

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

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

**COMMENTS OF PUBLIC KNOWLEDGE, BENTON INSTITUTE FOR
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To: The Commission

Public Knowledge, Benton Institute for Broadband and Society,¹ and Electronic Privacy Information Center (collectively “Public Interest Advocates” or “PIA”) file these Comments with regard to the above captioned proceeding.

SUMMARY

Rarely does Congress speak as definitively and clearly as it did with Section 1754: ordering the Commission, within 2 years to enact regulations to “eliminate” existing digital discrimination on the basis of “income level, race, ethnicity, color, religion, or national origin” and to prevent it from recurring in the future.² The Commission should interpret this instruction for what it is: a rebuke of the last 25 years of failed policies and “light touch” regulation under the apparent delusion that for the first time in 90 years “the market” would bring universal service to all Americans without Commission action. In the Telecommunications Act of 1996, Congress explicitly prohibited discrimination on the “basis of race, color, religion, national

¹ The Benton Institute for Broadband & Society believes that communication policy - rooted in the values of access, equity, and diversity - has the power to deliver new opportunities and strengthen communities. These comments reflect the institutional view of the Benton Institute for Broadband & Society, and, unless obvious from the text, is not intended to reflect the views of its individual officers, directors, or advisors.

² Infrastructure Investment and Jobs Act, Pub. L. 117-58 § 60506(b), codified at 47 U.S.C. § 1754(b).

origin, or sex,”³ and required the Commission to ensure “timely” deployment of broadband to all Americans.⁴ But 25 years later, Congress was forced to find that the “persistent digital divide . . . disproportionately affects communities of color, lower-income areas, and rural areas, and the benefits of broadband should be broadly enjoyed by all.”⁵

Unsurprisingly, carriers and their allies have sought to obscure and undermine the Congressional mandate to shift from a regime of “hopes and prayers” to one of rules and enforceable rights. They urge the Commission to adopt the most toothless, least effective regulations possible. Essentially they ask the Commission to treat Section 60506 of the IIA as it treated Section 706 of the 1996 Act before it, as a “hortatory” but ultimately meaningless provision.⁶ For the reasons set forth below, the Commission should reject these efforts as contrary to the plain language of the statute and the record compiled in response to the *Notice of Inquiry* supporting Congress’ finding of a persistent digital divide that disproportionately impacts low-income communities and communities of color.

Part I sets out the history of non-discrimination and universal service rooted in the Communications Act. It traces Congress’ specific intent as part of the Telecommunications Act of 1996 that the Commission prevent discrimination against low-income and minority communities in the deployment of new communications technologies Congress expected the 1996 Act would produce. It then traces the 25 years of failed “light touch” regulation while an increasingly impatient Congress pushed the Commission to use its existing authority to address the increasingly obvious digital divide impacting low-income communities and communities of color. Finally, the Commission’s explicit statement that it considered deregulation more

³ Telecommunications Act of 1996, Pub. L. 104-104 § 104.

⁴ *Id.* at § 706.

⁵ IIA § 60106(2)-(3), codified at 47 U.S.C. § 1701(2)-(3).

⁶ *See In re Restoring Internet Freedom, Declaratory Ruling, Report & Order, and Order*, 33 FCC Rcd 311, ¶¶ 267-83 (2017).

important than using its authority to prevent discrimination in broadband deployment in the RIFO Remond Order coupled with the Commission's self-congratulatory 14th Broadband Deployment Report despite the evidence of the COVID-19 Pandemic of widespread digital discrimination persuaded Congress to act in an unambiguous manner. In the IJJA, Congress adopted explicit findings setting out the Commission's failures, explicit policies to instruct the Commission that Congress genuinely intended universal service to include low-income and minority communities, and an explicit requirement to create – within 2 years – rules and enforcement mechanisms to eliminate the digital discrimination created by the Commission's preference for deregulation over universal service.

This history provides a framework for the creation of the rules required by Congress which rebuts the efforts by carriers to undermine Congress' clear instructions. Section 1754 is clearly part of the Communications Act, and Congress expects the Commission to use all the tools at its disposal to “eliminate” existing inequality of access and to prevent digital discrimination from recurring going forward.

Part II discusses what Congress intended when it required the Commission to “take into account issues of economic and technical feasibility.” Rather than an excuse for failure to deploy, as carriers have suggested, Congress clearly intended for the Commission to adopt presumptions of technological and economic feasibility. As informed by the 90-year history of the Act, Congress did not intend ISPs to do the impossible. Clearly Congress intended to permit reasonable time to deploy and for the Commission to recognize the differences between the different technologies used to deploy broadband. “Economic and technological feasibility” are about rebutting the parade of horrors offered by carriers as an excuse for inaction, not about creating safe harbors for discrimination. Case-by-case adjudication will allow the Commission

ensure reasonable deployment while holding ISPs accountable in the manner intended by Congress.

Part III reiterates that for those ISPs already subject to a franchise area or license area for a non-broadband services, the franchise or license area is the appropriate “service area” for the statute. Where the ISP does not have a license or franchise area, the Commission should consider (in the case of large providers) using the Metropolitan Statistical Area (MSA) where appropriate. The Commission should be cautious when addressing complaints against smaller providers or providers restricted to a particular service area by law.

Part IV addresses the question of disparate impact versus specific intent. Congress has made it clear that it intends the Commission to ensure universal service for the benefit of the nation as well as to protect those suffering from digital discrimination. This is consistent with the Commission’s 90 year history of preventing “unjust and unreasonable discrimination” and bringing communications service to all Americans. As explained in greater detail in **Part V**, the Commission must consider the vitality of experience for the protected class – especially with regard to speed, price and service.

Part VI and **Part VII** explain how the Commission can use its other programs and areas of jurisdiction – such as the Universal Service Fund and spectrum policy – to ensure equal access to broadband. In particular, the Commission must focus on ensuring equal access to broadband in Tribal areas. Because Tribes often lack even a single provider in the immediate vicinity, the rules adopted pursuant to Section 1754(b) are likely to be insufficient on their own to ensure equality of broadband access. The additional steps described in these sections therefore provide a necessary complement to the rules required by Section 1754(b), not a replacement for the rules.

Finally, **Part VIII** describes necessary enforcement mechanisms to make the rules adopted pursuant to Section 1754(b) effective. The suggestion by carriers that the Commission lacks authority to actually enforce the rules Congress commanded the Commission to enact should be rejected as ridiculous. Congress passed Section 1754 because it wanted the Commission to *stop* aggravating the digital divide and to take effective action to “ensure” equal access to broadband for all Americans. Had Congress intended the Commission to engage in a meaningless and ineffectual exercise, it could simply have left the Commission to continue its “light touch” policy of deregulation.

I. THE PROHIBITION ON DIGITAL DISCRIMINATION IS ROOTED IN THE COMMUNICATIONS ACT AND THE COMMUNICATIONS ACT PROVIDES THE FRAMEWORK FOR ITS IMPLEMENTATION AND ENFORCEMENT.

Almost 90 years, in the very first words of the Communications Act, Congress charged the FCC “to make available, so far as possible, to all the people of the United States,” access to a world-wide communications network at just and reasonable rates.⁷ Hand in hand with this positive agenda, Congress also made any “unjust and unreasonable” discrimination by carriers illegal.⁸ Congress invested the Commission with “broad authority” to achieve these twin goals of facilitating access and prohibiting discrimination.⁹ These powers include the power to issue regulations, to enforce those regulations and perform “any and all acts . . . not inconsistent with this chapter, as may be necessary in the execution of its function.”¹⁰ Congress further instructed

⁷ June 19, 1934, ch. 652, title I, § 1, 48 Stat. 1064, codified at 47 U.S.C. § 151. (“Communications Act of 1934”). As discussed below, Congress made explicit in the Telecommunications Act of 1996 that “all” means “without discrimination on the basis of race, color, religion, national origin, or sex.”

⁸ *Id.* at § 202(a).

⁹ See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (“The Commission was expected to serve as the ‘single Government agency’ with ‘unified jurisdiction’ and ‘regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.’ It was for this purpose given ‘broad authority.’”)

¹⁰ Communications Act of 1934 § 4(i).

that: “It shall be the duty of every person . . . to observe and comply with [the Commission’s] orders so long as the same shall remain in effect.”¹¹

In short, there is nothing more fundamental to the structure of the Communications Act and the duties of the Commission than ensuring for all Americans universal access, without discrimination, to communications services. Congress gave the Commission broad authority to accomplish this goal, including the authority, where necessary, to issue orders to those not directly under the Commission’s authority as providers of licensed services. Where Congress has found the FCC laggard or ineffective in this responsibility to ensure and facilitate universal access, Congress has given the Commission more detailed instruction and more specific authority to address this deficiency and target the specific populations that remain excluded from access or subjected to unreasonable rates, unreasonable practices, or unreasonable discrimination. At times, Congress has used carrots—such as subsidies. At other times Congress has used the stick of direct regulation.

While technologies and the identity of specific vulnerable populations may change, certain things remain constant. Specifically, Congress does not care about motives or accept excuses. Congress wants the inequality in access to communications eliminated. Particularly where Congress has found it necessary to identify specific at-risk populations, Congress expects swift, vigorous and forceful action. Whether the specific communities Congress identifies are the hearing or visually impaired,¹² rural communities,¹³ low-income communities,¹⁴ or people of

¹¹ *Id.* at. § 416(c).

¹² *See, e.g.*, Twenty-First Century Communications and Video Accessibility Act of 2010, P.L. 111-260.

¹³ *See, e.g.*, 47 U.S.C. § 254(b)(3).

¹⁴ *Id.*

color,¹⁵ the responsibility of the FCC remains the same—eliminate the existing disparity and prevent it from recurring while affirmatively fostering inclusion/equal access.

Importantly, when interpreting the requirements for the rules mandated by Section 1754, Congress does not invite the FCC to question its legislative determinations. Nor does Congress allow the FCC to inquire into the motivations of providers as a precondition of curing disparities and taking mandatory steps to foster inclusion.¹⁶ Congress did not invite the FCC to question whether broadcasters or providers of telecommunications equipment deliberately wished to exclude deaf people before mandating subtitles and hearing aid compatibility.¹⁷ Congress did not permit the FCC to inquire if racial animus or hostility to a particular religion is the cause of discrimination before declaring it “unreasonable.”¹⁸ Congress does not care *why* a community—or even an individual—cannot participate equally in our national communications infrastructure. Rather, as Congress has explained on numerous occasions the goal of mandating universal service is not remediation of past wrongs. The goal of universal service is to achieve the benefits to the nation of a communications network that includes the entire nation, and to ensure that *all Americans* receive these benefits.¹⁹ As the Commission itself has recognized, universal service is, and always has been, one of the core fundamental values Congress has consistently sought to achieve and protect.²⁰

¹⁵ 47 U.S.C. § 309(j)(4)(C).

¹⁶ By contrast, where Congress *does* intend the Commission to consider the motives or state of mind of those it regulates, Congress instructs the FCC to do so. *See, e.g.*, 47 U.S.C. § 333 (prohibiting “willful or malicious” interference with authorized radio signals); 47 U.S.C. § 643 (violation of law to “willfully and knowingly” or “recklessly” submit false broadband coverage data.)

¹⁷ 47 U.S.C. § 613.

¹⁸ *See, e.g.*, *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003).

¹⁹ *See, e.g.*, 47 U.S.C. §§ 151, 254, 1301, 1701.

²⁰ *See, e.g.*, *In re Technology Transitions, et al.* 29 FCC Rcd 1433, 1450 (2014) (declaring universal service a fundamental “enduring” value of Communications Act).

For this reason, the Commission does not inquire into the motive for exclusionary conduct or practices that create disparate impacts on access and deployment. To the contrary, the Commission entirely embraces the concept that rational economic actors will behave in ways that produce unjust and unreasonable discriminatory impacts—especially where serving specific communities would lower profits. As a consequence, the Commission’s universal service jurisprudence in the licensing context is replete with rules to prohibit “cherry-picking” or prevent carriers from refusing to serve less profitable areas. For example, the Commission has consistently refused to forbear from Section 214 discontinuance requirements for telecommunications carriers because it is aware that rational, profit maximizing businesses will eagerly discontinue service to areas with low rates of return.²¹ The Commission requires build out obligations for wireless carriers because it is fully aware that rational profit maximizing carriers will otherwise decline to deploy in rural communities where deployment costs are higher and customers are fewer and poorer.²²

It is in this context that the Commission must understand 47 U.S.C. § 1754. It is simply another “universal service” statute where Congress recognizes that the market has failed to provide equal access (here, to broadband) to specific vulnerable and excluded populations.²³ Unsurprisingly, these specific populations overlap with traditionally marginalized

²¹ In re Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, 14 FCC Rcd 11364, 11381 (1999) (declining to forbear from exit notification requirements and requiring notification of state PUCs because of “concern that, as local exchange markets become increasingly competitive, many currently dominant LECs may find themselves under increasing pressure to reduce or eliminate service in unprofitable areas.”)

²² See *In re WTB Announces for Relicensing 700 MHz Spectrum in Unserved Areas*, 34 FCC Rcd 350 (WTB 2019) (“construction obligations promote the Commission’s goal of making spectrum available, so far as possible, to all the people of the United States regardless of where they live.”)

²³ Except where we are specifically citing to section 254 of the Telecommunications Act of 1996, throughout this comment, we refer to “universal service” in its more general sense, where Congress establishes and directs the Commission to adopt rules to promote access for all.

communities—the poor and those who have suffered systemic discrimination—as evidenced by the strong overlap between the digitally excluded and historically “redlined” communities.²⁴ As discussed below, based on its lengthy experience with inequalities of access to vital communications services and the persistence of these inequalities absent regulatory intervention, Congress in the Telecommunications Act of 1996 identified the risk that low-income communities and traditionally redlined communities would once again suffer exclusion from the advanced communications services it intended the 1996 Act to promote.

Unfortunately, Congress’ initial hope that a broad anti-discrimination prohibition coupled with express universal service principles and subsidies would avert these disparities has failed. The last 25 years has therefore seen an increasingly impatient Congress push the Commission with increasing urgency to address the continued failure of carriers to deploy “advanced telecommunications capability” in the form of broadband equally and affordably to all, culminating in the current express command for the Commission to “facilitate equal access to broadband internet access service” and to “identify necessary steps to take to eliminate” discrimination.

A. 47 U.S.C. § 1754 Is the Culmination of 25 Years of Congressional Direction to Ensure Equal Access to Broadband for Low-Income Communities and Prohibit Discrimination “Based on Income Level, Race, Ethnicity, Color, Religion, or National Origin.”

With the Telecommunications Act of 1996, Congress undertook a major rewrite of the Communications Act as a result of dramatic sector-wide changes in technology.²⁵ Congress

²⁴ See Leonard M. Baynes, “Deregulatory Injustice and Electronic Redlining: The Color of Access to Telecommunications,” 56 Admin L. 263, 268-69 (2004) (defining “electronic redlining” and explaining relationship to traditional redlining). See also Comments of Electronic Frontier Foundation, *et al.*, Docket No. 22-69 (filed May 16, 2022) at 5-9. See generally USC Annenberg, “Who Gets Fast Broadband? Evidence from Los Angeles County 2014-17” (2019).

²⁵ “Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Rpt. 104-23 (1995) (“1996 Senate Report”) at 2-4.

broadly intended “to promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies.”²⁶ A critical goal of the Act was to ensure universal service of telecommunications to all Americans.²⁷ Congress was well aware, however, that rapid deployment has often left certain communities behind. The drafters of the 1996 Act considered various provisions to address traditional discrimination based on income level, race or other suspect criteria associated with traditional redlining or refusal to serve. The Senate version would have added a new Section 253A to the Communications Act that would have prohibited any telecommunications provider from “excluding from its services . . . any resident based on the person’s income,” and would have required public comment “on the adequacy of the carrier’s proposed service area.”²⁸ By contrast, the House version would have expressly forbidden common carriers offering video services “from excluding areas from its video platform services on the basis of the ethnicity, race, or income of the residents of that area” and also would have required public comment “on the adequacy of the proposed service area.”²⁹ Additionally, both the House and Senate versions emphasized the importance of ensuring deployment of internet access and other new “advanced telecommunications services” and “information services” to all Americans—with special concern for availability to low-income communities, rural communities, traditionally redlined communities, and individuals traditionally subject to discrimination on the basis of race, ethnicity or religion.³⁰

²⁶ Telecommunications Act of 1996, Pub. L. 104-104 (title).

²⁷ 1996 Senate Report 1-2 (purpose of the bill “to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans;” Senate Report at 4 (“the need to protect and advance universal service is one of the fundamental concerns of the Committee”).

²⁸ Telecommunications Act of 1996, Conference Report, S. Report 104-230 at 143. (“1996 Conference Report”)

²⁹ *Id.*

³⁰ House of Representatives Report on Communications Act of 1995, H.R. 1555, H. Rep 104-204 at 102 (“1996 House Report”); 1996 Conference Report at 131, 143.

In the end, Congress settled on a mixed approach of subsidy carrots and regulatory sticks. Rather than prohibit discrimination on a service by service basis, Congress adopted a broad “nondiscrimination provision” by amending Section 1 of the Act to expressly prohibit discrimination on the basis of “race, color, religion or national origin or sex.” As the Conference Report explained: “This Amendment to Section 1 applies to *all entities* covered by the Communications Act.”³¹ Additionally, Congress created a new Section 254 expressly designated “Universal Service” and including principles stating clearly that all Americans “including *low-income consumers* and those in rural, *insular* and high cost areas, should have access to telecommunications and information services” of comparable qualities and at comparable rates as in urban areas.³²(emphasis added). To ensure carriers complied with the new nondiscrimination provision and the principle of universal service and provided equal and affordable access to low-income and “insular” (which includes isolated or distinct communities, including those in rural areas or on islands, distinct language communities and urban ethnic enclaves, as well as Native tribes and Pacific islander) communities,³³ Congress created a new system of express subsidies.

Recognizing that both this combination of broad prohibition and subsidies might not achieve the goal of ensuring universal access, Congress also included a mandatory reporting requirement “to ensure that one of the primary objectives of the bill—to accelerate deployment of advanced telecommunications capacity—is carried out.”³⁴ It required the Commission (and state regulators) not merely to “encourage” deployment of advanced telecommunications

³¹ 1996 Conference Report at 143 (emphasis added).

³² 47 U.S.C. § 254(b)(3) (emphasis added).

³³ See Leonard Baynes, “The Mercedes Divide? American Segregation Shapes the Color of Electronic Commerce,” 29 W. NE L. Rev. 165, 169-70 (2006) (explaining how “extreme segregation” in certain urban areas isolates minority neighborhoods and allows perpetuation of digital redlining).

³⁴ 1996 Senate Report at 50.

services to all American,³⁵ but to regularly “initiate a notice of inquiry concerning the *availability* of advanced telecommunications capabilities to *all* Americans,” and to determine whether advanced telecommunications capability is “being *deployed* to *all* Americans in a reasonable and timely fashion.”³⁶ In the event of a negative determination, Section 706 instructed the FCC to take immediate action to accelerate deployment.³⁷

This was not intended to be simply a report with no action. As the Senate Report explained, this provision was intended to *require* the FCC to take “immediate action” if it found that some Americans lagged behind others in access to broadband.³⁸ [Senate Report at 50] It explicitly directed the FCC “to include an assessment . . . of the availability, at reasonable cost, of equipment needed to deliver advanced broadband capability” and expressly instructed the FCC to consider “price caps” as a mechanism for encouraging access to broadband for all Americans. Taking these two provisions together, it is clear that Congress was aware that Americans might face not merely a failure of deployment based on traditional discriminatory criteria, but access discrimination based on low-income. The Senate Report concluded by noting: “The Committee believes that this provision is *a necessary fail-safe* to ensure that the bill achieves its intended infrastructure objective.”³⁹

To summarize the state of play with the 1996 Act, Congress intended as a “primary objective” that carriers deploy broadband to “all Americans” in a reasonably timely manner. Congress specifically expressed concern that carriers, left to themselves, might not serve all Americans. Congress displayed particular concern, based on its lengthy history regulating the Communications sector to promote universal service, that carriers would discriminate on the

³⁵ Telecommunications Act of 1996 § 706(a).

³⁶ *Id.* § 706(b) (emphasis added).

³⁷ *Id.*

³⁸ 1996 Senate Report at 50.

³⁹ *Id.* at 51 (emphasis added).

basis of income, race, color, ethnicity or sex. Congress therefore adopted a broad nondiscrimination rule, created a new funding source for universal service and coupled this funding with an express principle to ensure access by low-income Americans and “insular” communities. In the event this proved insufficient to ensure universal service, Congress created a “fail-safe” of mandatory Commission monitoring with an express command “requiring” action if the Commission found anyone falling behind.

