Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

Public Knowledge, Benton Institute for Broadband and Society, and Electronic Privacy Information Center (collectively "Public Knowledge, et al.") file these timely reply comments to highlight certain critical areas of agreement and rebut efforts to limit the Commission's authority to effectuate the policy of Congress to "ensure that all people of the United States benefit from equal access to broadband internet access service."[1] Unsurprisingly, carriers and their supporters have done their best to blunt the edge of this important tool for closing the "persistent digital divide" that "disproportionately affects communities of color, lower-income areas, and rural areas"[2] by offering restrictive interpretations that would make it essentially impossible for the Commission to enforce any rules adopted. They urge that the Commission simply follow the same policies of deregulation, subsidies and state preemption that created the existing persistent digital divide. This would, of course, perpetuate the and aggravate the digital divide and leave digital discrimination utterly unaddressed. On the other hand, multiple commenters provide important input and suggestions on how the Commission can make real progress to eliminate digital discrimination and prevent it from recurring.

[1] 47 U.S.C. § 1754(a)(3).
[2] 47 U.S.C. § 1701(b)-(c).

Part I focuses on proposals in the record that will help eliminate digital discrimination. Most importantly, the Commission should ***not*** adopt the Communications Equity & Diversity Council's guidelines as the model code for states and localities required by Section 1754(d). The Commission should instead conduct broad outreach to state and local officials (who have not generally had opportunity for input until now) and rewrite the recommendations to reflect these discussions. Most importantly, the final model code should not simply regurgitate the same tired, failed policies of deregulation and subsidy. Instead, the model code should encourage states to adopt measures that go beyond the Commission's authority to police ISP conduct and compel them to serve the digitally excluded.

The Commission can also take three other steps to directly advance the goal of facilitating equal access to broadband for all. First, the Commission can establish an office of civil rights. Second, the Commission's rules should ban mandatory arbitration clauses, which disproportionately harm low-income Americans and could be used to create barriers to invoking the complaint process Section 1754 requires the Commission to create. Finally, the Commission should expand the protected classes of individuals by explicitly prohibiting digital discrimination against LGBTQ+ and the disabled. Public Knowledge also supports several proposals in the record for improving the consumer complaint process and making use of the data it will provide to eliminate digital discrimination.

In Part II and Part III, Public Knowledge, et al. address two pervasive arguments proffered to limit the Commission's ability to craft and implement strong rules. Part II rebuts the argument that requiring ISPs to address existing digital discrimination that results from previous deployment decisions is not "retroactive." Courts have long made clear that rules that upset previous business expectations are not "retroactive" simply because parties made decisions

expecting the law to remain unchanged in perpetuity. To the extent parties relied on the previous regulatory regime—sometimes called "secondary retroactivity"—this is merely one more factor the Commission must consider under the Administrative Procedure Act. Part III explains why the novel theory advanced primarily by AT&T that Section 1754 is severed from the rest of the of the Communications Act and therefore unenforceable has no basis in law and runs contrary to both the canons of statutory construction and common sense. Congress did not require the Commission to create new rules and modify its complaint process to take complaints by the public solely so that the FCC could continue the stale, failed policies of deregulation and subsidies urged by the ISPs.

Part IV discusses the need for the Commission to create a tool box of multiple enforcement strategies. It explains why the Commission has the authority to issue injunctive relief and compel providers to provide service where they have engaged in digital discrimination and chronic under investment. But the Commission must consider other remedies ranging from traditional forfeitures to disgorgement for discriminatory pricing to permitting rivals to apply for grants to overbuild communities and neighborhoods incumbent ISPs do not wish to serve.

Finally, in Part V, Public Knowledge, et al. return to the issue of economic feasibility. While the Commission must not allow carriers to define economic feasibility for themselves, and should ignore the usual parade of horrible about how any rules will paralyze investment, the Commission should offer guidelines as to what factors it will consider when evaluating an economic feasibility defense to complaints. This will benefit both carriers and the public. Part V concludes with several suggested factors the Commission should consider in such cases.

I. PUBLIC KNOWLEDGE ET AL. SUPPORT PROPOSALS IN THE RECORD THAT WILL HELP ELIMINATE DIGITAL DISCRIMINATION.

The Public Knowledge et al. support the proposals of other commenters in the record that will help eliminate digital discrimination. In particular, Public Knowledge et al. agree that the FCC should not adopt the Communications Equity & Diversity Council's guidelines as the model code for states and localities. Additionally, Public Knowledge et al. agree that the FCC should create a dedicated Office of Civil Rights and should ban mandatory arbitration agreements in consumer service contracts, along with class action waivers. The FCC should also expand the discrimination criteria to include members of the LGBTQ+ community and people with the disabilities. Finally, Public Knowledge et al. support revising the FCC's consumer complaint process.

A. The FCC Should Not Adopt the CEDC's Guidelines As the State and Localities' Model Code Because They Were Created Without Input from State and Local Governments.

