

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter Of

Implementing the Infrastructure
Investment and Jobs Act: Prevention
and Elimination of Digital
Discrimination

GN Docket No. 22-69

COMMENTS OF PUBLIC KNOWLEDGE

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I. INTRODUCTION

The importance of broadband internet access is indisputable. Along with electricity and water, it is one of the most essential utilities that every household and business needs to stay informed, participate in the economy, get an education, and stay connected with family and friends. Ensuring that access to this vital service is not denied to anyone based on their "income level, race, ethnicity, color, religion, or national origin," is one of the FCC's most important tasks. Digital discrimination is not just unjust towards individuals, but can hold back entire communities and prevent the nation from living up to its potential. It must end.

Thankfully, the Commission now has not merely the legal authority, but an affirmative obligation, to end digital discrimination. In order to do so successfully, it must compare all facets of broadband service between low-income and marginalized communities with service in wealthier or whiter communities— including the quality of service, price, and other terms and conditions. It then must adopt broad and flexible rules and definitions that target discrimination of all types. When the Commission is evaluating if digital discrimination has occurred, it should look for “discriminatory impact” and not just “discriminatory intent.” It should also recognize that Congress’ instruction to “consider issues of technological and economic feasibility” requires providers to offer comparable service, and is not a safe harbor from which to perpetuate digital discrimination. Finally, Congress’s command that the Commission take proactive steps to identify the causes of digital discrimination and affirmatively eliminate them requires the Commission to take proactive action to set policies that will end digital discrimination and promote equal access.

II. DIGITAL DISCRIMINATION IS PRESENT WHEN SIMILAR COMMUNITIES HAVE DIFFERENT CONNECTIVITY BECAUSE OF DEMOGRAPHICS

The Commission has sought comment on how to define digital discrimination.¹ To ensure that protected communities are not left out of the economic, educational, healthcare and other opportunities that emanate from broadband connectivity, the Commission should define digital discrimination as any time when one community has better broadband service than another, when the meaningful difference between the communities is the demographic characteristics, including the economic status, of its residents.²

The Commission should not just evaluate broadband availability. The statute requires protected classes to have “equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions.”³ The Commission should look broadly at the factors associated with determining whether network performance and the terms and conditions that accompany service (including price) are comparable. A community with slower, more laggy broadband is the victim of digital discrimination. A community with slower customer service, more outages, or a higher price per megabit is the victim of digital discrimination. And where a provider offers discounts and sales in one neighborhood, but not in other neighborhoods with “less desirable” customers, this too could constitute digital discrimination—even if the same physical access and speeds are offered.

A. The Commission Must Consider Multiple Quality of Service Metrics

In assessing comparable service, the Commission seeks comment on what the phrase “other quality of service metrics” may include and what it means for these variables to be

¹ Federal Communications Commission, *Notice of Inquiry in the matter of implementing the Infrastructure Investment and Jobs Act: prevention and elimination of digital discrimination*, GN Docket No. 22-69 at para. 21 (Mar. 17, 2022) (“NOI”).

² As discussed below, “service” includes a broad range of characteristics.

³ 47 U.S.C. § 1754(a)(2).

comparable.⁴ As Congress made clear, speed, capacity and latency are not the only relevant variables. Rather, it is important for the Commission to also evaluate network reliability, network resiliency, how much “jitter” the network experiences, how often the purported speed is being met, and other performance-based characteristics.⁵ The goal is to ensure that the network performance in any given area is comparable to the network performance in the comparison area.

For example, a network reliability measure—such as the number and length of outages—can ensure that networks function as reliably in the area under review as the comparison area. A network resiliency measure—such as measuring how fast networks are running again after a disaster—will show if providers are prioritizing network repairs in wealthier or whiter areas. An actual speed measure—showing how often the advertised speed is actually delivered—will help the Commission evaluate whether consumers in lower income neighborhoods, for example, are receiving a similar level of service as those in more affluent neighborhoods. Additionally, including jitter as a comparison characteristic will help the Commission understand whether upgrades to handle increasing capacity and bandwidth demands are being met in a comparable manner across a provider’s service area.⁶ For these reasons, we urge the Commission to compare services using an expansive list of quality of service metrics.

B. The Commission Should Draw Upon Its Existing Experience in Comparing Quality of Service Metrics

When determining whether the quality of service is comparable, the Commission can draw upon its experience.⁷ For example, the Commission has developed network performance

⁴ NOI at para. 13.

⁵ *Jitter - A Measure of Broadband Quality*, Doug Dawson, Pres. CCG Consulting, POTs and PANs, available at <https://potsandpansbyccg.com/2022/02/03/jitter-a-measure-of-broadband-quality/> (Feb. 3, 2022) (visited May 5, 2022).

⁶ *Id.*

⁷ NOI at para. 13.

testing in the universal service context.⁸ As part of that testing, the Commission required multiple rounds of testing over a varying range of subscriber locations and at varying times of day during the testing window.⁹ The Commission also tested speed and latency to ensure that universal service recipients were delivering on the speeds promised and that their networks performed at a level that would allow for real-time applications to operate properly.¹⁰ Similar testing will help the Commission determine whether network service is comparable between the enumerated classes and the rest of the community.

The Commission relied on the recipient's participation in the universal service program as one of the bases for collecting the data for the network performance testing.¹¹ Here, Congress has directed the Commission to develop rules to ensure that providers of broadband services are not discriminating against the enumerated classes and to identify necessary steps to eliminate discrimination.¹² Only by routinely collecting data on the performance of providers' networks will the Commission be able to develop a baseline understanding of the performance of any given provider's network. That information will be crucial for investigating potential discriminatory outcomes.

C. The Commission Must Ensure that Everyone Has Access to Comparable Terms and Conditions

Beyond the network performance issues discussed above, the Commission needs to have a full understanding of all of the components of a provider's broadband offering, including the terms and conditions under which service is being offered to consumers. In the NOI, the

⁸ *Connect America Fund*, WC Docket No. 10-90, Order, 33 FCC Rcd 6509 (2018).

⁹ *Id.*

¹⁰ *Connect America Fund*, WC Docket No. 10-90, Order on Reconsideration, 34 FCC Rcd. 10109 (2019).

¹¹ *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17705-06, para. 109 (2011), *aff'd sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

¹² 47 U.S.C. § 1754(b)(1), (2).

Commission specifically seeks comment on whether it should consider terms and conditions beyond price and duration of service contracts available to subscribers including customer support response time, data caps, promotional offerings, consumer premises equipment rental agreements, availability of devices that connect to the network, and/or the ways in which subscriber data is used by broadband providers.¹³ It also seeks comment on whether it should consider affordability as a condition for service.¹⁴

We urge the Commission to consider each of the variables mentioned in the NOI and to adopt an approach akin to other agencies that have sought to address discrimination.¹⁵ As with regulations adopted by the FDIC, disparate terms and conditions targeted at one of the enumerated classes should be impermissible.¹⁶ The Commission does not necessarily need to establish that the practices outlined in the terms and conditions are occurring, it only needs to be clear that discriminatory terms and conditions are unlawful.

