



PHOENIX CENTER FOR ADVANCED LEGAL
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Lawrence J. Spiwak, President

3 November 2023

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

RE: Notice of *Ex Parte* – GN Docket No. 22-69

Dear Ms. Dortch:

Upon reading the advance copy of the final Digital Discrimination Rules the Commission released in anticipation of its November Open meeting,¹ we discovered that Americans for Tax Reform/Digital Liberty filed PHOENIX CENTER POLICY PAPER NO. 58, *Digital Discrimination: Fiber Availability and Speeds by Race and Income* (September 2022) (<https://phoenix-center.org/pcpp/PCPP58Final.pdf>) into the record. The contents of the paper prompted a full paragraph of commentary from the Commission. (*Draft Order* at ¶ 58.) We note, however, the *Draft Order's* description of our paper as “comments” is inaccurate. The Phoenix Center, as a general matter, does not file comments in Commission proceedings and did not do so here. We produce legal and economic research to inform debate and we make this research freely available on our webpage. Our paper was included in ATR’s comments, not our own.

As the Commission did address our paper, we are filing this *ex parte* to clarify a few points, and to submit the mentioned paper in our own name. The focus of the paper cited in the *Draft Order* is to describe the sort of empirical methods needed to test for the presence of Digital Discrimination, and then to conduct the proposed empirical test using

¹ 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*”).

the Commission's Form 477 data. As part of that analysis, we offered a definition of Digital Discrimination, which the *Draft Order* addresses.

We are puzzled why the *Draft Order*, while recognizing a small portion of the work, entirely ignores our paper's empirical analysis and its results. Using methods commonly found in discrimination research and using the Commission's own Form 477 data, we found no systematic evidence of digital discrimination by race or income level, the latter of which is complicated by the fact income and demand (a legitimate business consideration) are highly correlated. Yet, the *Draft Order* cites several documents it claims demonstrates the presence of digital discrimination, though none of these studies supports the presence of digital discrimination, at least in manner consistent with Section 60506. With one exception, these studies are merely descriptive in nature and either ignore or acknowledge economic and technical feasibility explanations for differences in broadband access across geographic areas. The single serious statistical analysis of the bunch, which applies a Bayesian analysis to Form 477 data and controls for technical and economic conditions, concludes that there is "little difference by HOLC neighborhood classification across a range of technology types" and that "the posterior distributions for each HOLC neighborhood grade almost entirely overlaps the others."² Like our paper, this research supports the null hypothesis of "no digital discrimination." In the interest of accuracy and completeness, the *Draft Order* should acknowledge that all research applying advanced empirical methods mentioned in comments find no evidence of digital discrimination. In fact, there is *no evidence* of digital discrimination found in any analysis (of which we are aware) that incorporates economic and technical feasibility. While the absence of evidence is not evidence of absence, a more accurate assessment of the research on digital discrimination is that there is no evidence of it.

Also, the *Draft Order's* commentary on our definition of Digital Discrimination is inaccurate. The *Draft Order* states:

We additionally decline the Phoenix Center's suggestion to define digital discrimination of access "[as] when differences in the deployment of and/or the quality, terms, and conditions of access to broadband services are not explained by differences in the profitability of serving the different areas, but instead reflect non-economic decisions to underserve protected classes in a manner that causes adverse or negative consequences." This definition would limit the Commission to considering "profitability" rather than "issues of technical and economic feasibility," and would appear to place primary weight on economic rather than technical considerations.³

Technology is an element of the production function, and thus the cost and profit functions, a fact we acknowledge might be unfamiliar to an attorney. Profitability does

² B. Skinner, H. Levy, and T. Burtch, *Digital Redlining: The Relevance of 20th Century Housing Policy to 21st Century Broadband Access and Education*, EdWorkingPaper: 21-471 (2023) (available at: <https://doi.org/10.26300/q9av-9c93>).

