

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

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

REPLY COMMENTS OF PUBLIC KNOWLEDGE

Nick Garcia
Policy Counsel
Jenna Leventoff
Senior Policy Counsel
Public Knowledge
1818 N Street, NW
Suite 410
Washington, DC 20036

June 30, 2022

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I. INTRODUCTION AND FRAMING

Public Knowledge submits these reply comments in response to the Federal Communications Commission’s (FCC) Notice of Inquiry regarding the prevention and elimination of digital discrimination.¹ As the Electronic Frontier Foundation et al (“Joint Public Interest Advocates”) discuss in their comments, “discrimination against low-income communities and communities of color has historically deprived residents of those communities of the opportunity to build wealth for themselves or their community.”² Similarly, the lack of high quality broadband will deprive the victims of digital discrimination from innumerable aspects of modern life and future economic benefits.

By enacting section 1754 of the Infrastructure, Investment and Jobs Act (IIJA), Congress determined, on a bi-partisan basis, that internet service providers are discriminating against protected classes (including low-income consumers). Consequently, it directed the FCC to prevent and eliminate digital discrimination.³

¹ See 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 Joint Comments of Electronic Frontier Foundation et. al. at 11, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (Filed March 8, 2022) (“Joint Public Interest Advocates Comments”).

³ See 47 U.S.C. § 1754.

Unfortunately, some commenters, particularly internet service providers, call for the Commission to focus on new infrastructure deployment and greater support for adoption as the sole mechanisms for eliminating digital discrimination.⁴ These are undoubtedly critical elements for accomplishing the Commission’s new mandates to promote access and proactively prevent and eliminate digital discrimination, but these efforts alone will not fulfill that mandate.⁵ Neither will the promulgation of rules based solely on an internet service provider’s intent. Congress has called upon the FCC to prevent and eliminate digital discrimination. To do so, it must assess whether there is a discriminatory impact in how broadband services are deployed or offered to the protected classes in a given area.

Beyond that assessment, the Commission must take both proactive and remedial steps to promote broadband adoption, and punish those whose actions lead to a discriminatory impact for protected classes. The Commission can do this by (1) taking proactive steps to promote broadband adoption; (2) utilizing a discriminatory impact analysis; (3) properly considering questions of technological and economic feasibility; (4) properly defining “given area;” (4) refusing to grant presumptions of innocence or safe harbors; (5) considering the quality of service; (6) collecting better data; and (7) and improving its informal complaint process. In these ways, the Commission can put an end to digital discrimination once and for all.

⁴ See Comments of T-Mobile USA, Inc. at 10, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (Filed May 16, 2022) (“T-Mobile Comments”); Comments of NCTA - The Internet and Television Association at 15, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (Filed May 16, 2022) (“NCTA Comments”); Comments of Verizon at 8, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (Filed May 16, 2022) (“Verizon Comments.”)

⁵ See 47 U.S.C. § 1754.

II. THE DOCKET OVERWHELMINGLY SUPPORTS COMMISSION ACTION TO PROMOTE BROADBAND ADOPTION

An overwhelming number of commenters write that in order to fully eliminate digital discrimination and close the digital divide, victims of discrimination must have access to the internet, must be able to afford the internet as well as computers or tablets, and they must have the skills to connect.⁶ Otherwise, “it is as if they do not have access at all.”⁷ Multiple parties in the record also note that this proceeding clearly gives the Commission the authority to [identify] and [address] remaining barriers to broadband investment and adoption.”⁸ Public Knowledge agrees that although the Commission already had the authority to promote broadband deployment and adoption through its universal service mandate,⁹ this proceeding provides an additional avenue for the Commission to implement initiatives to improve broadband adoption nationwide.

A. The Commission Must Promote Device Access for Everyone

One way the Commission can take action is to promote device access. Although a device is necessary to connect to the internet, roughly 41% of low-income households do not have a computer.¹⁰ Microsoft suggested that the “Commission could consider adopting a device

⁶ See e.g. Verizon Comments; T-Mobile Comments; Comments of AT&T, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May, 16 2022) (“AT&T Comments”).