As the next two decades would show, Congress sadly underestimated the persistence of discrimination and apparent inability of the Commission to address it.

B. 1996-2021: Congress Grows Increasingly Impatient as the Digital Divide Persists.

1. 1996-2009: Congress Seeks More Information on Growing Disparities With a Focus on Low-Income and Traditionally Excluded Communities.

Almost immediately following the 1996 Act, it became clear that traditional discrimination in access and deployment would persist. The National Telecommunications Information Administration (NTIA) 1998 Report “Falling Through the Net II” warned that while overall access to the Internet was increasing, a persistent and growing “digital divide” was emerging. “There is a widening gap, for example, between those at upper and lower income levels. Additionally, even though all racial groups now own more computers than they did in 1994, Blacks and Hispanics now lag even further behind Whites in their levels of PC-ownership and on-line access.”⁴⁰ The Report urged policymakers “to focus on connecting these populations so that they too can communicate by telephone or computer.”⁴¹ Academic scholarship continued to confirm throughout the early 00s that, despite the clear intent of the 1996 to prevent discrimination and ensure deployment of broadband on a timely basis to all Americans, carriers

⁴⁰ NTIA, “Falling Through The Net II: New Data on the Digital Divide,” (1998) at 3.

⁴¹ *Id.*

had little interest in deploying or serving low-income Americans and non-White communities.⁴² As explained by Professor Leonard Baynes, this increasing disparity was not a result of specific racial animus, but from a failure to address historic systemic inequality and the desire of providers to avoid less desirable customers.⁴³ Again, motive did not matter. The natural function of the marketplace frustrated Congress' express goal of ensuring equal access to broadband.

The FCC responded by persistently failing to either enforce the “general nondiscrimination principle” added to Section 1 or trigger the “fail-safe” of the Section 706 report. To the contrary, the FCC released 4 reports on broadband deployment between 1996 and 2008, each finding deployment of broadband “to all Americans” in a “timely” manner.⁴⁴ To the extent the FCC took action to encourage broadband deployment and equal access to broadband, it focused exclusively on deregulation and forbearance—including the determination to reclassify broadband as an information service.⁴⁵ The FCC aggressively preempted local franchising authorities from using their powers to demand deployment of new video competitors or new broadband services to serve all low-income areas to encourage new entry and competition.⁴⁶ This, in turn, encouraged states to eliminate their own anti-redlining statutes through conversion to limited state-wide franchising to encourage deployment.⁴⁷

⁴² See Baynes, *The Mercedes Divide* *supra* n.26 at 168 (2006).

⁴³ Baynes, *Deregulatory Injustice*, *supra* n.17.

⁴⁴ See Broadband Data Improvement Act, Report of the Senate Committee on Commerce, Science, and Transportation on S. 1492, S. Rep. 110-204 (“BDIA Senate Report”) at 3-4.

⁴⁵ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14893 (2005); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798 (2002).

⁴⁶ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1985, as Amended by the Cable Competition and Consumer Protection Act of 1992*, 22 FCC Rcd 19633 (2007).

⁴⁷ See Congressional Research Service, “Potential Effect of FCC Rules on State and Local Video Franchising Authorities,” (2020) at 9-10.

Alarmed by the growing disconnect between reported facts on the ground and the FCC’s persistent insistence that all remained well, Congress acted to require the FCC to do a better job and elevate the importance and prominence of the Section 706 “fail-safe.”⁴⁸ The 2008 Broadband Data Improvement Act⁴⁹ proceeded on the assumption that with better data, increased involvement from other federal agencies and state partners—and with a firm nudge in the right direction—Congress could still rely primarily on market mechanisms coupled with subsidies and public/private partnerships.⁵⁰ Still, in a reflection of Congress’ increasing concern with the FCC’s failure to ensure deployment of affordable broadband to all Americans, and lack of clarity over what specific communities were not being served, Congress took several steps relevant here.

The BDIA begins with findings on the benefits achieved from existing deployment and adoption of broadband, but that further work to promote universal deployment and adoption “is vital” to the national interest.⁵¹ In addition to making the broadband progress report annual rather than “regularly,” the BDIA explicitly instructed the FCC to report specific areas as unserved and to collect demographic information for unserved areas—including “the average per capita income” of unserved areas.⁵² Congress also instructed the FCC to compare deployment in communities in the United States to at least 75 communities in at least 25 countries “for each of the data rate benchmarks for broadband service utilized by the Commission to reflect different speed tiers.”⁵³ The BDIA further instructed the FCC “[f]or the purpose of evaluating, on a statistically significant basis, the national characteristics of the use of broadband service capability,” surveys of consumers in urban, suburban and rural communities with regard to the

⁴⁸ BDIA Senate Report at 3-4.

⁴⁹ Broadband Data Services Improvement Act, Title I, §§ 101-106, Pub. L. 110-385, codified at 47 U.S.C. §§ 1301-1304.

⁵⁰ BDIA Senate Report 5-7.

⁵¹ 47 U.S.C. § 1301(1)-(2).

⁵² 47 U.S.C. § 1302(c).

⁵³ 47 U.S.C. § 1303(b)(1).

availability, price and use of broadband in their communities, as well as inquiring into why those in communities with broadband access did not adopt broadband.⁵⁴ The BDIA also instructed the FCC to work with the Census Bureau to develop further information on residential availability of broadband.⁵⁵ The BDIA created grant programs to assist states in various planning and mapping exercises to, among other objectives, track areas with low broadband deployment and to determine whether low adoption was a consequence of low demand or low availability.⁵⁶ Finally, in a recognition that the issue of broadband deployment and adoption required a broader approach, Congress instructed the FCC to work with other federal agencies to develop broadband metrics—while retaining ultimate authority and control for broadband policy with the FCC.⁵⁷

A year later as part of the American Reinvestment and Recovery Act,⁵⁸ Congress sought to achieve further clarity while also providing more money to address the issue of deployment and equal access. Again, Congress expressed its continued concern that minority communities and low-income communities will not receive equal access to broadband—although Congress still hoped to address the problem primarily via subsidies rather than direct regulation. Under the Broadband Technology Opportunity Program (BTOP) administered by the NTIA, Congress allocated approximately \$4.5 Billion for various grant purposes. The permissible purposes of BTOP grants included grants to “facilitate access to broadband service *by low-income*, unemployed, aged, and *otherwise vulnerable populations* in order to provide educational and employment opportunities to members of such populations.”⁵⁹ Congress instructed NTIA to create and maintain a “searchable” national broadband map detailing the availability of

⁵⁴ 47 U.S.C. § 1303(c).

⁵⁵ 47 U.S.C. § 1303(d).

⁵⁶ 47 U.S.C. § 1304.

⁵⁷ BDIA § 104.

⁵⁸ American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.

⁵⁹ 47 U.S.C. § 1305(g)(4) (emphasis added).

broadband access throughout the country.⁶⁰ Congress also instructed the NTIA to work with the Commission to develop and publish “non-discrimination . . . obligations that shall be contractual obligations under this section.”⁶¹ Finally, Congress required the Commission to develop a “National Broadband Plan” to “ensure that all people of the United States have access to broadband capability” and to “establish benchmarks for meeting that goal.”⁶²

As this sequence of events makes plain, Congress continued to have concerns that low-income and other traditionally marginalized, vulnerable communities would face discrimination in deployment of broadband and access to broadband services. This exclusion would not only deny those discriminated against the enormous educational, civic and economic benefits of equal access to broadband, but would also harm the nation as a whole. But Congress still lacked information to act with certainty and continued to hope that subsidies combined with broad non-discrimination principles would ensure that all Americans, without regard to race, religion, ethnicity or income level, would enjoy equal access to broadband. Consistent with this, Congress amplified and increased the rigor of the “safety valve” of broadband deployment reporting and instructed the Commission to develop a plan (with measurable benchmarks) to ensure broadband to all Americans. Congress also instructed the FCC to investigate and address the possibility that these disparities in adoption flowed not from the deployment and pricing decisions of carriers, but from failure on the demand side in communities with lower adoption rates.

In short, while concerned that the Commission was allowing disparities based on income or other traditional indicia to develop and increase, Congress still hoped that the Commission could ensure universal and equal broadband access with its existing authority and an infusion of

⁶⁰ 47 U.S.C. § 1305(l).

⁶¹ 47 U.S.C. § 1305(j).

⁶² 47 U.S.C. § 1305(k)(2).

capital. Congress carefully considered whether the growing disparity in adoption flowed from the supply side (*i.e.*, carrier decisions not to serve communities adequately) or the demand side (either from inability to afford access or failure to appreciate the value of broadband adoption).

2. 2010-2016 FCC Action Brings Disparities Into Focus.

In accordance with the explicit instruction from Congress, the FCC developed a National Broadband Plan that included recommendations on inclusion. Unfortunately, the 2010 Plan reflected the Commission's ongoing belief that racial and income-based lack of adoption and utilization primarily flowed from choices by residents in these communities, not from deliberate decisions by carriers to underinvest in these communities.⁶³ Lacking granular data that might reveal patterns of deliberate failure of carriers to invest, the National Broadband Plan recommendations treated deployment and exclusion as primarily a rural problem, albeit with particular concern for Tribal lands.⁶⁴ The National Broadband Plan noted the growing disparity in adoption among low-income Americans and in communities of color, but limited its recommendations to address this growing disparity to affordability programs and outreach on the value of broadband.⁶⁵

Two subsequent FCC actions, however, would bring the chronic underinvestment by carriers in low-income communities and communities of color into focus. Starting with the Seventh Annual Broadband Progress Report in 2011, the FCC required more precise data on broadband deployment. For the first time, the Commission required ISPs to report their available service on a census block basis.⁶⁶ This allowed organizations such as National Digital Inclusion

⁶³ Federal Communications Commission, "Connecting America: The National Broadband Plan," (2010).

⁶⁴ *Id.* 136-137.

⁶⁵ *Id.* 167-185.

⁶⁶ Inquiry Concerning the Deployment of Advanced Telecommunications Capability in a Reasonably and Timely Fashion to All Americans and Possible Steps to Accelerate Such

Alliance (NDIA) affiliate Connect Communities to document the reality of chronic underinvestment by ISPs in traditionally redlined communities.⁶⁷ While ISPs increasingly deployed fiber and gigabit speeds in wealthier communities and predominantly white suburbs, traditionally redlined communities sometimes saw the same provider offering speeds of 1.5 megabits over neglected copper. Reports using the same level of reporting confirmed similar divides tracking historic patterns of redlining.⁶⁸

Additionally, in 2015, the FCC reclassified broadband as a Title II service. This made broadband providers subject to Sections 201 and 202 of the Communications Act, which prohibit unjust and unreasonable practices or discrimination.⁶⁹ Using the data collected by the Commission and compiled by NDIA, several residents of Cleveland filed a formal complaint against AT&T for its unreasonable failure to upgrade broadband in low-income and predominantly non-white neighborhoods.⁷⁰ Soon thereafter, a second complaint was filed using similar data by residents of Detroit.⁷¹ With these actions, it appeared for the first time that the reporting “fail safe” mechanism created by the 1996 Act would finally lead to agency action to ensure equal access to broadband for low-income and non-white communities.

Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Order on Reconsideration, Report and Order*, 26 FCC Rcd 8008 (2011).

⁶⁷ See, e.g., Angela Siefer, “Access from AT&T Not Available to 1.5 Mbps Households,” NDIA Blog (September 5, 2016). Available at: <https://www.digitalinclusion.org/blog/2016/9/5/access-from-att-problem/> (last visited February 16, 2023).

⁶⁸ See USC Annenberg *Who Gets Fast Broadband supra* note 17; Bill Callahan, “More Digital Redlining? AT&T Home Broadband Deployment and Poverty in Detroit and Toledo,” (Sep. 6, 2017) Available at: <https://www.digitalinclusion.org/blog/2017/09/06/more-digital-redlining-att-deployment-and-poverty-in-detroit-and-toledo/> (last visited February 16, 2023).

⁶⁹ In re Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015)

⁷⁰ See Sean Buckley, “AT&T Denies Claims It Is Redlining Ohio Broadband Customers,” Fierce Wireless (Aug 25, 2017).

⁷¹ See Harper Neidig, “AT&T Hit With Second Complaint of Discrimination Against Low-income Neighborhood,” The Hill (September 25, 2017).

3. 2017-2020 *The FCC Reverses Course Again.*

In 2017, following the change in administration, the FCC completely reversed course. The Commission again reclassified broadband as a Title I service,⁷² eliminating the Commission's authority under Sections 201 and 202 to address unreasonable disparities in deployment and service based on income, color, ethnicity or religion.⁷³ But the Commission's 2017 Reclassification Order went further, deliberately stripping the FCC of any potential authority under 47 U.S.C. § 1302 to address discrimination⁷⁴ and eliminating any ancillary authority over quality of service or deployment.⁷⁵ The RIFO acknowledged that this might also require reversal of the Commission's previous decision allowing Lifeline recipients to use Lifeline for broadband services, an important subsidy to facilitate provision of broadband to low income Americans, but deferred final consideration on the matter to a future Order.⁷⁶ Swiftly following the loss of Section 201 and Section 202 authority, the pending complaints against AT&T for failure to invest in majority-minority neighborhoods were resolved via mediation and dismissed with prejudice.⁷⁷

⁷² In re Restoring Internet Freedom, *Declaratory Ruling, Report & Order, and Order*, 33 FCC Rcd 311 (2017).

⁷³ "Unreasonable" in this context does not mean disparate treatment simply because providing the service is less profitable, or in some cases even unprofitable to the specific customer or portion of the community. To the contrary, a primary goal of Sections 201 and 202 is to ensure uniform and fair treatment to all Americans even when market incentives dictate otherwise. *See* In re Rural Call Completion 28 FCC Rcd 16154 at ¶ 7 (2013); *Orloff v. FCC*, 352 F.3d 415, (D.C. Cir. 2003) (explaining role of Section 202(a) in a post-tariffing world).

⁷⁴ *Id.* at 470-81.

⁷⁵ *Id.* at 481-85.

⁷⁶ *Id.* at 425-26.

⁷⁷ Elkins, et al, EB Docket No. 17-223, ID No. EB-17-002 (F.C.C. Feb. 20, 2018) (granted jt. mot. to dismiss with prejudice), <https://www.fcc.gov/document/elkins-et-al-v-att>.

Next, the FCC resumed its previous course of declaring timely deployment of broadband to all Americans.⁷⁸ This triggered widespread criticism both within the Commission⁷⁹ and from without. Critics highlighted efforts by the Commission to lower the standards to make a positive finding,⁸⁰ the Commission's blind acceptance of clearly exaggerated deployment data,⁸¹ and numerous other flaws in the Commission's methodology.⁸² A GAO study on potential carrier fraud in the High Cost USF fund (repurposed for broadband) reiterated these criticisms for the FCC's broadband mapping as a whole,⁸³ further undermining confidence in the Commission's willingness to use the "failsafe" of Section 706 reporting to ensure deployment to all Americans as Congress intended. Finally, after a staff investigation in 2019-20 revealed extensive carrier exaggeration of deployment in the FCC's Mobility Phase II auction, the Commission opted simply to close the program and take no action against carriers that had exaggerated their coverage.⁸⁴

⁷⁸ See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *2020 Broadband Deployment Report*, 35 FCC Rcd 8986 (2020); Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and timely Fashion, *2019 Broadband Deployment Report*, 34 FCC Rcd 3857 (2019).

⁷⁹ *2020 Broadband Deployment Report*, dissenting statement of Commissioner Rosenworcel, dissenting statement of Commissioner Starks. *2019 Broadband Deployment Report*, dissenting statement of Commissioner Rosenworcel, dissenting statement of Commissioner Starks.

⁸⁰ See Harold Feld, "FCC Proposes to 'Fix' Rural Broadband by Changing the Definition," *The Daily Yonder* (Aug. 31, 2017).

⁸¹ See Jon Brodtkin, "FCC Fails to Count 21 Million People Without Broadband, Study Finds," *Ars Technica* (Feb. 6, 2020).

⁸² See Broadband Deployment, Accuracy and Technological Availability Act, Report of the Senate Committee on Commerce, Science, and Transportation on S.1822, S. Rep. 116-174 at 3-4 ("Broadband DATA Act Senate Report"); Liam Tung, "Microsoft: FCC Massively Overstating How Many Americans Have Broadband Access," *ZDNet* (April 9, 2019).

⁸³ Government Accountability Office, "FCC Should Take Additional Action to Manage Fraud Risks In Its Program to Support Broadband Service in High Cost Areas," (October 2019).

⁸⁴ See Broadband DATA Act Senate Report at 3, Jon Brodtkin, "FCC Tries to Bury Finding That Verizon and T-Mobile Exaggerated 4G Coverage," *Ars Technica* (Dec. 4, 2019); News Release, "Chairman Pai Announces Plan to Launch \$9 Billion 5G Fund for Rural America," FCC December 4, 2019). See also *In re Establishing a 5G Fund for Rural America*, *Report and Order* 35 FCC Rcd 12174 (2020) (terminating Mobility II fund).

Neither the revelation of widespread and systemic exaggeration by carriers of their coverage in the Mobility Fund auction, nor the consistent evidence of systemic overcounting of broadband deployment on form 477, prompted significant response from the Commission. To the contrary, the Commission appeared happy to continue to ignore the growing evidence of ever wider disparities in available speeds and quality of service between low-income communities and traditionally redlined communities on the one hand and wealthier, whiter communities on the other hand.⁸⁵ Moreover, the Commission consistently pointed to new deployments of fiber and upgrades of cable systems as proof that its deregulatory “weed whacker” approach to broadband accountability worked,⁸⁶ ignoring that these upgrades frequently passed over low-income communities and communities of color.

Once again, an increasingly frustrated Congress sought to nudge the FCC in the right direction. The 2020 Broadband DATA Act ordered the Commission to further increase the granularity and accuracy of its broadband collection and mapping. While the legislative history noted that the problem was especially acute with regard to rural overcounting because the maps dictated the flow of federal and state deployment grants, the Committee Report noted the widespread criticism of the Commission’s methodology as a whole and its failure to provide an accurate picture of broadband deployment and service critical to informing federal and state policy.⁸⁷

⁸⁵ See Shara Tibken, *The Broadband Gap’s Dirty Secret: Relining Still Exists In Digital Form*, CNet (June 28, 2021).

⁸⁶ See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 33 FCC Rcd 1660 (2018).

⁸⁷ Broadband DATA Act Senate Report at 2-5.

4. *COVID and the RIFO Remand Make the Need for Direct Congressional Action Clear.*

The arrival of COVID-19 made the impact of digital discrimination—and the negative impacts on those who have broadband as well as those denied equal access to broadband—impossible to ignore. As the country sheltered in place, virtually every activity that could be shifted from the physical to the virtual world moved online. Children in homes without equal access to broadband were effectively denied the online education accessed by their peers. College students without equal broadband access found themselves paying for classes they could not attend or were forced to drop out entirely. Adults without equal access to broadband were the first to lose their jobs as their workplaces went virtual. Those without equal access to broadband could not access telemedicine tools, often could not access aid programs requiring online application, and could not reduce their risk of exposure by moving their shopping online.

As Congress had presciently feared in 1996, the lack of equal access fell particularly hard on low-income communities, communities of color, and rural communities.⁸⁸ Additionally, as Congress had predicted, the lack of equal access to broadband imposed additional costs on the broadband “haves” as well as the “have nots.” Communities with substantial digital discrimination were required to spend millions of additional dollars to try to extend virtual schooling to those offline, and maintain additional analog services for those unable to access services online. Those forced to increase their exposure to COVID as a consequence of unequal

⁸⁸ Digital Discrimination on the basis of race and income is not limited to urban America. See Dominique Harrison, *Affordability & Availability: Expanding Broadband in the Black Rural South*, Joint Center for Political and Economic Studies (2021) (even controlling for income, majority-minority rural communities have poorer access to broadband than comparable majority-white rural communities). Tribal areas remain among the worst connected in the United States, which greatly exacerbated the harm to the communities caused by the Covid-19 Pandemic. See Darrah Blackwater, *For Tribal Lands Ravaged by Covid-19, Broadband Access Is a Matter of Life and Death*, AZCentral.com (May 9, 2020), <https://www.internetsociety.org/blog/2020/05/for-tribal-lands-ravaged-by-covid-19-broadband-access-is-a-matter-of-life-and-death/> (last visited February 16, 2023).

access to online services increased the cost of COVID care and increased the risk of COVID transmission for everyone.