³ *Draft Order* at ¶ 58.

not favor economic or technical feasibility but incorporates both. But, as we described in our paper,

Economic and technical feasibility are related and, in effect, essentially determine profitability, though perhaps in different ways. An example of technical feasibility affecting service levels is the highly varied speeds capable over DSL networks due to loop length (e.g., the longer the loop, the slower the connection on average). Equivalent speeds may be accomplished by shortening loops, or by building an entirely new network, both of which are costly options (often prohibitively so). In any geographic area, there may also be important variations in terrain, altitude, authority to provide service, and so on. Questions of economic and technical feasibility likely will be situationally specific, but all these qualifiers can create profitability differentials.⁴

In fact, the *Draft Order* recognizes that technical feasibility is an issue of cost and thus profit, and that technical and economic feasibility are essentially the same:

If the technology does not yet exist to provide a particular broadband internet access service to a particular geographic area, or the technology to provide the service does exist but utilizing it to reach the area in question would be prohibitively expensive, the failure to provide that specific service to that specific area would be explained by genuine technical or economic constraints.⁵

Broadband providers are profit-maximizing firms, and all decisions reflect that objective, though we recognize that the presence of regulation in the communications industry requires firms to maximize profits under atypical constraints. Certainly, there may be differences in broadband deployment among areas due to differences in costs and demand, but this is not discrimination (either under an intent or disparate impact analysis). As for digital discrimination, all money is green, so there is little prospect for discrimination by any sensible legal standard. In fact, inadvertent discrimination (disparate impact) reduces profits, so broadband providers would very much like to avoid it (and presumably try to do so).

For the most part, the *Draft Order's* definition is the same as ours, though the *Draft Order's* definition reflects the Commission's chosen methods for assessing it. It seems to us to make more sense for the Commission to acknowledge such consistency, though likewise acknowledge that our definition lacked the specific details about how discrimination will be evaluated (and that "how" is properly included). We note, however, that the *Draft Order's* definition excludes our proposed language: "in a manner that causes adverse or negative consequences." Of course, to be actionable, the alleged conduct must cause harm, so we believe any definition of Digital Discrimination should explicitly (rather than implicitly) recognize that fact. Moreover, the *Draft Order* is entirely

⁴ PHOENIX CENTER POLICY PAPER NO. 61 at p. 13.

⁵ *Draft Order* at ¶ 61.

unclear about how economic and technical feasibility will be evaluated. Economic and technical feasibility are not policies and practices, as the *Draft Order* seems to suggest, but are exogenous factors that serve as inputs into deployment policies and practices. Income, for instance, is a decidedly economic factor and not a policy or practice. The hardness of soil is a decidedly technical factor and not a policy or practice.

Since the *Draft Order*'s release, the Phoenix Center has released three more papers on digital discrimination. The first paper updates our earlier work to test for the presence of digital discrimination using the Commission's latest fabric data. Again, no evidence of discrimination is found. The second paper uses data from the Current Population Survey and asks whether minorities are more likely to report a lack of access as the cause of the lack of a broadband subscription. Minorities report a lack of access less frequently than do White Americans. Yet, Minorities report affordability as a concern more frequently than do White Americans (though not having an interest in home broadband service is by far the more frequently mentioned reason), suggesting demand-side subsidies may help close the adoption gap (which is distinct from Section 60506). The third paper explains why the discounted pricing plans now offered to low-income households are nakedly discriminatory, by either the differential treatment or differential effects standard, and thus cannot continue under Section 60506 and the *Draft Order*'s proposed rules. We also want to highlight another paper we authored on the availability gap in Tribal areas. Our analysis shows that while there is a shortfall in broadband availability in Tribal areas, this difference is fully explained by the unique demographic and economic conditions of these areas, and so such differences are not discriminatory. The abstracts of these four papers are:

- (1) PHOENIX CENTER POLICY PAPER NO. 61, *Digital Discrimination Under Disparate Impact: A Legal and Economic Analysis* (October 2023) (available at: <https://phoenix-center.org/pcpp/PCPP61Final.pdf>).

In this POLICY PAPER, we conduct an empirical analysis of racial discrimination in broadband access motivated by the caselaw on disparate impact analysis. Using data from the Commission's new broadband fabric data, as recommended by the Commission's draft final rules, we test for differences in broadband availability between predominantly minority and majority census block groups and find no evidence of Digital Discrimination against minorities. In fact, we find that, if anything, minority groups have better access to broadband than do Whites, on average. Accordingly, a *prima facie* case of disparate impact for "Digital Discrimination of access" is unlikely to be empirically supported on racial grounds.