⁷ See e.g. Comments of Next Century Cities at 6, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16, 2022) (“NCC Comments”).

⁸ T-Mobile Comments at 1; AT&T Comments at 5.

⁹ 47 USC § 254(b).

¹⁰ Emily A. Vogels, *Digital Divide Persists Even As Americans With Lower Incomes Make Gains in Tech*, Pew Research Center, Jun. 22, 2021, <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-asamericans-with-lower-incomes-make-gains-in-tech-adoption/> (last visited May 11, 2022).

subsidy... but without a co-pay or one-per-household limitation,” and we agree.¹¹ Although there are existing programs that can help those in need access a device, like the device discount within the Affordable Connectivity Program, those programs cannot fully bridge the device divide.¹² As we noted in our comments about the future of the Universal Service Fund, the Commission should model a new device program off of the Device Access for Every American Act, which would offer low-income families up to two vouchers that they can use to purchase a device directly from a retailer or refurbisher.¹³ Importantly, this model would overcome many of the problems facing existing programs.

B. The Commission Must Make Broadband Affordable for Everyone

The Commission should also use its authority stemming from this legislation and its universal service mandate to create a permanent broadband subsidy that resembles the current market price of service, and has broad eligibility. Many commenters in the docket write that affordability is one of the biggest barriers to connectivity.¹⁴ For example, Verizon cites a Pew Research study that says a staggering “45% of non-broadband users say a reason [that they do not subscribe to high-speed internet at home] is that the monthly cost of a subscription is too

¹¹ Comments of Microsoft at 11, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16, 2022) (“Microsoft Comments.”)

¹² Jenna Leventoff, *It’s 2021. Why is Redlining Still Happening?*, available at <https://publicknowledge.org/its-2021-why-is-redlining-still-happening/> (last visited June 30, 2022).

¹³ Comments of Public Knowledge at 16, *In the Matter of Report on the Future of the Universal Service Fund*, Docket No. 21-246 (filed February 17, 2022) (“Public Knowledge USF Comments”)

¹⁴ See e.g. Comments of National Urban League at 1, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16, 2022) (“National Urban League Comments”); Comments of Free Press at 3, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16, 2022) (“Free Press Comments”) (“15 million cited cost and affordability-related as reasons for non-adoption, and 10 million would have subscribed at a lower price.”)

expensive.”¹⁵ As we discussed in our comments regarding the future of the Universal Service Fund, the Commission can modify the Lifeline program so that it serves as a successor to the Affordable Connectivity Program.¹⁶ Multiple commenters have supported the concept of a permanent broadband subsidy that resembles the Affordable Connectivity Program.¹⁷ Such a program is likely to be one of the most impactful ways to promote broadband adoption and end systemic disenfranchisement.

III. THERE IS BROAD AGREEMENT THAT THE COMMISSION SHOULD DEFINE DIGITAL DISCRIMINATION USING A DISPARATE IMPACT TEST

Perhaps the most important takeaway from the initial round of comments is that many commenters agree that the Commission should define digital discrimination in terms of “disparate impact” rather than searching for “discriminatory intent.” While some of the service providers and industry associations argue that only discriminatory intent matters,¹⁸ that limited read is not consistent with the statutory directive, which concludes that discrimination is occurring and the Commission should both eliminate existing discrimination and prevent future

¹⁵ Verizon Comments at 4; Emily A. Vogels, *Digital Divide Persists Even As Americans With Lower Incomes Make Gains in Tech*, Pew Research Center, Jun. 22, 2021, <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/> (last visited May 11, 2022).

¹⁶ Public Knowledge USF Comments at 7.

¹⁷ NCTA Comments at 22 (The “commission can also help ensure affordability is not a hurdle to adoption by making the ACP permanent”); Comments of CTIA at 19, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (Filed May 16, 2022) (“CTIA Comments,”) (“Nonetheless, to increase adoption in instances where cost remains an issue, the Commission should examine how ACP and Lifeline could be reformed to continue to connect low-income households”).