Public Knowledge et al. agrees with the commenters that suggest the Commission should not adopt the Communications Equity and Diversity Council's (CEDC) guidelines as the model code for states and localities.[3] As TURN and others note, while the effort by the CEDC is commendable, it lacked formal coordination with state and local officials and therefore lacks meaningful guidance designed to prevent and eliminate digital discrimination. Comments filed by Next Century Cities, Consumer Reports, Access Humboldt, Center for Rural Strategies, and National Consumer Law Center note that the CEDC only had two local representatives and no representatives at the state level.[4] TURN similarly explains that while the CEDC did interview an "array of experts, there were "comparatively few—in number and variety—of representatives

[3] TURN comments, Next Century Cities et.al. comments, American Libraries Ass'n comments
[4] Next Century Cities, et. al. comments at 15.

from state and local entities."[5] These deficiencies in scope of representation have resulted in recommendations that would place little burden on ISPs.[6]

As Local Government commenters note, the Commission should expressly recognize that "states and local governments can and should act concurrently with the Commission to ensure that communications providers who have the privilege of using scarce and valuable public assets and infrastructure provide appropriate public benefits, including equal access to broadband services."[7] Buildout obligations and access to rights-of-ways, infrastructure maintenance and resiliency, usage fees and customer service obligations, as the National League of Cities notes, are local governments most effective tools in promoting equal access in their communities.[8] By not adequately promoting cooperation and relying on state and local governments to use these tools in helping the Commission detect and address digital discrimination, the CEDC recommendations fall short of what is needed to address digital discrimination.

Additionally, the report's focus on incentives (carrots) does not sufficiently acknowledge that Congress, by directing the Commission to adopt rules, by mandating cooperation between the FCC and the Department of Justice, and by requiring the Commission to adopt model policies that "to ensure that broadband internet access service providers do not engage in digital discrimination" was expressing its rejection of the light touch regulatory policies that led to this situation in the first instance. Congress wants ISPs to be incentivized to deploy broadband, and for that the NTIA is offering $42.5 billion worth of carrots and the Treasury Department is offering an additional $10 billion. But Congress also wants to ensure there is adequate enforcement (sticks), which is why it has asked the expert agency, the FCC, to develop the

[5] TURN comments at 27.
[6] TURN comments at 26.
[7] City of Philadelphia, Pennsylvania et. al. (Local Governments) comments at 9.
[8] National League of Cities at 5.

enforcement tools. Public Knowledge et al., therefore, urge the Commission to not adopt the CEDC report as the final model policy, something the report's authors seems to support.[9] Instead, we urge the Commission to consider conducting formal outreach to state and local officials during the pendency of this proceeding to help further the deliberations on what model rules should look like so that state and local governments can adopt rules and partner with the Commission to help through policies and enforcement ensure that digital discrimination is eliminated.[10]

B. The FCC Should Create an Office of Civil Rights.

Public Knowledge et al. support the Leadership Conference[11] (LC) and National Urban League's[12] (NUL) proposals to establish an Office of Civil Rights at the FCC. NUL is right—civil rights needs the kind of "specialized attention" that only a dedicated Office of Civil Rights can provide. As Leadership Conference explains, "an Office of Civil Rights at the FCC would not only play a critical role in enforcing the digital discrimination rules, but it would also provide the commission with civil rights expertise in other proceedings that impact the communications needs of underserved and unserved communities."[13]

In 2019, the FCC published a working paper on how to best organize economists within the regulatory agency—either by integrating them into each department (divisional organization)

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[9] NPRM at App. B at 78 ("the Report provides a starting point for further deliberations and actions that promote increased deployment, adoption, and use of high-speed broadband that not only make it easier for populations to engage in daily activities of remote work, learning, and health care, but also encourage affordable and widely deployed connectivity.").

[10] The Commission should note that while the statute requires the rules mandated pursuant to 1754(b) to be completed "no later than 2 years after November 15, 2021," there is no similar requirement for the development of the model code required by 1754(d). Given the importance of the model code in shaping state and local policy, the Commission should not release the model code with the final rules unless the Commission has consulted with state and local officials and properly considered their input.

[11] Leadership Conference Comments at 8.

[12] National Urban League Comments at 2.

[13] Leadership Conference Comments at 8.

or by organizing them into their own functional unit (functional organization).[14] The research consistently favored the functional organization of economists or *other specialized workers*.[15] Even though the research was focused on economists, the logic favoring functional organization for specialized expertise remains true in the context of civil rights:

- When kept in a single office civil rights experts would be supervised by other civil rights experts. This means that the goal setting and monitoring of a civil rights specialist's work would reward work that other civil rights experts see as valuable, which may differ from priorities set by non-civil rights experts.[16]
- When divided amongst departments, civil rights specialists may face pressure to support a manager's proposed course of action, even if their expert analysis challenges their manager's decisions.[17]
- A single functional office of civil rights would make it easier to exploit economies of scale, facilitate better quality control of the civil rights specialists' work, identify and reward civil rights expertise, encourage the development of a common framework for addressing civil rights concerns, and encourage civil rights specialists to share and develop ideas and new solutions for civil rights challenges.[18]

Additionally, as the Leadership Conference points out,[19] the Office of Civil Rights could serve many functions, including enforcing civil rights policies and regulations (such as the rules the FCC will adopt as part of this proceeding); issue policy guidance and provide specialized expertise in agency proceedings, and conduct investigations into civil rights violations of the FCC's rules. Establishing an Office of Civil Rights is a worthy "investment in the pursuit of communications equity and justice."[20]

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[14] Jerry Ellig & Catherine Konieczny, *The Organization of Economists in Regulatory Agencies: Does Structure Matter?* OEA Staff Working Paper 48, F.C.C. (April 2019). [Hereinafter OEA Working Paper]
[15] *See* OEA Working Paper at 2, 3.
[16] *See* OEA Working Paper at 2.
[17] *See* OEA Working Paper at 2.
[18] *See* OEA Working Paper at 3-4.
[19] *See* Leadership Conference Comments at 8.
[20] National Urban League Comments at 2.