The Commission's response highlighted the inadequacy of the Commission's authority absent Title II. The Commission was reduced to begging carriers for voluntary pledges to maintain service for those who could not afford to pay their bills⁸⁹ and clarifying that E-Rate recipients could use their subsidized services to provide connectivity in their parking lots.⁹⁰ While many ISPs stepped forward in this time of crisis, no ISP however generous can provide service where underinvestment has left a community without equal access. More importantly, the American people deserve to have connectivity in crisis as a matter of law and enforceable right, not at the discretion of companies as charity. This principle is foundational to the mission of the Commission.

Because the Commission wrongfully chose to abandon its obligations, Congress took several immediate steps to address the need for equal access to broadband in the first few months of the Pandemic. In the CARES Act, Congress for the first time, and on a bipartisan basis, designated broadband a "utility" on par with "electricity, gas, water, transportation [or] telephone service," and therefore eligible for Covid relief support.⁹¹ As part of the second COVID relief package in the Consolidated Appropriations Act of 2020 (CCA), Congress created the Emergency Broadband Benefit program to provide direct subsidies to low-income Americans to remain connected during the Pandemic.⁹² The CCA also created an Office of Minority

⁸⁹ See FCC, "Keep America Connected Pledge," available at: <https://www.fcc.gov/keep-americans-connected> (last visited February 16, 2023).

⁹⁰ See Public Notice, "Wireline Competition Bureau Confirms that Community Use of E-Rate Supported Wi-Fi Networks During School and Library Closures Due to Covid-19 Pandemic," 35 FCC Rcd 2879 (2020).

⁹¹ 15 U.S.C. § 9005(a)(5).

⁹² See Congressional Research Service, "The Consolidate Appropriations Act, 2021 Broadband Provisions: In Brief," at 4 (March 4, 2021).

Broadband Initiatives for the express purpose of providing grants to bring broadband to minority communities—in particular by attempting to leverage the connectivity of community institutions to compensate for the lack of broadband infrastructure in minority communities.⁹³ The CCA expanded subsidy programs for connectivity on tribal lands.⁹⁴ Finally, the CCA appropriated additional money to create the new broadband map required by the Broadband Data Act.⁹⁵

Once again, we see Congress' increasing concern that minority communities and low-income communities lacked equal access to broadband. As the Pandemic made it abundantly clear to anyone willing to see, the Commission's radical deregulatory policies and reliance exclusively on subsidies aggravated the digital divide precisely along the lines Congress had worried about since 1996. For one last time, Congress attempted to ensure equal access to broadband without discrimination due to low-income, race, religion or ethnicity with even more granular reporting and targeted subsidies—going so far as to create a specific office at NTIA for the purpose of making broadband accessible in minority communities. But as the Trump Administration drew to a close, the FCC took two last actions that finally snapped Congressional patience and produced the current mandate.

5. *The Commission's Final Outright Refusal to Address the Lack of Equal Access to Broadband.*

The Commission took one last action that made the need for direct Congressional action beyond enhanced reporting requirements mandatory. In *Mozilla v. FCC*,⁹⁶ the D.C. Circuit remanded the RIFO to the Commission to consider, among other matters, the continuing availability of Lifeline to subsidize broadband for low-income Americans. In the *Order on*

⁹³ *Id.* at 5-6.

⁹⁴ *Id.* 6-7.

⁹⁵ *Id.* 4-5.

⁹⁶ *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

Remand,⁹⁷ the Commission found it had the authority to continue repurposing Lifeline for broadband. In closing, however, the Commission found that it would sacrifice this important subsidy for low-income Americans on the altar of deregulation and deliberate evisceration of authority over ISPs.

Finally, while we are confident that our analysis of the statutory authority allows for the continued support of broadband Internet access service through the Lifeline program, we would still reach the same conclusion on the classification of broadband Internet access service that we did in the *Restoring Internet Freedom Order* ***even if a court were to conclude that the Lifeline program could not support broadband Internet access service.*** As the Commission previously stated, a return to Title I classification better facilitates critical broadband investment through the removal of regulatory uncertainty and lower compliance burdens. Further, Title I classification allows for greater freedom to operate and serve customers in rural or underserved areas of the country. Additionally, by reclassifying broadband Internet access service as a Title I service the Commission sought to bring greater regulatory certainty to the market, removing a fog that stifled innovation. As such, ***we believe that the benefits of reclassification would outweigh the removal of broadband Internet access service from the Lifeline program,*** were the sound statutory authority relied on today be found insufficient.⁹⁸

In other words, the *RIFO Remand Order* made it clear that the Commission would take no action to address the growing disparity in deployment and service for low-income communities and communities of color that conflicted with its deregulatory agenda. Despite the evidence produced by the Pandemic of the now stark disparity in availability of broadband between wealthier, whiter communities on the one hand and low income and traditionally redlined communities on the other, the *RIFO Remand Order* explicitly stated that Commission considered the loss of the one broadband subsidy targeted at affordability an acceptable trade-off for stripping the Commission of virtually all oversight authority over ISPs.

⁹⁷ In re Restoring Internet Freedom; Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform Modernization, *Order on Remand*, 35 FCC Rcd 12328 (2020).

⁹⁸ *Id.* at 12388 ¶ 103 (emphasis added, footnotes omitted).

As the ultimate seal on the Commission’s refusal to even *acknowledge* the problem of digital discrimination on the basis of income, race, ethnicity or religion—let alone actually attempt to address the problem and ensure equal access to broadband for all—the Commission released the 14th Annual Broadband Report.⁹⁹ over the vigorous dissents of both then-Commissioner Starks and then-Commissioner Rosenworcel, the Report once again found that broadband was being deployed in a timely manner to all Americans. At literally the moment Congress was demanding better data and appropriating money to try to address the clear lack of equal access and the harm caused by digital discrimination to both those excluded and the nation as a whole, the FCC was declaring all was well and patting itself on the back for its policies of not-so-benign neglect.

Clearly, no amount of mapping granularity or improved data could force the FCC to trigger the Section 706 “failsafe.” The traditional patterns of discrimination based on income, race, religion or ethnicity had reasserted themselves precisely as Congress had feared they would. But despite everything, the Trump FCC confirmed that absent a clear and unambiguous Congressional finding that digital discrimination exists and an unequivocal statutory command to eliminate digital discrimination and prevent it from recurring, an FCC determined to do nothing would do nothing. The time had come for Congress to issue an unambiguous requirement for the Commission to do what Congress had commanded it to do since 1996—ensure universal access to the most vulnerable and the historically excluded.

⁹⁹ Inquiry Concerning Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Manner, *Fourteenth Annual Broadband Deployment Report*, 36 FCC Rcd 836 (2021).

6. *Congress Finally Loses Patience and Gives the Commission Unambiguous Direction.*

Happily, we do not have to guess Congress' motivation based on this detailed history. Congress begins Division F of the IIA¹⁰⁰ with a set of generally applicable findings. These findings directly rebuke the Commission's determination that its deregulatory agenda was closing the digital divide, and that even the loss of the one broadband subsidy program specifically directed at low-income affordability (*i.e.*, Lifeline) was an acceptable causality in the war on FCC authority. First, consistent with designating broadband a "utility" in the CARES Act, Congress described access to affordable broadband as "essential to full participation in modern life."¹⁰¹ Contrary to the FCC's most recent broadband report, there exists a "persistent" digital divide that "is a barrier to the economic competitiveness of the United States and equitable distribution of essential public services, including health care and education."¹⁰² In particular, the "digital divide disproportionately affects *communities of color, lower-income areas*, and rural areas, and the benefits of broadband should be broadly enjoyed by all."¹⁰³ Finally, Congress found that "[t]he 2019 novel coronavirus pandemic has underscored the critical importance of affordable, high-speed broadband for individuals, families, and communities to be able to work, learn, and connect remotely while supporting social distancing."

Consistent with these findings, Division F included Section 60506, to provide targeted remedies to address the "persistent digital divide" that "disproportionately affects communities of color [and] lower income communities." These policies and mandatory regulations are

¹⁰⁰ Infrastructure Investment and Jobs Act, Pub. L. 117-58, Sections 60101-60506, codified at 47 U.S.C. §§ 1701-1754 ("IIJA").

¹⁰¹ 47 U.S.C. § 1701(1).

¹⁰² 47 U.S.C. § 1701(2).

¹⁰³ 47 U.S.C. § 1701(3) (emphasis added).

complementary to, but different from, the subsidies also included in Division F for different programs.

To conclude this section, as demonstrated by this detailed history, Section 1754 did not emerge *sui generis* from the IIA like Athena from the head of Zeus. Its roots extend to the essential imperative of the Communications Act to “make available, so far as possible, to all people of the United States” access to our national communications networks. This mandate for universal service flows not only from a desire to remedy past wrongs, but from the benefits to Americans individually and collectively of a communications network that unites us. Because “consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services,”¹⁰⁴ and because doing so “is vital to ensuring that our Nation remains competitive and continues to create business and job growth.”¹⁰⁵ As with rural communities, both the evidence of history and the logic of the functioning market dictate that low-income communities and communities of color will not enjoy these benefits without direct regulatory intervention to address these market failures. Indeed, defenders of the current digital discrimination regime have repeatedly in the record of this very proceeding argued that equal access to broadband *cannot* be achieved by market mechanisms alone because the functioning market will invariably discriminate on the basis of income and follow traditional patterns of exclusion even without personal animus.¹⁰⁶ This, of course, is why Congress has never required personal animus or discriminatory intent as a precondition of prohibiting discrimination in deployment or provision of service.

¹⁰⁴ 47 U.S.C. § 254(b)(3).

¹⁰⁵ 47 U.S.C. § 1301(2).

¹⁰⁶ Baynes, *Deregulatory Injustice* at 268.

C. Congress Created 47 U.S.C. § 1754 to Compel the FCC to Do Its Traditional Job of Ensuring Universal Service for All Americans.

Section 1754 and the associated Congressional findings¹⁰⁷ and statement of policy¹⁰⁸ constitute a clear rejection of the Commission’s “light touch” deregulatory approach.¹⁰⁹ Had the Commission not deliberately stripped itself of all authority to require equal access to broadband, Congress would not have needed to write Section 1754. Had the strategy of subsidies and general principles of universal access worked to create equal access, Congress would not have needed to write Section 1754. Had the Commission not insisted in the face of all evidence to the contrary that traditional patterns of discrimination had reasserted themselves, Congress would not have needed to write Section 1754. But the Commission *has* deliberately stripped itself of all authority to require universal and equal access to broadband. The Commission *has* failed to solve the problem through subsidies alone. And the Commission *has* in defiance of all evidence to the contrary, insisted that broadband is being deployed in a timely and appropriate manner to all people of the United States—without regard to income, race or ethnicity.

Accordingly, before making a once in a generation investment to close the digital divide and promote digital inclusion, Congress has decided to take no chances. Although these comments address specific questions on appropriate rules and enforcement mechanisms below, this section will address some of the general questions and arguments raised in the NPRM.

1. The Structure of Section 1754 and How Its Sections Work Together

As noted above, Congress would not have needed to enact the digital non-discrimination provision had broadband remained a Title II service and subject to Sections 201 and 202. While

¹⁰⁷47 U.S.C. § 1701 (2021).

¹⁰⁸ 47 U.S.C. § 1754(a) (2021).

¹⁰⁹ ACA Connect’s arguments that (a) there is no history of discrimination in deployment in broadband; and (b) that additional regulations imposed by states and the Cable Act prevent deployment discrimination, NPRM at ¶ 23, are plainly refuted by the history of deregulation and Congressional dissatisfaction with the outcome of this deregulation.

Congress remained deadlocked on the matter of Title II and therefore continued to leave the ultimate classification of broadband to the agency’s discretion, it clearly intended the agency to replicate the functions of Section 201 and 202 insofar as necessary to achieve the statutory purpose of universal service.

The statute first states the policy of the United States “to ensure that all people of the United States benefit from equal access to broadband internet access service.” In light of 25 years of continued failure of the Commission to use its authority to achieve that goal, and the FCC’s actions immediately prior to passage underscoring the Commission’s willingness to ignore the goal of universal service in favor deregulation, Congress explicitly instructed the Commission to achieve the goal of universal service by protecting populations that 25 years of evidence demonstrated will not have “equal access to broadband” by creating rules—not simply relying on incentives and deregulation to ‘encourage deployment.’¹¹⁰ To remedy past Commission failures of policy, Congress explicitly instructed the agency to complete the rulemaking within two years.¹¹¹ Because the Commission does not require ISPs to apply for licenses under Section 214, and because states do not require ISPs to apply for franchises, Congress instructed the agency to define a relevant service area in a manner similar to Section 254’s instruction to compare rural and urban areas to determine whether all Americans have “reasonably comparable” access to the same services.¹¹² The statute then instructs the Commission on *how* to achieve this universal service goal of equal access to broadband—explicitly reversing the Commission’s self-described ‘light touch’ for something

¹¹⁰ 47 U.S.C. § 1701(3) (2021).

¹¹¹ 47 U.S.C. § 1754(b) (2021).

¹¹² While many ISPs offer services that are tied to a license area or franchise, these areas are not uniform and do not apply to the provision of broadband service. Additionally, it is worth noting that while the comparison between urban and rural areas is of necessity only roughly “comparable,” Section 1754 requires the stricter standard of Sections 201 and 202 that service in the relevant area be “equal.”

actually effective. In addition to any affirmative actions the Commission takes to “facilitate equal access,” Congress explicitly required the Commission to create rules that prohibit discrimination on the basis of the specific characteristics the evidence shows are persistently denied “equal access.” Because history and existing evidence show that this inequality is already entrenched, and will persistently reassert itself due to the incentives and structure of communications markets, Congress also required the Commission to “identify necessary steps” to eliminate existing inequalities of service and prevent them from recurring.

Sections 1754(c) and 1754(d) follow logically from Congress’ experience with broadband—notably the experience with the BDIA—that managing discrimination in broadband access impacts other areas of daily life outside the scope of the FCC’s jurisdiction and that without an “all of government” approach, the benefits of universal broadband access (to individuals and the nation as a whole) will not be achieved. Congress therefore instructed the FCC to work with the Attorney General to advise other federal agencies on how to use their authorities to root out discrimination and promote equal access to broadband in the areas under their jurisdiction. Section 1754(d) reinstates the role of states and localities as partners to ensure “timely deployment” of broadband to all Americans as Congress intended in 1996—and which the Commission has consistently thwarted through preemption designed to preempt state authority.

2. *Section 1754 is Clearly Part of the Communications Act.*

With the proper understanding of statute, it becomes easy to address certain specific questions raised by the NPRM. First and foremost, Section 1754 is clearly part of the Communications Act.¹¹³ There is nothing “unique” or even unusual in Congress’ determination to prohibit discrimination against low-income Americans and low-income communities. Section

¹¹³ NPRM ¶ 71.

1 of the Communications Act since its inception has listed as one of the primary purposes of the Act “to make available to all people of the United States . . . service with adequate facilities at reasonable charges.” Sections 201 prohibited any “unjust and unreasonable” rates or practices¹¹⁴ and Section 202 prohibited any other discrimination, including on the basis of income.¹¹⁵ When Congress passed the Cable Act of 1984, it explicitly prohibited discrimination on the basis of income, in particular requiring service throughout a franchise area without regard to the income of the residents.¹¹⁶ When Congress regulated mobile telephony, it again prohibited discrimination on the basis of income (and race) by classifying the new CMRS service as a Title II service and prohibiting the Commission from using its new forbearance authority on Sections 201 or 202.¹¹⁷ As discussed in considerable detail above, Congress continued to express its historic concern with regard to discrimination based on income (and race) as part of the 1996 Act.

Similarly, there is nothing novel or unusual in Congress’ decision to prohibit discrimination on the basis of race, religion or ethnicity. Nor does identifying race, ethnicity or religion as indicia that a community is at risk for exclusion uproot Section 1754 from the Communications Act. Indeed, as noted above, Congress augmented the pre-existing prohibitions on discrimination based on race as part of the 1996 Act in what the Conference Report described as a “general prohibition” intended to apply to all services under Commission jurisdiction.¹¹⁸ Had this approach succeeded, Congress would not have found it necessary to draft Section 1754. It is the height of irony to suggest that Congress’ direct instruction to the Commission that it finally—after 25 years of failure – prohibit discrimination in deployment of “advanced

¹¹⁴ 47 U.S.C. § 201(b).

¹¹⁵ 47 U.S.C. § 202(a).

¹¹⁶ 47 U.S.C. § 541(c).

¹¹⁷ 47 U.S.C. § 332(c)(1)(A).

¹¹⁸ 1996 Conference Report at 143.

telecommunications capability” as expressly intended by the Telecommunications Act of 1996 is somehow foreign to the Communications Act, or its traditional remedies.

3. *Communications Act Precedent Governs Section 1754 Because It Is Part of the Communications Act.*

It is hornbook administrative law that an agency is governed by its governing statute and its precedents interpreting that statute.¹¹⁹ Additionally, when Congress delegates authority to an agency via statute, it is presumed to know how that agency works and that the agency has authority to act in any way “reasonably related” to its enabling statute.¹²⁰ As a general rule we presume Congress meant what it said and said what it meant. In particular, although the statute recognizes that other federal agencies are engaged in the important work of preventing discrimination,¹²¹ Congress delegated this specific statute to the Commission. It instructed the Commission to make rules, and to advise other federal agencies on how to prohibit digital discrimination on the basis of race or income or “other factors *the Commission* determines to be relevant.” (emphasis added).

As always, the Commission may look to other statutes or the practices of sister agencies as informative. The Commission has done this repeatedly in the past. Most recently, in the CPNI data breach proceeding, the Commission sought comment on the implementation and enforcement of a wide sampling of federal and state data breach laws.¹²² The Commission has also looked to labor law to interpret the phrase “good faith negotiation” as applicable to the

¹¹⁹ See *City of Arlington, TX v. FCC*, 569 U.S. 290 (2013).

¹²⁰ See *Wash. All. of Tech. Workers v. DHS*, 50 F.4th 164, 178-79 (D.C. Cir 2021) (even though specific action not specified in statute, rule not arbitrary because agency “articulated rational reasons related to its statutory responsibility” (citing *Keating v. FERC*, 569 F.3d 427, 433 (D.C. Cir. 2009)).

¹²¹ 47 U.S.C. § 1754(c)(3) (emphasis added).

¹²² In re Data Breach Reporting Requirements, *Notice of Proposed Rulemaking*, WC Docket No. 22-21 (rel. Jan. 6, 2023) at ¶ 9.

statutory mandate that parties engage in retransmission consent negotiations in “good faith,”¹²³ or financial law for guidance on attributable interests.¹²⁴ It is both sensible and consistent with this tradition for the Commission to seek comment on civil rights case law, and the practices of agencies tasked with preventing discrimination under other statutes.¹²⁵ Nevertheless, the Commission must bear in mind that this is the Communications Act, and Communications Act law and precedent governs. While cases such as *Inclusive Communities* and *McDonnell Douglas* may provide useful information, they do not govern.

This is not only a matter of administrative law. As discussed at length above, the prohibition on discrimination in the Communications Act is fundamentally different from other civil rights statutes. The prohibition on discrimination in the Communications Act is neither primarily about remedying past wrongs or primarily about protecting the rights of individuals injured by unfair treatment—although these are certainly important goals. The primary goal of the Communications Act’s anti-discrimination provisions is to ensure universal service for the benefit of the nation as a whole as well as for the benefit of the otherwise excluded individual. Unlike standard civil rights law, there is no exception for a “standard” business reason. Explicit anti-discrimination provisions are designed to correct market failure. Intent and animus are irrelevant, in no small part because the benefits of universal service flow to the nation as a whole. Universal service mandates, including explicit anti-discrimination provisions, are therefore treated as standard economic regulation.

¹²³ In re Implementation of Satellite Home Viewer Improvement Act of 1999; Retransmission Consent: Good Faith Negotiation and Exclusivity, *First Report and Order*, 15 FCC Rcd 5445, 5448 (2000).

¹²⁴ In re Implementation of the Cable Consumer Protection and Competition Act of 1992; Implementation of the Cable Reform Provisions of the Telecommunications Act of 1996; Review of the Commission’s Cable Attribution Rules, *Report and Order*, 14 FCC Rcd 19014, 19035 (1999).

¹²⁵ NPRM at ¶ 92.

Or, put another way, the purpose and authority at issue here flow from the Commerce Clause, not the Due Process Clause or Equal Protection Clause. For this reason, it is *the Commission* that must make the ultimate decision on applicable rules, following applicable precedent and in harmony with the other provisions of the Communication Act. The Commission may not simply parrot the regulations of a sister agency operating under an entirely different statute designed for an entirely different purpose—however vital and complimentary that statute and purpose may be to the Communications Act.