¹⁸ Comments of USTelecom at iii, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May, 16 2022)(“Digital Discrimination Must Be an Intent-Based Inquiry”); Verizon Comments at 10 (“the Commission should provide in any proposed rules that ‘digital discrimination of access’ means ‘the intentional denial of access to a broadband internet access service because of income level, race, ethnicity, color, religion, or national origin.’”); AT&T Comments at 15 (“Section 60506 Targets Intentional Discrimination.”).

discrimination. Congress did not frame this provision as an open question that directed the Commission to act only if it found discrimination. Congress concluded there is discrimination and the Commission must address it. In short, Congress has tasked the Commission with addressing the disparate impacts of business policies that account for the current and historical inequities that impelled the passage of this legislation.

As addressed in our initial comments, the disparate impact standard is commonly used in other areas of nondiscrimination law, including under the Fair Housing Act.¹⁹ There was broad agreement across the docket that the Commission should incorporate a disparate impact test into its definition of digital discrimination. The Utility Reform Network stated that “the Commission should refrain from any path forward that directly or indirectly adopts broadband internet access service provider practices that may have a disparate impact.”²⁰ The National Urban League called for the Commission to “ensure any definition of digital discrimination factors in disparate impact and not just intentional discrimination with business case defenses.”²¹ Similarly, the Leadership Conference on Civil and Human Rights called for the Commission to “address digital discrimination that prohibits both disparate impact and intentional discrimination.”²²

¹⁹ Comments of Public Knowledge at 21, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (Filed May 16, 2022) (“Public Knowledge Digital Discrimination Comments.”)

²⁰ Comments of The Utility Reform Network at 10, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed March 8, 2022) (“TURN Comments”).

²¹ See e.g. Comments of National Urban League at 2, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 17, 2022) (“National Urban League Comments”).

²² Comments of the Leadership Conference on Civil and Human Rights at 5, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, (filed May 16, 2022) (“LCCHR Comments”).

Service providers and industry association comments emphasize their efforts to avoid policies and practices of intentional discrimination.²³ There is broad agreement that this is likely the case; no commenter has alleged or described any example of invidious or intentional discrimination directed at people or communities based on race, ethnicity, or religion. Nevertheless, as the Communications Workers of America commented, “the Commission should acknowledge that digital discrimination is a widely documented problem and be skeptical of attempts by industry or other parties to claim that digital discrimination does not exist or to otherwise minimize or obfuscate the Commission’s important charge from Congress.”²⁴

Service providers and industry commenters tacitly admit that they make deployment and service decisions based on income levels as part of typical return-on-investment calculations.²⁵ While those practices have historically been undertaken as an element of the profit-maximizing nature of private enterprise, these policies have resulted in disparate impacts that perpetuate inequalities and systemic disenfranchisement. These inequities disproportionately affect people

²³ See e.g. Comments of ACA Connects at 29-30, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16, 2022) (“ACA Connects Comments”).

²⁴ Comments of Communications Workers of America at 2, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16, 2022) (“CWA Comments”).

²⁵ See Joe Kane Jessica Dine, *Broadband Myths: Do ISPs Engage in “Digital Redlining?”*, Information Technology & Innovation Foundation (April 2022) (“top-line data supports the hypothesis that income, rather than race, is the driving factor in broadband connectivity”); see also Utah Rural Telecom Association at FN 7, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, (filed May 16, 2022) (“URTA Comments”) (“A reason why services may not be available in a specific geographic area is that it is economically infeasible to invest infrastructure [sic] in the area. This may be due to any number of economic factors such as density or income level, the prospect of a return on investment and recovery of costs is too uncertain to compel investment.”); Report of the Increasing Broadband Investment in Low-Income Communities Working Group at 15-16, Broadband Deployment Advisory Council, Federal Communications Commission (Dec. 2020) (“[Service providers] assert that allocation of limited investment resources generally flows first to markets where there is the greatest opportunity for a return on that investment. . . . Additionally, providers are more likely to invest in markets in which demand for “upstream” products and services augments their return on investment.”).

