

Will Digital Discrimination Policies End Discount Plans for Low-Income Consumers?

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Section 60506 of the Infrastructure Investment and Jobs Act of 2021 prohibits “digital discrimination of [broadband] access based on the protected classes limited to income level, race, ethnicity, color, religion, or national origin,” including requiring services to be offered on “comparable terms and conditions.”¹ While statistical analysis of the Commission’s own Form 477 and fabric data on deployment,² as well as Census data,³ does not reveal any differences in broadband availability by race or income after accounting for technical and economic feasibility, in anticipation of its November Open Meeting on October 25, 2023 the Commission released a draft final order implementing Section 60506 that sets forth an expansive new regulatory regime.⁴

As discussed in this PERSPECTIVE, the Commission plans to adopt both a disparate treatment (intent) and disparate impact (effects) analysis to determine whether there is any discrimination of access. As part of its rules, the *Draft Order* requires “pricing consistency” across protected classes.⁵ There is a serious unintended consequence of this requirement—that is, the low-income pricing plans offered by broadband providers—many of which were strongly supported by (if not mandated by) the Commission, the NTIA, the White House, and even state organizations issuing subsidy dollars—are explicitly designed to discriminate by income level (“intent”) and, since income and race are correlated, these income-based discount plans lead to a disparate impact along racial lines.

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Accordingly, a reasonable reading of the Commission’s forthcoming rules is that these low-income discount plans offered by broadband providers are likely now illegal and thus risky to offer. As a result, an unintended consequence of the Commission’s Digital Discrimination rules may be to cause such discounted plans to disappear, raising the price of broadband to low-income households (to ensure the mean price is equal across income levels and race).

Defining Digital Discrimination

In its *Draft Order*, the FCC defines “digital discrimination of access” for purposes of this proceeding as:

Policies 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.⁶

According to the Commission, this definition will "achieve [Section 60506's] equal access purposes, the legal standard must address not only business conduct motivated by discriminatory intent, but also business conduct having discriminatory effects."⁷ Thus, the Commission seeks to prohibit "intentional" discrimination as well as "inadvertent" discrimination (*i.e.*, disparate impact analysis).

To see the difference, consider an employer that seeks to hire some employees. Intentional discrimination exists when the employer explicitly refuses to hire or promote persons aged 65 years or older. A disparate impact, alternately, may occur if the employer requires a response-time test of all applicants and bases its employment decisions on the results of such a test. As older persons may perform, on average, worse on this test, the test inadvertently treats older applicants differently. If response times are important (say, the employee will operate a forklift), then the response time test may be a reasonable condition of employment and thus not constitute a disparate impact. But, if the position is in accounting, then the response-time test is irrelevant, and the use of the test constitutes a disparate impact. Thus, intentional discrimination is direct, while a disparate impact is rooted in the correlation between the unnecessary policy and a protected class.

The Commission stresses the fact the statute requires "the equal opportunity to subscribe to an offered service [] for comparable terms and conditions."⁸ Attaching its policies to the "comparable terms and conditions" language, the Commission's *Draft Order* demands

"comparability in [] price" and "pricing consistency [] between different groups of consumers."⁹ That is, pricing may not differ "based on income level, race, ethnicity, color, religion, or national origin."¹⁰

Note that the protected classes listed in Section 60506 are neither "low-income" households nor "minority" households; the protected classes are "income" and "race."¹¹ Thus, the differential treatment of low-income households relative to high-income households is as problematic as the differential treatment of high-income households relative to low-income households. Both cases are prohibited. Let's trace this "pricing consistency" provision through to its inevitable conclusion.

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Price Discrimination

A broadband connection of particular properties (say, speeds of 100/20 Mbps) is technically the same service whether it is consumed by a low- or high-income household. The services are "like" in all respects.¹² Charging different prices based on income level is what economists call *third-degree price discrimination*, which involves charging different prices to different market segments or customer groups.¹³

As part of its *Draft Order* the Commission demands “comparability in [] price” and “pricing consistency [] between different groups of consumers.”¹⁴ That is, pricing may not differ “based on income level, race, ethnicity, color, religion, or national origin.”