C. The Commission Should Ban Mandatory Arbitration Clauses and Class-Action Waivers in Telecom Service Agreements.

Public Knowledge et al. support the Lawyers' Committee for Civil Rights Under Law's proposed ban on forced arbitration clauses and also proposes including class-action waivers as part of the ban as well.[21]

First, it is well known that mandatory arbitration clauses are bad news for consumers. Not only do consumers lack equal access to information at the time of agreeing to a mandatory arbitration clause, they also suffer from information asymmetry if a dispute is brought under an arbitrations agreement due to arbitration's limited discovery rules.[22] This makes disputes involving discrimination particularly difficult to win since extensive discovery is often needed to prove disparate impact or discriminatory intent.[23] Additionally, "unlike judges who receive a predetermined salary, arbitrators are generally only paid when they are selected to resolve a dispute,"[24] which means they are incentivized the favor the party, usually the commercial entity that drafted the arbitration clause, that selects the arbitrator. A 2009 study found mandatory arbitration agreements in all 4 of the largest cell phone companies and in 5 of the 8 largest cable companies,[25] making their inclusion in telecom related contracts a real discriminatory concern.

Second, most mandatory arbitration agreements in consumer contracts also include class-action waivers which are detrimental to consumers.[26] Often, consumers are only able to

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[21] Lawyers' Committee Comments at 28.
[22] *See* at 17.
[23] *See* Katherine V.W. Stone and Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, Economic Policy Institute, 4 (Dec. 7, 2015).
[24] Mindy R. Hollander, *Overcoming the Achilles' Heel of Consumer Protection: Limiting Mandatory Arbitration Clauses in Consumer Contracts*, 46 Hofstra L.R. 380 (Feb. 1, 2018).
[25] *Id.* at 379.
[26] Stone and Colvin at 16.

protect their rights and pursue low-value claims through collective efforts[27]—which makes losing the right to pursue class-actions particularly harmful in the context of communications services.

Public Knowledge et al. agree with the Lawyers Committee and the Commission, "customers should not be forced to agree to binder arbitration and surrender their right to their day in court to obtain broadband Internet access service."[28] Similarly, customers should not also have to sacrifice their right to pursue class-action claims when members of a large group have been harmed by their communications service provide.

D. The Commission Should Ban Carriers from Discriminating Against Members of the LGBTQ+ Community and People with Disabilities.

The Commission sought comment on inclusion of additional criteria on which ISPs would be forbidden to discriminate. Others object, arguing that the Commission lacks legal authority to expand the criteria listed in Section 1754(b)(1). Public Knowledge et al. support expanding the criteria to prohibit discrimination against members of the LGBTQ+ community and against the disabled.

As an initial matter, the Commission has clear authority to expand the criteria. Opponents of expanding the criteria note that while Section 1754(c)(3) explicitly invites the Commission to add "other factors the Commission finds relevant," Section 1754(b)(1) provides an explicit and limited list. This objection ignores the fact that Section 1754(b) instructing the Commission to create rules uses the word "including" before breaking out Sections 1754(b)(1) and (b)(2). As the Commission has previously explained, the word "include" indicates that the mandatory elements are a starting point rather than an end point.[29] While it is true that the findings highlight that "the

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[27] *Id.*
[28] Lawyers Committee Comments at 28.
[29] See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, 22 FCC Rcd 20335, 20526 (2007), affrmd sub nom National Cable & Telecommunications Association v. FCC, 567 F.3d 659 (D.C. Cir. 2009).

digital divide disproportionately affects communities of color, low income areas and rural areas,"[30] "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[31] Given the statutory policy that "the Commission should take steps to ensure that all people of the United States benefit from equal access to broadband internet access service,"[32] it is both lawful and reasonable for the Commission to expand the protected criteria to include groups protected under other civil rights statutes.[33]

As LGBT Tech posits, expanding the definition of digital discrimination to include age, sexual orientation, gender, gender identity or disabilities will "promote greater inclusivity of populations who experience singular, multiple, and other vulnerabilities not necessarily defined [explicitly]...in the IIJA statute."[34] Public Knowledge et al. agree with the Human Rights Campaign; even though discrimination against LGBTQ+ people in accessing internet services is understudied, the "longstanding body of research indicating that widespread discrimination against LGBTQ+ people…across every aspect of public life…suggests they are likely experiencing discrimination in their efforts to access broadband services as well."[35]

Importantly, even without documentation of discrimination against LGBTQ+ individuals, recent events clearly show that members of this community increasingly face harassment and discrimination. [36] It is not difficult to imagine situations—especially in small communities with only one local provider—an ISP or ISP employee may simply refuse to provide service to a

[30] IIJA 60101, codified at 47 U.S.C. 1701
[31] NCTA, 567 F.3d at 663 (citation omitted).
[32] 47 U.S.C. § 1754(a)(3).
[33] *See* NCTA at 664 ("Statutes written in broad, sweeping language should be given broad, sweeping application").
[34] LGBT Tech Comments at 1.
[35] Human Rights Campaign Comments at 2.
[36] *See, e.g.,* Anne Branigin, "Trans People Have Never Been So Visible—And So Vulnerable," Washington Post (April 13, 2023). Available at: https://www.msn.com/en-us/news/us/trans-people-have-never-been-so-visible-or-so-vulnerable/ar-AA19OkfG

member of the LGBTQ+ community. Such conduct would undoubtedly thwart the Congressional policy of ensuring equal access to broadband access for all. But no rule prevents such conduct. Given that acting proactively in this regard imposes zero cost, and may prevent digital discrimination against vulnerable individuals in the future, the Commission should act.