Of course, one of the most important terms and conditions of broadband service is the price of that service. The Commission must ensure that that similar service is being offered for a comparable price. Necessarily then, lower-quality service should cost less than higher-quality service. The National Digital Inclusion Alliance has found evidence of "tier flattening" whereby the consumers with access to the slowest, oldest networks pay higher rates per each megabit. For example, in 2018, AT&T advertised internet access offering 6-10 Mbps down and 0.6-1 Mbps up

¹³ NOI at para. 16.

¹⁴ NOI at para. 16.

¹⁵ NOI at para. 15.

¹⁶ 24 C.F.R § 100.65.

for \$60 a month, while it *also* advertised 100/100 speeds for, again, \$60 a month.¹⁷ This sort of pricing should be a clear violation of offering comparable terms and conditions.

Other terms are also related to affordability. For example, late fees, equipment rentals, security deposits, and disconnection terms can all substantially impact the affordability of service. In addition, these often unexpected fees can increase the likelihood of service cancellation for non-payment, potentially resulting in a disproportionate and discriminatory impact on low income consumers in particular.

Similarly, it is critical that services such as repairs or customer service support be offered in a comparable manner to all subscribers.¹⁸ For example, those in low income communities should not have to wait longer for a customer service representative to pick up the phone, or for a repair technician to arrive at their home, than those in more affluent areas. Further, data caps on lower-income consumers should not be permissible where providers do not impose such restrictions on consumers that have cleared a credit-check requirement.¹⁹ The purpose of the rules Congress has charged the Commission with developing is to look broadly at the various ways in which consumers are offered broadband service and to then ensure that members of the enumerated classes are not being treated differently.

¹⁷ Bill Callahan and Angela Siefer, *Tier Flattening: AT&T and Verizon Home Customers Pay a High Price for Slow Internet*, National Digital Inclusion Alliance (July 31, 2018), <https://www.digitalinclusion.org/wp-content/uploads/2018/07/NDIA-Tier-Flattening-July-2018.pdf>.

¹⁸ The FDIC regulations states, for example, that failing or delaying maintenance or repairs is a discriminatory act under its rules. 24 C.F.R. §100.65(b)(2).

¹⁹ *See generally Best No Credit Check Internet*, Broadband Now (last accessed May 16, 2022), <https://broadbandnow.com/internet/best/no-credit-check>.

III. THE COMMISSION CAN LEVERAGE VARIOUS FEDERAL AND STATE DATA SOURCES TO DETERMINE IF DIGITAL DISCRIMINATION IS OCCURRING

The Commission has asked what sources of data it can leverage to determine if digital discrimination is occurring.²⁰ While we do not purport to know of all existing data sources, or all of the benefits and limitations of each, below we have suggested a few sources with relevant information. When determining which sources of information to use, the Commission should look for sources that cover the entire country, and which offer as granular of demographic and income information as possible. Granular data can ensure that the Commission has the information it needs to find all instances of digital discrimination.

A. The Commission Can Use U.S. Census Bureau and Center for Disease Control Data for Demographic Information

The Commission should consider using the U.S. Census Bureau's American Community Survey and the Center for Disease Control's (CDC) data on populations and vulnerabilities. The American Community Survey contains a wealth of information about the demographics of a particular community. For example, it can show the demographic makeup of a zip code.²¹ Likewise, the CDC's data on Populations and Vulnerabilities contains estimates about the number and percentage of people in an area by demographics including race, ethnicity, age and gender.²²

B. The FCC Can Use Various Federal and State Sources for Income Data

There are many sources of income data. Perhaps the most comprehensive sources are the Internal Revenue Service and the Social Security Administration, both of which have data from

²⁰ NOI at para. 28.

²¹ *American Community Survey Demographic and Housing Estimates*, U.S. Census Bureau, <https://www.census.gov/programs-surveys/acs/data.html>.

²² *Populations and Vulnerabilities*, Center for Disease Control (last updated Feb. 22, 2022) <https://www.cdc.gov/nceh/tracking/topics/PopulationsVulnerabilities.htm>.

virtually everyone who is required to file taxes.²³ While these agencies have not traditionally shared this information with other federal or state agencies – if shared, it would enable the Commission to determine income on an address level basis. Another source of income information is state unemployment insurance agencies. States usually collect income data from many employed individuals in order to administer its program. While this data does not include information about independent contractors or government employees – it can nevertheless serve as a helpful source of income information if the FCC were to get this data from every state and territory.²⁴

If the Commission is not able to get pure income data, it could consider using data about participation in certain government programs intended for low-income individuals as a proxy. In most cases, only low income individuals can qualify for government programs – like the Supplemental Nutrition Assistance Program (SNAP). The FCC and USAC already collect data from the administrators of some state SNAP programs in order to administer Lifeline and the Affordable Connectivity program through the National Verifier.²⁵ Thus, in a pinch, this data could indicate which areas are predominantly low income.

IV. CONGRESS HAS REQUIRED THE FCC TO BOTH PREVENT AND ELIMINATE DIGITAL DISCRIMINATION

Congress has charged the Commission with a clear and unambiguous mission to ensure that “all people of the United States benefit from equal access to broadband internet access service.” The rules contain three separate clauses charging the Commission with “preventing

²³ See Rachel Zinn, *Classroom to Career: Leveraging Employment Data to Measure Labor Market Outcomes*, Workforce Data Quality Campaign at 2 (May 2016), available at https://sites.ihep.org/sites/default/files/uploads/postsecdata/docs/resources/leveraging_employment_data_0.pdf

²⁴ *Id.*

²⁵ *FCC Has Implemented the Lifeline National Verifier but Should Improve Consumer Awareness and Experience*, Government Accountability Office (Jan. 2021), <https://www.gao.gov/assets/gao-21-235.pdf>.

digital discrimination of access” based on a list of protected characteristics,²⁶ “identifying necessary steps for the Commission to take to eliminate discrimination [of access,]”²⁷ and coordinating with the Attorney General of the United States to “ensure that Federal policies promote equal access...by prohibiting deployment discrimination” based on income level, race, ethnicity, and other relevant factors determined by the Commission.²⁸ These three clauses operate together to charge the Commission with a broad mission to identify, prevent, and eliminate digital discrimination in all its forms.

A. The Commission is Charged With Combating Both “Discrimination of Access” and “Deployment Discrimination”

The Commission’s mission to promote equal access by combating digital discrimination requires it to address all forms of discrimination. Section 1754 refers to both “discrimination of access” (hereinafter, “access discrimination”) and “deployment discrimination.” These forms of discrimination are distinct, but interrelated.

Access discrimination relates to a group or individual’s ability to access services. This can include instances of intentional and explicit discrimination but also (as discussed below) policies or practices that result in a disparate impact, even where there is no intent to discriminate. Access discrimination occurs in how networks, services, and business practices are administered for existing networks and services. From technical elements of network operation to customer service policies, there is potential for discrimination to arise at every level and in every aspect of service. Unravelling this complex web of interacting elements makes assessing access discrimination particularly challenging. This is a tangled and intricate knot, and so the Commission must adopt broad, flexible, and widely applicable rules to cut through the

²⁶ 47 U.S.C. § 1754(b)(1)

²⁷ 47 U.S.C. § 1754(b)(2)

²⁸ 47 U.S.C. § 1754(c)(1)

complexities. All barriers to access—including those the Commission already works to address as part of its universal service mission—that have disparate impacts upon protected classes are rightly considered aspects of access discrimination.