- (2) PHOENIX CENTER POLICY PERSPECTIVE NO. 23-03: *Digital Discrimination and Broadband Subsidies: Which Matters?* (October 31, 2023) (available at: <https://www.phoenix-center.org/perspectives/Perspective23-03Final.pdf>).

In this PAPER, we look at the relative importance of Digital Discrimination and broadband subsidies on the Digital Divide. Data from the Current Population Survey of the U.S. Census Bureau provide further evidence of a lack of discrimination. Minorities and low-income households are, in fact, less likely to report a lack of broadband adoption in the home is motivated by a lack of access. Instead, the key

drivers of broadband non-adoption are a lack of interest and, to a much lesser extent, affordability. As a result, improving the efficacy of the Affordability Connectivity Program offers a greater potential for closing the adoption gap than aggressive rules on discrimination.

- (3) PHOENIX CENTER POLICY PERSPECTIVE NO. 23-04: *Will Digital Discrimination Policies End Discount Plans for Low-Income Consumers?* (November 1, 2023) (available at: <http://www.phoenix-center.org/perspectives/Perspective23-04Final.pdf>).

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.” While the Commission’s own deployment data, as well as Census data, do not reveal any differences in broadband availability by race or income, the statute and the Commission’s proposed rules embed a serious unintended consequence. In this PAPER, we detail how Section 60506 and the Commission’s draft final rules appear to prohibit discounting of broadband prices based on income. These discount plans tied explicitly to income are nakedly discriminatory and violate both the differential treatment and differential effects standards proposed by the Commission. While past discounting is unproblematic, the continued use of income-based discounts, even for customers already on these plans, poses risks for broadband providers as they violate both the statute and the Commission’s proposed rules. The Commission requires “pricing consistency [] between different groups of consumers” and that providers cannot “freely engage in discriminatory policies and practices with regard to the ongoing provision” of broadband service. In comments to the FCC, several public interest groups argue strongly against such price discrimination, with some arguing the prohibition of such discrimination should be the loadstar of the Digital Discrimination rules.


- (4) PHOENIX CENTER POLICY BULLETIN NO. 62: *The Tribal Broadband Gap: An Empirical Evaluation* (November 2022) (available at: <https://phoenix-center.org/PolicyBulletin/PCPB62Final.pdf>).

In this PAPER, we study broadband deployment over the years 2014-2020 in Tribal and non-Tribal census tracts using the Federal Communications Commission’s Form 477 data to quantify progress. This “Tribal Gap” is measured as the difference in average broadband availability between Tribal and non-Tribal census tracts. Unmatched and matched sample are used, and a sample of census tracts within 30 miles of a Tribal area are also analyzed with and without matching. In all cases, the gap between Tribal and non-Tribal census tracks has been getting closer to zero over time and by 2020 (the last year data are available) the Tribal Gap was near zero in all cases, especially when the deployment differences are conditioned on a few covariates. Indeed, the Tribal Gap is nearly fully explained by differences in demographic characteristics. These results are encouraging and suggest efforts to close the Tribal Gap are meeting with some success, though many factors that determine deployment largely are beyond regulatory remedy (e.g., population density).

Full copies of each of these four papers, along with a copy of PHOENIX CENTER POLICY PAPER NO. 58, are attached hereto.

Facts matter, and the fact is that there is no meaningful evidence of discrimination in broadband access. Surely, this lack of evidence should affect how the Commission proceeds, which should be with humility and caution. Moreover, inadvertent discrimination (disparate impact) is costly to broadband providers, and they would willingly avoid such practices. All parties (absent intent, which the *Draft Order* places in the unlikely category) wish to avoid discrimination (it is socially undesirable and privately unprofitable). The only form of digital discrimination observed today is the discounted plans offered by provide providers to low-income households (usually due to pressure from regulators and the Biden Administration). Such plans are now explicitly illegal as they are nakedly discriminatory in income and violate disparate impact in race, so even that form of discrimination will (or should) soon end. Ensuring equal access, subject to economic and technical feasibility, is in everyone's interest. The Commission's final order should reflect these realities.

Respectfully Submitted

A handwritten signature in dark ink, appearing to read 'L. Spiwak', is written over a light gray rectangular background.

Lawrence J. Spiwak
President

Attachments