4. *Section 1754 Is the Regulatory “Stick” that Goes With the Subsidies.*

Industry interests advance a number of inventive theories in an effort to undermine the Commission’s authority to actually enforce rules adopted in this proceeding. First, some commenters in the NOI suggest a thematic reason to reject enforcement. They argue that since the IJA generally and Division F (Broadband) specifically focus on federal subsidies, Congress only intends the FCC to ensure equal access to broadband and prevent digital discrimination through subsidies and other ‘incentives.’¹²⁶ Even if the text supported such a thematic interpretation (which it does not), such a reading is utterly inconsistent with both the explicit statutory findings and the detailed history discussed above. It is far more reasonable to conclude that Congress explicitly included Sec. 1754 because its effort to ensure equal access to broadband for all primarily through subsidies has failed for the last 25 years. Despite the inclusion of a general anti-discrimination provision in the 1996 Act, despite the explicit principles in Sec. 254, despite the “fail safe” of Section 706 designed to require the Commission to take action to ensure equal access for all, a purely subsidy-based approach had created and amplified a “persistent digital divide” that particularly impacted low-income communities and

¹²⁶ See NPRM at ¶ 85 (citing e.g. AT&T NOI Reply Comments at 12-18 & n.48).

communities of color.¹²⁷ The Commission’s strategy of larding these subsidies with deregulation to ‘remove barriers to entry’ and ‘create investment incentives’ has simply made the ongoing digital discrimination worse.

It is therefore far more logical to conclude that Congress finally decided to accompany the gift of federal dollars with strict regulations—and enforcement authority with real teeth—so that *this time* the funds will *actually* facilitate equal access to broadband for low-income communities and communities of color.

Indeed, if the Commission is to look for a “theme” in Division F, it will find a theme of holding carriers accountable. For example, Congress also required the Commission to complete the broadband disclosure “nutrition label” proceeding.¹²⁸ (Indeed, the provision is not merely in Title V Broadband Affordability Section, “Adoption of Consumer Broadband Labels” is codified at 47 U.S.C. § 1753, immediately preceding Section 1754.) In addition to protecting consumers generally, this mandatory disclosure will allow communities and the Commission to assess whether all residents within a given area 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.” Additionally, the sections specifically addressing the distribution of subsidies are themselves replete with requirements to ensure the goal of equitable universal service.

The argument that Section 1754 is not properly part of the Communications Act because Congress did not state explicitly that it intended to amend the Communications Act is utterly without merit.¹²⁹ To quote a well-worn judicial cliché, “Congress does not hide elephants in

¹²⁷ 47 U.S.C. § 1701(2)-(3).

¹²⁸ IIJA § 60504.

¹²⁹ See NPRM at ¶ 71.

mouseholes.”¹³⁰ Congress has, on other occasions, passed statutes not explicitly designated as amendments to the Communications Act that the Commission and the courts have understood as amendments to the Communications Act and enforceable by the Commission in its usual manner. For example, the Communications Assistance to Law Enforcement Act (CALEA) is expressly designated as “an Act to Amend Title 18 of the United States Code.” This did not stop codification of various provisions in Title 47. To the contrary, the FCC has always treated CALEA as it has treated any other provision of the Communications Act, creating and enforcing rules¹³¹ and receiving *Chevron* deference for the same.¹³² Other examples where Congress has not explicitly designated a statute an amendment of the Communications Act include the broadband transparency proceeding required by Section 60504 of the IIJA, and the Broadband Data Improvement Act of 2008. These provisions have likewise been included in Title 47 and treated as ordinary provisions of the Act, enforceable by the Commission’s standard powers.

Furthermore, the Commission has enforced—or at least has enforcement authority—over relevant statutes that are not part of the Communications Act. For example, both the prohibition on broadcast indecency and on broadcasting advertisements for lotteries in states where they are illegal, are provisions of Title 18, not Title 47.¹³³ This has not prevented the FCC from exercising its general authority to investigate violations and impose suitable penalties pursuant to its enforcement authority.¹³⁴

Finally, even if the Commission were to give credence to the suggestion that 47 U.S.C. § 1754 is some sort of statutory hanging chad, it would not compromise the Commission’s

¹³⁰ *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

¹³¹ *In re Communications Assistance for Law Enforcement Act*, *Report and Order*, 20 FCC Rcd 14989 (2005).

¹³² *American Council on Education v. FCC*, 451 F.3d 226 (2006).

¹³³ 18 U.S.C. § 1464 (indecency); 18 U.S.C. § 1304 (gambling or lotteries).

¹³⁴ *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) (lotteries); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecency).

enforcement authority. Section 4(i) empowers the Commission to take actions “not inconsistent with this chapter” (i.e., the Communications Act) “as may be necessary to carry out its functions.” Note, neither the enforcement authority nor the “functions” need to be part of the Communications Act. Whatever the functions assigned by Congress, the Commission may issue such orders (including enforcement orders) as necessary provided they do not contradict the express limits imposed by the Act.¹³⁵ For example, while nothing authorizes the Commission to use a *prima facie* case screening for program carriage complaints or issue “stand still orders” where necessary under Section 616 of the Act, it did so under its general authority.¹³⁶ Nothing authorizes the Commission to auction telephone numbers, but it found it had the authority to do so.¹³⁷ And, while nothing authorized the Commission to divert auction revenue from the Treasury Department to reimburse existing C-Band licensees for migration expenses—and include financial incentives to accelerate the process—the Commission did so.¹³⁸ The Commission has routinely cited Section 4(i) not as “ancillary authority,” but as direct authority to issue rules (including rules on enforcement).¹³⁹ While the Commission’s authority is not unlimited, Section

¹³⁵ In re Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order and Notice of Proposed Rulemaking*, 24 FCC Rcd 11494, 11513-14 at n.106 (2011) (contrasting adoption of “standstill orders” using Section 4(i) for program carriage complaints with decision not to adopt standstill orders in retransmission consent disputes because stand still orders in retransmission disputes would violate Section 325(b)(1)(A)).

¹³⁶ *Id.* and at 11502 (noting that Commission adopted *prima facie* requirement on its own initiative).

¹³⁷ In re Toll Free Assignment Modernization, *Report and Order*, 33 FCC Rcd 9274, 9307-09 (2018) (citing general authority under Sections 251(e), 4(i) and 201(b)).

¹³⁸ In re Expanding Flexible Use in the 3.7-4.2 GHz Band, *Report and Order, Order Proposing Modifications*, 35 FCC Rcd 2343, 2416 and n.476 and n.477 (2020) (citing authority under Sections 303(r) and 4(i), and citing *Mobile Communications Corp. of America*, 77 F.3d 1399 (D.C. Cir. 1996) as affirming authority under Sections 303(r) and 4(i)).

¹³⁹ Virtually every ordering clause adopting new rules or procedures cites to the Commission’s general authority under Sections 4(i) and 201(b).

4(i) (as well as other provisions of the Act) provide it with more than adequate enforcement authority to implement and enforce Section 1754.

5. *Section 1754 Applies to All Services Included in Section 8.1(b).*

The NPRM seeks comment on which services Section 1754 covers.¹⁴⁰ Fortunately, Congress has resolved this question. Section 60501 (codified at 47 U.S.C. § 1751) states: “For purposes of this Title” *i.e.*, Title V of Division F of the IJJA, “the term ‘broadband internet access service’ has the meaning given the term in section 8.1(b) of title 47, Code of Federal Regulations, or any successor regulation.”¹⁴¹ Section 60506, codified at 47 U.S.C. § 1754, is a part of Title V of Division F of the IJJA. Accordingly, Section 1754 applies to any service defined in 47 C.F.R. § 8.1(b). This does not mean that the Commission should treat all services interchangeably—as discussed below, the questions of technical and economic feasibility may be different for different providers, and with different technologies. But as a starting point, Section 1754’s definitions are clear, and inclusive.

It is clear that Congress intended that those on the wrong side of the digital divide should not be denied the choices available throughout the service area. To the contrary, Congress expressly found that: “In many communities across the country, increased competition among broadband providers has the potential to offer consumers more affordable, high-quality options for broadband service.”¹⁴² The Commission is therefore obligated to apply Section 1754 to all broadband services in the relevant service area. It may not excuse discrimination by a provider simply because a different provider offers service in the relevant area. The same clearly holds true when a broadband access provider offers service but at discriminatory prices, or discriminates in other ways prohibited by the statute and the Commission’s rules. The fact that a

¹⁴⁰ NPRM at ¶ 25.

¹⁴¹ 47 U.S.C. § 1751(1).

¹⁴² IJJA Section 60101(4) (codified 47 U.S.C. § 1701(4)).

competitor does *not* discriminate cannot excuse discrimination by another provider simply because the non-discriminatory option is potentially available.

II. TECHNICAL AND ECONOMIC FEASIBILITY

A. The Commission Should Adopt Presumptions of Feasibility

Ending digital discrimination will be a hard task, not an impossible one. In directing the FCC to enact rules to ensure equal access to broadband, Congress did not ask for the impossible, and recognized that rules should take into account “technical and economic feasibility.”

Something is “feasible” if it is “capable of being done or carried out,”¹⁴³—that is, if it is possible.

The Commission should ensure that its rules or policies do not require that providers do things that the technology does not support. Neither should the Commission's rules require that providers undertake deployment that would drive them to insolvency. Projects that are technologically possible and that a provider can undertake in its normal course of business should be deemed both economically and technically feasible unless a provider can provide compelling evidence to the contrary.

The Commission has often been tasked with determining what is “feasible” when it comes to following regulatory requirements. Its approach in determining what technical and economic feasibility should mean here should be informed by these past efforts, including distinguishing between the distinct but related concepts of technical feasibility versus economic feasibility. In the context of telecommunications interconnection, the Commission's rules state that

‘Technically feasible’ means capable of accomplishment as evidenced by prior success under similar circumstances. For example, preexisting access at a particular point evidences the technical feasibility of access at substantially similar points. A determination of technical feasibility does not consider economic, accounting, billing,

¹⁴³ Merriam-Webster, feasible, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/feasible>

space or site except that space and site may be considered if there is no possibility of expanding available space.¹⁴⁴

While the specifics as applied to digital discrimination will differ, this existing rule can provide guidance to the Commission in a few ways. First, while the rule states what is feasible, it does not state what is infeasible. This is appropriate—while a record of success in similar circumstances (including service from competitors in the same or similar areas) would plainly show feasibility, broadband deployment may still be feasible in areas even where there are no similar circumstances to use as a benchmark. If “feasible” broadband deployment was limited to circumstances where there is a direct analog, certain areas that have gone long underserved due to unique characteristics might continue to fall through the cracks.

Second, this rule clarifies that questions of technical feasibility should be considered separately from questions of economic feasibility. If a provider contends that serving a particular area is technically infeasible, it must show that the technology itself cannot support the desired deployment. As always, technical differences between these services may require treating the services differently when applying Section 1754. For example, it may be physically impossible for a satellite broadband provider to serve a particular building because the surrounding buildings block the signal. But the same problem could easily be overcome by a mobile provider with the installation of additional microcells. The Commission might therefore reasonably conclude that it is not technologically feasible for a satellite provider to serve the building, but that a terrestrial mobile provider can provide service of a similar quality to others in the surrounding area.

Other Commission rules are instructive as well. For example, 47 CFR § 51.319 states that once a particular practice is found to be technically feasible in one context, the burden shifts to

¹⁴⁴ 47 C.F.R. § 54.5.

the provider to demonstrate that it is not in future cases. The Commission can adopt such burden-shifting provisions to prevent complainants from repeatedly having to re-establish the same facts, and to make it easier for future complainants to bring their claims. Commission precedent also shows that it can make sense to establish rules showing that particular ways of providing service are *per se* technically feasible.¹⁴⁵

The question of whether something is economically feasible is a separate consideration than whether it is technically feasible, and must be informed by the purposes, structure, and context of the Act. A project plainly cannot be economically “feasible” only if a provider would choose to undertake it absent government policy—Congress did not pass a law to tell providers to do things they already were going to do. The International Center for Law & Economics suggests that “[i]f a firm cannot expect to recoup its costly upfront investments to deploy or upgrade a network in a given territory, because the residents of that territory are unlikely to demand service at prices that would make the deployment economically feasible, the firm should not be penalized for avoiding money-losing ventures.”¹⁴⁶ First, this is not a question of penalties, but ensuring broadband deployment. Second, it is precisely this sort of analysis that Congress rejected in enacting Section 1754. Long-standing investment policies of service providers have resulted in the persistence of the digital divide, under-investment in both rural and urban core low-income communities, and the repeated failure of service providers to connect marginalized communities despite decades of publicly-funded support for infrastructure deployment and service affordability subsidies. Under Section 1754, the question is not whether the proposed broadband deployment will make a provider as much money as some other investment, or if the provider will need more time to recoup the money it invested in a particular deployment; it is

¹⁴⁵ See 47 CFR §§ 51.305; 319.

¹⁴⁶ Comments of the International Center for Law & Economics, Docket No. 22-69 (filed May 16, 2022) at 11.

whether the deployment is feasible. The Commission must make its own independent judgment of this, and not simply ratify the discriminatory decisions of ISPs.

If they work as designed, the FCC’s digital discrimination rules should require that providers build out to (feasible) areas they otherwise would not serve, and where they might not see an immediate return on investment. The Commission can provide clarity about what constitutes an economically feasible deployment in a few ways. The Commission should start from a presumption that a project is economically “feasible” if a provider can accomplish the project with existing and readily available economic resources—including access to state and federal programs and subsidies and commercially reasonable financing. In this context, “taking into account” questions of feasibility means that the size and resources available to a provider are relevant. What may be economically feasible for a nationwide cable provider might not be for a non-profit co-op, or a smaller commercial provider. For example, in the case of a provider that relies on unbundled network elements (UNEs) to provide service, the Commission would still apply Section 1754, but could potentially find that it is not technically feasible to serve customers where UNEs are not available, and not economically feasible to construct an entire middle-mile network to take the place of UNEs.

Of course, under a case-by-case approach, providers would have the opportunity to present evidence of infeasibility to overcome any presumptions. But the analysis of feasibility should always be informed by the purpose and text of Section 1754 and the fundamental purpose of the Communications Act: “to make available, so far as possible, to all the people of the United States, without discrimination ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges[.]”¹⁴⁷

¹⁴⁷ 47 U.S.C. § 151.

For example, determining whether a given broadband project is economically “feasible” cannot take into account the income characteristics of the un- or underserved area. The Commission was charged by Congress with “preventing digital discrimination of access based on income level,” and taking steps to “eliminate” it. A provider who makes buildout decisions based on income level would violate the plain terms of the statute, and allowing providers to introduce evidence of this sort would be contrary to the statute’s unambiguous goals.¹⁴⁸

Additionally, determinations of economic feasibility also cannot take into account opportunity costs. In many cases, a provider has the choice to build out and provide service in one area, or another. It will likely choose to build out in the more profitable area, even if it could break even or turn a profit serving the other, as well. As the entire purpose of Section 1754 is to require providers to build out to areas where otherwise they would not, it would not be appropriate to allow providers to claim as “costs” the theoretical lost profits they would collect if allowed to continue discriminating against lower-income areas.

Providers should also not be permitted to cherry-pick metrics and geographic areas designed to portray particular broadband deployments as economically “infeasible.” If a provider uses a particular technology within a service area, then the use of that same technology to serve unserved areas within that area should be deemed both technically and economically “feasible.” Similarly, the costs for serving an area should only be considered for the service area as a whole, not cherry-picked collections of the most high-cost addresses.

Congress did not enact Section 1754 to tell providers to serve areas they were planning to serve anyway, but a little more quickly, or more equally. Section 1754 is a universal service law,

¹⁴⁸ See *MCI Communications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990)(if Commission were to consider evidence of competitive necessity and differential pricing as proof discrimination is reasonable, “the very discrimination Section 202 attempts to prevent would be the grounds for finding that section inapplicable.”)

rooted in Communications Act precedent and history, the purpose of which is not only to give the Commission the tools to ensure that carriers do not discriminate in broadband deployment according to characteristics such as race or income, but to require the Commission to action after allowing a “persistent digital divide” to take root. The law does not direct carriers to do the impossible, but it does expect them to reassess how they decide where to deploy broadband, and to work towards the goal of universal service. If they do not, Section 1754 gives the FCC rulemaking and enforcement authority that might change their thinking.

B. The Commission Should Not Adopt Safe Harbors.

Safe harbors would be inconsistent with the purpose of Section 1754. The statute directs the Commission to facilitate equal access to broadband and counter digital discrimination. A system of safe harbors could allow in at least some cases broadband providers who engaged in digital discrimination to avoid having to take remedial steps, and it could leave households who have suffered from historical redlining unserved. But the Act did not direct the Commission to determine the optimal amount of digital redlining; it was tasked with eliminating it. A system of safe harbors, particularly at this stage, instead would offer providers a blueprint on how to avoid liability for continuing to bypass exactly those communities and households Congress determined should not be bypassed any longer.

Safe harbors, like many policy tools, are typically justified in cost/benefit terms. Congress has already determined that the cost of households without adequate connectivity is too high to bear, which alone makes safe harbors an inappropriate policy choice. But even beyond this, the Commission lacks a sufficient factual basis to establish safe harbors.

Safe harbors can be justified in circumstances where companies that meet the safe harbor criteria would be very unlikely to face actual liability if not for the safe harbor. A safe harbor in these circumstances might protect good faith efforts to comply with the law and reduce time

spent in litigation or administrative proceedings that are unlikely to lead to substantive liability. For example, by following the requirements of the Digital Millennium Copyright Act, an online service provider cannot be held liable for injunctive or monetary relief for copyright infringement.¹⁴⁹ A provider that does *not* fall into the safe harbor is not necessarily infringing—but Congress determined that a provider that does meet those requirements is so unlikely to be found substantively likely to be infringing that a safe harbor was appropriate. Similarly, while Section 230 of the Communications Act¹⁵⁰ is best thought of as a blanket immunity than a safe harbor, similar considerations apply. In almost every case, platform content moderation decisions are protected by the First Amendment. But First Amendment cases take time to litigate—Section 230 in many cases disposes of claims that would be unlikely to ever succeed, at an earlier stage of litigation, and with less expense.

Here, the Commission lacks an evidentiary record that would allow it to identify circumstances which, if met, would strongly correlate with a lack of digital discrimination, and thus a lack of liability. This is another reason why safe harbors are not appropriate. By contrast, a case-by-case approach to determining what measures are feasible in ending digital discrimination would best allow the Commission to carry out Congress's intent. Congress has never before found it necessary to task the Commission so directly with countering digital redlining, including redlining based on income. A case-by-case approach would allow the Commission to uncover not just specific instances of digital discrimination, but to uncover trends, and build up a body of precedent that would provide certainty to both complainants and providers. Even complaints that ultimately did not prevail would inform the Commission's understanding of local broadband

¹⁴⁹ 47 U.S.C. § 512(c).

¹⁵⁰ 47 U.S.C. § 230.

markets, and would aid the Commission not only in enforcement and rulemaking, but in better understanding the technical and economic constraints that affect whether a project is feasible.

III. GEOGRAPHIC AREA FOR DETERMINING SCOPE OF AREA TO EVALUATE FOR EQUAL ACCESS.

As noted above, Congress has over the past 90 years charged the Commission with ensuring that communications service by wire or radio are made available to all Americans. Subsection (a)(2) defines equal access 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” and subsection (a)(1) states that “subscribers should benefit from equal access to broadband internet access service *within the service area* of a provider of such service.” The Communications Act offers definitions for service areas based on the technology under consideration. For cable systems, the service area is a “franchise,”¹⁵¹ for traditional wireline service it is a “service area”¹⁵² and for wireless it is a “license” area.¹⁵³ We agree with NDIA that for purposes of adopting rules in this context, these legally-defined service areas could be the basis for the rules and then to provide uniformity and a basis for comparison, the Commission should further refine the term “service area” to be the service area of the provider within a given metropolitan or micropolitan statistical area.¹⁵⁴ Additionally, for those ISPs that are not licensed or franchised, the MSA provides the most reasonable definition for “service area.”¹⁵⁵ By doing so, the Commission’s rules can provide a

¹⁵¹ 47 U.S.C. § 522(9).

¹⁵² 47 U.S.C. § 214(e)(5).

¹⁵³ 47 U.S.C. § 301.

¹⁵⁴ Metropolitan statistical area and micropolitan statistical areas are definitions developed by the Office of Management and Budget using Census Bureau data. *See* <https://www.census.gov/programs-surveys/metro-micro/about.html>.