of color and marginalized communities, especially those that struggle with poverty.²⁶ It is notable that Congress included income level as one of the protected characteristics in 1754(b)(1), taking direct aim at these economics focused practices. As the Leadership Conference on Civil and Human Rights observes, “[i]t is clear, particularly with Congress’ emphasis on income, that Congress intended for the Commission to identify a wide range of practices and policies that lead to disparate treatment of people based on the characteristics protected.”²⁷

Simply put, the service providers must factor the impact of their decision making on the protected classes and that can only be achieved through Commission rules. Even policies that were made with no discriminatory intent gave rise to conditions that have been explicitly identified by a bipartisan agreement of Congress as a problem to be rectified and prevented. From inner-city low income neighborhoods to Tribal lands, we know this discriminatory impact is a fact. As noted by the Joint Public Interest Advocates, “the ISPs’ business decisions could be economically ‘rational’ while still having a disparate impact on consumers of color, consumers with disabilities, and other unserved and underserved communities.”²⁸ And they have. The only reasonable course of action for the Commission—given the mandate from Congress and the current state of the broadband ecosystem—is to adopt rules that will prevent discriminatory impacts through a combination of enforceable explicit prohibitions to change the rational calculus and constructive incentives aimed at remedying and rectifying past injustice.

IV. COMMENTERS HIGHLIGHT HOW THE COMMISSION SHOULD PROPERLY CONSIDER QUESTIONS OF TECHNOLOGICAL AND ECONOMIC FEASIBILITY AND DEFINE “GIVEN AREA”

²⁶ Joint Public Interest Advocates Comments at 21.

²⁷ LCCHR Comments at 5.

²⁸ Joint Public Interest Advocates Comments at 12.

A. Technical and Economic Feasibility Should Be Considered Narrowly

In our initial comments, Public Knowledge explained that statutory construction and the need to prevent loopholes requires the Commission to construe technical and economic feasibility narrowly and distinctly from “extent feasible” language used elsewhere.²⁹ Many commenters raised similar concerns about current and anticipated technical and economic objections that could be used to hinder the mission of preventing and eliminating digital discrimination.³⁰ For example, the Joint Public Interest Advocates point out the effect of artificial and incredibly short return on investment expectations of investors as “[a] driving factor of digital discrimination.” They explain “[it] is the three-to-five year return-on-investment (ROI) formulas that major ISPs follow when determining where to invest fiber.”³¹ Not unexpectedly, comments from service providers and industry associations argue that it is economic factors and expected return on investment that drives the decision to decline to serve certain areas.³²

Countering these narratives, the Joint Public Interest Advocates point out how the “longevity of [fiber optic] infrastructure gives providers a much longer window of flexibility to recover their investment and make a profit, turning economic feasibility into a question of

²⁹ Public Knowledge Digital Discrimination Comments at 28-30.

³⁰ Joint Public Interest Advocates comments at 13; TURN Comments at 8; NCC Comments at 12-13; Comments of National Digital Inclusion Alliance at 8, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, (filed May 16, 2022) (“The Commission should maintain a strict standard for what constitutes a valid instance of economic infeasibility.”) (“NDIA Comments”).

³¹ Joint Public Interest Advocates Comments at 15.

³² See AT&T Comments at 21 (“That “technical and economic feasibility” qualifier means what it says: providers may continue basing deployment decisions on ordinary business-case criteria, including projected demand and returns on investment.”); URTA Comments at FN 7 (“A reason why services may not be available in a specific geographic area is that it is economically infeasible to invest infrastructure [sic] in the area. This may be due to any number of economic factors such as density or income level, the prospect of a return on investment and recovery of costs is too uncertain to compel investment.”); USTelecom Comments at 14 (“Likewise, providers may not expand into a neighboring community where a competitor has already achieved a strong foothold in a community, particularly if the costs to deploy are high or if other impediments to deployment...are present.”).

expected ROI.”³³ Similarly, The Utility Reform Network argues that when considering economic feasibility, infrastructure investments must be viewed as “a long-term asset in which costs should be appropriately recuperated over the course of tens of years and not under a short time horizon such as a three-to-five-year window.”³⁴

While there is no doubt that broadband infrastructure deployment is complex and expensive, the Joint Public Interest Advocates point out that “[i]t is critical for the FCC to understand that prohibiting discrimination will not force ISPs to deploy into unprofitable markets. Rather it will drive them to take a holistic look at whole communities where the aggregated revenues will still repay overall costs of full deployment and generate expected profit, just over a longer time frame.”³⁵ When considering what is technically or economically feasible, the Commission should demand that providers look at how to build up and connect communities in the long-term, rather than through the short-sighted perspective of near-term profit.

