

ALERT

FCC Adopts Rules Implementing Infrastructure Act Provision On Digital Discrimination

November 28, 2023

On November 20, 2023, the Federal Communications Commission (FCC or Commission) released a Report and Order (Order) and a Further Notice of Proposed Rulemaking (FNPRM) adopting rules to establish a framework for preventing and eliminating digital discrimination of access and seeking additional comment on proposed obligations for broadband internet access service providers to address both intentional discrimination and discrimination through disparate impact. The Order applies to a broad scope of policies and practices that affect the provision of broadband service – including deployment, network upgrades, and maintenance – and could be read to conclude that any material differentiation in quality of broadband service may provide a basis for discrimination liability under the new rules.

Below, we provide a high-level summary of the Order and FNPRM.

Background

The FCC adopted the Order pursuant to Section 60506 of the Infrastructure Investment and Jobs Act (Infrastructure Act), following the Commission's initial Notice of Proposed Rulemaking (NPRM) released on December 21, 2022 and Notice of Inquiry (NOI) released on March 17, 2022. The NPRM and NOI built on prior Commission efforts to expand consumer access to broadband internet service, such as facilitating subsidy programs like the Affordable Connectivity Program, relying in part on Congress's finding in the Infrastructure Act that the global COVID-19 pandemic underscored the need for access to affordable, high-speed broadband internet service for all Americans.

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Digital Discrimination of Access Defined

The Order prohibits policies or practices that either intentionally or differentially impact consumer digital discrimination of access. “Digital discrimination of access” is defined as “[p]olicies or practices, not justified by genuine issues of technical or economic feasibility, that (1) differentially impact consumers’ access to broadband internet access service based on their income level, race, ethnicity, color, religion or national origin or (2) are intended to have such differential impact.” ¶ 33. The Order adopts a disparate impact legal standard for review of complaints that focuses not only on business conduct motivated by discriminatory intent but also business conduct that has discriminatory effects. In so doing, the FCC defines “access” in terms of opportunity or right to obtain service, citing as support Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and Section 60506 of the Infrastructure Act.

Technical and Economic Feasibility Defined

Because Section 60506 directs that the FCC take into account issues of technical and economic feasibility in determining whether digital discrimination of access exists, the Order defines those terms as follows: a “technically feasible” policy or practice is one that is “reasonably achievable as evidenced by prior success by covered entities under similar circumstances or demonstrated technological advances clearly indicating that the policy or practice in question may reasonably be adopted, implemented, and utilized[,]” while an “economically feasible” policy or practice is “reasonably achievable as evidenced by prior success by covered entities under similar circumstances or demonstrated new economic conditions clearly indicating that the policy or practice in question may reasonably be adopted, implemented, and utilized.” ¶ 66. The FCC rejected commenters’ arguments in the record that the technical and economic feasibility language in Section 60506 meant that Congress did not intend to include disparate impact in the definition of digital discrimination of access, ¶ 65, as well as claims that including disparate impact in the definition of “digital discrimination of access” would conflict with broadband funding programs set out in the Infrastructure Act or otherwise chill investment in broadband funding networks. ¶ 51. The FCC would place the burden on providers to establish economic or technical infeasibility in cases where the complainant could establish a *prima facie* case of disparate impact. ¶ 78.

Scope of Prohibition of Digital Discrimination

The prohibition against policies or practices that either intentionally or differentially impact digital discrimination of consumer access based on one of Section 60506’s listed characteristics applies to “any lack of comparability in service quality, as indicated by the metrics specifically listed in the statutory definition of ‘equal access’” and “any lack of comparability in terms and conditions of service, including but not limited to price.” ¶ 100. The broad list of examples of service aspects that could form the basis of a discrimination claim includes technical terms, deployment, conditions of service, installation, network maintenance, account termination, deposits, credit checks, and customer-premises equipment. The Commission may also compare service availability, service quality, and the terms of conditions of service between different geographic areas to determine whether a violation of the prohibition has occurred.

Additionally, the prohibition applies to “covered entities” that provide, facilitate, and affect consumer access to broadband internet service, including broadband providers and their contractors, entities facilitating or involved in the provision of broadband internet service; entities maintaining and upgrading network infrastructure; and entities that otherwise affect consumer access to broadband internet access service. ¶ 85.

The Order also defines covered “consumers” to encompass both current and potential subscribers including individual persons, groups of persons, individual organizations, and groups of organizations with the capacity to “subscribe to and receive broadband internet access service.” ¶ 89.

