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FCC Adopts Anti-Discrimination Rules for Broadband Providers

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Earlier this week, the Federal Communications Commission (“FCC”) voted 3-2 to adopt rules intended to prohibit discrimination and promote equal access to broadband internet service, regardless of race, income, or other factors. The rules cover both technical and non-technical aspects of broadband service, and consider the impact of broadband providers’ decision-making, not solely the intent behind those decisions. The FCC also proposed further rules that would require an annual public report on infrastructure projects completed that year, and require an internal compliance program to assess the company’s impact on equal access to broadband internet in its service areas.

New Rules

The FCC’s new rules respond to a Congressional mandate included in the 2021 Infrastructure Investment and Jobs Act, directing the FCC to adopt rules addressing antidiscrimination issues in the broadband industry within two years. After a lengthy comment period, the FCC arrived at a final rule with several key elements:

Definition of Digital Discrimination. The FCC defines “digital discrimination of access” 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.” The first prong of this definition expresses the broader “disparate impact” standard prioritized by FCC leadership, giving the agency room to enforce against providers whose actions result in what the FCC finds to be a discriminatory result without having to go through the potentially much more difficult process of proving discriminatory intent.

Technical and Economic Feasibility. Perhaps the most significant exception to the new rules is baked directly into the key definition. The FCC provides allowance for “genuine issues of technical or economic feasibility” confronted by broadband providers. The FCC’s order provides some guidance on the meaning of these defenses, describing prior success by other entities under similar circumstances, or technological advancements, as circumstances which might cut against a defense of technical infeasibility. Similarly, prior success by similarly situated providers, or changed economic conditions, may undercut a defense of economic infeasibility. How exactly the FCC will apply this standard in practice, including the extent to which expert economic analysis from outside the agency, and from the FCC’s Office of Economic Analysis, may factor into this, will only become clear as enforcement trends develop.

Covered Elements of Service. The FCC's rules cover technical aspects of service such as speed, capacity, data caps, latency, reliability, and an array of other technical measures, but also broader technical trends such as deployment, network maintenance, and customer premises equipment, as well as installation practices. But more broadly, the agency also looks to "terms and conditions of service" including prices, arbitration clauses, credit requirements, deposits, discounts, customer service, language options, marketing and advertising, upgrades, and account termination and service suspension. The sweeping breadth of the rules opens providers up to complaints and potential enforcement not only for the networks they build and services they provide, but the financial and contracting practices that govern nearly all aspects of relationships with customers.

Enforcement & Implementation

This week's action modifies the FCC's enforcement rules to specifically allow for investigations regarding digital discrimination of access. The FCC's Enforcement Bureau will have primary responsibility here, and as in other contexts will be able to initiate investigations on its own, or in response to complaints from consumers. With the latter category in mind, the FCC further modified its informal complaint process to establish a dedicated pathway for accepting complaints under these new rules. It remains to be seen how the FCC will pursue enforcement of these rules and where it will prioritize enforcement across the breadth of issues these rules cover.

Recognizing limitations on the agency's ability to address discrimination in some contexts (e.g., in multi-tenant properties, on Tribal lands, and in other circumstances) the FCC will also prepare model policies and best practices guidance for state, local, and Tribal governments to "support [those agencies'] efforts in combating digital discrimination of access."

Proposed Rules

As broad and impactful as this week's rulemaking is, the Report and Order also includes a Further Notice of Proposed Rulemaking ("NPRM") highlighting the next steps in the agency's plans in this area.

First, the FCC's NPRM proposes an expansion to the existing Broadband Data Collection requirement. This supplement would require each broadband provider to publicly report on major deployment, upgrade, and maintenance projects completed, or substantially completed, in the prior calendar year, broken down by state or territory. This report would also identify the number of housing units impacted through tiered bands, describe the projects in detail, and identify census tracts impacted. The FCC invites comment on an array of components of the report, but outlines what could be a significantly burdensome level of reporting detail.

Second and perhaps most impactful is the proposal to require a formal internal compliance program "designed to ensure regular assessments of whether and how the provider's policies and practices advance and impede equal access to broadband." This would include establishment of internal policies and procedures, designation of compliance officer(s), training on FCC rules, developing lines of reporting, and providing for internal monitoring and auditing as well as escalation of issues to respond to problems and take corrective action. Further, the FCC would require evaluation and assessment of policies and procedures, to culminate in an annual written report to management regarding the results of such evaluations. Finally, providers would need to certify annually to the fact that a compliance program meeting all these requirements is in place.

What Companies Should Be Doing

As with other compliance obligations, the administrative burden to providers in conjunction with these rules, and particularly with the proposed compliance program and annual reporting requirements, may be significant. The anti-discrimination rules will not take effect until some time (likely 60 days) after their publication in the Federal Register, and the proposed rules will be subject to intense debate and public comment over the coming months. However, there are a few key actions companies can take now:

- Ensure management are aware of and understand the impact of the rules and the potential regulatory exposure, to ensure FCC enforcement continues to be considered as a source of risk in business decision-making;
- Review existing policies and procedures regarding covered elements of service to identify and remediate any immediately evident issues and reduce enforcement risk; and
- Closely monitor and actively engage in ongoing rulemaking processes to ensure concerns and input regarding the FCC's new proposals are included in the agency's record.

Paul Hastings attorneys continue to closely monitor developments in the area, and are available to discuss these issues and the impacts on broadband provider businesses at any time.



If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Washington, D.C. lawyers:

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