On the other hand, deployment discrimination relates to how infrastructure and networks are planned, built, and maintained. Deployment discrimination considers not only people in a protected class but areas and whatever other relevant factors the Commission ultimately decides to consider to support its goal of ensuring equal access. It is also critical that the Commission consider issues that might not be found on broadband maps, including extended delays in planned deployments, pro forma build-outs that are heavily subsidized and then abandoned, and systemic issues in how service providers evaluate communities for development potential.

B. Identifying, Preventing, and Eliminating Digital Discrimination Each Requires Different Rules and Enforcement

The NOI seeks comment on the relationship between paragraphs (b)(1) and (b)(2) in Section 1754. Specifically, the Commission inquires about how to parse the differences in these provisions, including the operative effect of the words identify, prevent, and eliminate. These differences create three distinct obligations, each with their own authority, all aimed at ensuring that all people of the United States benefit from equal access to broadband internet access service.

Paragraph (b)(1) charges the Commission with “preventing digital discrimination of access” based on a list of protected characteristics. This creates a duty to proactively stop digital discrimination from occurring. Paragraph (b)(2) requires the Commission to adopt rules “identifying necessary steps for the Commission to take to eliminate [access] discrimination.” The phrase “identifying necessary steps,” creates a duty of research, information gathering, and investigation. To satisfy this duty, the Commission must identify the existing scope of digital

discrimination and develop an effective response. This requires understanding the root causes of the inequities. The third element of duty is to eliminate access discrimination. The use of “eliminate” in this paragraph creates a duty to rectify existing discrimination. As will be discussed in Section V(B) and Section V(C), combined, these duties require the Commission to change or enact policies that will support the overall mission of the legislation to facilitate equal access.

C. The Commission Has Authority To Prevent And Eliminate Digital Discrimination

In carrying out its mission to identify, prevent, and eliminate digital discrimination, the Commission has been delegated authority to act under Section 1754 in addition to its ordinary Communications Act authority. When Congress identifies a problem and commands an agency to address it, Congress delegates authority to the agency to solve that problem.²⁹ That is made particularly clear by the use of the word “shall.”³⁰ This combination provides the Commission with the authority to make and enforce rules to combat all aspects of digital discrimination.

The Commission’s authority in this area extends beyond its Communications Act authority. While elements of its Communications Act authority may be useful in addressing the myriad of causes and effects of digital discrimination, the Commission is further empowered by Section 1754 to carry out every element of this task. This is best exemplified by the grant of new powers such as coordination with the Attorney General and the addition of digital discrimination to the Commission’s public complaint process. It is self-evident that if the Commission is to accept public complaints of digital discrimination, it has the power to review and act upon those complaints.

²⁹ See *e.g. Mistretta v. United States*, 488 U.S. 361, 373 (1989).

³⁰ 47 U.S.C. § 1754(b)-(e).

D. The Commission Requires Broad, Flexible, and Widely Applicable Rules to Combat Digital Discrimination

To effectively combat digital discrimination, the Commission must adopt broad, flexible, and widely applicable rules. The NOI calls for comment on the best approach to rulemaking in this area; contrasting the approaches of a general prohibition of discrimination based on protected characteristics and the more narrow set of specific prohibited business practices under the Fair Housing Act.³¹ The Commission ought to adopt a broad and flexible approach, while embracing some of the benefits of enumeration.

This approach is helpful because a failure to catch instances of digital discrimination could have far lasting consequences. In fact, many of the areas that were once redlined have remained economically disadvantaged.³² The inability to connect today, and into the future, could not just leave those in protected classes without the ability to take online classes, work remotely, search for a job, or connect with loved ones. It could lead to continued disparities for a long time to come. We see this consistently in the cycle of upgrades by ISPs. Areas that have been abandoned by ISPs have increasingly worse connectivity than areas that are consistently upgraded.³³ Without high quality connectivity, those individuals and communities will lose out on the economic, educational, and health opportunities that connection affords.

³¹ NOI at para. 30

³² Bruce Mitchell and Juan Franco, HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality, National Community Reinvestment Coalition (Mar. 20, 2018), available at <https://ncrc.org/holc/>.

³³ See Communications Workers of America and National Digital Inclusion Alliance, *AT&T's Digital Redlining Leaves Communities Behind for Profit*, (October 2020) (tracing consistent lack of investment over time in low-income communities, leaving them further and further behind in digital access), available at: <https://cwa-union.org/sites/default/files/20201005attdigitalredlining.pdf>.

1. The Commission's Rules Should be Broad

The Commission should adopt broad rules that prohibit discrimination based on protected characteristics. These rules should be written to encompass anything that could be deemed digital discrimination, and not just target specific practices. Adopting a general prohibition on discrimination allows the Commission to cover the wide array of failure points that exist in the broadband ecosystem. To make these broad rules more practically enforceable, the Commission can incorporate in a non-exhaustive and representative list of specifically prohibited practices. Combined with broad prohibitions, these enumerated lists will help guide compliance and clarify Commission intent without unduly constraining the Commission's ability to address more novel instances of digital discrimination. This approach will ensure that all forms of discriminatory conduct are captured under the Commission's rules, allowing for effective enforcement that will both prevent and eliminate digital discrimination.

2. The Commission's Rules Should be Flexible

In addition to adopting broad rules to ensure all discriminatory practices are encompassed, the Commission's rules must also be flexible. Any rules and definitions must be easily adaptable to changes in technology, markets, and the needs of society.

In paragraph 25 of the NOI, the Commission inquires about what technologies the rules should cover. The rules should be technology agnostic to account for changes in how people access broadband service. As businesses and technologies develop and change, the Commission should have rules and definitions that don't need to be frequently updated. For example, rules should not reference—except by way of illustration—specific technologies, technical standards, or performance benchmarks.

Flexibility is essential when regulating technology like broadband because of how fast it can change, and how quickly society can change as a result of its influence. An essential example of this kind of rapid shift is the pandemic. As lockdowns went into effect, and as schools, businesses, and healthcare providers switched to virtual environments, bandwidth-intensive activities like video streaming and video conferencing became not only more common, but essential. Use of these applications and activities was already important prior to the pandemic, but the sudden change in conditions accelerated the need for fast and reliable broadband internet service.³⁴ Service plans that service providers often categorized as premium high-speed plans came to be appropriately recognized as the minimum viable level of service needed to participate in the modern digital landscape. If rules are written with specific standards for speed or reliability, they will be insufficiently flexible to adapt to rapid inflection points like the pandemic.

3. The Commission's Rules Should be Widely Applicable

The Commission's rules should cover all service providers, all types of business models, and other parties that have direct control over access to broadband service. Ensuring that the Commission's rules are widely applicable will give the Commission the ability to address discrimination and facilitate access at every level. It will also prevent potential bad actors from evading discrimination rules by shifting business models, technical characteristics, or responsibility to business partners.