When it comes to people living with disabilities, the lack of access to broadband can compound the disparities they experience by negatively impacting their "ability to receive specialized services, such as Braille or orientation and mobility instruction…."[37] Some families of blind and low-vision children have even stopped their children's services completely due to their lack of access to the internet.[38] This is a critical issue for families who have children with disabilities because early intervention, education, rehabilitation, and access to other services have a cumulative effect on their success later in life.[39] The compounding negative impact of lack of access for people with disabilities is concerning, and one that the Commission can help address by expanding the definition of discrimination to include people with disabilities.

Public Knowledge et al. urge the FCC to include a prohibition on discrimination against LGBTQ+ people and people with disabilities in its model codes for states and localities along with suitable penalties. *All* people of the United States deserve access to broadband.

E. Revising the Consumer Complaint Process

Public Knowledge et al. commented in support of the Commission's proposals for revising its consumer complaint processes.[40] Other commenters have added their enthusiastic support for such revisions including the National Digital Inclusion Alliance ("NDIA"), Free Press, National Hispanic Media Coalition ("NHMC"), and The Utility Reform Network

[37] American Foundation for the Blind Comments at 2.
[38] *Id.*
[39] *See id.*
[40] Public Knowledge et al Comments at 90-94.

("TURN"). All of these commenters support providing a direct informal path for digital discrimination complaints by individuals, a separate pathway for organizations submitting claims on behalf of impacted communities, the option for voluntary self-identification for the purpose of collecting demographic information, as well as other changes to the informal complaint process to make it more effective, accessible, transparent, and inclusive.[41]

The importance of the consumer complaint process is highlighted in the record, with commenters noting that "[t]he Commission's informal complaint process is often the first and only way consumers or subscribers interact with the Commission"[42] but also that "individuals, especially those from historically and intentionally marginalized groups, are sometimes hesitant to file complaints for themselves due to mistrust of the government or lack of information on how the system works."[43] It is therefore critically important that the Commission build a system that works for the communities these digital discrimination rules are intended to protect. That means clear and accessible design for the complaint process that sets clear expectations and provides users with agency throughout the process. In particular, Public Knowledge et al. believe that the detailed and specific design proposals described by NDIA and TURN provide the Commission with valuable insights into how to undertake such a revision of the consumer complaint process. An effective, accessible, transparent, and inclusive complaint system will allow individuals, and organizations representing them, to advocate for their interests and build critical bonds of trust between the Commission and the public.

Additionally, the record shows significant recognition of the value of consumer complaint data in identifying and combating digital discrimination. Commenters broadly agree that

[41] NDIA Comments at 14-17; Free Press Comments at 40-41; NHMC Comments at 8-12; TURN Comments at 5-22.
[42] TURN Comments at 3.
[43] NHMC Comments at 10.

informal consumer complaints should be analyzed in the aggregate by the Commission and/or released for public analysis and scrutiny to better identify trends in the data indicative of digital discrimination and to develop targeted solutions.[44] The importance of this informal complaint process is also acknowledged by industry commenters. NCTA agrees that consumers should have the option to lodge both formal or informal complaints[45] and recognizes that:

> "Unlike a consumer's allegation that her phone bill was wrong or broadband service is suffering outages, for example, allegations of discrimination are likely to involve groups of complainants and require statistical evidence. Therefore, the Commission should use an informal complaint process in its discretion to determine if and when a potential pattern of discrimination exists that should be investigated. An example of such a pattern would be if there are numerous similar complaints that allege discrimination of access against the same provider in a single geographic area."[46]

Similarly, the U.S. Chamber of Commerce recommends using the consumer complaint database to "serve as a basis for referrals in appropriate cases to relevant consumer protection or civil-rights agencies."[47] This broad support in the record for the importance of consumer complaint data in identifying and eliminating digital discrimination, paired with the strong support and detailed feedback on the Commission's proposed revisions, highlights the importance of undertaking substantial revisions to the consumer complaint process.

II. RULES DESIGNED TO ELIMINATE THE PRESENT DAY EFFECTS OF DIGITAL DISCRIMINATION ARE NOT IMPERMISSIBLY RETROACTIVE.

Verizon, AT&T, USTelecom, and other commenters argue that rules designed to "eliminate" the present-day effects of past discrimination are inherently "retroactive."[48] They are

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[44] NDIA at 15 ("the Commission should both review individual complaints and conduct robust analyses of the full dataset to proactively identify and prevent potential discrimination"); Free Press Comments at 41; NHMC Comments at 11-12; TURN Comments at 15-17.
[45] NCTA Comments at 23.
[46] NCTA Comments at 24.
[47] Chamber of Commerce Comments at 6.
[48] *See* Comments of Verizon 24-26, GN Docket No. 22-69 (February 21, 2023); Comments of USTelecom 49, GN Docket No. 22-69 (February 21, 2023); Notice of Ex Parte of AT&T (GN Docket No. 22-69) (November 22, 2022).

wrong. Section 1754 is a prospective statute that does not seek to penalize ISPs for past discriminatory acts, but to ensure they do not happen again, and to eliminate their effects by "facilitate[ing] equal access to broadband internet access service."[49] USTelecom argues that "under the Administrative Procedure Act, agency action can constitute a 'rule' only if it has 'legal consequences only for the future.'"[50] But Section 1754 does not direct the FCC to impose legal consequences for past actions—it only prospectively looks to eliminate digital discrimination and ensure universal broadband access.