¹⁵⁵ As noted in the section on technical and economic feasibility, there may be situations where the use of the MSA is inappropriate. For example, a cooperative limited to residents of a particular building complex or neighborhood, or an ISP contracted specifically to serve public

basis of comparison for consumers and providers alike to understand where the comparisons in service will be made.

The statute defines the area for comparison to determine whether equal access is being provided as a “given area” within the service area. For this “given area”, we urge the Commission to consider census blocks. These will be discrete areas within metropolitan or micropolitan statistical areas and would closely approximate a community in which the comparison to the larger area could be made.

For rural areas, the Commission should consider the Census Bureau’s definition of rural area along with county boundaries.¹⁵⁶ The service area would, therefore, be the provider’s service area within a rural county. In looking at the area for comparison, the Commission could look at census blocks or an even more discrete unit of measure since census blocks can be quite large in rural areas. As the National Broadband Mapping Coalition urges, it may be helpful for the Commission to work with state, local and tribal governments to identify the appropriate area for comparison in these areas.¹⁵⁷

IV. THE COMMISSION’S RULES MUST ADDRESS DISCRIMINATORY IMPACT.

As the Commission seek to define “digital discrimination of access” and develop rules to prevent and eliminate such digital discrimination, the Commission is rightly considering how the statutory language, read in a way that is consistent with the Communications Act’s overall structure, is to be implemented in terms of the scope of the rules (disparate impact and disparate treatment), how to assess whether digital discrimination is occurring (service area for consideration) and whether there are factors related to economic or technical feasibility it should take into account in developing those rules. By

housing would not reasonably expect to serve the entire MSA. These decisions are ideally suited for case-by-case adjudication.

¹⁵⁶ *See*

<https://mtgis-portal.geo.census.gov/arcgis/apps/MapSeries/index.html?appid=49cd4bc9c8eb444ab51218c1d5001ef6>.

¹⁵⁷ National Broadband Mapping Coalition Comments at 6.

focusing on these various components that underlie the definition and rules, the Commission seeks to fulfill the mission Congress has once again charged it with addressing—ensuring equal access to broadband service for all people of the United States.¹⁵⁸

A. Congress’ Mandate to the Commission to Develop Rules Includes Preventing Both Disparate Treatment and Disparate Impact.

Section 1754 instructs the Commission to adopt rules to both prevent and eliminate digital discrimination.¹⁵⁹ This broad mandate to the Commission must be read to mean something more than just addressing disparate treatment; it must include rules that ensure, no matter how unintended, that protected communities are not to be left behind. In other words, the rules must work to prevent disparate impact as well as disparate treatment (also referred to as “discriminatory intent”). Such a reading is consistent both within the context of the IIA provision itself and the Communications Act more generally, as well as with judicial precedent in civil rights jurisprudence more generally.

As discussed at length in Part I.C.1, Section 1754 is broken down into five sections, two of which have a bearing on the question of the scope of the Digital Discrimination provision: subsection (a), which sets out the policy objective of the statutory provision and subsection (b), which directs the Commission to adopt rules.

In subsection (a)(3), Congress declared that it is the policy of the United States that “all people of the United States should benefit from equal access to broadband service.”¹⁶⁰ This language is similar to language that has been in the Communications Act since 1934, when Congress created the Commission to “make available, so far as possible, to all the people of the United States” communications services.¹⁶¹ Over the years, the Commission has relied on this

¹⁵⁸ 47 U.S.C § 1754 (a)(3).

¹⁵⁹ 47 U.S.C § 1754 (b)(1), (2).

¹⁶⁰ 47 U.S.C § 1754 (a)(3).

¹⁶¹ 47 U.S.C. § 151 (emphasis added).

directive to adopt rules that promote access to basic phone service, mobile services, cable services and broadband. And over the years, rules and policies taken to effectuate this directive have not focused solely on intent; rather, they have focused on advancing policies to ensure that the providers of these services make their services available to “all people ” within their service area. A fair reading of this subsection would, therefore, be that Congress is asking the Commission to do more than just address intentional discrimination. Instead, Congress is stating that the Commission must affirmatively ensure equal access to broadband services and such a directive is to be met regardless of the provider’s intentions. In fact, the provider’s intentions are irrelevant, as nowhere in section 1754 is there language that could be construed as seeking to get at the motivations or intentions of the provider. Instead, section 1754 speaks to actions the Commission must take to ensure that “people” have “equal access.” Providers, to be sure, are the means by which that access is to be achieved, but beyond “taking into account” economic and technical feasibility (as discussed above), their role is to abide by and effectuate the Commission’s rules.

Confirmation that Congress did not intend to limit the Commission’s rules in this space to “disparate treatment” is further supported by the definition of “equal access” itself. In defining “equal access,” Congress explained that it means the “equal opportunity” for people to subscribe to broadband service that “provides comparable speeds, capacities, latency, and other quality of service metrics” in their community. Nowhere is there a mention of a provider’s actions or decision-making. As befitting a universal service statute, equal access focuses on the opportunity of people to subscribe, not the provider’s intent.

The definition of “equal access” is akin to section 202’s prohibition against discrimination in “charges, practices, classifications, regulations, facilities, or services for or in

connection with like communication service.”¹⁶² As discussed above,¹⁶³ section 202 was foundational to the Commission’s work in ensuring equal access to phone service and mobile services. In promoting subscribership to those services, the Commission adopted rules designed to give everyone an opportunity to subscribe; from offering a Lifeline subsidy for low-income subscribers,¹⁶⁴ to ensuring that low-volume and high-volume consumers could receive service at a price that better reflected their usage of the phone network.¹⁶⁵

As with the policy discussion in subsection (a), subsection (b) affirmatively instructs the Commission to adopt rules to “facilitate equal access to broadband access service” including by adopting rules to “prevent” digital discrimination and identify the steps necessary to eliminate it.¹⁶⁶ As with subsection (a), Congress has again centered the focus of the Commission’s actions on getting all people access, regardless of any discriminatory treatment or intent of the provider. As previously noted, the Commission’s own precedent supports construing this mandate as one that is meant to achieve universal access. As the Lawyers’ Committee for Civil Rights Under the Law noted in an ex parte filed in response to the Commission’s Notice of Inquiry, the text is

¹⁶² 47 U.S.C. § 202(a).

¹⁶³ Part I.C.2 *supra*.

¹⁶⁴ 50 Fed. Reg. 939, n. 25; ¶¶ 9-14 (*asserting* “Access to telephone service has become crucial to full participation in our society and economy which are increasingly dependent upon the rapid exchange of information. In many cases, particularly for the elderly, poor, and disabled, the telephone is truly a lifeline to the outside world. Significant increases in the price of basic telephone service could isolate many of the elderly and poor by depriving them of the ability to obtain medical and police assistance or communicate with family and friends. Our responsibilities under the Communications Act require us to take steps, consistent with our authority under the Act and the other Commission goals in this proceeding, to prevent degradation of universal service and the division of our society into information “haves” and “have nots.”).

¹⁶⁵ In re Access Charge Reform, *Sixth Report and Order*, et.al., CC Docket No. 96-262, et. al., 15 FCC Rcd 12962, 12964 (2000) (“This Order resolves historically vexing issues, some going back nearly two decades, in a manner that benefits consumers. Consumers that make no or few long-distance calls and consumers that make many long distance calls will both enjoy meaningful savings.”).

¹⁶⁶ 47 U.S.C § 1754(b)(1), (2).

“results-oriented” and demonstrates that the prohibition is not limited to discrimination involving intent or knowledge.¹⁶⁷

Regarding the judicial precedents the Commission cites related to civil rights cases that have been considered when a statutory provision in civil rights laws are meant to include disparate treatment, as noted above, these cases are very instructive and should be taken into consideration, but again the Congressional directive here is one primarily directed at ensuring universal service, for which there is a separate body of case law.¹⁶⁸ However, even if it were controlling precedent, it is clear that under the test established in *Inclusive Communities*, this statutory provision was intended to include disparate impact. As the Commission notes, the two-prong analysis from *Inclusive Communities* “the consequences of actions and not just the mindset of the actors” and that “the interpretation is consistent with statutory purpose.”¹⁶⁹ As outlined above, the statutory purpose of section 1754 could not be more clear—“ensure that all people of the United States benefit from equal access to broadband internet access service.”¹⁷⁰ From there, the statute directs the Commission to focus on “facilitat[ing] equal access” or in other words, to focus on the result or consequence of action, not the intent.¹⁷¹

AT&T, US Telecom and Verizon’s assertions that *Inclusive Communities* is due a more restrictive reading are misplaced on two fronts.¹⁷² First, the test as explained by the Court is straightforward and the objective of the text is to determine whether “the operative [statutory]

¹⁶⁷ Letter from David Brody, Lawyers’ Committee for Civil Rights Under Law, to Marlene H. Dortch, Implementing the Infrastructure and Jobs Act: Prevention and Elimination of Digital Discrimination, WC Docket No. 22-69 (Dec. 12, 2022).

¹⁶⁸ See discussion at Part I.C.3 *supra*.

¹⁶⁹ *NPRM* at High-Cost Fund 18.

¹⁷⁰ 47 U.S.C. § 1754(a)(3).

¹⁷¹ *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 534 (2015).

¹⁷² *NPRM* at ¶ 20.

text looks to results.”¹⁷³ As explained above, here the charge for rulemaking by the Commission is focused on facilitating equal access and is agnostic as to the motivation of the providers. Second, even if the reading were as constrained as AT&T and US Telecom assert, section 1754 does include a “catchall phrase” that looks towards consequences. In subsection (c)(3), the Commission is directed to consider “other factors the Commission determines to be relevant” to prohibit digital discrimination.¹⁷⁴

Moreover, AT&T and US Telecom’s assertion that the phrase “based on” limits the Commission to disparate intent is based on the *dissent* not the *majority* opinion of *Inclusive Communities*. The majority’s opinion states the exact opposite of their assertion. The phrase at issue in *Inclusive Communities* was “because of,” which is equivalent to “based on” contained in section 1754. In *Inclusive Communities*, the Court expressly held that the “because of” language did **not** limit the statutory provision to intent and noted that its prior precedent actually addressed this assertion and concluded that disparate impact was within the scope of the statute.¹⁷⁵ It is only in the dissent that the position called for by AT&T and US Telecom is stated and as such it is not the law that governs.¹⁷⁶

The Commission seeks comment on a number of other arguments, primarily from ISPs, that they assert should limit the Commission to only rules addressing discriminatory intent. These arguments should not dissuade the Commission from moving forward with this broad mandate from Congress to address digital discrimination. AT&T’s arguments that interpreting section 1754 to include disparate impact would put the provision on a “collision course” with

¹⁷³ *Id.* [Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 534, 135 S. Ct. 2507, 2519 (2015)].

¹⁷⁴ 47 U.S.C. § 1754(c)(3).

¹⁷⁵ *Inclusive Communities*, 576 U.S. 519, 534.

¹⁷⁶ *Id.* (dissenting op.).

other broadband provisions of the IIJA.¹⁷⁷ The better reading of how section 1754 fits into the broadband provisions in the IIJA is that Congress understood that “access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States” and that “the digital divide disproportionately affects communities of color, lower-income areas, and rural areas, and the benefits of broadband should be broadly enjoyed by all.”¹⁷⁸ And given the essential nature of broadband, every effort must be made to eliminate the “persistent digital divide.”¹⁷⁹ Thus, there is funding made available to get broadband to unserved and underserved communities and where a provider’s bid is not accepted, then the Commission would not treat that as “within the service area of a provider.”¹⁸⁰ However, where a provider is responsible for serving an area, the Commission has the authority to adopt rules to ensure the benefits of broadband are enjoyed by all.¹⁸¹

Regarding the assertion by ACA Connect that “there is no record of a history of discriminatory conduct in the telecommunications sector to justify adoption of a disparate impact rule,” this is simply not true. Lower income and minority communities, which often suffer from redlining in the context of housing, banking and other economic areas, have been demonstrated to be subject to digital discrimination.¹⁸² Tribal lands, which remain some of the least served areas in the country, have historically faced a lack of access, often due to the combination of lower income and rurality. In any event, as discussed at length in Part I above, Congress arrived

¹⁷⁷ *NPRM* at ¶ 23.

¹⁷⁸ 47 U.S.C. § 1701.

¹⁷⁹ *Id.*

¹⁸⁰ 47 U.S.C. § 1754(a)(1).

¹⁸¹ 47 U.S.C. §§ 1701, 1754(a).

¹⁸² The Long Arm of Redlining: Health Inequities in the Digital Divide, available at <https://www.themedicalcareblog.com/redlining-digital-divide/>; Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S., available at: <https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/>.

at the conclusion that without an express directive to eliminate digital discrimination, the United States will not achieve the universal service necessary for the benefit of the nation as well as the benefit of the individuals previously excluded.¹⁸³ As set out explicitly in Section 1701, Congress expressly finds that a “persistent digital divide” continues to exclude low-income communities and communities of color—as demonstrated by the COVID-19 Pandemic.¹⁸⁴ Congress does not permit the Commission to second-guess its express findings and ignore its express directives.¹⁸⁵

The conclusion that the Commission has the authority to adopt rules that address both intent and impact is well supported through statutory construction and other provisions of the Communications Act. It is also consistent with civil rights case law. For all of these reasons, the appropriate course of action for the Commission to take would be to find that it is well within its authority to adopt rules to prevent and eliminate digital discrimination to ensure all people have equal access to broadband internet access service.

B. The Commission Must Implement Its Digital Discrimination Rules In Ways that Address Discriminatory Impact.

The Commission seeks comment on other components of the definition of digital discrimination of access that are meant to inform its implementation of rules. These components include what metrics it should consider, which consumers are within the purview of the definition, and what the geographic area of consideration is for assessing whether digital discrimination is occurring or could occur.

1. The Commission’s Rules Must Account for the Totality of How Services Are Delivered.

In implementing rules to address ways in which policies and practices of providers can differentially impact consumers’ access to broadband, the Commission’s rules must take into

¹⁸³ See Part I.B *supra*.

¹⁸⁴ 47 U.S.C. § 1701(2)-(3), (5).

¹⁸⁵ See *MCI Telecommunications Corporation v. AT&T*, 512 U.S. 218, 234 (1994).

account the totality of how services are delivered, or as section 1754 states “opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics.”¹⁸⁶ That means the Commission must consider speed offerings, latency, data caps, throttling, late fees, equipment rentals, contract renewal and termination, credit and account history and any other factors that are a part of the delivery of broadband service to consumers. This would include, for example, whether an ISP offering service throughout the area responds to subscriber requests for assistance similarly or whether low-income and minority communities consistently receive worse service and slower response times.¹⁸⁷

To the extent that providers deploy algorithms or artificial intelligence (AI) for purposes of making credit decisions, those should be within the scope of the Commission’s rules as well.¹⁸⁸ These tools are known to have flaws in their accuracy pertaining to decision-making concerning lower income and minority persons. As the European Commission’s Explanatory Memorandum on artificial intelligence found, these “systems used to evaluate the credit score or creditworthiness of natural persons should be classified as high-risk AI systems, since they determine those persons’ access to financial resources or essential services such as housing, electricity, and telecommunication services.”¹⁸⁹

¹⁸⁶ 47 U.S.C. § 1754(a)(2).

¹⁸⁷ See, e.g., Baynes, *Regulatory Injustice*, 56 Admin L. Rev. at 320-30 (describing various forms of discrimination in provision of phone service including slow response time and poor maintenance of network in minority neighborhoods).

¹⁸⁸ *NPRM* at ¶ 32.

¹⁸⁹ Proposal for Regulation of the European Parliament and of the Council, Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, 2021/0106 at 27, available at https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF (2021).

2. *The Commission Must Consider the Experiences of All Individuals and Communities Within the Protected Classes.*

Additionally, those rules need to consider the experience of all individuals and communities that meet one of the enumerated protected-class characteristics. We agree with the comments filed by CEO Action for Racial Equity asserting that only by looking at communities as well as individuals can a pattern emerge that will help the Commission identify where deployment decisions are having a discriminatory impact, regardless of whether the policies or practices are facially neutral.¹⁹⁰

We disagree with the scoping proposed by ACA Connects, which would limit the consumers whose experiences the Commission should consider to current “subscribers.”¹⁹¹ If the Commission were to follow this reasoning, a provider would be able to avoid any scrutiny over its practices by simply not deploying to lower-income communities or minority communities. That reading would turn section 1754 on its head and exclude from within the scope of the Commission’s rules the very people its rules are supposed to protect—those that have been denied access because they or their communities are in one of the enumerated classes. As discussed in great detail in Part II, *supra*, the entire point of this provision is to address the failure of ISPs to deploy in neighborhoods and communities with specific demographics. As Congress explained in Section 1701, the very purpose of a universal service statute is to address the persistent digital divide that especially impacts low-income and minority communities to the detriment of the residents of those communities and the nation as a whole.¹⁹²

¹⁹⁰ In this context, it is worth noting that Congress in the 1996 Telecommunications Act focused on ensuring deployment of advanced services in “all regions of the Nation, including low-income consumers,” 47 U.S.C. § 254(b)(3) in addition to prohibiting individual discrimination in 47 U.S.C. § 151 and requiring timely deployment to “all Americans.” 47 U.S.C. § 1302.

¹⁹¹ *NPRM* at ¶ 39 (*citing* ACA Connect Comments that argue only current “subscribers to broadband service; not potential subscribers or consumers generally” should be within the scope of the Commission’s definition.).

¹⁹² 47 U.S.C. § 1701(1)-(5).

ACA Connect’s focus on one word (“subscribers”) in subsection (a)(1) cannot support this unreasonable reading of the statute as being only current subscribers. Even without consideration of the history and specific findings in 47 U.S.C. § 1701, ACA Connect’s interpretation would contradict the plain language of subsection (a)(2) (defining “equal access” as the “opportunity to subscribe,” (emphasis added), subsection (a)(3) (policy to provide equal access defined in (a)(2) to “all people of the United States.” The far better reading is that while 1754(a)(1) addresses discrimination against existing subscribers, 1754(a)(2) and (3) address discrimination in the form of denying the opportunity to subscribe. The breadth of subsection (b) makes it clear Congress intended the Commission’s rules to ensure “all people of the United States” have an “equal opportunity” to subscribe.¹⁹³

V. COMPARABLE SERVICE TERMS AND METRICS ARE AN ESSENTIAL FEATURE OF EQUAL ACCESS.

The principle of equal access sits at the heart of the Commission’s anti-discrimination mission, and the question of how to properly assess and evaluate “comparable” service offerings lies at the center of equal access. As discussed above, Section 1754 defines “equal access” to mean “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.”¹⁹⁴ The statute clearly commands the Commission to “ensure that all people of the United States benefit from equal access to broadband internet access service”¹⁹⁵ and directs the Commission to adopt rules that “facilitate equal access” including by preventing discrimination of access, eliminating discrimination of access,¹⁹⁶ while also adopting federal policies to

¹⁹³ 47 U.S.C. § 1754(a)(3), (b).

¹⁹⁴ 47 U.S.C. § 1754(a)(2)

¹⁹⁵ 47 U.S.C. § 1754(a)(3)

¹⁹⁶ 47 U.S.C. § 1754(b)

“promote equal access ... by prohibiting deployment discrimination.”¹⁹⁷ Every element of the Commission’s anti-discrimination mission invokes the “equal access” definition which itself relies upon properly evaluating the comparability of service offerings across a variety of criteria.

In response to the NOI,¹⁹⁸ we addressed the issue of comparative service in general terms, stating:

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.¹⁹⁹

Those comments highlight some of the multitudinous ways in which the speed, reliability, affordability, accessibility, and overall quality of service are related to digital discrimination.

This interpretation is clearly shared by Congress considering that the definition of equal access explicitly centers both technical and non-technical quality of service metrics.

A. The Comparability Elements of Equal Access Cannot be Interpreted to Constrain Section 1754 to a “Deployment Only” Approach to Digital Discrimination.

The Commission has sought comment on arguments that can generally be categorized as advancing a “deployment only” approach to interpreting to Section 1754 that are rooted in a very narrow interpretation of the comparable service element of the definition of equal access.²⁰⁰

These arguments endeavor to twist the statute away from its clear universal service and

¹⁹⁷ 47 U.S.C. § 1754(c)

¹⁹⁸ 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 ¶ 21 (Mar. 17, 2022) (“NOI”).

¹⁹⁹ *PK Comments* at 6.