The Commission should ensure that rules are adopted to allow for accountability at every level of infrastructure. This means that last mile and middle mile providers must comply with the

³⁴ See Cecillia Kang et. al, *Surging Traffic is Slowing Down our Internet*, The New York Times (May 20, 2020), available at <https://www.nytimes.com/2020/03/26/business/coronavirus-internet-traffic-speed.html>.

relevant rules for non-discrimination. It also means that the rules must apply regardless of technology or business model.

Similarly, the Commission's rules must prevent those with the power to frustrate access to others from doing so. Landlords, homeowners associations, and other entities that can serve as a barrier to broadband access must also be reachable through Commission rules. "Gatekeeper" entities like these are inextricably tied to the historical practices of redlining, and continue to have outsized power over the enumerated classes. The Commission's recent actions related to multi-tenant environments has substantiated the critical role gatekeepers play in the broadband ecosystem, as they coordinate with or are influenced by service providers into preferencing or blocking specific services. The Commission must ensure that it has anti-discrimination rules that reach down to the gatekeeper level, which is often the first barrier that many people encounter when trying to gain broadband access. This is well within the Commission's authority, given its broad Congressional directive to eliminate digital discrimination.

While the rules for middle mile, last mile, and gatekeepers must each be tailored to these different actors, the Commission should adopt the same level of enforcement for each. If the Commission does not adopt rules that are widely applicable to service providers and gatekeepers at every level, the pernicious problem of digital discrimination is liable to adapt and re-emerge where the Commission has failed to act.

E. The Definition of Given Geographic Area Should Be Designed to Catch All Instances of Digital Discrimination

Congress has required the FCC to promulgate rules that require consumers to have "the equal opportunity to subscribe to an offered service... in a given area, for comparable terms and conditions."³⁵ However, there can be many definitions of a "given area," some of which are more

³⁵ 47 U.S.C. § 1754(a)(2).

suitable for one part of the country than another. As we noted above, all of the Commission’s definitions should be broad and flexible. Thus we urge the Commission to heed this advice when determining what a given geographic area is.

Any definition the Commission selects should take into account two separate areas: a comparison area and an enforcement area. The comparison area—which the Commission should examine when considering how an area purported to be discriminated against compares to a different area—should be large. However, the Commission should enable itself to find digital discrimination in very small areas—even at just one address. Discrimination against just one home or individual is still discrimination.

1. The Definition of Geographic Area Should be Flexible

Meaningful implementation of the digital discrimination rules will require a level of granularity that can account for the diversity of population density, terrain, jurisdictional boundaries, and other factors that can impact an appropriate determination of a “given area.” Selecting a single type of geographic unit to define a given area could be problematic because not every definition will work across the country. For example, census blocks and zip codes range from very small to very large and don't necessarily take into account geological features or terrain that can impact infrastructure deployments. Similarly, while the “metropolitan statistical area,” has been a relatively effective definition of a given geographic area in the context of housing and banking redlining, it would not be an appropriate definition to determine if digital discrimination is occurring in a rural community. According to the Census Bureau, a metropolitan statistical area (“MSA”) is one “containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.”³⁶

³⁶*About Metropolitan and Micropolitan*, U.S. Census Bureau, available at <https://www.census.gov/programs-surveys/metro-micro/about.html> (last accessed May 16, 2022).

According to current standards, each MSA “must have at least one urbanized area of 50,000 or more inhabitants.”³⁷ Necessarily then, this definition would not work for rural communities.

2. The Commission Should Have a Large Comparison Area and Small Enforcement Area

To compare broadband access across a “given geographic area” the Commission must compare the broadband available in the area of purported discrimination to the broadband available in a larger or different area (the “comparison area”). The Commission should ensure that the comparison area is large enough to ensure equity by accounting for discrimination against entire communities. For example, if a comparison area were at the county level, a provider could discriminate against a majority-minority county in the same metropolitan area as a primarily white county because the Commission would only compare service within one county.

However, to catch all instances of discrimination, the enforcement area (the area allegedly discriminated against) should be permitted to be small. As a matter of policy, the Commission should be able to make a finding of discrimination against just one address, or just one person that is part of a protected class. If, for example, a service provider did not want to serve the home of a religious minority because of that fact, the Commission’s rules should allow it to find that digital discrimination. Allowing a small enforcement area would allow the Commission to enforce against narrow instances of discrimination of this kind.

F. When Determining if Digital Discrimination is Present, the Commission Should Require a Showing of Disparate Impact

The Commission has asked when digital discrimination is based on a listed characteristic, and further seeks comment on if discrimination requires discriminatory intent, or a

³⁷ *Id.*

discriminatory effect.³⁸ As the Commission notes, the Department of Housing and Urban Development (HUD) will find housing discrimination if there is a “discriminatory effect, even if not motivated by discriminatory intent.”³⁹ As in housing discrimination cases and other civil rights claims, a showing of disparate impact should be enough to prove digital discrimination (although a showing of discriminatory intent should also be considered a violation of the Commission’s rules).

A disparate impact test is superior to a discriminatory intent test for a number of reasons. Most importantly, it is more likely to be effective. Showing discriminatory intent might require extensive research or litigation about something that may have happened years ago. Documents that might demonstrate discriminatory intent may have been lost, destroyed, or never generated at all. Key people might have even died. By contrast, the effects of discrimination are immediately apparent. A disparate impact analysis will make it easier to address instances of apparent discrimination, and even uncover discrimination that would otherwise go undetected. Additionally, a disparate impact test is more likely to lead to predictable results. While different factfinders may come to different conclusions about whether discriminatory intent exists, the effects are easier to prove conclusively.

Under a disparate impact framework, once discriminatory effects are shown, the burden would shift to the alleged violator to demonstrate that digital discrimination has not taken place, either by rebutting the evidence, or by providing a "substantial legitimate justification" for the unequal access to broadband that the complainant has shown. Although previous discriminatory impact cases can inform actions brought under this law, it must be noted that the IIIJA prohibits discrimination based upon a broader set of criteria than the Civil Rights Act. Title VI of the Civil

³⁸ NOI at para. 22.

³⁹ 24 CFR § 100.5(b).

Rights Act prohibits discrimination based on "race, color, or national origin,"⁴⁰ while Congress directs the Commission, more broadly, to remedy discrimination based on "income level, race, ethnicity, color, religion, or national origin".⁴¹ The additions of ethnicity and religion are valuable and might capture instances of discrimination a less comprehensive set of criteria would not. Additionally, the critical inclusion of "income level" should also help the FCC ensure that broadband is deployed and maintained in an equitable way. This is of particular importance because, as noted above, those in traditionally redlined communities still have low-wealth decades later, making income often a proxy for race.

G. The Commission Needs a Robust System for Addressing Consumer Complaints

Section 1754(e) requires the Commission to “revise its public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination,” and the Commission seeks comment on this requirement⁴² The Commission should make its complaint process a robust system for addressing the problem of digital discrimination.