As the Supreme Court held, "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law."[51] That is the case here, and industry commenters who disagree with section 1754's policy goals have not established otherwise. As the DC Circuit explained, "An agency order that 'alters the future effect, not the past legal consequences' of an action, or that 'upsets expectations based on prior law,' is not retroactive."[52] USTelecom's confused analysis of retroactivity would make it difficult or impossible for the FCC to address digital discrimination or broadband deployment at all.

It is self-evidently true that the current state of broadband deployment is the result of past buildout decisions, but this does not mean that any measure designed to promote broadband deployment is "retroactive" in a sense that is disfavored by the law. As Justice Scalia has noted, rules that deal with past transactions and involve substantial reliance interests have been

[49] 47 U.S.C. § 1754(b).
[50] Comments of USTelecom 49, GN Docket No. 22-69 (February 21, 2023).
[51] Landgraf v. USI Film Products, 511 US 244, 269 (1994) (citation omitted).
[52] Mobile Relay Associates v. FCC, 457 F. 3d 1 (DC Cir. 2006) (quoting Sinclair Broad. Group v. FCC, 284 F.3d 148, 166 (D.C.Cir.2002); DIRECTV, Inc. v. FCC, 110 F.3d 816, 826 (D.C.Cir. 1997).

described as having "secondary retroactivity."[53] But implementing Section 1754 does not implicate even secondary retroactivity because ISPs have not demonstrated substantial reliance interests on being permitted to discriminate based on protected characteristics such as race or income.[54]

To the extent there are reliance interests, the FCC must merely take account of them. Rules with "secondary liability" are not disfavored in the law. A rule with "secondary retroactivity" may be valid or invalid under the APA, like any other rule, but there is no prohibition on rules with this sort of effect.[55] In this way rules with secondary retroactive effect are like agency policy changes, which likewise are not disfavored in the law or subject to a more "searching" analysis.[56] As in all rulemaking under the APA, the FCC must merely take into account all relevant facts and provide a reasoned explanation for its decision.

In another attempt to nullify the statute, AT&T argues that "section 60506 authorizes the Commission to proceed only against current acts of 'discrimination,' no matter how that term ["eliminate"] is construed."[57] AT&T's reading of the statute would make it difficult or impossible for the Commission to implement Congress's directive to adopt "rules to facilitate equal access to broadband internet access service."[58] As discussed above, rules that seek to remedy past wrongs,

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[53] *See* Bowen v. Georgetown Univ. Hospital, 488 US 204 (1988) (Scalia, J., concurring) ("A rule with exclusively future effect ... can unquestionably affect past transactions ... but it does not for that reason cease to be a rule under the APA.").

[54] For example, no ISP has suggested (or could credibly suggest) that it would have avoided providing service in wealthier neighborhoods had it known this would also require providing the same level of service in adjacent low-income or majority-minority neighborhoods. But even if they could prove such a claim, it would at best constitute "secondary retroactivity" (although even that postulate is questionable).

[55] Bowen at 220 (Scalia, J. concurring) (citing General Telephone Co. of Southwest v. United States, 449 F. 2d 846, 863 (CA5 1971) ("[w]here a rule has [secondary] retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable.")).

[56] *See* FCC v. Fox Television Stations, 556 US 502. 512 (2009).

[57] Notice of Ex Parte of AT&T (GN Docket No. 22-69) (November 22, 2022).

[58] 47 U.S.C. § 1754(b). Though sometimes lost in the debate, the primary purpose of the rules mandated by Section 1754(b) is "to facilitate equal access to broadband internet access service."

but do not impose new legal consequences on them, are not impermissibly retroactive. Regardless, digital discrimination, even if it began in the past, is an ongoing act. Discrimination persists as long as communities are unserved or underserved due to "income level, race, ethnicity, color, religion, or national origin."[59]

Section 1754 is not the first time the FCC has sought to remedy the effects of past discrimination. As the Supreme Court explained in upholding the Commission's broadcast licensing policies,

> Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H. R. Conf. Rep. No. 97-765, p. 43 (1982). Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.[60]

This is analogous to Section 1754. Both Congress and the FCC have recognized that broadband deployment has long been marred by discriminatory decisions. But unlike rules that the Supreme Court has determined are impermissibly retroactive, neither Section 1754 nor any rules the FCC adopts pursuant to its authority seek to make injured parties (who may not live in the affected area any longer) whole for past injuries. It only seeks to prevent future injuries by closing the "persistent digital divide" that disproportionately affects communities of color [and] low-income areas."[61] *See Albemarle Paper Co. v. Moody*, 422 US 405, 421 (1975) (discussing the "central statutory purposes" in Title VII of the Civil Rights Act of 1964 "of eradicating

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as part of this purpose, the rules must ***also*** prevent digital discrimination, 1754(b)(1) and identify steps to eliminate it. 1754(b)(2).

[59] 47 U.S.C. § 1754(b)(1).

[60] Metro Broadcasting, Inc. v. FCC, 497 US 547, 566 (1990) (reversed on other grounds by Aderand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)).

[61] Section 1701(2)-(3).

discrimination throughout the economy and making persons whole for injuries suffered through past discrimination").