²⁰⁰ *NPRM* at ¶ 45.

accountability meaning into what would amount to a very obtuse suggestion from Congress that more broadband deployment deployment subsidies are the only tool available to the Commission. These arguments assert that Section 1754 is limited to addressing deployment and physical availability, leaving the Commission unable to address barriers to adoption like price and quality of service—which are also important for making meaningful comparisons of offered services. The “deployment only” comments crucially fail to appreciate that Section 1754 is essentially a direct and definitive rebuke of profit-motivated marginalization and its attendant economic models upon which the “deployment only” arguments rely.

B. Broadband Service Suffers From Considerable Disparities in Service Quality and Terms Which Constitute Digital Discrimination.

There is considerable empirical evidence that internet service in low-income communities, neighborhoods that have been historically redlined, and communities of color is slower, less reliable, and comparatively *more* expensive. This stands in stark contrast to the economic models championed by service providers that posit that they would equitably serve any community that was economically viable, but that communities with more income simply pay more for internet service. Rather, service providers have been able to charge low-income and minority communities the same as they charge in whiter, more affluent communities while avoiding investing in faster speeds, resulting in a bizarre form of wealth distribution and cross-subsidization where the poor subsidize the wealthy. The landmark studies of this phenomenon—dubbed “tier flattening”—are the NDIA’s 2018 study which coined the term, and

a 2022 study by The Markup which used an even larger dataset.²⁰¹ These studies bypassed the data that service providers gave to the Commission through Form 477—which has proven to be overstated and unreliable²⁰²—and instead used the “broadband availability tools” that the service providers themselves offer to prospective customers. What these studies have found is that service providers have continued to “flatten” rates so that consumers are charged more or less the same for service, despite considerable variances in the actually offered and delivered services. These studies revealed that low-income and minority communities are offered slower speeds at the same price and over networks that are slower due to a lack of investment, meaning that lower income families are subsidizing the upgrades made to the networks used by wealthy families.

These findings indicate that, in many places, service would flatly fail to meet the definition of equal access in more than one way. First, if the same speed is not even being offered to all customers in a given area, then those customers clearly do not have “the equal opportunity” to subscribe to that offered service. Secondly, if service providers are offering slower speeds at the same price as they are offering a higher speed elsewhere in a given area, then the service is failing to deliver comparable speed since it is, ostensibly, the same service offering.

²⁰¹ 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>; Leon Yin and Aaron Sankin, *How We Uncovered Disparities in Internet Deals*, The Markup (Oct. 19, 2022), <https://themarkup.org/show-your-work/2022/10/19/how-we-uncovered-disparities-in-internet-deals>.

²⁰² Benjamin Skinner, Hazel Levy and Taylor Burtch, *Digital redlining: the relevance of 20th century housing policy to 21st century broadband access and education*, EdWorkingPaper: 21-471, Annenberg Institute at Brown University at 14 (2021), <https://doi.org/10.26300/q9av-9c93>.

C. The Commission Should Consider Strictly Comparing Service Offerings Across a Wide Range of Factors.

The Commission should make strict comparisons between service offerings, holding service providers accountable for providing service that is comparable across a wide range of technical and non-technical quality of service factors and terms of service. Technical factors should include actual and advertised speeds, network latency, reliability, and resiliency. Non-technical factors and terms of service worth close scrutiny are actual and advertised service prices, customer service and technician responsiveness, the availability and advertising of promotions, additional fees, and structural barriers to service like credit checks. Simply put, the Commission ought to interpret the wording of the statute in the simplest but most direct terms: each customer in a given area must have the opportunity to subscribe to any service that is offered to any other customer in that area, and the delivered service must then actually be comparable. If the actual quality of service or terms and conditions of the two services differ so substantially that they are no longer comparable, then the customer does not have equal access. Critically, it should be noted that this standard applies across the range of service offerings that might exist; customers should be able to take advantage of existing service offerings at different levels and not just be guaranteed the highest (and therefore probably most expensive) plan.

The Commission has sought comment specifically on the issue of substitutability: whether the availability of a comparable service where another service is unavailable—perhaps from a different provider or where superficial or insignificant elements of the service differ—means that a consumer still benefits from equal access in a given area.²⁰³ The Commission should be guided by a consumer-focused approach to the statute; the goal is not to create draconian or highly formalistic requirements for the service providers but to ensure that

²⁰³ *NPRM* at ¶ 45.

consumers are no longer left behind. To that end, if there is a truly comparable service, such that a consumer is going to be equally well-served with that service as the unavailable one, then equal access has been achieved. This evaluation can be technology neutral, though there are likely to be significant technical variations between different technologies (e.g. wireline vs wireless), such that the default assumption should be that even with stated similarities a service that employs different technology is not comparable.

The Commission has also sought comment on how to best approach the analysis of technical aspects of service when assessing comparability. The Commission should identify and establish a prescriptive range of permissible variability in key quality of service metrics, supported by empirical data from existing networks. Service offerings that operate within that level of variability could be deemed comparable without the Commission needing to make qualitative assessments of service quality. Relatedly, service outages and interruptions are inevitable due to natural conditions as well as the practicalities of network operation, maintenance, and improvement, and need not be factored in overall network performance for the purpose of comparability, however these factors should be considered separately (i.e. frequency and duration of outages) as an additional criteria for assessing comparable service. In other words, service might have similar speed and latency characteristics across two neighborhoods, but if one of the two suffers from many more outages, or much longer service interruptions, that may be a basis to deem those services not comparable.

With regard to non-technical factors including terms and conditions, the Commission should adopt different standards for services offered by the same provider and for comparing services between providers. For services offered by the same provider, the Commission should adopt a strict policy of comparability. There is no basis for different terms and conditions

between different customers or groups of customers in the same area receiving ostensibly the same service offering. Accordingly, the Commission's rules should not allow for deviation in formal terms and conditions and should hold providers to high standards on more informal and elective non-technical service metrics like customer service availability and technician responsiveness.

Naturally, comparing across providers on non-technical factors is considerably more challenging, and there are compelling competition reasons for different providers to have different terms of service or approaches to customer service. However, given that this comparison is only necessary when making a service substitutability analysis, the successful outcome of which is likely to inure to the benefit of the service provider who has failed to make a service available, it may be the case that the consumer is best served by the Commission still conducting a fairly skeptical analysis of how well the terms of service compare between the two services to assure consumers are not saddled with inferior service. For example, if replacement providers implement suspect practices like frequent or excessive late fees, significant equipment rental costs, requiring credit checks or having unfavorable contract termination, or having significantly degraded customer service or technical support, this may result in the service being judged to be not comparable.

Finally, the Commission has sought comments about price discrimination.²⁰⁴ In some sense the inverse of the practice of tier flattening, discussed above, price discrimination refers to the practice of charging different consumers different prices for the same service. As with tier flattening, this practice would constitute a clear violation of comparability and therefore equal access. An offered service is, in perhaps its simplest form, offering a specific tier of service for a specific price. Offering the same service at two prices would essentially constitute two different

²⁰⁴ *NPRM* at ¶ 47.

offered services, as would offering two different service tiers at the same price. In either instance, customers should have the equal opportunity to subscribe to any of those offered services.

VI. ADDRESSING DIGITAL DISCRIMINATION REQUIRES THE COMMISSION TO PROMOTE INFRASTRUCTURE INVESTMENT.

The Commission seeks comment on what actions it can take “to promote infrastructure deployment” to “address digital discrimination” and how such actions will “further[] the goals identified by Congress in section 60506.”²⁰⁵ The Commission’s stated goals based on these Congressional directives are (1) “to identify and address the harms experienced by historically excluded and marginalized communities;” (2) “provide a grounding for meaningful policy reforms and systems improvements;” and (3) “establish a framework for collaborative action to promote and facilitate digital opportunity for everyone.”²⁰⁶

To achieve these goals and promote infrastructure deployment that will address digital discrimination, the Commission needs to address several critical areas of broadband policy, including: spectrum policy, multi-tenant environments (MTEs), and USF. These policy areas have significantly impacted the infrastructure deployment in historically excluded and marginalized communities, making them ripe areas for reform and improvement to address digital discrimination.

A. The Commission Should Take Action on Spectrum Policy to Address Digital Discrimination.

The Commission identified spectrum policy as a specific topic it seeks to address and requests comment on “what specific action [it] should take in these proceedings to address digital discrimination.”²⁰⁷ Spectrum policy is an area that is ripe for the Commission’s attention in this proceeding because of its often overlooked impact on digital discrimination. By adopting a

²⁰⁵ *NPRM* at ¶ 84 (codified at 47 U.S.C. § 1754).

²⁰⁶ *NPRM* at ¶ 2.

²⁰⁷ *NPRM* at ¶ 84.

spectrum policy framework centered in public interest principles the Commission can improve the spectrum policy system and enact meaningful change that addresses digital discrimination. Specifically, the Commission should adopt policies that both require wireless carriers to provide coverage to their entire service areas and make it possible for underserved communities to provide their own telecommunications services.

1. Spectrum Policy Has Historically Exacerbated Digital Discrimination.

Historically, advocates and policymakers have not considered spectrum policy relevant to digital discrimination. In their eyes, the technical aspects of spectrum policy removed it from the realm of social issues involving discrimination.²⁰⁸ The dominant belief was that because a single cell tower could provide coverage to a large enough geographic footprint to serve both white and non-white neighborhoods, a wireless carrier would naturally end up serving both communities.²⁰⁹ This thinking created a blind-spot, that when coupled with build out requirements that are lower than a service area’s population, has allowed wireless carriers to avoid serving marginalized, low-income communities that are disproportionately non-white.²¹⁰

The spectrum policies the Commission enacts can and have exacerbated this discriminatory impact. Consider the following examples:

- **The Spectrum Frontiers Rulemaking.** In this rulemaking,²¹¹ the Commission opened up high frequencies that bounce off solid objects (such as buildings) instead of penetrating them for mobile use. The resulting signal loss means that using these frequencies for mobile service requires widely distributed “micro-cells” rather than

²⁰⁸ Kathleen Burke, Back to the Spectrum Future: The 20th Anniversary of the Spectrum Policy Task Force, Public Knowledge, 58 (Jan. 2023), <https://publicknowledge.org/policy/back-to-the-spectrum-future-the-20th-anniversary-of-the-spectrum-policy-task-force/>.

²⁰⁹ *Id.* at 59

²¹⁰ *Id.*

²¹¹ F.C.C., Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Use of the Spectrum Bands Above 24 GHz for Mobile Service; etc.*, GN Docket No. 14-177 (rel. July 14, 2016).

just a few towers to cover an entire urban market,²¹² negating the traditional assumption that wireless service in an area will necessarily include any traditionally “red-lined” communities. Instead of addressing this issue, the Commission has expressly limited the permitting authority of localities to ensure deployment in traditionally red-lined neighborhoods²¹³ and failed to establish any deployment monitoring mechanisms to ensure equitable and inclusive access to next-generation 5G wireless services.

- **The FAA vs. 5G Altimeter Battle.** The conflict between the FAA and licensees of the 3.7 GHz C-Block auction demonstrates how technical decisions can unintentionally impact the availability of services to communities of color. To guard against potential interference from the licensees in the 3.7-3.98 GHz band with the altimeters that assist planes in take-off and landing, the FAA demanded significant exclusion zones around major airports.²¹⁴ These exclusion zones would impact the neighborhoods surrounding major airports, neighborhoods that are disproportionately home to marginalized communities.
- **The CBRS Professionally Certified Installer Requirement.** While the FCC’s professionally certified installer requirement for CBRS base stations²¹⁵ arguably helps prevent faulty installations that could create harmful interference, it also prevents marginalized communities from creating their own local wireless networks by adding a regulatory barrier and raising the costs. The requirement’s marginal advantage to mitigate potential interference does not outweigh the barriers it creates for low-income and disadvantaged communities. Not only does such a requirement facilitate digital discrimination by limiting equal access, it also ignores Section 309(j)’s instruction to consider licensing and frequency use to enhance access to spectrum access for minority owned businesses, and to provide “economic opportunity” and “the opportunity to participate in the provision of spectrum-based services” for minority-owned businesses and communities.²¹⁶

²¹² *Id.* at ¶ 6. See also, Alejandro Jasso, *Small Cells, Picocells, and Microcells: the Complete Guide*, Wilson Amplifiers (Oct. 6, 2022), <https://www.wilsonamplifiers.com/blog/small-cells-picocells-and-microcells-the-complete-guide/>.

²¹³ See F.C.C., Declaratory Ruling and Report & Order, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCCRcd 9088 (2018).

²¹⁴ Bevin Fletcher, *FAA Identifies Airports Set for 5G C-Band Buffer Zones*, Fierce Wireless (Jan. 10, 2022), <https://www.fiercewireless.com/5g/faa-names-airports-set-5g-c-band-buffer-zones>.

²¹⁵ See 47 C.F.R. § 96.45.

²¹⁶ 47 U.S.C. §309(j).

The FCC has begun to reckon with the ways that spectrum policy can impact digital discrimination and equal access to services. In its most recent spectrum proceedings, the FCC has explicitly sought comment on how its decisions might impact diversity, equity and inclusion.²¹⁷ This proceeding also provides a key vehicle for the Commission to consider the ways that the existing wireless market perpetuates existing inequalities and, if so, what steps to take to reverse course and facilitate equal access to broadband by all Americans.

2. *The Commission Should Adopt a Backcasting from Public Interest Principles Framework for Spectrum Policy Because It Aligns with the Congressional Directives in 47 U.S.C. § 1754.*

In Public Knowledge’s recently published white paper, *Back to the Spectrum Future: the 20th Anniversary of the Spectrum Policy Task Force*, Public Knowledge proposed adopting a backcasting model for spectrum policymaking rooted in public interest principles.²¹⁸ A backcasting policy framework asks us to decide what kind of future we want, and then works backwards to determine what policies will help us get there. Backcasting using principles adds additional flexibility to this model by focusing on what principles will govern an ideal future, rather than envisioning exact details about the future. The conditions necessary for the envisioned future serve as principles to guide today’s policy decisions. This “value-based framework for making policy decisions affords policymakers the flexibility necessary to adapt spectrum policies, even technical ones, to meet the needs of a technological future we cannot truly predict.”²¹⁹

²¹⁷ See e.g. F.C.C., Notice of Inquiry and Order, *In the Matter of Expanding Use of the 12.7-13.25 GHz Band for Mobile Broadband or Other Expanded Use*, GN Docket No. 22-352, ¶ 43 (rel. Oct. 28, 2022).

²¹⁸ Kathleen Burke, *Back to the Spectrum Future: The 20th Anniversary of the Spectrum Policy Task Force*, Public Knowledge (Jan. 2023), <https://publicknowledge.org/policy/back-to-the-spectrum-future-the-20th-anniversary-of-the-spectrum-policy-task-force/>.

²¹⁹ *Id.* at 13.

The Congressional directives in 47 U.S.C. § 1754 are particularly suited to this model for spectrum policy. In Sec. 1754(a)(3) Congress provides a vision and a necessary condition for the future—“all people of the United States benefit from equal access to broadband internet access service.”²²⁰ This is step one, defining the conditions of the future we are trying to create, of a backcasting framework. In Sec. 1754(b) Congress essentially directs the FCC to complete step 2 of a backcasting framework by developing rules that will achieve this vision—“the Commission *shall* adopt final rules to facilitate equal access to broadband internet access.”²²¹ Congress then goes one step further by providing a starting point to move towards a future of equal access by directing the Commission to take into account “preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.”²²²

The Commission should adopt the backcasting using public interest principles model proposed by Public Knowledge because it provides a flexible framework for staying focused on the Congressional directives in 47 U.S.C. § 1754 while navigating complex policy decisions.

3. *To Address Digital Discrimination, the Commission Must Adopt Spectrum Policies that Require Wireless Carriers to Provide Coverage to their Entire Service Areas and Make it Possible for Marginalized Communities to Provide Their Own Wireless Service.*

The right spectrum policies can help move us towards a future of equal access and combat digital discrimination by facilitating spectrum use and innovation. Specifically, PIA recommends that the Commission take a two-pronged spectrum policy approach to address digital discrimination by adopting policies that: (1) require wireless carriers to provide coverage to their entire service areas and (2) make it possible for underserved communities to provide their own telecommunications services.

²²⁰ 47 U.S.C. § 1754(a)(3).

²²¹ 47 U.S.C. § 1754(b).

²²² 47 U.S.C. § 1754(b)(1).

- **Adopt a Use-It-Or-Share-It Policy and/or a Keep-What-You-Use policy for Spectrum Licenses.** Use-it-or-share-it policies allow for “opportunistic access to licensed or federal spectrum that is unused or underutilized in a specific area.”²²³ Alternatively, a keep what-you-use policy that allows a licensee to only keep its license for the geographic areas that it actually services.²²⁴ Keep-What-You-Use can even complement a use-it-or-share-it policy “by allowing any current or subsequent opportunistic user to deploy, commence service, and acquire the lost licensing rights.”²²⁵ These policies would eliminate a licensee’s ability to prevent another provider from servicing areas that they refuse to serve. This incentivizes licensees to deploy to all areas of its license—reducing the opportunity for digital discrimination.
- **Increase Spectrum Access with Shared and Unlicensed Access Models.** Unlicensed and shared access models encourage infrastructure development by providing an affordable alternative to spectrum access outside of the traditional exclusive licensed regime. For example, many low-income schools have started building their own networks using free access to spectrum to provide service to their students. The Fresno (CA) school district “already provides service to 25,000 mostly low-income student households by using “schools as towers” to locate CBRS wireless access points.”²²⁶ And, the Lindsay Unified School District in California’s Central Valley (a predominantly low-income, agricultural community) combines Wi-Fi, CBRS, EBS to provide “a free, reliable internet connection for every student household.”²²⁷
- **Reduce Spectrum Scarcity by Updating Technical Regulations, Metrics, and Modeling Based on Current Technology.** Technical rules drive the cost of devices and services. They also limit the flexibility of services and use cases. Unfortunately, many of the Commission’s technical regulations, metrics, and modeling do not reflect the major advancements in spectrum-based technologies—particularly when it comes to

²²³ Michael Calabrese, *Use It or Share It: A New Default Policy for Spectrum Management*, New America, 1 (March 2021),

https://d1y8sb8igg2f8e.cloudfront.net/documents/Use_It_or_Share_It.pdf.

²²⁴ Comments of New America’s Open Technology Institute and Public Knowledge, *In the Matter of Partitioning, Disaggregation, and Leasing Spectrum*, WT Docket No. 19-38, at 15 (Feb. 28, 2022),

<https://publicknowledge.org/policy/public-knowledge-open-technology-institute-fcc-comments-on-partitioning-disaggregation-and-leasing-of-spectrum/>.

²²⁵ *Id.* at 16.

²²⁶ Matthew Marcus and Michael Calabrese, *The “To and Through” Opportunity: Case Studies of School and Community Networks Able to Close the Homework Gap for Good*, Open Technology Institute at New America, 3 (Aug. 2022),

https://newamericadotorg.s3.amazonaws.com/documents/Anchor-Nets-Case-Studies-revisedFIN_AL_091422.pdf.

²²⁷ *Id.*

interference protection.²²⁸ These outdated policies can limit access to spectrum and place unnecessary burdens on secondary and unlicensed spectrum use cases. Updating technical regulations based on the current technology would make it easier for marginalized communities experiencing digital discrimination to build usable networks using unlicensed or shared-use spectrum.

These policies will address the two-sided coin of spectrum policy issues that address digital discrimination—requiring carriers to service their entire licensing area and making it possible for communities experiencing digital discrimination to provide their own telecommunications services.

B. The Commission Should Apply a Single Regulatory Regime for Residential and Commercial MTEs.

The Commission “seek[s] further comment on the record’s focus on issues regarding broadband service in multiple tenant environments (MTEs) such as apartment buildings and offices.”²²⁹ PIA urges the Commission to Many MTE’s are mixed use environments with commercial properties co-existing with residential units. This type of mixed-use development is trending nationally and is often used for affordable housing projects and to incentivize investment in marginalized and low-income areas.²³⁰ Determining whether a mixed-use MTE is residential, and subject to the Commission’s rules, or commercial, and therefore exempt, is challenging. This creates confusion, facilitates loopholes, and delays enforcement of the

²²⁸ See Kathleen Burke, Back to the Spectrum Future: The 20th Anniversary of the Spectrum Policy Task Force, Public Knowledge, 29-30 (Jan. 2023), <https://publicknowledge.org/policy/back-to-the-spectrum-future-the-20th-anniversary-of-the-spectrum-policy-task-force/>.

²²⁹ NPRM at ¶ 84.