A. “Area” Must Mean More Than Merely “Current Service Area”

It is no secret that this legislation was born out of observations that the historic practice of redlining has continued to have echoes into the patterns of digital connectivity.³⁶ Redlining practices were at once both subtle and brutal in the bright lines that it drew between communities, carving up cities and counties into “desirable” and “undesirable” areas. Yet service providers, when addressing the notion of examining a “given area” for discrimination choose to interpret “area” as either coextensive with their current service area or entirely irrelevant.

³³ Joint Public Interest Advocates Comments at 16.

³⁴ TURN Comments at 17.

³⁵ Joint Public Interest Advocates Comments at 15.

³⁶ Comments of Lawyer’s Committee for Civil Rights Under Law at 6-9, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16, 2022) (“LCCRUL Comments”); *see also* Joint Public Interest Advocates Comments at 4; TURN Comments at 6-8.

For instance, AT&T chooses to define “service area” when used in Section 1754(a)(1) as coextensive with existing broadband service areas.³⁷ Even then, AT&T considers the language of this section “precatory and non-binding” and as merely expressing “a national policy goal of ‘equal access’ within each provider’s broadband service area, but it neither imposes nor authorizes the Commission to impose legally binding obligations on private entities.”³⁸ In other words, service providers won’t even accept responsibility for discrimination discovered *within their existing service areas*.

Yet, when confronted with the incontrovertible mandate from Congress to the Commission to “adopt final rules to facilitate equal access to broadband internet access service,” AT&T now draws a new distinction: “Whereas subsection (a)(1) addresses ‘equal access ... within the service area’ of each broadband provider, subsection (b) directs the Commission to ‘facilitate equal access’ nationwide.” AT&T reads “nationwide” into the statutory language and goes on to suggest that the exclusive mechanism for facilitating access “nationwide” is through subsidies to increase deployment and adoption. Yet, equal access is clearly defined in (a)(2) as “the 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” (emphasis added). The clear intent of Congress was to compare the service offered within distinct geographical areas—not service areas—to ensure that communities were not suffering the effects of discrimination.

To allow service providers to use their own service areas—shaped by the historical legacy of redlining and defined by the deployment and service inequities that this legislation is meant to redress—as the only meaningful definition of a “given area” would be nonsensical. To

³⁷ AT&T Comments at 12 (“First, because the term ‘such service’ means broadband service, the phrase ‘the service area of a provider of such service’ means ‘broadband service area.’”).

³⁸ AT&T Comments at 13.

redress the problem of digital discrimination, the Commission must compare communities, neighborhoods, and households that are outside of a provider's current service area, but similarly situated or part of a rational contiguous geographic area that is being served, to determine if service providers are fulfilling their obligations to provide equal access.

For example, Next Century Cities highlights how “some providers claim that they serve an entire population in a particular geographic area, [but] the ability of a consumer to engage that provider for service varies widely. Several municipalities stated that city block-level data would most accurately allow them to identify and address digital discrimination challenges in their communities.”³⁹ On the other hand, in a rural county, the Commission may need to zoom out to determine that despite similar density and geography, a low-income or majority minority community has not been served while more affluent neighbors have been.

Examining only whether service providers are being internally consistent within their own service area is insufficient to fulfil the mandate to eliminate digital discrimination. The Commission must look to areas that are more flexible and broadly defined than what the service providers have already set up for themselves.