1. The Complaint Process Is An Important Component Of Enforcement

Discrimination is often cryptic, disguised, or obfuscated by facially neutral policies. Data collected from service providers is notoriously unreliable when it comes to service coverage and quality.⁴³ Therefore, it would be impractical to rely on service provider data as the sole evidence of digital discrimination. Individuals, however, can provide a clear picture of their own

⁴⁰ 42 U.S.C. § 2000d

⁴¹ 47 U.S. Code § 1754(b)(1)

⁴² 47 U.S.C. § 1754(e).

⁴³ See Devin Coldewey, *FCC 'looking into' reported error throwing broadband deployment numbers off by millions*, TechCrunch (Mar. 7, 2019), <https://techcrunch.com/2019/03/07/fcc-looking-into-reported-error-throwing-broadband-deployment-numbers-off-by-millions/>; Shara Tibken, *Millions of Americans can't get broadband because of a faulty FCC map. There's a fix*, CNET (Feb. 19, 2021), <https://www.cnet.com/home/internet/features/millions-of-americans-cant-get-broadband-because-of-a-faulty-fcc-map-theres-a-fix/>.

broadband access. This is why the Commission must also collect information directly from the people and communities it serves. Collecting and addressing individual complaints—and analyzing complaints for patterns of behavior to serve as the basis of investigations and enforcement actions—are likely the strongest methods for eliminating digital discrimination, identifying key barriers to equal access, and deterring gatekeepers and service providers from violating rules. It is also an important way to engage the public.

2. An Accessible Informal Consumer Complaint Process Is Critical For Effective Enforcement

Informal consumer complaints provide a direct line between the Commission and the public and are therefore critical for effective digital discrimination enforcement. However, the Commission must adapt its informal complaint process to make it more accessible.

Currently, consumers primarily use the Commission’s online Consumer Complaint Center to file informal complaints. However, it is critical that consumers have other methods of filing complaints – particularly since many digital discrimination complaints are likely to originate from unserved or underserved communities. While the Commission Complaint Center is also available by telephone, the telephone Consumer Complaint Center greeting message recommends filing a complaint online because that allows consumers to receive updates and notifications regarding their complaint.⁴⁴ The Commission should make the features of the digital discrimination complaint center reasonably comparable – whether the complaint is made over the phone or in writing. In order to ensure that all consumers can file a complaint – both the online and telephone complaint system should be available in multiple languages.

Another challenge regarding digital discrimination complaints is identifying and categorizing them. A consumer may not recognize that, for example their complaint about not

⁴⁴ Available at 1-888-225-5322 (last accessed May 13, 2022).

having service when they know a neighbor does, is an issue of digital discrimination. Similarly, consumers may report complaints about degraded service quality or other quality of service issues into a different category of service complaints. The Commission should develop mechanisms (such as screening questions) to guide consumers towards the appropriate category for their complaint. It should also implement a complaint auditing process to attempt to identify consumer complaints that relate to digital discrimination that were not initially categorized as such.

Finally, to make the informal consumer complaint process meaningfully accessible, consumers should have an extremely low burden of proof. A consumer should only have to make a prima facie case for discrimination, because their ability to ascertain service provider policy and service information is necessarily limited. Rejecting or closing out consumer complaints for lack of evidence at an early stage creates a barrier that would severely limit the accessibility of the complaint process for the vast majority of consumers. It should be up to service providers and gatekeepers to show that they are in compliance with Commission rules.

3. The Informal Complaint Process Must Be Responsive

It is not enough for the informal complaint process to be accessible, the Commission must also ensure that discrimination complaints are routinely and consistently investigated and that consumers receive clear feedback regarding outcomes. A responsive system will increase consumer confidence in the process, leading to increased utilization of the system. It will also provide a consistent enforcement mechanism that will deter discrimination.

At a minimum, all consumer digital discrimination complaints must be reviewed and acted on in some way, with the resolution or action then reported back to the complainant. Some complaints will warrant Commission investigation, and the Commission should investigate both

individual complaints of discrimination as well as larger patterns of discrimination. The Commission should also include a curative process whereby Commission staff will give complainants instructions on how to amend and augment a complaint before complaints are closed out for purely procedural or evidentiary reasons. Whatever the ultimate disposition of a complaint is, the Commission should report the disposition to the complainant along with resources and additional options or actions for the complainant to take. In this way, the consumer complaint process can also serve as an artery for consumer education and resources. Ultimately, a robust system of complaint collection, review, investigation, and reporting, while undoubtedly resource intensive, will create a highly responsive system that can prevent digital discrimination.

4. The Complaint Process Requires Transparency And Accountability

To ensure accessibility and responsiveness, the Commission should reform the informal consumer complaint process to increase transparency and accountability. Publicly accessible information about consumer complaints and their disposition, as well as the creation of an independent Digital Discrimination Ombudsperson within the Consumer and Governmental Affairs Bureau are two mechanisms to create the necessary transparency and accountability.

In the NOI, the Commission notes that “[t]he collective data received from consumer complaints help us monitor what consumers are experiencing and inform our policy work.”⁴⁵ Since the Commission already aggregates consumer complaint information for internal analysis, the Commission should revise this process to create a publicly accessible, transparent place for accessing aggregated consumer complaint information. The public should be able to access information including where complaints originate, the subject or target of the complaint, anonymized demographic information about the complainant, a timeline of Commission actions taken, and the ultimate disposition of the complaint. Public reporting and access to consumer

⁴⁵ NOI para. 34.

complaint information will create a sustainable mechanism for Commission accountability but may also allow individuals, consumer advocacy groups, state and local governments, and even service providers to identify and take action against problematic patterns.

Another mechanism to improve accountability and ensure that discrimination complaints are addressed fairly and independently is the designation of a Digital Discrimination Ombudsperson. Similar to the Open Internet Ombudsperson, the Digital Discrimination Ombudsperson would be housed in the Consumer and Governmental Affairs Bureau, but would have independence and direct access to senior Commission officials.⁴⁶ The Ombudsperson should oversee the collection, resolution, and reporting of all consumer complaints related to digital discrimination and can serve as an expert resource for service providers or other organizations that have questions or concerns regarding digital discrimination rules.

H. Effective Enforcement Will Require Extensive Coordination and Resources

Combatting digital discrimination is a considerable undertaking that will require resources at every level of government. The Commission must effectively coordinate with the Attorney General and Department of Justice, as well as a variety of entities at the state and local level.

1. The Commission Must Coordinate with the Attorney General and Department of Justice

Section 1754(c) specifically directs the Commission and Attorney General to “ensure that Federal policies promote equal access to robust broadband internet service by prohibiting deployment discrimination” based on protected characteristics and factors determined by Commission rulemaking.⁴⁷ The clear imperative of this section is the careful review of

⁴⁶ *Open Internet Ombudsperson*, Federal Communications Commission, available at <https://www.fcc.gov/open-internet-ombudsperson> (last accessed May 16, 2022).

⁴⁷ 47 U.S.C. § 1754(c).

deployment projects to prevent deployment discrimination, and swift enforcement actions from both the Commission and DOJ to bring violators of federal into compliance.