Informal Complaint Process Revised

The Order revises the existing informal consumer complaint process administered by the Consumer and Governmental Affairs Bureau to (1) add a dedicated pathway for digital discrimination of access complaints; (2) collect voluntary demographic information from filers who submit digital discrimination of access complaints; and (3) establish a clear pathway for organizations to submit digital discrimination access complaints on behalf of consumers. Informal complaints will be reviewed and processed through the Consumer Inquiries and Complaint Center, and complaints alleging digital discrimination by a covered entity will be forwarded to that entity for investigation and a written response. The Order further states that informal complaints may be shared internally and referred to the Enforcement Bureau for further investigation of potential violations and enforcement action. Anonymized complaint data will also be made available to the public to promote transparency and help identify trends.

Enforcement

The Commission intends to use its full arsenal of enforcement mechanisms to address digital discrimination complaints, including but not limited to letters of inquiry, audits, remedial orders, and forfeiture proceedings, asserting its legal authority to do so under Section 60506(b)(1) & (6), and ancillary authority under Section 4(i) of the Communications Act.

The Commission intends to launch investigations into complaints and allegations filed through the informal complaint process or otherwise brought to the Commission’s attention, including from state, local and Tribal governments, and to pursue remedies and penalties where it determines a violation has occurred. The Commission will use its discretion to determine whether investigation of a complaint or allegation is warranted, and whether further response from covered entities alleged to have violated the rules prohibiting digital discrimination will be required. Notably, the Order establishes a grace period after these rules go into effect during which no enforcement investigation solely concerning conduct that allegedly produces differential impacts will be launched for at least six months.

To investigate complaints alleging discriminatory intent, the Commission will use either the Arlington Heights framework that applies when an otherwise facially neutral policy or practice is allegedly motivated by discrimination or the McDonnell Douglass standard that applies when a policy or practice is intended to treat similarly situated persons differently because of a protected status.

To investigate allegations of discriminatory effect, the Commission will (1) identify the policy or practice that is causing the disparate impact on a prohibited basis; (2) assess whether the policy or practice in question is justified by genuine issues of technical or economic feasibility; and (3) as a part of the assessment, determine whether there were reasonably achievable, less discriminatory alternatives. The Order makes clear that the Commission is skeptical of arguments relying on economic convenience.

The Order also includes an option for complainants and covered entities to engage in voluntary mediation facilitated by FCC staff and – as a preventative measure – the Order allows covered entities seeking clarity on compliance to request an advisory opinion from FCC staff for both current and prospective policies and practices affecting broadband access. Additionally, the Order designates a Special Advisor for Equal Broadband Access within the Wireline Competition Bureau to provide neutral technical assistance to all stakeholders. The Order also establishes a presumption of compliance for policies or practices already in compliance with the Broadband Equity, Access, and Deployment (BEAD) and Universal Service Fund (USF) high-cost programs since the programs are intended to remedy inequities in broadband deployment. The Commission will also recognize "a presumption of compliance for future broadband funding programs that account for digital discrimination of access rules." ¶ 142.

Lastly, the Order adopts the recommendations provided by the Communications Equity and Diversity Council (CEDC) report titled "Model Policies and Best Practices to Prevent Digital Discrimination by ISPs" as guidance for state and local municipalities on actions they may take to advance digital equity.

Further Notice of Proposed Rulemaking

The Order is accompanied by an FNPRM seeking comment on proposed affirmative obligations that could be imposed on providers, which the Commission claims will address possible digital discrimination of access. These proposed affirmative obligations include an annual reporting requirement for providers to submit, on a state-by-state or territory-by-territory basis, information concerning what communities are served and not served by large scale broadband deployment, upgrade, and maintenance projects that are completed or substantially completed by each provider. The FNPRM also proposes to require each provider to adopt and maintain a formal internal compliance program that would require internal assessment of whether the provider's broadband related policies and practices might differentially impact consumers' access to broadband based on the listed characteristics and without adequate technical or economic justification. The Commission seeks comment on specific proposals including the need for mandatory designation of a compliance officer or compliance committee, periodic employee training, submission of a certification that the compliance program satisfies all proposed requirements, exemption for certain providers based on their "size, footprint, or niche service area," and records retention.

Although the Order declines to create an Office of Civil Rights, the Commission seeks further comment on establishing such an office within the FCC, which has broad support from both advocates and broadband service providers. More broadly, the Commission seeks comment on implementation, costs and benefits, and legal authority regarding these proposals, and on how its proposals would promote or inhibit advances in diversity, equity, inclusion, and accessibility.

Conclusion

These rules and proposals represent a sweeping and complex new area of policymaking and regulation for the Commission that may significantly affect broadband infrastructure deployment and the provision of broadband internet access services. Wiley attorneys are available to advise and assist with navigating these changes.

For additional information, please contact one of the attorneys listed on this alert or the Wiley attorney who regularly handles your FCC matters.