Yet, for years, as part of mandatory “voluntary” merger commitments, the FCC pushed carriers to offer discounted prices to low-income households.¹⁵ And, as part of its push for the Affordability Connectivity Program (“ACP”), the Biden Administration “secured” low-income pricing plans from many broadband providers, which when accounting for the \$30 ACP subsidy often make broadband essentially free to qualifying households.¹⁶ As the *Draft Order* recognizes, “[m]any internet service providers also offer low-cost broadband plans for low-income families. These service offerings can be free to consumers once the ACP benefit is applied.”¹⁷ Some states are involved in these pushing these discounts. Recently, Charter Communications refused to accept \$6.9 million in deployment subsidies in Maine due to the condition that receipt of such subsidies required the company to offer a \$30 plan to ACP eligible consumers (making the effective price \$0 after the \$30 subsidy), so states likewise have encouraged if not conditioned subsidies on such discounts.¹⁸ The NTIA’s “middle class affordability” requirements to receive BEAD funding is similar in nature.¹⁹

These discounted plans offered to low-income customers are a naked case of third-degree price discrimination; they target discounts to an easily-segmented group through qualifications like income requirements, receiving food stamps, and so forth. For example, Cox Communications offers 100 Mbps broadband service for \$49.99 per month, but ACP eligible households can get the same service for \$30 per month.²⁰ Higher-income households may not avail themselves of the discounted price.

These discount plans are discrimination with intent—they are tied directly to income. Likewise, these discounted plans invoke disparate impact since race and income are correlated (Blacks and Hispanics have lower average incomes than do Whites).²¹ To comply with the *Draft Order’s* rules, the targeted, low-income pricing plans offered by broadband providers must be abandoned. Doing so, obviously, increases the price of broadband for low-income households and disproportionately affects some racial minorities, but does ensure that there is no price discrimination across income level and no disparate treatment across race.

This prohibition of income-based price discrimination had broad support in comments. The political-interest group Public Knowledge, for instance, asserts that price discrimination should be a violation of price comparability, and Next Century Cities, likewise, argues that the Commission should ban price discrimination based on income level.²² The Texas Coalition of Cities argues that for digital discrimination, “the disparate impact on the community, including price discrimination, must be the loadstar.”²³

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Past practices of such discrimination are no cause for concern. The Commission does not view Section 60506(b)(1) to “constitute a clear grant of authority to impose retroactive liability on industry participants.”²⁴ The *Draft Order* is forward-looking. Thus, a reasonable interpretation of the FCC’s forthcoming final rules holds that such explicit price discrimination must cease going forward, which complies with

the Commission's conclusion in the *Draft Order* that providers cannot "freely engage in discriminatory policies and practices with regard to the ongoing provision" of broadband service.²⁵

Other Potential Problems

Under the "economic feasibility" analysis proposed in the *Draft Order*, the Commission appears to plan to assess feasibility by comparing areas with and without broadband access (or access of equivalent levels) based on a set of demographic factors X. If the X are reasonably comparable, then access should be too. Yet, variation across areas in the adoption of low-income pricing plans distorts the access-to-X relationship (if an omitted variable), putting broadband providers at risk of a disparate treatment claim. Consequently, it may prove too risky for broadband providers to continue to offer the low-priced plans, for fear of worse

consequences and excessive administration and litigation costs.

Conclusion

Section 60506 of the Infrastructure Act requires "equal opportunity to subscribe" to broadband services on equal terms and conditions. The Commission's *Draft Order* interprets the statute as requiring "pricing consistency" among protected classes. Thus, the Commission's rules ban the low-income pricing plans now offered by many, if not most, broadband providers as such discounted plans are explicitly discriminatory. In conflict with the goal of increased broadband adoption, the Commission's rules will increase the prices paid by low-income consumers, though doing so ensures the end of discriminatory treatment among protected classes.

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¹ Infrastructure Investment and Jobs Act § 60506, codified at 47 U.S.C. § 1754.

² T.R. Beard and G. S. Ford, *Digital Discrimination: Fiber Availability and Speeds by Race and Income*, PHOENIX CENTER POLICY PAPER No. 58 (September 2022) (available at: <https://phoenix-center.org/pcpp/PCPP58Final.pdf>); G.S. Ford and L.J. Spiwak, *Digital Discrimination Under Disparate Impact: A Legal and Economic Analysis*, PHOENIX CENTER POLICY PAPER No. 61 (October 2023) (available at: <https://phoenix-center.org/pcpp/PCPP61Final.pdf>).

³ G.S. Ford, *Digital Discrimination and Broadband Subsidies: Which Matters?*, PHOENIX CENTER POLICY PERSPECTIVE No. 23-03 (November 1, 2023) (available at: <https://www.phoenix-center.org/perspectives/Perspective23-03Final.pdf>).

⁴ *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, FCC-CIRC2311-01, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING (available at: <https://docs.fcc.gov/public/attachments/DOC-397997A1.pdf>) (hereinafter “Draft Order”).

⁵ *Id.* at ¶ 105.

⁶ *Id.* at ¶ 33.

⁷ *Id.* at ¶ 34.

⁸ Section 60506, *supra* n. 1.

⁹ *Draft Order*, *supra* n. 4 at ¶ 105.

¹⁰ Section 60506, *supra* n. 1.