2. *The Commission Must Coordinate with State and Local Governments*

Congress has required the Commission to coordinate with state and local governments to develop policies and practices that combat discrimination at every level. Specifically, section 1754(d) charges the Commission with developing “model policies and best practices that can be adopted by States and localities to ensure that broadband internet access service providers do not engage in digital discrimination.”⁴⁸ In completing this process, the Commission should solicit input from a variety of sources at the state and local level, including state attorneys general, public utility commissions, and state agencies that work on civil rights and antidiscrimination issues. The model guidelines should serve as a floor that states can exceed in order to be responsive to their particular concerns and needs. In addition, the Commission should explicitly clarify that it does not preempt state law enforcement, and it should work to support state enforcement efforts.

V. CONGRESS INTENDED THE FCC TO CONSTRUE “FEASIBILITY” QUESTIONS NARROWLY

The Commission solicits comment on how to interpret the requirement that any rules “tak[e] into account the issues of technical and economic feasibility presented by that objective.”⁴⁹ The Commission seeks additional comment on how to take these factors into account, what measures constitute either “technical” or “economic” feasibility, and the appropriate burden of proof on ISPs claiming technical or economic feasibility as a defense against deployment.⁵⁰ As explained in greater detail below, the purposes given in Section 1754(a)

⁴⁸ 47 U.S.C. § 1754(d).

⁴⁹ NOI at para. 19.

⁵⁰ *Id.* at para.s 24, 33.

and the language of Section 1754(b) make clear that Congress intended for the FCC to interpret this phrase narrowly. In contrast to other places in the Communications Act where Congress explicitly limited obligations to the *extent* economically or technologically feasible⁵¹ (essentially making economic and technological feasibility a “safe harbor” for non-performance) Section 1754(b) merely requires the FCC to “*take into account* issues of technological and economic feasibility.” Too broad an interpretation of these terms would allow the exemption to swallow the rule. Carriers already avoid low income areas because they feel serving these areas lead to lower profits.⁵²

Moreover, the Commission’s existing programs, and its obligation to eliminate digital discrimination, can eliminate the factors that contribute to any economic or technical lack of feasibility. This includes promoting the availability of middle mile facilities to stranded neighborhoods and counties where transport is the bottleneck, holding middle mile providers that fail to provide adequate facilities due to the income level, race, ethnicity, color, or religion of the relevant geographic region accountable, and offering both deployment and service subsidies through the Universal Service Fund.

A. “Economic and Technological Feasibility” Means ISPs Must Offer Service to the Greatest Extent Possible, Not Limit Service Based on Feasibility

In the past, when Congress intended to establish a safe harbor for technological and economic feasibility, it made that intent clear in the statutory language. For example, Congress expressly limited the duty of common carriers to provide number portability “to the extent

⁵¹ See, e.g., 47 U.S.C. §§ 223(c)(1) (“to the extent technically feasible”); 228(c)(5)(B) (“where the Commission determines it is technically and economically feasible”). See also 47 U.S.C. § 610(b)(2)(B)(iii) (regularly review exemption for hearing aid compatibility and remove exemption where compliance “is technologically feasible for telephones” subject to exemption.)

⁵² See Joe Kane and Jessica Dine, “Broadband Myths: Do ISPs Engage in ‘Digital Redlining,’” ITIF (2022) (arguing that ISPs do not discriminate on the basis of race, but income).

technically feasible.”⁵³ By contrast, Congress has often used language about feasibility to mandate action “to the extent technologically feasible.”⁵⁴ Thus, it is clear that Congress understands the difference between a safe harbor for economic feasibility versus a directive that the Commission ensure the maximum possible compliance – and here, Congress is seeking to ensure maximum possible compliance.⁵⁵

By asking the FCC to “*take into account* issues of technological and economic feasibility,” Congress intended to mandate the Commission to ensure, to the greatest extent possible, equal access to comparable broadband services. In light of the explicit directive of Congress in both the purpose section and the rulemaking requirements to affirmatively identify, target and eliminate discrimination based on the listed factors, the logical reading of “consider issues” means to consider how to eliminate these issues wherever possible and to affirmatively order coverage to the greatest extent possible.

Any other reading would allow this “consideration” to completely swallow the entire section and undermine the clear purpose of the statute to ensure that all Americans benefit from equal access to broadband internet service. For example, if a wireless provider does not build out sufficient coverage, it could claim that it is not “technologically feasible” to serve a low-income or minority population. If a handful of buildings in the urban core would yield lower profit, an ISP could claim it is not “economically feasible” to serve them. But this is *precisely* the kind of discrimination on the basis of income that Congress intended to eliminate. If the Commission

⁵³ 47 U.S.C. § 251(b)(2).

⁵⁴ 47 U.S.C. §§ 251(c)(2)(B) (requirement to provide interconnection “at any technically feasible point within the carrier’s network); 331(a) (requirement to provide at least one high-frequency station per state “if technologically feasible.”)

⁵⁵ *Compare* 47 U.S.C. § 228(c)(5)(B) (pre-subscribing to or block specific pay-to-call services only required where Commission determines it to be “economically and technically feasible”) with 47 U.S.C. § 554a(c)(2)(B)(ii) (cable operator must deliver signal directly to television or VCR “to the extent economically and technologically feasible.”).

were to adopt such a lax definition of economic or technological feasibility as to enable providers to excuse their behavior, it would perpetuate the very problem Congress intended to solve.

B. Determining Technical Feasibility Is Straightforward for Wireline, More Complicated for Wireless.

When considering economic and technical feasibility, the Commission should consider factors that minimize the likelihood of excusing non-performance and maximize equal access to broadband. For example, with regard to wireline services, if a provider can bring any type of wire to the physical premises, then it is clearly “technologically feasible” to provide the same level of service throughout the service area. There is no physical difference in pulling fiber to a building v. pulling coax v. pulling copper. This makes the question of technological feasibility for wireline fairly straightforward.⁵⁶

This is especially true where a broadband provider upgrades a portion of the service territory to fiber but declines to upgrade the remainder of the service territory. This is one of the very harms the statute aims to address – providers’ refusal to invest in upgrades for neighborhoods with either low expected rates of return or pernicious stereotypes regarding race.⁵⁷ A broadband provider which upgrades portions of its service area clearly has no technical problem upgrading the remainder of its service area.

⁵⁶ Traditionally, DSL varied by distance from the central office (CO). This is not generally a factor in urban and denser suburban areas, where copper lines remain close enough to the CO to avoid this sort of attenuation. As ILECs phase out their copper loops, concern over signal attenuation due to distance from the CO become increasingly irrelevant. The presence of a copper line to the home indicates, however, that it is technically feasible to upgrade to a fiber line—as ILECs have announced they plan to do in major parts of their footprints. *See* Diana Goovearts, “AT&T Wants to Cut Its Copper Footprint in Half by 2025,” *Fierce Telecom* (March 11, 2022), available at: <https://www.fiercetelecom.com/telecom/att-wants-cut-its-copper-footprint-half-2025>.

⁵⁷ Hence the statutory command to ensure equal access “within the service area of the provider.” 47 U.S.C. § 1754(a)(1).