Accomplishing this might mean correcting past mistakes to ensure that broadband is built out to people who may have been unfairly passed over in the past, and to ensure that future buildout decisions do not take into account unlawful criteria. But buildout requirements are not some sort of punishment or legal consequence for past actions—they are a common tool in communications policy. For example, the FCC imposes buildout requirements on most wireless licensees.[62]

Arguments presented by industry commenters that fully implementing Section 1754 would be impermissibly retroactive are unfounded. It is not “retroactive" for the FCC to focus on remedying past harms, without imposing penalties for decisions that may have been lawful at the time, but are no longer. The statute directs the FCC to enact rules that are prospective in nature, focusing on facilitating equal access to broadband internet access service and eliminating digital discrimination, rather than penalizing ISPs for past discriminatory actions. The Commission's objective should be to implement Congress's directive and ensure that universal broadband access is achieved for all, and to eliminate discrimination and its effects.

III. THE ARGUMENTS RAISED THAT THE FCC HAS NO ENFORCEMENT AUTHORITY ARE UNSUPPORTED, CONTRARY TO CANONS OF INTERPRETATION, AND INTERNALLY CONTRADICTORY.

Multiple commenters adopt the argument first advanced by AT&T in the *NOI* that the Commission lacks authority to enforce Section 1754 because it is not actually part of the Communications Act.[63] Despite expressly instructing the Commission to amend its complaint

[62] *See* FCC: Construction Requirements by Service, https://www.fcc.gov/wireless/support/universal-licensing-system-uls-resources/construction-requirements-service; GAO, Spectrum Management: FCC's Use and Enforcement of Buildout Requirements 8 (2014).
[63] *See e.g.,* AT&T Comments at 36-42, USTelecom Comments at 43-47.

process,[64] carrier commenters insist that because Congress did not explicitly designate Section 1754 as an amendment to the Communications Act of 1934, the Commission therefore lacks any ability to actually enforce the statute. Aware that this would render the explicit directive of Congress a nullity, commenters rush to assure the Commission that—through some unexplained (and inexplicable) legislative magic—the Commission may still use the statute to preempt state and local law that might otherwise compel carriers to serve the communities it has persistently avoided and funnel money to carriers with no strings attached.[65] In short, carriers urge the Commission to view Section 1754 as a statutory Santa Claus—but one prohibited from even maintaining a naughty list. While this interpretation is certainly convenient, it suffers from an utter lack of legal support and a host of internal contradictions.

Most significantly, AT&T and its supporters ***fail to cite a single case*** in support of this extraordinary doctrine that when Congress explicitly directs a legislative provision to an agency instructing an agency to take action well within its jurisdiction, the legislation is utterly disconnected from the agency's enabling statute and general enforcement powers. Surely somewhere in the vast experience of courts with administrative law and the tremendous number of federal agencies operating under general enabling statutes, there should be a case that clearly states such an important rule that unless Congress *explicitly* says that the general enabling statute applies, it does not apply.[66] But the carriers do not cite a single one.

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[64] 47 U.S.C. § 1754(e).
[65] *See* USTelecom Comments at 47-48.
[66] *Cf.* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania. 140 S. Ct. 2367, 2381 (2020) ("By introducing a limitation not found in the statute, respondents ask us to alter, rather than to interpret, the ACA."); Watt v. Energy Action Ed. Foundation, 454 U.S. 151, 168 (1981).

A. The Commission Has Previously Rejected the Carrier Argument That a Statute Must Expressly Amend the Communications Act of 1934.

This is not the first time Congress did not expressly state that it amended the Communications Act of 1934. The Commission has never hesitated in these instances to enforce these statutes through its Section V authority and to treat these statutes as part of the Communications Act. Most recently, the Commission considered and rejected this exact challenge to its enforcement authority when it adopted the Broadband Consumer Label rules last November.[67]

Section 60504 of the IIJA[68] required the Commission to complete its proceeding to create and require broadband providers to use a clear label informing consumers about the price and other elements of the service.[69] The Commission began the initial proceeding following reclassification of broadband as a Title II service, and therefore proposed to rely on its general rulemaking authority and various provisions of Title II.[70] The Commission's reclassification of broadband as a Title I service in 2017 stripped the FCC of the necessary authority to complete the proceeding.[71] Accordingly, the sole source of direct authority for the Commission to conclude the proceeding is Section 60504 of the IIJA. Like Section 60506, Section 60504 of the IIJA nowhere states that it amends the Communications Act.

Nevertheless, the Commission had no difficulty concluding that it had adequate authority to enforce the rules it adopted. As the Commission observed: "given Congress' directive that 'the

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[67] F.C.C., Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Empowering Broadband Consumers Through Transparence*, CG Docket No. 22-2 at n. 248 (re. Nov. 17, 2022). [Hereinafter Broadband Consumer Label Order].
[68] Codified at 47 U.S.C. § 1753.
[69] 47 U.S.C. § 1753.
[70] *See* Public Notice, "Consumer and Governmental Affairs, Wireline Competition, and Wireless Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels, 31 FCC Rcd 3358 (2016).
[71] Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, WC Docket No. 17-108, 33 FCC Rcd 311 (2017).