¹¹ Not all discrimination statutes are so general. The Age Discrimination in Employment Act (“ADEA”) forbids age discrimination against people who are age 40 or older. See *Age Discrimination*, U.S. Equal Employment Opportunity Commission (last visited: October 30, 2023) (available at: [https://www.eeoc.gov/age-discrimination#:~:text=The%20Age%20Discrimination%20in%20Employment,younger%20workers%20from%20age%20discrimination](https://www.eeoc.gov/age-discrimination#:~:text=The%20Age%20Discrimination%20in%20Employment,younger%20workers%20from%20age%20discrimination#:~:text=The%20Age%20Discrimination%20in%20Employment,younger%20workers%20from%20age%20discrimination)). For race discrimination, however, White Americans may bring suit. See *Race/Color Discrimination – FAQs*, U.S. Equal Employment Opportunity Commission (last visited: October 30, 2023) (available at: <https://www.eeoc.gov/youth/racecolor-discrimination-faqs#Q6>) (“Are White employees protected from race discrimination even though they are not a minority? Yes. You are protected from different treatment at work on the basis of your race, whether you are White, Black, or some other race.”).

¹² A discussion of discrimination under Section 202 of the Communications Act is provided in G.S. Ford and L.J. Spiwak, *Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC’s New Net Neutrality Principle*, PHOENIX CENTER PERSPECTIVE No. 10-03 (March 24, 2010) (available at: <https://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf>); L.S. Spiwak, *USTelecom and its Aftermath*, 71 FEDERAL COMMUNICATIONS LAW JOURNAL 39 (2019).

¹³ A simple summary of third-degree price discrimination is provided by T. Pettinger, *Third Degree Price Discrimination*, EconomicsHelp (November 12, 2019) (available at: <https://www.economicshelp.org/microessays/pd/third-degree-price-discrimination>). To avoid arbitrage, the different group must be cleanly delineated through some type of mechanism. For instance, age-based discrimination may be enforced by checking a person’s driver’s license.

¹⁴ *Draft Order*, *supra* n. 4 at ¶ 105.

¹⁵ See T. Randolph Beard, George S. Ford, Lawrence J. Spiwak, and Michael Stern, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, PHOENIX CENTER POLICY PAPER NO. 49 (October 2015) (available at: <https://www.phoenix-center.org/pcpp/PCPP49Final.pdf>); and published as *Regulating, Joint Bargaining, And The Demise of Precedent*, MANAGERIAL AND DECISION ECONOMICS (27 June 2018).

¹⁶ A. Huffman, *White House Announces ACP Eligible Plans from 20 Internet Service Providers*, NDIA (May 9, 2022) (“The Biden-Harris Administration is announcing today that they have secured commitments from 20 Internet Service Providers (ISPs) to

NOTES CONTINUED:

offer at least one high speed internet plan with a minimum of 100 MB download for no more than \$30 a month, and a guarantee of no additional fees or data caps.”).

¹⁷ *Draft Order, supra* n. 4, Appendix D at p 35.

¹⁸ J. Engebretson, *Charter Declines \$6.9M Main Broadband Award*, TELECOMPETITOR (October 30, 2023) (available at: <https://www.telecompetitor.com/charter-declines-6-9m-maine-broadband-award>).

¹⁹ George S. Ford, *Middle-Class Affordability of Broadband: An Empirical Look at the Threshold Question*, PHOENIX CENTER POLICY BULLETIN NO. 61 (October 2022) (available at: <https://phoenix-center.org/PolicyBulletin/PCPB61Final.pdf>).

²⁰ Data available at: <https://www.cox.com/residential/internet.html>, https://www.cox.com/residential/internet/low-cost-internet-plans.html?dclid=CjgKEAjqwqP2pBhCVidzI6f2b6BESJAB9scnzD6tRISKxye3b_gF9VG0gTWIzRNULvGwR-PELFO8aSfD_BwE. Other such discount plans are summarized in T. Paul, *Save Money with the ACP: Find Out if You're Eligible for Free Internet*, CNET (October 4, 2023) (available at: <https://www.cnet.com/home/internet/shave-up-to-75-a-month-off-your-home-internet-bill-with-the-acp>).

²¹ G.S. Ford, *Race and Broadband Adoption: A Decomposition Analysis*, PHOENIX CENTER POLICY BULLETIN NO. 52 (May 2021) (available at: <https://www.phoenix-center.org/PolicyBulletin/PCPB52Final.pdf>); *Income and Wealth in the United States: An Overview of Recent Data*, Peter G. Peterson Foundation (November 9, 2022) (available at: <https://www.pgpf.org/blog/2023/02/income-and-wealth-in-the-united-states-an-overview-of-recent-data>).

²² *Draft Order, supra* n. 4 at ft. 358.

²³ *Id.*

²⁴ *Id.* at ¶ 130.

²⁵ *Id.* at ¶ 106.