Wireless service, however, poses a somewhat more complicated question. The same coverage in terms of towers may yield very different coverage results depending on terrain or other factors. As an initial step, the Commission should consider any area within the service area technically feasible to serve if differences in quality of service or overall coverage can be achieved through deployment of additional towers or microcells. A mere statement by a mobile provider that it chooses not to deploy in a given neighborhood or that its current network cannot achieve the same quality in low-income or non-white majority neighborhoods because the provider has not deployed sufficient towers or microcells should not be considered “technically infeasible.”

With regard to fixed wireless, technical feasibility should consider the ability of providers to use sophisticated (but increasingly common) antenna techniques.⁵⁸ Where the obstacle is objections by landlords, condo associations or housing associations, providers should be required to invoke the Commission’s Over-the-Air Reception Device (OTARD) rules.⁵⁹ Similarly, wireless carrier decisions to contest local restrictions should be judged on whether the wireless carrier has shown a similar reluctance in other portions of the service area. Where a wireless provider finds it worthwhile to challenge restrictions for wealthier or majority white portions of the service area, it must pursue challenges in low-income or majority-minority communities with

⁵⁸ See, e.g., Linda Hardesty, “Starry Model of Fixed Wireless on mmWave Could Pose Threat to Cable,” Fierce Wireless (April 5, 2022), available at <https://www.fiercewireless.com/tech/starrys-model-fixed-wireless-mmwave-could-pose-threat-cable>; John Engebretson, “T-Mobile’s Neville Ray: Fixed Wireless is ‘Super Exciting Use Case’ for 5G,” Telecompetitor (Nov. 15, 2021), available at <https://www.telecompetitor.com/t-mobiles-neville-ray-fixed-wireless-is-a-super-exciting-use-case-for-5g/>

⁵⁹ See 47 C.F.R. § 1.4000. As the Commission has explained: “The Commission’s OTARD rule prohibits laws, regulations, or restrictions imposed by State or local governments or private entities that impair the ability of antenna users to install, maintain, or use over-the-air reception devices.” *Updating the Commission’s Rule for Over-the-Air Reception Devices*, 36 FCC Rcd 537 ¶ 2 (2021). By invoking the OTARD rules where appropriate, a wireless provider can install necessary transmitter and receiver equipment to deliver equal access to broadband.

equal vigor. An inability to place necessary towers or microcells because the carrier does not challenge restrictions in portions of the service area the carrier does not wish to serve should not qualify as “technically infeasible.” In keeping with the principle that the Commission should “consider” technical feasibility as part of determining digital discrimination and to facilitate equal access to broadband, it should require the provider to make the same efforts throughout the service area to ensure full coverage.

C. Determining Economic Feasibility Includes Factors Such as Depreciation of Network Assets Over Time, Profitability for the Entire Service Area, and Participation in ACP, Lifeline and Other Federal and State Subsidy Programs.

Wireline providers in particular are likely to claim that equal access is not “economically feasible” (rather than not technically feasible). Fulfilling the statutory mandate to provide equal access throughout a given geographic area requires the Commission to view such claims with extreme skepticism. As discussed above, the definition of “geographic area,” if too narrow, could provide ISPs with the opportunity to game the system and discriminate against residents of majority-minority or low-income communities. Even with the service area properly defined, the Commission must take care to “consider factors” of economic feasibility in a way that ensures the broadest opportunity to access similar quality broadband (and similar terms and conditions).

Specifically, the Commission should evaluate not simply the short-term profitability of providing service. Instead, the Commission should consider economic feasibility over the life of the network. As financial experts have long recognized, the marginal cost of adding additional units to the network is virtually zero.⁶⁰ Network upgrades, such as upgrading from copper to fiber, generally pay for themselves over time.⁶¹ Once the initial deployment cost is recovered,

⁶⁰ See “The Fallacy of Marginal Cost Advantage,” Moffet Nathanson (July 1, 2020).

⁶¹ Ernesto Falcon, *Frontier's Bankruptcy Reveals Why Big ISPs Choose to Deny Fiber to So Much of America*, Electronic Frontier Foundation (Apr. 30, 2020),

carriers have relatively modest operating cost and virtually no marginal cost.⁶² Assessing economic feasibility within the service territory is therefore not simply a question of comparing quarterly profits. Rather, the Commission must take a longer-term view, considering the economic return for *the entire service area* over the *entire expected life of the network*. This complies with the statutory mandate to “consider issues of economic feasibility,” “identify” barriers to equal access, and eliminate them.

It should be noted that programs such as Lifeline and the Affordable Connectivity Program (ACP), should make providing service more “economically feasible,” because they ensure that low-income consumers can pay for broadband service. The recent announcement by several large providers shows that ACP and other subsidies make it economically feasible to offer comparable high speed access in low-income communities.⁶³ If providers do not wish to participate in a federal or state program that subsidizes affordable broadband, they have that choice. But their decision to spurn participation in these programs does not justify discrimination on the basis of income or other protected characteristics. If participation makes equal access throughout the service economically feasible, then the FCC rules should require providers to participate so as to “facilitate” the equal access mandated by the statute.

D. The Rules Should Address How Build Out and Middle Mile Connectivity Issues Cause Digital Discrimination

<https://www.eff.org/deeplinks/2020/04/frontiers-bankruptcy-reveals-cynical-choice-deny-profitable-fiber-millions>.

⁶² See Paul de Sa, “Broadband Financials: A Practical Primer,” Quandra Partners (May 2022); Ernesto Falcon, Cory Doctorow, and Katherine Trendacosta, “Frontier’s Bankruptcy Reveals Why Big ISPs Deny Fiber to So Much of America,” EFF (April 30, 2020), available at <https://www.eff.org/deeplinks/2020/04/frontiers-bankruptcy-reveals-cynical-choice-deny-profitable-fiber-millions>.

⁶³ See The White House, *President Biden and Vice President Harris Deliver Remarks on the Affordable Connectivity Program*, Youtube (May 9, 2022), <https://www.youtube.com/watch?v=tWN16Lqokt4&feature=youtu.be>.

As detailed above, Congress has tasked the Commission with identifying, preventing, and eliminating digital discrimination.⁶⁴ Thus, the Commission has an affirmative obligation to enact policies that could make it more technically or economically feasible for providers to serve those in protected classes.

Access to middle mile backhaul is a critical element for providing equal access to broadband, especially when comparing service areas. For example, the black rural south has less broadband availability than majority white rural areas of comparable income.⁶⁵ The Commission has also identified Tribal lands as among the least connected communities in America.⁶⁶ To the extent a lack of access to middle mile backhaul is a contributing factor to this form of digital discrimination, the FCC should identify it and take action to eliminate it. Such action might include ordering affordable interconnection at locations that make provisioning these communities “economically and technically feasible.”⁶⁷

Access to affordable backhaul is even more critical to providing equal access to mobile services and fixed wireless broadband. The Commission should identify where the absence of middle mile, or affordable interconnection with middle mile, creates unequal access to broadband. If the behavior of existing middle mile providers has created unequal access, the Commission should address that behavior under the authority of this Section.⁶⁸

⁶⁴ NOI at para. 20.

⁶⁵ See Dominique Harrison, “Affordability & Availability: Expanding Broadband in the Black Rural South,” Joint Center for Political and Economic Studies (Oct. 2021) at 17.