Commission shall promulgate regulations to require the display of broadband consumer labels,' it only makes sense that we would also be able to enforce those rules."[72] The Commission additionally cited Section 4(i) as direct authority to enforce the rules adopted in the NPRM.[73] The Commission therefore expressly relied on its "existing forfeiture authority and other remedies [as] sufficient to deter noncompliance and to hold accountable those providers that do not comply with the label requirements."[74]

There is literally no meaningful way to distinguish Section 60504 of the IIJA from Section 60506 of the IIJA. Both are part of the IIJA. Neither expressly states that it amends the Communications Act of 1934, or otherwise provides for enforcement. Both statutes require the Commission to adopt regulations. Indeed, to the extent there is a relevant difference, it is that in addition to requiring the Commission to adopt regulations, Section 60506 *also* requires the Commission to amend its complaint process "to accept complaints from consumers or other members of the public that relate to digital discrimination."[75] If it "only makes sense" that Congress intended the Commission to enforce Section 1753, it would be absurd to imagine that—after ordering the Commission to adopt rules and to expand its complaint processes "to accept complaints from consumers or other members of the public that relate to digital discrimination"—Congress intended to deny the Commission the authority to enforce these rules. Simply put, "[i]t is implausible that Congress meant the Act to act in this manner."[76]

The precedent of the Consumer Label Order is further compelling in that AT&T, USTelecom, and other proponents of this novel new principle of statutory interpretation

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[72] Broadband Consumer Label Order at ¶ 111 n. 248.
[73] *Id.*
[74] *Id.* ¶ 112.
[75] 47 U.S.C. § 1754(e).
[76] King v. Burwell, 576 U.S. 473, 494 (2015).

participated in the Broadband Consumer Label Proceeding.[77] Nevertheless, despite the Commission stating its theory of legal authority in the Notice of Proposed Rulemaking,[78] "no commenter contend[ed] that we lack legal authority" to use the Commission's standard enforcement powers to enforce the rules adopted pursuant to Section 60504 of the IIJA.[79] Not only did AT&T and USTelecom decline to raise any objection to the Commission's theory of authority for use of Title V enforcement powers in the proceeding, they further declined to contest this interpretation of Commission authority in a properly filed Petition for Reconsideration. Whether or not these parties are formally estopped from raising the argument here, this past failure to raise the objection vitiates their objection here. At a minimum, parties here are bound by the Commission's recent precedent and have urged no reason for the Commission to depart from this precedent. Nor have they provided any grounds to distinguish the Commission's legal conclusion in the Consumer Broadband Label proceeding from the current proceeding.

As the Commission wisely determined only a few months ago, it is necessary for the Commission to enforce the rules adopted under the IIJA to ensure their effectiveness.[80] The same is even more true here, where Congress has expressly instructed the Commission to root out and eliminate discrimination and to expand the complaint process. As the Supreme Court has warned, one "cannot read federal statutes to negate their own stated purpose."[81] The logic that compelled the Commission to conclude that Congress intended it to use its standard Section V enforcement powers for Section 60504 of the IIJA because doing so is necessary to effectuate the statute is even more compelling for Section 60506.

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[77] *See* Broadband Consumer Label Order, Appendix D.
[78] *Id.* at n.248.
[79] *Id.*
[80] Broadband Consumer Label Order at ¶ 112.
[81] Burwell, 576 U.S. at 493.

B. Canons of Statutory Interpretation Require Rejecting AT&T's Construction.

AT&T's theory rests on two unsupported legs. First, AT&T argues that the Communications Act is limited to 47 U.S.C. §§ 151-646.[82] Second, that the Commission is therefore powerless to invoke its Section V enforcement authority, or any other enforcement authority.[83] Again, AT&T cites no actual case law or Commission precedent for either proposition. To the extent AT&T offers any cases in support, it cites to *AT&T Corp. v. Iowa Utility Bd*.[84] Specifically, AT&T points to a footnote in which the majority responds to a criticism in Justice Stevens' dissent on the applicability of the FCC's general 201 rulemaking authority by observing that: "the 1996 Act was not adopted as a freestanding enactment but as an amendment to, and therefore part of, the Act which said 'the Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act'."[85] From this, AT&T makes two leaps of logic. First, that there is such a thing as "freestanding enactment" (as opposed to this merely being a response to the dissent that such "freestanding enactments" do not exist because all statutes directed to the Commission amend the Communications Act).[86] Next, that the difference between a "freestanding" provision and an actual amendment to the Communications Act is the requirement that Congress must expressly state that the statute is intended to amend the Act.[87] This is quite a lot of interpretive juice to squeeze from a passing footnote responding to a dissent—especially one that dealt not with enforcement but with rulemaking! For even if one accepts that the footnote must be read as distinguishing between "freestanding" provisions and "amendments," it tells us nothing of the

[82] AT&T Comments at 38.
[83] *Id.* at 39-42.
[84] AT&T Corp. v. Iowa Utility Bd., 526 U.S. 366 (1999).
[85] *Id.* at 378 n. 5.
[86] AT&T Comments at 37.
[87] *Id.* 38.

differences between the two. Certainly it does not prove AT&T's claim that only 47 U.S.C. §§ 151-646 constitute the one true Act and all other provisions are "freestanding." Nor does it follow that the FCC may not enforce "freestanding" provisions through Title V. (And, as discussed in Part III.C *infra*, this would prove too much and render Section 1754 a nullity.)

Nor does *American Council on Education v. FCC*[88] (*ACE*) directly support AT&T's position. In *ACE*, the reviewing court granted *Chevron* deference to the FCC's determination that Congress had passed CALEA for a different purpose than the general Communications Act and that therefore the definition of terms in Sections 1001-10 could reasonably differ from the definition of the same terms elsewhere in the Communications Act.[89] Again, this says nothing about distinguishing "freestanding" provisions from "amendments." It simply means that—under the deferential *Chevron* standard of review—the Commission's explanation for why the same word had different meanings in different sections of the same statute (the Communications Act) was reasonable.