V. THE COMMISSION SHOULD NOT GRANT PRESUMPTIONS OF INNOCENCE OR OFFER SAFE HARBORS

Some commenters have sought presumptions of innocence, or worse, safe harbors from the Commission's eventual digital discrimination rules. However, granting these requests would run afoul of the Commission's bipartisan Congressional mandate because presumptions of innocence or safe harbors will enable instances of digital discrimination to slip through the cracks. Instead of granting these requests the Commission must proactively draft and enforce its rules so as to capture *every* instance of digital discrimination.

³⁹ NCC Comments at 8.

A. The Commission Should Not Grant Presumptions of Innocence or Safe Harbors for Any Provider Serving Less than 100% of the Required Area

T-Mobile has argued that the FCC should presume that any provider who has deployed to 90% of their service area has not digitally discriminated. However, there is no fathomable way that such a presumption would adhere to Congress’s mandate that the FCC “should take steps to ensure that *all* [emphasis added] people of the United States benefit from equal access to broadband internet access service.”⁴⁰ Merriam Webster defines the word all as “every member or individual component.”⁴¹ By definition then, allowing providers to serve just 90 percent of a service area is not ensuring equal access to *all* people.

B. The Commission Should Not Grant Presumptions of Innocence or Offer Safe Harbors for Providers Participating in Lifeline or the Affordable Connectivity Program

T-Mobile has also argued that the Commission should presume that any provider who participates in Lifeline or the Affordable Connectivity Program has not digitally discriminated.⁴² However, as noted above, programs that help make broadband more accessible and affordable are just part of the equation for ending digital discrimination. A presumption such as this would enable providers to discriminate, even intentionally, without reproach, so long as they accept government funding through the ACP. Such a proposal is absurd, and would clearly run afoul of the Congressional directive to eliminate digital discrimination.

C. The Commission Should Not Presume that Eligible Telecommunications Carriers (ETCs) Are Not Digitally Discriminating

The Utah Rural Telecom Association has asked the Commission to adopt a presumption that eligible telecommunications carriers (ETCs) “provide equal access to supported services” on

⁴⁰ 47 U.S.C. § 1754(a)(3).

⁴¹ Merriam-Webster.com Dictionary, *All*, Merriam-Webster (last accessed Jun. 30, 2022), <https://www.merriam-webster.com/dictionary/all>.

⁴² T-Mobile Comments at 18.

the grounds that ETC's already have to provide "equal access for supported services to all end-users in a designated area."⁴³ However, just because a company has rules imposed upon them, does not mean they adhere to those rules. In fact, there have been multiple examples of ETCs failing to comply with various rules.⁴⁴ Earlier this month, the Commission entered into a consent decree with American Broadband because it sought Lifeline support for ineligible and even deceased consumers.⁴⁵ We cannot risk presuming innocence on the mere idea that rules already exist. Moreover, if ETC's are following the rules already – they should not mind the Commission's enforcement of rules that other providers are not following.

VI. THE COMMISSION SHOULD NOTE COMMENTS ABOUT QUALITY OF SERVICE METRICS, DATA COLLECTION, AND CHANGES TO THE CONSUMER COMPLAINT PROCESS

A. Many Comments Highlighted the Importance of Considering Quality of Service Metrics in the Context of Equal Access

Numerous comments addressed the importance of quality of service in the context of equal access. The mere existence of service is only the first step in ensuring equal access; customers must also be able to adopt service and be able to receive stable and reliable service. Degraded or inefficient service can mask the realities of digital discrimination, making communities seem well-served on paper while suffering from low-quality service in reality.

⁴³ URTA Comments at 2.

⁴⁴ See, Federal Communications Commission, *Order in the Matter of NewPhone Wireless LLC*, File No. EB-IHD-20-00031449, (Dec. 17, 2021), <https://www.fcc.gov/document/fcc-settles-lifeline-violations-newphone-wireless-100k>; Department of Justice, *TracFone Wireless to Pay \$13.4 Million to Settle False Claims Relating to FCC's Lifeline Program* (Apr. 4, 2022), <https://www.justice.gov/opa/pr/tracfone-wireless-pay-134-million-settle-false-claims-relating-fcc-s-lifeline-program>.

