IN THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Implementing the Infrastructure Investment	)	GN Docket No. 22-69
and Jobs Act: Prevention and	)	
Elimination of Digital Discrimination	)	

REPLY COMMENTS OF THE R STREET INSTITUTE

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The R Street Institute (R Street), on behalf of itself, submits these reply comments in response to the Notice of Proposed Rulemaking relating to the implementation of Section 60506 of the Infrastructure Investment and Jobs Act (IIJA).[1]

I. Introduction

In its original comments, R Street argued that the Commission should leverage existing programs like the Affordable Connectivity Program; develop a forward-looking digital literacy program, not rely on a one-size-fits-all approach to closing the digital divide; and consider the market realities of adoption and deployments.[2] After reviewing the record, R Street urges the Commission to adopt a pragmatic definition of Section 60506, and preempt state and local laws and regulations to avoid a messy patchwork that will impair deployments.

II. Definition of Section 60506

One of the most discussed topics in the record is how the Commission should interpret the language in Section 60506. There was significant disagreement between commenters as to whether a disparate impact or disparate treatment standard was appropriate. It is clear from the record that a disparate impact standard is inappropriate based on the text of the statute. Despite this, some commenters have thought to weaponize this rulemaking as an attempt to "backdoor" rate regulation.[3] While the statute does call on the agency to promulgate rules by November, it does not empower the agency to utilize the rulemaking proceeding to create a broad authority to pursue heavy-handed regulations beyond the narrow scope of the statute.[4] If congressional intent was for a broad regulatory regime, the statute would have been more direct with its directive to the Commission.

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[1] 47 U.S.C. § 1754(a).
[2] Comments of R Street Institute at 1.
[3] USTelecom Comments at 17.
[4] See Reply Comments of Jeffrey Westling at 3.

The entire discussion of digital discrimination stems from Congress requiring the Federal Communications Commission (FCC) to promulgate rules "to facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility […] including […] preventing digital discrimination of access and […] identifying necessary steps for the Commissions to take to eliminate discrimination."[5] The record has a range of viewpoints as to how the Commission could interpret the statute, but as Lincoln Network notes, "The FCC should root its rules in explicit instructions from Congress."[6] R Street agrees with commenters like the National Cable and Telecommunications Association in saying the Commission should rely on the "plain meaning of Section 60506 and focus strictly on deployment." [7] Anything beyond this is beyond the scope of Congress's intent.

As the U.S. Chamber of Commerce highlights, "Congress did not specifically prohibit any conduct under Section 60506. Rather, the main charge of Section 60506 directs the Commission to 'facilitate equal access' to broadband."[8] The statute does not empower the Commission to create overzealous regulations that could impair current and future broadband deployments. Defining this distinction is fundamental. As Competitive Enterprise Institute points out, looking at disparate impact, instead of discriminatory intent, "risks categorizing rational business decisions as prohibited."[9] This could result in "false positives for discriminatory behavior" that drive up the cost of litigation, expending resources that could otherwise be used for deployments.[10]

The Commission should avoid falling into a trap that could imperil the federal government's efforts to bridge the digital divide. With unprecedented investment in access and adoption, overzealous

[5] 47 U.S.C. §1754(b).
[6] Lincoln Network Comments at 9.
[7] National Cable and Telecommunications Association Comments at 8-12.
[8] U.S. Chamber of Commerce Comments at 2.
[9] Competitive Enterprise Institute Reply Comments at 4.
[10] *Id.*

rules by the Commission including a disparate impact standard would go against congressional intent, and impede future deployments.

III. Preemption

Some state utilities commissions argued that local and municipalities should not be impeded by federal rules and regulations. Creating another patchwork of rules that burdens future deployments and buildout will do little to address digital discrimination, but may impede these deployments and impair companies' good-faith efforts to build out in certain states. These commenters note that local and state authorities are better positioned to assess the needs of their localities, but that does not mean that states should create their own digital discrimination rules. If these localities are aware of unserved areas, they can work with providers to lower barriers and encourage deployments in these areas.[11] States like California have suggested that the FCC "condition funding for the deployment of broadband upon written affirmations by broadband providers that they will not utilize such funding to engage in digital discrimination."[12] This would not only be inappropriate, but it is against Congress's intent in the statute. With the largest investment in broadband to date, any action to overly condition or impair deployment will leave more communities unserved and negate the goal of universal connectivity.

As commenters have highlighted, Section 60506 directs the Commission to adopt rules, and develop models that can be adopted by states. Further, the statute's statement of policy reflects that Congress intends that the rules are the "policy of the United States."[13] The Commission should expressly preempt state and local laws, especially those that deviate from any action the Commission takes. Unlike other federal legislation, the IIJA does not contain a "savings clause" showing congressional intent for a uniform federal regulation, nor a patchwork of state frameworks. [14]

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[11] California Public Utilities Commission Comments at 4.
[12] *Id.*
[13] See NCTA comments at 35.
[14] NCTA Comments at 36-37.

Several counties have filed comments asking expressly for non-preemption.[15] As the County of Santa Clara points out, "an express statement of non-preemption is not legally required to avoid preemption."[16] While the county argues this is reason to allow non-preemption, instead, this demonstrates the need for the Commission to clarify strong preemption language to avoid a convoluted patchwork of municipal, local, state and federal regulations working in contradiction with one another. Some states, including California, have already introduced legislation to impose their regulatory landscape to address digital equity.[17] States are working to avoid preemption to undermine the FCC to create a uniform policy across the United States, imperiling future deployments. With unprecedented investment in broadband access and affordability, failure to preempt states from enacting their own regulations would impair or hamper future deployments, in a way that is antithetical to this proceeding.

IV. Conclusion

The Commission stands at a crossroads. While Congress has forced the hand of the agency to promulgate rules, the statute was narrowly tailored enough to ensure that the FCC does not fall into the pitfalls and traps that some commenters have called for. We urge the commission to use a plain textual definition of 60506 and avoid the disparate impact standard, and also that the rule expressly preempts any state or local laws and regulations.

Respectfully submitted,

__/s/_____
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[15] *See, e.g.,* Comments of The County of Santa Clara at 8.
[16] *Id.*
[17] Bethanne Cooley, "CTIA Letter in Opposition to California AB-2753," April 25, 2022. https://api.ctia.org/wp-content/uploads/2022/04/CTIA-Letter-in-Opposition-to-California-AB-2753-Broadband.pdf.

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