²³⁰ See e.g., Montgomery County Mixed-Use Development Study: Summary of Findings, 13, 16, 28-29 (July 2021), https://montgomeryplanning.org/wp-content/uploads/2021/07/Montgomery-County-Mixed-Use-Study-7-12-21_FINAL.pdf.

Commission’s protections against digital discrimination in MTE environments.²³¹ Therefore, the Commission should adopt a single regulatory regime for *all* MTEs.

C. The Commission Can and Should Tailor Subsidy Programs Under Its Control to Promote Infrastructure Investment that Addresses Digital Discrimination.

The Commission “seek[s] comment ... about whether and how the Commission can use its funding programs to combat digital discrimination of access.”²³² The Commission also asks, “What programs should the Commission consider using in undertaking this effort?”²³³ The Commission can and should use its Universal Service funding programs to combat digital discrimination—including E-rate and the Rural Digital Opportunity Fund (RDOF). The Commission also asks, “What programs relate to digital discrimination of access and how?”²³⁴ The answer is simple—all of the Commission’s Universal Service programs relate to digital discrimination of access.

The Universal Service Fund was established to help the Commission achieve Congress’ goal of providing telecommunications services to *all* Americans. Successfully combating digital discrimination of access is a necessary prerequisite of achieving that goal. Additionally, several of the Universal Service Fund’s statutorily mandated principles directly relate to digital discrimination of access.²³⁵ For example, the first principle states: “Quality services should be available at just, reasonable, and affordable rates.”²³⁶ Digital discrimination of access occurs when only select populations have access to quality services. The second principle states:

²³¹ Comments of Public Knowledge and Consumer Reports at 20, <https://publicknowledge.org/policy/comments-to-the-fcc-on-improving-competitive-broadband-access-to-multiple-tenant-environments/>.

²³² NPRM at ¶ 85.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *See* 47 U.S.C. § 254(b)(1, 2, 3, 6, 7).

²³⁶ 47 U.S.C. § 254(b)(1).

“Access to advanced telecommunications and information services should be provided in all regions of the Nation.”²³⁷ Digital discrimination of access occurs when some regions, including marginalized communities, do not have access to advanced telecommunications and information services. The Commission also has authority, in conjunction with the Joint Board, to establish additional Universal Service principles as “necessary and appropriate for the protection of the public interest, convenience, and necessity and consistent with this chapter.” Congress’s mandates in 47 U.S.C. § 1754 establish that facilitating equitable access and addressing digital discrimination of access are appropriate and necessary for achieving universal service.

1. The Commission Can Use E-Rate to Combat Digital Discrimination.

Because the E-rate program relates to digital discrimination, the Commission can and should use E-rate to address digital discrimination of access.

Digital discrimination of access often shows up in the context of education and the availability of community resources. As the Commission recognized in its *Emergency Connectivity Fund Order*, “before the pandemic, millions of students who lacked home broadband connections and access to computers were caught in the ‘Homework Gap.’”²³⁸ The E-Rate program has and continues to play a vital role in addressing this issue. As the Commission explained in the *2nd E-rate Modernization Order*, E-rate funding “allow[s] libraries to offer a free and safe place to search for information on job opportunities, find public services, access online education, and connect with friends and family.”²³⁹ E-rate helps “to connect every student and every library patron to high-speed broadband, no matter where they live or their

²³⁷ 47 U.S.C. § 254(b)(2).

²³⁸ F.C.C., Report and Order, *In the Matter of Establishing Emergency Connectivity Fund to Close the Homework Gap*, WC Docket NO. 21-93, at ¶ 1 (rel. May 11, 2021).

²³⁹ F.C.C., Second Report and Order and Order on Reconsideration, *In the Matter of Modernizing the E-Rate Program for Schools and Libraries; Connect America Fund*, WC Docket No. 13-184; WC Docket No. 10-90, at ¶ 2 (rel. Dec. 19, 2014).

income level,” providing “a vital link to the digital world and new opportunities.”²⁴⁰ E-rate essentially relates to digital discrimination of access by increasing digital access for *all* students and establishing digital access in *all* communities through libraries.

PIA supports the Schools, Health and Libraries Broadband Coalition (SHLB) proposal that the FCC waive the E-Rate cost allocation rules, to permit E-Rate recipients to extend their networks into local communities that lack equal access.²⁴¹ This proposal will advance the Commission’s mandate to address digital discrimination by allowing schools and institutions to provide service to communities that experience digital discrimination.

Moreover, allowing schools and libraries to extend their networks will help achieve E-rate’s goals by making sure that students and educators have access to the internet for remote-learning. Even as society has declared the pandemic over, remote learning is here to stay—nearly all of the 20 largest public school districts in the United States offered a remote option in the fall of 2022.²⁴² As SHLB explained, “Non-instructional facilities are as vital to the provision of education and library services as any school or library building ... The artificial distinction between buildings with or without classrooms in a school district is irrelevant when it

²⁴⁰ *Id.*

²⁴¹ See Reply Comments of the Schools, Health, & Libraries (SHLB) Coalition In Support of Petitions for Reconsideration Submitted by State E-Rate Coordinators’ Alliance and Infinity Communications and Consulting, Inc., *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184 (April 20, 2020), <https://www.fcc.gov/ecfs/document/10421143424620/1>; SHLB website: “E-Rate and Emergency Connectivity Fund,” available at: <https://www.shlb.org/policy/E-rate>.

²⁴² Kalyn Belsha and Matt Barnum, *Sticking Around: Most Big Districts Will Offer Virtual Learning this Fall, A Sign of the Pandemic’s Effect*, Chalkbeat (Jun. 6, 2022), <https://www.chalkbeat.org/2022/6/6/23153483/big-school-districts-virtual-learning-fall-2022#:~:text=Nearly%20all%20of%20the%20nation's,pandemic%2C%20a%20Chalkbeat%20review%20found.>

comes to remote online instruction.”²⁴³ E-learning is here to stay, and E-rate can help make sure *all* students can access the new opportunities it affords.

2. *The Commission Can Use the High-Cost Fund to Combat Digital Discrimination.*

PIA also supports using the Universal Service High Cost fund (High-Cost Fund) to upgrade networks that serve communities subject to digital discrimination.²⁴⁴ PIA recommends using the RDOF Phase II auction to target service areas subject to digital discrimination. Once the current RDOF program expires, PIA also recommends modifying the High-Cost Fund to explicitly prioritize funding projects to service and upgrade networks areas that are subject to digital discrimination. This will help the Commission achieve the goals outlined in 47 U.S.C. § 1754.

According to the Commission, the High-Cost Fund is designed “to promote deployment of communications networks to those Americans who lack access to infrastructure capable of providing high-speed broadband.”²⁴⁵ This goal aligns perfectly with the Congressional directive in 47 U.S.C. § 1754 to facilitate equal access to broadband service, creating an opportunity for the Commission to use the High-Cost Fund to prioritize infrastructure investment in areas experiencing digital discrimination.

The Commission does not need to wait for the current RDOF allocation framework to expire before using High-Cost funds to combat digital discrimination. The Commission has not even started the Phase II auction for RDOF. In the *RDOF Report and Order*, the Commission

²⁴³ Reply Comments of the Schools, Health, & Libraries (SHLB) Coalition In Support of Petitions for Reconsideration Submitted by State E-Rate Coordinators’ Alliance and Infinity Communications and Consulting, Inc., *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, at 3-4 (April 20, 2020), <https://www.fcc.gov/ecfs/document/10421143424620/1>.

²⁴⁴ See PK Digital Discrimination NOI Comments at 36.

²⁴⁵ F.C.C., Report and Order, *In the Matter of Rural Digital Opportunity Fund; Connect America Fund*, WC Docket No. 19-126; WC Docket No. 10-90, ¶ 3 (rel. Feb. 7, 2020).

explicitly declined to determine which areas it would target for Phase II funding. Instead the Commission decided that it would “later determine” Phase II service areas “[b]ecause we will have an additional opportunity to seek comment on how best to target Phase II support as we gather more granular data on where broadband has been actually deployed.”²⁴⁶ Because the Commission has not yet determined which service areas it will prioritize in the RDOF Phase II auction, it can and should prioritize service areas that experience digital discrimination.

Once the RDOF auction is complete, the Commission should formally modify the High-Cost Fund goals to focus on funding projects to service, upgrade, and build networks in areas experiencing digital discrimination. Modifying the High-Cost Fund to make this goal explicit will help facilitate equal access of broadband and help combat digital discrimination.

VII. THE COMMISSION MUST ADOPT POLICIES TO ADDRESS DIGITAL DISCRIMINATION ON TRIBAL LANDS.

The Commission seeks comment on “actions [it] can take to address digital discrimination of access on Tribal lands.”²⁴⁷ The Commission should take actions that will help eliminate digital discrimination on Tribal lands while respecting Tribal sovereignty. Tribes occupy a unique position with regard to Commission policy. The Commission has recognized the federal trust relationship it has with Tribes and the unique relationship it creates. The Commission recognizes the responsibilities it has towards Tribes as well as the rights that Tribal governments have to set their own communications priorities and goals. Despite these requirements, Tribal reservations (especially in rural areas) remain among the least-served areas in the United States.

²⁴⁶ *Id.* at ¶ 9.

²⁴⁷ NPRM at ¶ 87.

A. Tribes Have and Continue to Face Digital Discrimination of Access to Communications Services.

Since the advent of communications services, Tribal lands have often been overlooked and left behind. In 2000, in an acknowledgment that members of federally-recognized American Indian Tribes and Alaska Native Villages and other residents of Tribal lands lacked meaningful access to wired and wireless communications services, the Commission adopted a Policy Statement acknowledging the important trust relationship of the Commission in working in consultation with Tribes on a government-to-government basis to to ensure access to communications services.²⁴⁸

In 2002, former Senator John McCain spoke about the lack of basic phone service on tribal lands, noting that only 47% of tribal households had access at a time when the rest of the nation was focused on broadband deployment.²⁴⁹ Senator McCain went on to note that “many Native American communities across the United States have been left behind during the information age and do not have access to advanced telecommunications services, or even basic phone service.”²⁵⁰ At the time he delivered those remarks, the Commission had already issued its third report on the state of broadband deployment.²⁵¹

Unfortunately, the Tribal digital divide has not substantially improved in the last 20 years. A recent report found that the share of households with Internet access is 21% lower in tribal

²⁴⁸ Statement on Policy on Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement, 16 FCC Rcd 4078 (2000) (“Tribal Policy Statement”)

²⁴⁹ Opinion, *McCain Spotlights Lack of Telephone Service on Arizona Indian Reservations*, Navajo-Hopi Observer (May 29, 2002), <https://www.nhnews.com/news/2002/may/29/mccain-spotlights-lack-of-telephone-service-on-ar/>.

²⁵⁰ *Id.*

²⁵¹ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Third Report, 17 FCC Rcd 2844 (2002).

areas than in neighboring non-tribal areas.²⁵² The same study found that the access gap between Tribal and non-Tribal areas is approximately three times larger than the White-Black access gap and four times larger than the urban-rural access gap.²⁵³ The disparity these statistics reveal also emphasizes how important it is that the Commission take concerted action to address the digital discrimination Tribes face.

B. The Commission Should Take Steps to Eliminate Digital Discrimination of Access on Tribal Lands.

While the Commission continues its work to address the challenges presented in serving Tribal communities, 47 U.S.C. § 1754 makes clear that differential access due based on lower income is no longer an acceptable reason.²⁵⁴ In its 2021 Fourteenth Report on Broadband Deployment, the Commission concluded that “[t]he remote, isolated nature of these areas, combined with challenging terrain and lower incomes, increase the cost of network deployment and entry, thereby reducing the profitability of providing service.”²⁵⁵ To address tribal digital discrimination, the Commission must take action to address these challenges and adopt policies that facilitate infrastructure investment on tribal lands. We urge the Commission to take a two-pronged approach towards encouraging infrastructure investment on Tribal lands: (1) close loopholes that allow providers to avoid deploying to Tribes within their service areas; and (2) adopt policies and programs that enable Tribes to build their own networks.

²⁵² Anahid Bauer, Donn L. Feir, Matthew T. Gregg, *The Tribal Digital Divide: Extent and Explanations*, 46 Telecommunications Policy 102401, at 6 (June 18, 2022), https://www.sciencedirect.com/science/article/abs/pii/S0308596122001033?utm_medium=email&utm_campaign=Newsletters&utm_source=sendgrid

²⁵³ *Id.* at 2.

²⁵⁴ *See* 47 U.S.C. § 1754(b)(1).

²⁵⁵ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Fourteenth Broadband Deployment Report, GN Docket No. 20-269, 36 FCC Rcd 836, 846-847 ¶ 20. (2021).

1. *The Commission Should Close Loopholes that Allow Providers to Avoid Deploying to Tribes.*

PIA urges the Commission to ensure that the Commission's rules are not enabling ongoing discrimination based on income by closing regulatory loopholes that allow service providers to avoid deploying to Tribes within their service footprint. Tribal areas are often comprised of sparsely-populated and lower-income populations, which means that—in addition to the higher cost as compared to urban areas—carriers have less profit opportunity than the more affluent or populous parts of their service area. In the wireless context, inclusion of Tribal lands within larger license areas without adjusting build out obligations to ensure these areas are built has resulted in the lower connectivity that we see on Tribal lands. In the wireline context, too often, particularly in price cap areas, providers have failed to upgrade their exchanges on Tribal lands because of the higher cost of serving lower-income populations that reside on Tribal lands. To address these deployment problems that are rooted in income, the Commission must seek to promote how it can eliminate regulatory loopholes and better empower Tribal governments and Tribal providers to secure access to communications.

For instance, the Commission should evaluate whether the build-out obligations it places on wireless licensees should continue to allow those licensees to meet their obligation to serve the licensed area when they have not built out to tribal communities. Where licensees have not built out, the Commission could, as part of its trust relationship with tribes, impose a good-faith negotiation process to ensure that tribal lands have broadband internet access service. The Commission proposed such a remedy in 2011 as part of its rulemaking on promoting greater spectrum utilization over tribal lands.²⁵⁶ As the Commission suggested in that proceeding, the

²⁵⁶ Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, Notice of Proposed Rulemaking, WT Docket No. 11-40, 26 FCC Red. 2623, 2638-2642, ¶¶ 45-63. (2011) (*Tribal Broadband NPRM*).

process for good-faith negotiations would be actively overseen by the Commission and would require negotiation by the licensee where it had not deployed. Such negotiations would require that the licensee designate a representative to engage in negotiations with the tribe and would prohibit a “take it or leave it” single proposal by the licensee.²⁵⁷

Alternatively, the Commission could eliminate the voluntary aspect of the Enhanced Competition Incentive Program (ECIP). The ECIP program encourages licensees to partition, disaggregate, or lease spectrum to small carriers and Tribes.²⁵⁸ But, it does so only on a voluntary basis. This limits the effectiveness of ECIP and creates a loophole that allows carriers to continue warehousing spectrum over tribal territories that they never intend to service. By making ECIP mandatory with regard to fallow spectrum on Tribal lands, the Commission could help facilitate better access for residents of Tribal lands.

2. *The Commission Should Enable Tribes to Deploy Their Own Networks.*

Additionally, the Commission should adopt policies and establish programs that enable Tribes to build their own networks. Not every Tribe wants to become a telecommunications provider, but for those that do, the Commission should take steps that will facilitate their ability to do so. Unfortunately, Tribes that hope to build their own networks face significant barriers. The cost of participating in—let alone winning—a spectrum auction acts as a significant barrier for most tribes.²⁵⁹ Even if a Tribe could afford an exclusive spectrum license, the geographic area

²⁵⁷ *Id.* at ¶ 48.

²⁵⁸ In the Matter of Partitioning, Disaggregation, and Leasing Spectrum, *Report and Order and Second Further Notice of Proposed Rulemaking*, WT Docket No. 19-38 (rel. June 23, 2022), <https://www.fcc.gov/document/establishing-enhanced-competition-incentive-program>.

²⁵⁹ Kathleen Burke, *Back to the Spectrum Future: The 20th Anniversary of the Spectrum Policy Task Force*, Public Knowledge, 70 (Jan. 2023), <https://publicknowledge.org/policy/back-to-the-spectrum-future-the-20th-anniversary-of-the-spectrum-policy-task-force/>.

of most licenses extends well beyond a Tribe's lands. To meet the performance metrics associated with these licenses, Tribes would need to deploy and operate a wireless network well outside their tribal lands.

Some tribes have attempted to work around this issue by using unlicensed spectrum to build their own wireless ISPs. But, regulations like unlicensed spectrum's low-power requirements have limited the utility of this approach. Fortunately, three of the Commission's recent innovations and prior proposals provide potential solutions: (1) the Commission's 2011 build-or-divest proposal; (2) the Tribal Priority Window in the recent 2.5 GHz auction; and (3) the CBRS multi-tiered band plan. The Commission can and should adopt or expand these policies in order to facilitate tribal self-deployment as a way to address digital discrimination on tribal lands.

First, to facilitate the deployment of communications networks, the Commission could, for example, adopt its build-or-divest proposal from 2011 but expand it to also include wireline service.²⁶⁰ Under the Commission's build-or-divest proposal, a provider would be given notice by a qualifying Tribal entity of its intent to initiate a process by which the provider must certify it intends to build or that it will enter into negotiations for the transfer of the service areas to the Tribal entity. Once underway, the Commission would need to oversee the negotiations to ensure good faith and compliance with all of the regulatory steps. The Commission can also assist the Tribal entity in taking over the obligation to provide service to the area by streamlining the eligible telecommunications carrier designation process for the Tribal entity to qualify for

²⁶⁰ *Tribal Broadband NPRM* at ¶¶ 54-63. The proposal outlined in *Tribal Broadband NPRM* was specifically to address mobile service but could be adapted to provide Tribal entities access to the exchanges necessary to provide wireline service as well.

universal service support or disaggregating the tribal lands from the geographic area of the wireless license. The Office of Native Affairs and Policy could be a critical facilitator of this oversight, given its expertise.

This approach promotes self-determination and Tribal sovereignty because it affords Tribes an opportunity to build this essential service to their residents. It also meets the charge of 47 U.S.C. § 1754, which directs the Commission to take steps necessary to eliminate discrimination.²⁶¹ As noted above, among the reasons cited by providers who have responsibility for serving these areas is that because the populations on Tribal lands are generally low income they do not have an incentive to build out. That can no longer be a justification for denying Tribes access to broadband.

Second, the Commission recently adopted a Tribal Priority Window that allowed Tribes to apply for the spectrum licenses covering their lands prior to the 2.5 GHz spectrum auction. During the window, the Commission received 418 applications and amendments from 266 Tribes despite the numerous challenges Tribes faced in completing their applications during the COVID-19 pandemic.²⁶² This success, not only demonstrates that the demand for spectrum access amongst Tribes is high, but also that the Commission has an effective mechanism for awarding licenses to Tribes outside the auction system.²⁶³ The FCC's authority to create the

²⁶¹ 47 U.S.C. § 1754(b)(2).

²⁶² Mark Colwell, *Success of Rural Tribal Window Demonstrates Need for Rural Education Window*, Voqal (Sept. 9, 2020), <https://voqal.org/success-of-rural-tribal-window-demonstrates-need-for-rural-education-window/>.

²⁶³ See Public Notice, *Wireless Telecommunications Bureau Waives 2.5 GHz Rural Tribal Window Specific Interim and Final Performance Deadlines* (rel. July 8, 2022) (noting that FCC had at that time issued 335 licenses to over 350 Tribes in 30 states), <https://www.fcc.gov/document/25-ghz-rural-tribal-window-extension-performance-deadlines>.

Tribal Priority Window is not limited to the EBS band. To the contrary, it applies to any spectrum auctioned under the FCC’s general authority—meaning that the FCC can, and should, adopt a policy of holding a Tribal Priority Window prior to every auction.²⁶⁴

Third, the Commission’s adoption of Citizens Broadband Radio Service demonstrates in an immediate sense the power of developing spectrum policy that allows communities to access spectrum in a more cost-efficient way through sharing. By allowing Tribal entities, as well as a diverse array of other stakeholders, to access CBRS spectrum by rule (instead of auction), the FCC has created a broad base of spectrum users who will help meet their communities’ needs and drive innovation in CBRS devices and services. This will better help Tribal communities meet their service needs. CBRS-type band planning also demonstrates that non-federal entities can successfully share federal spectrum with federal users without causing harmful interference.

As with the use of Tribal Priority windows, the FCC (and federal users) can develop sharing mechanisms unique to Tribal lands. Section 927(b) of the Communications Act²⁶⁵ allows the Secretary of Commerce, in conjunction with the FCC, to permit non-federal entities to share spectrum allocated for primarily federal use. In light of the Federal Trust Relationship, which creates a unique relationship between Tribal governments and federal agencies, it would serve the public interest to invoke this provision to permit Tribal governments access to federal spectrum on tribal lands—subject to rules established by the FCC. This access could be accompanied by formally recognizing that tribes have an interest in the electromagnetic spectrum on their tribal lands, restoring an additional measure of sovereignty to Native American Tribes.