⁴⁵ See Federal Communications Commission, *Order In the Matter of American Broadband & Telecommunications Company*, File No. EB-IHD-17-00023554 (June 3, 2022), <https://www.fcc.gov/document/fcc-settles-lifeline-investigation-american-broadband>.

To combat this issue, Public Knowledge and many other commenters have noted the importance of examining numerous quantitative and qualitative quality of service metrics from neutral and reliable sources. The National Broadband Mapping Coalition urges the Commission to include latency information as one such metric, describing how “[l]atency is a meaningful indicator of how well a consumer will be able to interact with others online, especially for high bandwidth applications such as video conferencing, business application, and gaming... Jitter, packet loss, and bufferbloat (latency under load) each have a direct impact on actual experience of Internet users. When any of these metrics are performing poorly, it can be especially detrimental to the performance of real-time applications that support activities.”⁴⁶ Similarly, NTCA – The Rural Broadband Association, notes that metrics like speed, capacity, and latency “are the primary metrics that NTCA has supported for inclusion in broadband disclosure labels because they are tied most directly to the broadband experience of the customer and are the overarching factors in the quality of the service.”⁴⁷ The Joint Public Interest Advocates also comment that “[i]n addition to speed, other components of broadband service that the Commission should include in its analysis are latency and data caps.”⁴⁸

Beyond quantitative quality of service metrics, other commenters highlight the importance of qualitative service metrics. The Leadership Conference on Civil and Human Rights recommends quality of service metrics be interpreted broadly to include “non-technical aspects of service quality, such as customer wait times, service outages or other service quality

⁴⁶ Comments of National Broadband Mapping Coalition at 3, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16, 2022) (“NBMC Comments”).

⁴⁷ Comments of NTCA- The Rural Broadband Association at 8, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16).

⁴⁸ Joint Public Interest Advocates Comments at 4.

metrics.”⁴⁹ A similar sentiment is echoed by the Multicultural Media Telecom and Internet Council and the Lawyers’ Committee for Civil Rights Under Law.⁵⁰

B. Commenters Emphasize the Importance of Data Collection

A critical and recurring theme in comments is the importance of reliable data sources, collection, and methods. One of the prongs of the Commission’s digital discrimination mission is to “identify[] necessary steps for the Commissions to take to eliminate discrimination.”⁵¹ To correctly identify instances and the root causes of digital discrimination, the Commission requires accurate and reliable data about broadband deployment, adoption, pricing, quality of service, and other factors that weigh upon equal access.

Much of this data has, historically, been self-reported by service providers. The Joint Public Interest Advocates note that this “reliance on self-reported data from ISPs is deeply problematic. In the past, ISPs have provided the FCC with woefully inaccurate information that significantly overstates deployment.”⁵² Creating a regulatory framework to identify, prevent, and eliminate digital discrimination with strong enforcement mechanisms would be impossible if the Commission continues to rely on service providers as their primary data source. Service

⁴⁹ LCCHR Comments at 5.

⁵⁰ Comments of Multicultural Media Telecom and Internet Council at 4, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed May 16) (“MMTC Comments”) (“Furthermore, “equal access,” as defined in subsection 60506(a), should be construed broadly to include non-technical quality-of-service attributes, such as equal opportunity in procurement, transactions, and advertising, in addition to the core technical criteria of speed, capacity, and latency.”); LCCRUL Comments at 18 (“In addition to the technical metrics enumerated in the statute, the Commission should consider qualitative aspects of service that can impact a subscriber’s broadband usage—what one might call ‘bureaucratic friction.’ These include the caliber of customer service, which can be measured by number of support channels, support wait times and call durations, available languages, and representative expertise”).

⁵¹ 47 U.S.C. § 1754(b)(2)

⁵²Joint Public Interest Advocates Comments at 22

providers continue to ignore and downplay digital discrimination, dismissing any evidence that is presented.

