



FCC DIGITAL DISCRIMINATION RULEMAKING ADVISORY

On December 21, 2022, the Federal Communications Commission adopted a Notice of Proposed Rulemaking (NPRM) that has the potential to impact local governments' ability to ensure equitable broadband deployment throughout their communities as well as local rights-of-way management generally. The Commission will be adopting rules aimed at facilitating equal access to broadband services, and the NPRM provides a significant opportunity for local governments to:

- Ensure the rules protect and promote local governments' ability to address broadband access issues;
- Demonstrate that the Commission's preemption of local authority over wireless deployment and cable franchising hinders efforts to ensure equal access to broadband; and
- Defend against efforts to use the digital discrimination docket to further preempt local authority.

The NPRM follows a Notice of Inquiry (NOI) the FCC issued in March of 2022 as a first step in implementing 60506 of the Infrastructure Investment and Jobs Act. Section 60506 requires the Commission to adopt rules by the fall of 2023 "to facilitate equal access to broadband internet access service." The NPRM, among other things, seeks further comment on the rules the Commission should adopt to facilitate equal access and combat digital discrimination.¹ The Commission expressly contemplates addressing state and local laws that may impact infrastructure deployment.

Unlike many past NPRMs impacting local governments, in this case **we have the opportunity to proactively propose rules and rule changes that support local authority**. The NPRM references municipal comments filed in response to the NOI suggesting that the Commission examine whether its regulations can be revised to provide local governments greater latitude to encourage providers to address underserved area. It also cites comments urging the Commission to examine the discriminatory impact state laws may have, arguing that statutory schemes from the mid-2000s fail to address issues of digital discrimination. The NPRM also proposes to adopt model policies and best practices for states and localities to combat digital discrimination. The model policies, developed by the Commission's Communications Equity and Diversity Council (CEDC), include a discussion of the positive role cable franchising has had in enforcing buildout and system upgrades, and specifically recommends a policy that "[a]greements to use the rights-of-way should reflect that the privilege of using public assets comes with an obligation to provide a benefit to the public" It is critical that local governments build on this record, reinforce the CEDC's support for local franchising as a means of addressing digital discrimination, and push the Commission to establish rules that support local efforts to respond to the broadband needs of

¹ Section 60506 requires the Commission to adopt rules to facilitate equal access to broadband, accounting for "issues of technical and economic feasibility," that include "preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin," and "identifying necessary steps for the Commission to take to eliminate [digital] discrimination."

their communities. This docket also provides the opportunity to urge the Commission to revisit the preemptive impacts of its small cell and cable franchising order that impede those efforts. Commission support for local authority may also help efforts to reshape state laws that limit authority over broadband deployment and local franchising.

In addition to proactive efforts, it is evident that some industry groups seek to use this docket to further preempt local authority. The NPRM cites to industry suggestions from the NOI that the Commission enact rules to expedite and streamline permitting, facilitate access to poles and public rights-of-way, and preempt municipal right-of-way access fees. This effort to paint local regulations as the problem is similar to arguments that resulted in the preemption of local authority over small cell deployments and new limitations on authority over cable companies' non-cable facilities and services. It is important for local governments to file in this docket to **counter the suggestion that local regulations are contributing to digital discrimination and to oppose further limitations on local authority.**

Comments will be due 30 days after publication in the Federal Register, with reply comments due 30 days after the comment deadline. With publication likely to occur sometime in January, we estimate that comments will be due in February and replies due in March.