

FCC Notice of Inquiry on Digital Redlining Highlights the Challenges Ahead

March 21, 2022

The Infrastructure Investment and Jobs Act (IIJA) gave the Federal Communications Commission (FCC or Commission) two years within which to adopt rules that will “facilitate equal access to broadband internet access service.”^[1] As directed by Congress, these rules should prevent “digital discrimination ... based on income level, race, ethnicity, color, religion, or national origin” and identify the steps the Commission needs to take in order to “eliminate” such discrimination.^[2] In addition, the FCC must devise “model policies and best practices” for state and local jurisdictions as well as revise its complaint process to accept complaints from consumers “or other members of the public.” Consistent with that Congressional directive, the FCC adopted a Notice of Inquiry (NOI) at its March 16 Open Meeting entitled “Implementing the Infrastructure and Jobs Act: Prevention and Elimination of Digital Discrimination.” Comments are due May 16, 2022.

The FCC’s NOI begins by asking for comment on almost every term used in the Congressional mandate, starting with “equal access.” Under the IIJA, the term “equal access” means the “equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions.”^[3] The FCC proceeds to seek comment on the terms “equal opportunity to subscribe,” “comparable,” and “in a given area.” It then seeks comment on what Congress intended by the phrase “facilitate equal access” and what the difference is between “preventing” and “eliminating” discrimination in the context of broadband deployment. The FCC even seeks comment on the meaning of “digital discrimination” itself, asking whether discriminatory intent is required under the statute, or

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whether it should develop a disparate impact test.

In addition to the NOI's extensive definitional questions and questions regarding statutory interpretation, the FCC also asks how it should go about identifying instances of digital discrimination, including leveraging existing and pending data sources regarding broadband deployment to support identification of areas or individuals impacted by digital discrimination, and what steps the Commission should take to "prevent" and "eliminate" digital discrimination, including the types of rules the agency should adopt. The Commission notes that the recently chartered Equity and Diversity Counsel will also be making recommendations that will "drive the Commission's implementation of section 60506(d)" which requires the FCC to develop model policies and best practices. Finally, the NOI seeks comments on the complaint process consistent with IJJA's directive for the Commission to revise its existing public complaint process to accept complaints related to digital discrimination. Overall, the NOI raises no less than 170 questions in a matter of 20 pages.

As Commissioner Rosenworcel notes in her statement in support of the item, the FCC is faced with a "tall task." Balancing technical and economic feasibility, while addressing historic issues of discrimination, all within a competitive framework, will be a challenge indeed. Nevertheless, given the thoroughness of the NOI, the FCC is signaling that it is approaching this new Congressional mandate with all the due care and seriousness that the topic deserves.

If you have any questions regarding the FCC NOI, please contact one of the authors listed on this alert.

[1] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2021) (IJJA), § 60506 (b).

[2] *Id.*

[3] IJJA, 60506(a)(2).