For example, in the NOI, the Commission asked for comment on several studies that demonstrate digital discrimination.⁵³ In its comments, USTelecom dismissed these studies out of hand, with little explanation beyond saying “each incorrectly equates correlation with causation” and “[e]ven when parties simply cite demographics in a particular area as evidence of discrimination, there are many other reasons why deployment might not have occurred.”⁵⁴ AT&T’s comments similarly attack the same suite of studies, mostly by bashing the sources and trying to provide alternative hypothetical explanations for the evidence of digital discrimination in those reports. In both instances, the industry comments bristle at the notion that the disparities observed in the reports represent discrimination, and leap to try to explain away these inequities. These comments evidence, at best, a complete failure to understand that it is the *effects* of decades of telecom policy, not the motives, that are at issue. At worst, this dismissal indicates an intent to continue to obfuscate and undermine evidence for digital discrimination in order to avoid regulatory scrutiny that would challenge the entrenched business practices.

Studies of digital discrimination are challenging to complete, and it is indisputable that the robust public data sources needed to analyze digital discrimination are lacking. This fact only highlights what many commenters said about data collection: it is imperative for the Commission to collect information itself. The National Digital Inclusion Alliance, National Broadband Mapping Coalition, Multicultural Media Telecom and Internet Council, and other commenters all provided detailed and considered comments on what data to collect and how to collect it.⁵⁵

⁵³ NOI para. 28. See 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. 28 (Mar. 17, 2022) (“NOI”).

⁵⁴ USTelecom Comments at 17.

⁵⁵ NDIA Comments at 5-7; NBMC Comments 4-6; MMTC Comments at 19-20.

C. Commenters Broadly Agree That Changes to the Informal Complaint Process Are Needed

In our initial comments, Public Knowledge emphasized the importance of the informal consumer complaint process and proposed changes to make it more robust, accessible, and adapted to complaints about digital discrimination.

Many other commenters expressed similar sentiments about the need to adapt the informal consumer complaint process to serve this new function. Next Century Cities, The Utility Reform Network (“TURN”), and the National Digital Inclusion Alliance (“NDIA”) all highlighted the need for additional complaint options, raising concerns with barriers in the current online complaint process and with how paper applications do not have the same follow-up procedures as complaints submitted online.⁵⁶ Accessible options that serve multiple languages, allowing for complaints by telephone, and easily accessible resources about digital discrimination will make informal consumer complaints more accessible.

The Commission can also take steps to ensure it maximizes the impact of the informal complaint process. TURN and NDIA both call for complaints to include demographic data, and for consumer complaints to be analyzed in the aggregate and shared publicly or with state and local authorities to better identify underlying patterns of discrimination that complainants themselves may be unaware of.⁵⁷ We agree that maximizing the amount of information collected from a consumer as part of an informal complaint, and creating partnerships and transparency surrounding complaint data, will increase the efficiency and utility of the informal complaint process. Next Century Cities also called for a separate portal for complaints from state, local, or Tribal governments.⁵⁸ A separate portal, processing path, or at the very least a way to distinguish

⁵⁶ TURN Comments at 27-29; NCC Comments at 14; NDIA Comments at 20-21.

⁵⁷ TURN Comments at 27-29; NDIA Comments at 20-21.

⁵⁸ *Id.*

such complaints, would certainly enable the Commission to identify and respond to particularly substantive complaints and it would promote cooperation with state, local, and Tribal authorities.

Finally, EveryoneOn proposes that the Commission require ISPs to display information about, and contact information for, the Commission’s digital discrimination complaint process “prominently on bills and emails.”⁵⁹ We agree that this would be a good way to promote consumer awareness of the complaint process.

VII. CONCLUSION

Congress has seen that there is a problem, and has taken action to fix it. It’s now time for the Commission to do the same. The record clearly shows that the Commission must take proactive steps to promote equal access, and reactive steps to punish those whose actions lead to a discriminatory impact. Without action on both of these fronts, systemic disenfranchisement will continue for generations to come. The time is now for the Commission to ensure equity – even if it means challenging entrenched business practices.

⁵⁹ Comments of EveryoneOn at 2-3, *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (filed March 8, 2022).