⁶⁶ See Transforming the 2.5 GHz Band for NextGen 5G Connectivity, *Notice of Proposed Rulemaking*, Docket No. 18-120, 33 FCC Rcd 4687 at ¶ 35 (May 10, 2018).

⁶⁷ For example, NTCA – the Rural Broadband Association have frequently filed on the difficulty of securing affordable interconnection.

⁶⁸ The FCC need not wait to reconsider its authority under 47 U.S.C. § 1302 to reach middle mile providers for purposes of identifying and addressing causes of digital discrimination. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (finding Section 706 is a source of FCC authority for net neutrality). On the other hand, any future notice of proposed rulemaking addressing middle mile providers should explicitly reconsider the determination of the Restoring Internet Freedom Order that Section 1302 does not provide the Commission with additional authority to ensure timely

E. The Commission Should Identify Federal Policies that Facilitate Economic and Technical Feasibility

Section 1754(b)(1) prevents providers and others from engaging (either now or in the future) in digital discrimination. But Section 1754(b)(2) does not stop at the behavior of others. It requires the Commission to examine and address *its own* actions – and those of other federal agencies – to determine how to use the policies under its control “to eliminate” digital discrimination and facilitate equal access for all. This “whole of government” approach to eliminate unequal access is further emphasized by the statutory requirement that the Commission work with the Attorney General to “ensure that Federal policies promote equal access to robust broadband” and develop model state and local codes.⁶⁹ While this goes beyond “taking into account issues of economic and technical feasibility,” the Commission should identify what policies at the federal level will address economic and technical feasibility, particularly where last mile or middle mile providers bypass entire communities.

As an initial matter, the Commission can and should tailor subsidy programs under its control to address access inequality. For example, the FCC can and should review the rules governing E-Rate to extend these programs into communities that have unequal access to broadband. For example, the Schools, Health and Libraries Broadband Coalition (SHLB) has pressed the FCC to waive the E-Rate cost allocation rules, to permit E-Rate recipients to extend their networks into local communities that lack equal access.⁷⁰ Another possibility would be to modify the Universal Service High Cost fund, once the current RDOF program expires, to explicitly upgrade networks that serve communities subject to digital discrimination.

deployment of broadband to all Americans. *Restoring Internet Freedom Order*, 33 FCC Rcd 311 (2017).

⁶⁹ 47 U.S.C. § 1754(c), (d).

⁷⁰ See SHLB website: “E-Rate and Emergency Connectivity Fund,” available at: <https://www.shlb.org/policy/E-rate>

Additionally, the Commission can use its authority to regulate spectrum to provide greater access to broadband. As the Commission itself has already noted, expanding access to unlicensed spectrum increases equitable access to broadband in both rural and urban communities.⁷¹ But, unlicensed spectrum is not the only tool the Commission can use to expand spectrum access – it can also leverage at least two existing laws. For example, Section 309(j)(3)(B) of the Communications Act already requires the FCC to use its system of competitive bidding to “promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and *businesses owned by members of minority groups and women.*” (Emphasis added.) Likewise, Section 309(j)(4) of the Communications Act explicitly instructs the Commission to use the designation of license areas to provide opportunities for women and minority-owned businesses to acquire licenses to “ensure” that they “are given the opportunity to provide spectrum-based services.”⁷² For over 25 years, the Commission has failed to find a working mechanism to achieve these mandates. The digital discrimination law should give the Commission new urgency to achieve these statutory commands.

Additionally, two recent innovations will enable the FCC to use its licensing authority to address digital discrimination and fulfill the statutory mandates of Sections 309(j)(3) and 309(j)(4). The Commission’s recent use of Section 307(e) licensing by rule authority, combined with the 2020 2.5 GHz Rural Tribal Priority Window, have allowed many Native Tribes to

⁷¹ See *In re Use of the 5.850-5.925 GHz Band, First Report and Order, Further Notice of Proposed Rulemaking, and Order of Proposed Modification*, ET Docket No. 19-138, 35 FCC Rcd 13440 at ¶ 24 (2020). See also Hannah Rank and Christopher Mitchell, “A Public Housing Digital Blueprint,” Institute for Local Self-Reliance and Community Networks (2019).

⁷² 47 U.S.C. §§ 309(j)(4)(C)&(D).

deploy their own networks using a combination of unlicensed spectrum, Citizens Broadband Radio Service (CBRS) General Authorized Access (GAA) spectrum, and 2.5 GHz licensed spectrum. The FCC can continue to expand the CBRS licensed by rule regime by providing access to licensed and unlicensed spectrum for communities that wish to build their own networks, or for small providers wishing to serve communities suffering from digital discrimination.

To increase connectivity in areas likely to suffer from digital discrimination, the Commission can make Tribal priority windows prior to auction a standard part of license distribution. In addition, the Commission should consider priority application windows for rural areas subject to persistent poverty⁷³ and areas the Commission finds are systematically excluded from access to broadband. The Commission could use the most recent mapping data to define such areas. Although Section 309(j)(1) generally requires the FCC to use auctions to resolve conflicting applications for exclusive licenses, the Commission should consider whether the mandates of Section 309(j)(3) and 309(j)(4) (in addition to Section 1754 authority) allow the Commission to avoid the auction requirement. In the 2.5 GHz window, the Commission limited conflicts by limiting the application to Tribal governments on rural tribal lands, and by creating an opportunity to resolve conflicting applications (rather than accepting the conflicting applications for filing). The Commission should explore the potential for these and other mechanisms to place licenses in the hands of communities suffering systemic digital discrimination in the planned notice of proposed rulemaking.

Lastly, the Commission can recommend to Congress and the National Telecommunications and Information Administration (NTIA), that NTIA make unused federal

⁷³ See CRS, “The 10-20-30 Provision: Defining Persistent Poverty Counties.” (April 14, 2022), available at <https://sgp.fas.org/crs/misc/R45100.pdf>.

spectrum available in Tribal lands for Tribal use. This would be consistent with both the Section 1754 “whole of government” approach and the Federal/Tribal trust relationship.⁷⁴

VIII. CONCLUSION

Congress recognized that digital discrimination is a harm that our nation can no longer ignore. Like other forms of redlining before it, if left to fester, digital discrimination will create decades of inequality. The Commission should use its full congressional authority to identify, prevent, and eliminate digital discrimination.

As we noted in our comments – digital discrimination is not only present when protected communities do not have access to broadband. It’s also present when protected classes have lower-quality broadband, pay higher prices per megabit, or receive worse customer service than those in non-protected classes. It doesn’t matter if internet service providers *intended* to offer unequal access to those in protected classes – it only matters that those protected classes don’t have the same access as a result of provider action or inaction.

To identify, prevent and eliminate digital discrimination, the Commission should create broad and flexible rules and definitions designed to catch new and novel instances of digital discrimination. It should also proactively implement policies designed to facilitate equal access to broadband for protected classes and to prevent providers from claiming that serving a protected class is “technically or economically” infeasible.

⁷⁴ See Statement on Policy on Establishing a Government-to-Government Relationship with Indian Tribes, *Policy Statement*, 16 FCC Rcd 4078 (2000); President Obama's Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, published at 74 Fed. Reg. 57,879 (Nov. 9, 2009).