²⁶⁴ The success of the Tribal Priority Window should not justify forcing Tribes to operate their own networks. Rather, Tribes that want to provide service to their communities should have an opportunity to do so.

²⁶⁵ 47 U.S.C. § 927(b).

VIII. THE COMMISSION MUST ADOPT EFFECTIVE ENFORCEMENT RULES AND POLICIES.

No matter how finely crafted the Commission’s rules are they will fail to rise to the significant challenge set to it by Congress without effective enforcement. The Commission has sought comment on enforcement processes, specific remedies, enforcement authority, and revisions to its complaint processes.²⁶⁶ There are effective rules and policies that the Commission can adopt in each of these categories and all of these rules and policies can and should be considered in the context of a comprehensive enforcement strategy.

A. The Commission Should Adopt an Enforcement Strategy that Focuses on Impacts on Equality, Aligning Incentives, and Enforcement Efficiency.

Across its three missions related to digital discrimination—preventing access discrimination, preventing deployment discrimination, and eliminating existing digital discrimination—the Commission needs a unified enforcement strategy supported by its new and existing authority under Section 1754 and the Communications Act more generally. Getting all of the definitions in the rules right, making measured and impactful policy choices, and gathering the mountains of information needed to come to grips with digital discrimination are each significant challenges, but they are also only the first steps in the journey to end digital discrimination. A clear, efficient, and active enforcement strategy is the key to ensuring that the Commission’s tripartite digital discrimination mission actually succeeds. Across its discrimination prevention and elimination missions—as well as in its coordination with states, localities, and stakeholder groups—the Commission should focus on impacts on equality, aligning incentives, and enforcement efficiency.

²⁶⁶ NPRM ¶¶ 69-77.

1. *The Commission's Enforcement Strategy Should Focus on Impacts on Equality.*

First and foremost, the Commission's enforcement strategy ought to center actions that will have direct and tangible impacts that improve equality. As discussed above, Section 1754 is best understood as the latest legislative measure to ensure that the FCC has the mandate, authority, and resources to accomplish its universal service mission.²⁶⁷ The persistent issue of the digital divide—and especially its disproportionate effect on low income, majority minority, and other marginalized communities—led directly to the inclusion of Section 1754 in the IIJA.²⁶⁸ The primary goal of enforcement actions, therefore, must be to find ways to concretely impact these stubbornly persistent inequities.

There is a pervasive underlying anxiety amongst some industry comments that strong digital discrimination rules will lead to a campaign of punitive enforcement actions, but any such retributive project would fail to address the mission at hand: preventing and eliminating digital discrimination. Expending enforcement resources to uncover instances of discrimination merely to symbolically punish bad actors must be secondary to leveraging enforcement actions to actually prevent and eliminate the persistent problem.

This is not to say that service providers responsible for creating and perpetuating inequalities are getting off the hook. On the contrary, comprehensive and vigorous enforcement is needed. The Commission ought to hold service providers that have failed, or are failing, in their obligations to provide services equitably to account, but the Commission's enforcement strategy must also aim at restorative outcomes to obtain equal access for the marginalized communities that have long been un- and under-served. For example, in some instances it may be preferable to use enforcement to hold providers to existing commitments and establish clear

²⁶⁷ See discussion *supra* Part I.C.

²⁶⁸ See *supra* footnotes 99, 100 and accompanying text.

timetables for compliance rather than assessing monetary fines. In other instances, consistent and predictable penalties that will deter existing practices may be the best solution. Additional proposals for how to properly align incentives for service providers are discussed below, and specific feedback on the efficacy of different remedies is reviewed in section VIII.C.

2. *The Commission Should Re-Align the Incentives for Broadband Providers.*

Despite deregulatory schemes supposedly aimed at spurring investment, billions of dollars in subsidies, and a generally permissive enforcement environment, somehow the large ISPs have been unable to bring universal broadband service to all Americans. Most concerning, these failures all-too-often follow precisely the same contours as historical redlining and further marginalize vulnerable communities. Clearly the existing incentive structures for broadband service providers are seriously misaligned. The Commission can use its digital discrimination enforcement strategy to realign these incentives to point service providers onto the right path.

Most obviously, this means that the waste, fraud, and abuse of funds designated for deployment effort to close the digital divide—past and present—must be met with clear and consistent sanction so as to properly deter both irresponsible and intentional misallocation of these funds. Monetary fines, clawing back federal funds, restitution, and other penalties should be employed to ensure that service providers treat their deployment and service obligations seriously. These potential consequences need to be clearly articulated and enforced routinely to be effective.

For example, recent reports indicate that service providers are intentionally overclaiming areas as served when—in some cases they know for a fact they are not.²⁶⁹ The misalignment here

²⁶⁹ Jon Brodtkin, *ISP admits lying to FCC about size of network to block funding to rivals*, Ars Technica (Feb. 2, 2023), <https://arstechnica.com/tech-policy/2023/02/cable-company-tries-to-block-grants-to-rivals-by-lying-about-coverage-area/>; Jon Brodtkin, *Comcast gave false map data to FCC—and didn't admit it until Ars got involved*, Ars Technica (Feb. 9, 2023),

is clear: providers are incentivized to claim the intention to serve areas that they do not actually wish to serve, to avoid competition in those areas for their existing low-speed internet access service or simply to receive additional federal funding for “planned” deployment that might otherwise go to a rival. Then, when called upon to report their actual service area, providers are incentivized to continue to claim these areas as “served” to protect them from new entrants. Misaligned incentives of this kind are what have allowed digital discrimination to persist for so long.

Both of these incentives require counterbalancing with strong enforcement. The problem of providers claiming areas that they do not actually intend to fully serve might be counterbalanced by simply holding providers to their claimed intentions on a strict timetable and at their own expense or through penalties that allow the Commission to recoup public funds. Similarly, the problem of misreporting served areas could be addressed through monetary fines that escalate based on the length of the misrepresentation (to properly incentivize providers to come forward sooner rather than later) or by prohibiting the provider from receiving funding to serve that area and guaranteeing the entry of a competitor.

3. *The Commission Should Leverage Partnerships and Other Resources to Improve Enforcement Efficiency.*

Obviously it would be ideal if the Commission could unfailingly enforce everything, everywhere, all the time, but the reality is that the Commission has a lot of ground to cover and enforcement actions are often time-consuming and resource intensive. Any good enforcement strategy must acknowledge the realities, limitations, and challenges of enforcement. That is why the final component of the Commission’s enforcement strategy must be to evaluate how to most

<https://arstechnica.com/tech-policy/2023/02/comcast-gave-false-map-data-to-fcc-and-didnt-admit-it-until-ars-got-involved/>.

effectively utilize its existing enforcement tools, and assess how it can leverage partnerships and other resources to optimize enforcement efficiency.

Adopting a broad general prohibition on digital discrimination will necessitate a flexible and multi-pronged approach to enforcement, along with new processes to increase efficiency. The mission to combat digital discrimination reaches into so many aspects of the broadband landscape that it necessitates the Commission using its full toolkit in strategically targeted fashion, rather than trying to establish a single process or silver bullet enforcement mechanism. The Commission should employ staff-initiated investigations and enforcement actions, adjudication of formal and informal complaints, and could even adopt new expert review processes modeled after those of the Equal Employment Opportunity Commission (EEOC) to assist in streamlining its docket of enforcement actions.²⁷⁰

Finally, the Commission should consider states, localities, and community stakeholder organizations as potential strategic partners in enforcement. Model rules for state and local enforcement, partnerships with state attorneys general in investigative matters, and public data sharing to engage and empower public interest and community stakeholder groups to bring complaints can all serve as enforcement force multipliers for the Commission.

B. The Commission’s Enforcement Processes Should Focus on Achieving Outcomes.

The Commission has sought comment on whether “current FCC enforcement capabilities are the best and most effective avenue to accomplish Congressional intent” and, more specifically, if the Commission should “rely principally or exclusively on FCC staff-initiated investigations.”²⁷¹ As discussed above, the Commission ought to approach enforcement of any

²⁷⁰ *NPRM* at ¶ 74; *see also* Comments of Multicultural Media, Telecom and Internet Council, Docket No. 22-69 (filed May 16, 2022) at 22.

²⁷¹ *NPRM* at ¶ 69.

broad digital discrimination prohibition in a similarly broad and flexible manner. Staff-initiated investigations should be a significant component of any enforcement strategy, but trying to meet the challenge of preventing and eliminating all digital discrimination entirely through FCC enforcement would undoubtedly overwhelm the Commission's investigative staff. Trying to maintain vigilance over the entire broadband landscape for enforcement purposes is unnecessary when the Commission can also leverage consumers, community stakeholders, and state and local officials with on-the-ground knowledge.

At the same time, the Commission's is the single largest repository of information about broadband service, and has direct access to information from providers through tools like letters of inquiry, giving it unrivaled contextual awareness and investigative power. As such, staff-initiated investigations and enforcement actions are best understood as a targeted, strategic, and high-impact tool. The Commission should focus its investigative resources on the kinds of cases that would be difficult for other partners to build or recognize, and on achieving outcomes that other enforcement avenues could not provide, such as consent decrees.

C. The Commission Should Modify Its Informal and Structured Consumer Complaint Processes.

The Commission has sought comment on revisions to its informal consumer complaint process as well as a proposed structured complaint process.²⁷² The Commission should absolutely seize this opportunity to design consumer complaint processes that serve its overall enforcement strategy. Complaint collection, adjudication, and reporting should all work together harmoniously to ensure that the complaint processes focus on impacting equality, aligning incentives for service providers, and increasing enforcement efficiency.

²⁷² *NPRM* at ¶¶ 52-57, 72-73.

1. Structure and Initiation of Consumer Complaints

PIOs strongly endorses the Commission's proposed modifications to its informal consumer complaint process. A dedicated pathway for digital discrimination of access complaints, collecting voluntary demographic information from complainants, and establishing a dedicated pathway for public interest and community stakeholder organizations to submit complaints, are all important modifications that will enable the Commission to more efficiently and effectively accomplish its mission.

A dedicated pathway for digital discrimination complaints makes sense as a mechanism to help the Commission identify complaints related to digital discrimination because discrimination is often cryptic, disguised, or obfuscated by facially neutral policies and so may be difficult to parse from the general pool of internet complaints. However, for the same reasons that the Commission may struggle to identify complaints that relate to digital discrimination, consumers may also struggle to do so. Therefore, if the Commission chooses to adopt a dedicated pathway for digital discrimination complaints, the Commission should also develop mechanisms (such as screening questions) to guide consumers towards the appropriate category for their complaint. It should also implement an internal complaint auditing process to attempt to identify consumer complaints that relate to digital discrimination that came in through other complaint categories.

Relatedly, collecting demographic information from consumer complaints is another pathway to identifying digital discrimination patterns. To best implement this policy, demographic data collection fields related to the categories in Section 1754 should be implemented on all internet service-related complaint paths because of the aforementioned likelihood of potential discrimination-related complaints being filed in other paths. The presence and reasoning for these demographic fields should be concisely explained on complaint forms to

ensure that complainants understand why this information is being requested (i.e. to aid in identifying patterns of discrimination) and how it will be used (including how the information will be protected). This explanation should aid in counteracting any possible discouraging effect collecting this data might have and improve the response rate to the questions by assuaging complainant concerns. The demographic fields should be mandatory for submission of the form, but should all include an option like “Prefer Not To Say” to allow complainants to opt out of demographic data collection.

The Commission’s proposal to establish a dedicated pathway for public interest and community-based organizations to file complaints is another good change to the informal complaint process. Organizational filers will not be able to complete the same forms as an individual filer so a separate pathway makes sense to enable these organizations to better participate in the complaint process. Enfranchising community organizations promotes enforcement efficiency by allowing these groups with first-hand experience of discrimination to identify and organize a case to present to the Commission. However, the Commission should resist any call to hold organizations to more formal submission standards or higher evidentiary requirements; the goal is to further enable marginalized communities to be represented through the complaint process and to throw up additional barriers would undermine this goal.

The Commission has also sought comment on setting up a structured complaint process for digital discrimination complaints.²⁷³ It is essential that any structured complaint process remains easily accessible. The marginalized communities that bear the burden of digital discrimination may lack the time, resources, and expertise to navigate a formal complaint

²⁷³ *NPRM* at ¶ 72.

process so the structured complaint process should be accessible through informal written complaints, in line with existing section 208 rules.²⁷⁴

One complaint mechanism that the Commission seeks comment on that would not be particularly appropriate or effective is that of a dispute assistance process modeled after section 14.32.²⁷⁵ A dispute assistance process would forward the complaint to the service provider, and if there is no resolution, the consumer's next recourse is to file a new informal complaint which also would be forwarded to the service provider. This would create a confusing and frustrating loop for consumers, and—given the potentially more high-stakes nature of digital discrimination claims compared to something routine like a billing dispute—would be very unlikely to lead to an early resolution without the prospect of Commission review.

Finally, we reiterate our call to make all informal complaint processes as accessible as possible: for marginalized communities suffering from digital discrimination making the complaint process accessible in languages other than English and through mechanisms other than the internet-based Consumer Complaint Center are both essential changes to ensure that these communities have a meaningful opportunity to communicate their concerns to the Commission.

2. Complaint Adjudication

Complaint processes in any form are very useful in establishing a consistent and reliable flow of Commission decisions about instances of digital discrimination. In the context of incentive alignment, this is exceedingly valuable. The deterrent effect of enforcement is most pronounced when enforcement is swift and certain even if the penalties are relatively modest; a highly-accessible informal complaint process, as well as a structured complaint process that serves as a direct conduit to the Commission, would therefore both strongly incentivize service

²⁷⁴ 47 C.F.R. § 1.716.

²⁷⁵ *NPRM* at ¶ 73.

providers to comply with the digital discrimination rules. What is most important is that the Commission have mechanisms to actually effectively resolve complaints and communicate to complainants, service providers, and the public how complaints are being resolved.

3. Complaint Transparency and Data Reporting

The Commission seeks comment on making complaint data public through its Consumer Complaint Data Center.²⁷⁶ As the Commission notes, making this data public would “promote transparency and empower third parties to identify trends in digital discrimination”²⁷⁷ and PIA strongly supports data sharing of this kind. While preparing this data for public consumption will require resources, the overall effect will be a net positive for enforcement efficiency through the insights and analysis generated by third-parties.

There are privacy concerns regarding how to handle sensitive information like personal identification or billing information, street addresses, and demographic data in consumer complaints, but a combination of data aggregation and anonymization should be sufficient to protect consumer privacy while allowing the public to take advantage of the granular nature of individual complaint data in the context of larger complaint trends. Additionally, more complete data could be offered to state and local officials through data sharing agreements that maintain standards for the confidentiality of consumer information and place strict limitations on the data’s usage in furtherance of digital discrimination-related enforcement.

D. The Commission Must Adopt Effective Penalties and Remedies.

The Commission seeks comment on “the punishments or remedies the Commission could impose and award as part of our enforcement of rules prohibiting digital discrimination of access.”²⁷⁸ The short answer is that the Commission should seek any remedy or penalty that it

²⁷⁶ NPRM at ¶ 57.

²⁷⁷ *Id.*

²⁷⁸ NPRM at ¶ 70.

calculates will positively impact equality in a concrete way or prevent future discrimination through deterrence.

Monetary fines and forfeitures are an obvious penalty for punishing noncompliance with Commission rules. However fines and forfeitures must be so significant, and ideally so certain in each instance of noncompliance, that they become an effective deterrent rather than a mere cost of doing business that enables ignoring the rules. Fines must be calibrated so that they change the economic calculus for service providers, and properly align their incentives with the rules.

Another monetary option is restitution. In keeping with the Commission's past consumer protection policies, the Commission should consider whether restitution is an effective remedy in circumstances where consumers have been directly harmed. Restitution could be directed back into consumers, or more generally into efforts to combat discrimination if specifically identifying consumers would be impractical.

A more targeted and fact-contingent monetary penalty is the possibility of clawing back federal funding. In instances where a provider received federal funding, but failed to meet its deployment obligations in a way that resulted in a disparate impact, the most appropriate financial penalty may be for the Commission to try to recoup the value of the funding that ought to have reached the affected community.

Similarly, barring a provider from receiving future funding in a given area could be an effective deterrent that also has the potential to increase competition in the broadband marketplace. It is critical that such a penalty should only be levied where a viable potential competitor exists, though the vacuum created by such a finding might make such an area conducive for small, municipal, community-based, or cooperative providers to fill in.

In addition to financial penalties, the Commission of course has a wide range of possible conditions that it could dictate as part of a consent decree, such as specific compliance with deployment obligations or network repairs, establishing timetables for a provider to come into compliance by discontinuing discriminatory policies and procedures, or mandatory reporting or review processes.

Finally, given the serious imperative bestowed by Congress in the face of these long-standing inequities, the Commission should also consider criminal referrals where appropriate, such as in instances of intentional misrepresentations to the Commission about illegal discriminatory practices, gross instances of fraud, and other circumstances where conduct crosses the line into criminality.

E. The Commission Has Authority to Adopt Enforcement Mechanisms for Its Digital Discrimination Rules.

The Commission seeks comment about the extent of its enforcement authority and, specifically, the argument that “the Communications Act’s Subchapter V enforcement remedies may not be available to the Commission because Section 60506 was not enacted ‘as part of the Communications Act even though [Congress] explicitly [took] that step with other Infrastructure Act provisions.’”²⁷⁹

As discussed in detail in Part I.C.2, section 1754 is clearly part of the Communications Act. This provision is not unique or unusual, as the Communications Act has a long history of prohibiting discrimination in telecommunication services, from Section 1’s universal service charge, to the Cable Act of 1984 which also prohibits income-based discrimination, and the regulation of mobile telephony through Title II. Congress has repeatedly expressed its concern about discrimination based on income and race. The 1996 Act even reinforced these provisions

²⁷⁹ *NPRM* at ¶ 71.

with a "general prohibition" to prevent discrimination and a "failsafe" reporting requirement concerning the deployment of advanced telecommunications capabilities to "all Americans." Viewed in this context, it is clear that the provisions of Section 1754 are not foreign to the Communications Act, and the intention of Congress was to add yet another anti-discrimination component considering that, somehow, all its previous legislative efforts had not yet resulted in its clearly communicated desired outcome for universal broadband internet service.

Furthermore, the wording of subsections 1754(e) and 1754(b) conclusively demonstrate Congress's intention for the FCC to address digital discrimination complaints and enforce rules prohibiting discrimination of access in the deployment of broadband infrastructure. Subsection 1754(e) requires the FCC to revise its public complaint process to accept complaints related to digital discrimination, while subsection 60506(b) directs the FCC to adopt rules that facilitate equal access, including addressing digital discrimination of access. These provisions demonstrate a clear intent by Congress for the FCC to take action to prevent and address digital discrimination in broadband access.

Finally, as discussed in Part I.C.4, even if Section 1754 were not part of the Communications Act, this would be no barrier to the Commission enforcing rules adopted under this section. Again, it is important to stress that Section 4(i) is not an exercise of ancillary authority, but a provision granting the Commission *direct* authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."²⁸⁰ Enforcement of the rules Congress required the Commission to create is surely not "inconsistent" with the Communications Act.

²⁸⁰ See *In re Rural Call Completion* 28 FCC Rcd 16154 at ¶ 28 (2013) ("We conclude we have ample *direct* authority to adopt this Order and accompanying rules by virtue of Section 1, **4(i)**, 201(b), [and] 202(a)") (emphasis added)." See also at ¶ 31 n.94 (citing Section 4(i) as direct authority to authorize discovery and enforcement proceedings).

CONCLUSION

Congress made itself crystal clear. As with every communications technology before it, the Commission must use its authority to ensure universal deployment, without discrimination, to all Americans. In addition to the rules required by Congress by Section 1754, the Commission has numerous other tools at its disposal. What is most imperative is that the Commission *act*. The time of study is long over. Congress put an end to the debate over whether the “free market” and a “light touch” from the Commission will somehow be different than the past 90 years of the Commission’s existence. To repeat what Congress expressly found, the “persistent” digital divide “disproportionately affects communities of color, lower-income areas, and rural areas, and the benefits of broadband should be broadly enjoyed by all.” Congress charged the Commission to create rules that will finally address and eliminate this digital divide rather than aggravate it.

Respectfully submitted,

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