than-you-think/) (visited Apr. 20, 2023).

[42] Comments of Americans for Tax Reform and Digital Liberty at 3.

[43] Comments of Free State Foundation at 8.

B. THE IMPLEMENTATION OF ANY RULES MUST BE PROSPECTIVE, ONLY, AND CONSISTENT WITH THE PLAIN READING AND INTENT OF THE STATUTE.

The implementation of any rules adopted in this proceeding must be prospective, only, and consistent with the plain reading and intent of the statute. Contrary to the arguments of some parties,[44] Section 60506 can have prospective applicability, only. "[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."[45] There is a firm legal presumption against retroactive laws.[46] Fundamental fairness proscribes attaching new legal consequences to past events; retroactive application cannot be invoked in the absence of clear Congressional intent: "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[47] In the instant proceeding, the twin objectives of "prevent" and "identify" point toward forward-looking efforts only, but not "remedial measures to punish past actions."[48]

In addition to timing, the scope of applicability is also clear from the construction and language of the statute, which states "*subscribers* should benefit from equal access to broadband internet access service within the service area of a provider of such service."[49] Free Press argues,

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[44] Comments of Texas Coalition of Cities for Utility Issues and the Cities of Boston, Massachusetts, and Portland, Oregon, at 2.

[45] *See, Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (a law becomes effective "from the first moment" of the effective date).

[46] *See,* Comments of AT&T at 34.

[47] *Landgraf v. USI Film Products*, 511 U.S. 244, 272-73 (1994) (finding no such clearly expressed congressional intent with respect to the civil rights law's new compensatory and punitive damages remedies and the associated right to a jury trial).

[48] Comments of U.S. Chamber of Commerce at 3.

[49] Section 60506 (a)(1) (emphasis added).

"In the absence of any substantive legislative history, the Commission has no choice but to interpret the law before it as it is written, and to interpret the law's lack of specificity on certain matters as an indication that such questions are those the Commission is best suited to provide."[50] And yet where this statutory language is clear and specific, Free Press reads expansive and broad meaning into otherwise limited terms by proposing that *non-subscribers* be covered by the statute.[51] A tenet of statutory interpretation is to rely on the plain language of the statute.[52] The language is clear and unambiguous as it limits is application to "subscribers," *i.e.*, a person who "receives services regularly on order;"[53] "a person who pays to receive or access a service;"[54] one who enters into a "written contract by which one engages to . . . contribute a sum of a money for a designated purpose . . . or in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like."[55] The common thread among these definitions is the contractual relationship between the parties in which the subscriber, in consideration of payment, receives a good or service. The attempt of Free Press and other parties[56] to extend the application of Section 60506 to non-subscribers conflicts with the plain language of the statute.

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[50] Comments of Free Press at 11.

[51] Comments of Free Press at 20.

[52] *See, i.e., Babbitt, Secretary of Interior, et al., v. Sweet Home Chapter for a Great Oregon,* 515 U.S. 687, 697 (1995) (relying on dictionary definition where scope of statutory definition is not expanded or limited).

[53] Merriam Webster's Collegiate Dictionary, Tenth Edition, Springfield, MA (1993).

[54] Oxford Languages, www.languages.oup.com/google-dictionary-en (visited Mar. 10, 2023).

[55] Black's Law Dictionary, Sixth Edition, West Publishing Company, St. Paul, MN (1990).

[56] Comments of Free Press at 20; Comments of National Digital Inclusion Alliance and Common Sense Media at 8; Comments of Public Knowledge, Benton Institute for Broadband and Society, and Comments of Electronic Privacy Information Center at 58.

The statute enumerates protected classes; that scope should likewise not be expanded.[57] Some parties support a "dedicated pathway" for complaints.[58] But, even if the Commission enables some administratively efficient process, it should reject calls to permit third-parties such as "digital navigators" standing to submit complaints.[59] Similarly, the Commission should decline to allow private rights of action, which can lead to a never-ending barrage of complaints against which a provider must defend, often opening to public inspection sensitive company and strategic information.

A complaining party should be required to not only produce evidence of the alleged violation, but to show membership in the protected class.[60] TURN suggests voluntary disclosures of income level, race, ethnicity, color, religion, or national origin.[61] But TURN then suggests that the Commission should share complaint data, without sharing the complainant's information, to "aid in the analysis" by third parties, including states.[62] The Commission should reject such sharing, as well as suggestions that the Commission allow state or local officials to enforce rules, or to create a private right of action.[63] The statute is clear in its focus: It does not empower enforcement action, and can neither draw such power from the Communications Act into which it was *not* incorporated. NTCA concurs with the Chamber of Commerce, which cautions the

[57] *Contra* Cites at 3.

[58] Comments of The Utility Reform Network at 9 (TURN).

[59] Comments of TURN at 13.

[60] Comments of Free State Foundation at 4.

[61] Comments of TURN at 11, 12.

[62] Comments of TURN at 15.

[63] *Accord* Comments of U.S. Chamber of Commerce at 3.

Commission against using the instant proceeding to "open the door" to rate or other service-oriented regulations.[64]

Finally, NTCA reiterates the value of a safe harbor. Free Press argues for a "stringent test" for recipients of Federal funding who claim technical or economic infeasibility.[65] But here, too, the remonstrations are redundant. Those Federal funding programs already feature build-out obligations. ISPs taking funds under those programs and who comply with the deployment requirements that are conditioned upon receipt of those funds are *de facto* deploying to their legal obligations and hence could hardly be found to be in violation of deployment standards imagined by other sections of the same statute.

III. CONCLUSION

The record indicates affirmatively that broadband access is available in equivalent measures to Americans without distinction based on the status of protected classes. Moreover, existing Commission requirements prohibit discriminatory activities. The Commission must decline to impose an "impact based" standard that would be inconsistent with the language and intent of the statute and which would moreover chill investment and discourage rational upgrades even where economically and technically feasible. Accordingly, the Commission is urged to implement Section 60506 in a surgical manner to (1) bridge instances that might not be

[64] Comments of U.S. Chamber of Commerce at 2.

[65] Comments of Free Press at 33-35.

addressed by other statutory or regulatory offerings; (2) direct its application to instances of intent-based discrimination, only; and (3) ensure that the statute is applied on a prospective, rather than a retroactive basis.

Respectfully submitted,

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