Lacking a case citation to support its theory, AT&T relies primarily on canons of statutory interpretation. Specifically, AT&T observes that Congress generally states that it intends to amend the Communications Act, but did not do so here.[90] Invoking the canon against surplusage, AT&T concludes that the failure to specifically call a statute an amendment to the Communications Act makes it "freestanding" and not part of the Act. According to AT&T, this demonstrates that Congress affirmatively chose to withhold enforcement power from the Commission. How? Because Sections 501 and 502 authorizing forfeitures limit themselves to violations of "this chapter,"[91] *i.e.*, only those provisions AT&T claims constitute the "true"

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[88] American Council on Education v. FCC, 451 F.3d 226 (D.C. Cir. 2006).
[89] *Id.* at 232.
[90] AT&T Comments at 38-39.
[91] 47 U.S.C. §§ 501, 502.

Communications Act. In aid of this construction, AT&T invokes *expression unis est exclusio alterius*, that by explicitly applying Title V to violations of "this chapter," Congress intended to exclude "freestanding provisions."[92] By combining the rule against surpluses and *expression unis*, AT&T concludes that Congress meant to deny the Commission authority to actually enforce the rules Congress required it not merely to create, but to expand its complaint process to receive complaints.[93] Again, this seems quite a long way to go, with many leaps and assumptions along the way, to reach AT&T's desired result.

As the Supreme Court has warned, however, "reliance on context and structure in statutory interpretation is a subtle business, calling for great wariness."[94] Additionally "it is not uncommon to find tension between different canons of statutory construction . . . many of the traditional canons have equal opposites."[95] Accordingly, "canons of construction are no more than rules of thumb."[96] This is particularly true in long statutes, frequently amended over time, where redundancy and other errors inevitably occur.[97] Rather than rigidly applying any one specific canon, the reviewing authority must look to the context of the statutory scheme as a whole to give effect "to the cardinal canon above all others . . . a legislature says in a statute what it means and means what it says."[98] Statutes must not be read to produce absurd results,[99] or interpreted in ways that undermine their clear purpose.[100]

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[92] AT&T Comments at 39.
[93] *Id.* at 41.
[94] King v. Burwell at 497-98. (cleaned up)
[95] Landsgraf v. USI Film Products, 511 U.S. 244, 263 (1994).
[96] Connecticut National Bank v. Germain, 503 U.S. 249, 253 (1992).
[97] *Id.*; *See also* Burwell, 576 U.S. at 491-92; *Iowa Utility Bd*, 525 U.S. at 397; Landsgraf, 511 U.S. at 259-60.
[98] CN National Bank at 253-54.
[99] United States v. Granderson, 511 U.S. 39, 47 n.5 (1994).
[100] CN National Bank at 253-54.

The Supreme Court has therefore made it clear that a claim that a statute deviates from the traditional authority granted an agency and imposes limits on its usual discretion and enforcement power requires a clear statement of this intent.[101] Congress will not be presumed to impose a fundamental restriction on clearly delegated authority through cryptic words or negative implications, particularly where a more sensible reading is available.[102] Even where the plain language argument may be "strong" (which is not the case here) and not wholly absurd, it must yield where "it is implausible that Congress intended the Act to operate in this manner."[103]

We must therefore begin with the premise that Congress "says in [Section 1754] what it means and means what it says;"[104] that the Commission "shall" adopt rules that provide all American with equal access to broadband by, at a minimum, "preventing" digital discrimination and "eliminating" existing digital discrimination, furthermore, the Commission "shall" amend its complaint process so that members of the public and other interested parties may file complaints for the Commission to enforce these rules. More broadly, we understand that when Congress delegates a function to the Commission, it intends for the Commission to enforce that function.[105]

This reading is further bolstered by Section 401 and Section 416.[106] While 401(a) refers to a "failure to comply with any provision of this chapter,"[107] 401(b) requires a court to issue an injunction requiring any party to obey "***any*** order of the Commission other than for payment of

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[101] American Hospital Association v. NLRB, 499 U.S. 606, 613-14 (1991). *See also Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981).
[102] American Hospital Association v. NLRB, 499 U.S. 606, 613 (1991); National Cable Telecommunications Association v. FCC, 567 F.3d 659, 664-665 (D.C. Cir. 2009)
[103] Burwell at 494.
[104] CN Nat'l Bank
[105] Iowa Utility Bd., 525 U.S. at 379-380 (rejecting AT&T argument that Commission required an explicit authorization from Congress for every section of the 1996 implicating intrastate communications) and n.8.
[106] 47 U.S.C. §§ 401, 416.
[107] 47 U.S.C. § 401(a).

money" (emphasis added) without any language linking it to "this chapter" or "this Act."[108] Similarly, Section 416 requires all persons to obey any order of the Commission, without limiting the order to any provision of "this Chapter" or the Communications Act.[109]

We are therefore faced with two possibilities. If we accept AT&T's argument that failure to expressly amend the Communications Act is Congress' subtle and cryptic way of withholding forfeiture power under Title V, Congress must have intended the Commission to rely on injunctive relief under Title IV. This reconciles the conflicting statutes and avoids surplusage. Reading these statutes as literally as AT&T insists we should, if the FCC could not issue orders for injunctive relief to be enforced by the Court, both Section 401(b) and Section 416(c) would be rendered superfluous. The failure of Congress to include the words "under this chapter" or some similar limiting language for the enforcement of injunctive relief—especially when combined with the explicit authority of Section 154(i) to issue such order—must be as pregnant with meaning as including the words "under this Chapter" in Section V. This would, of course, ***require*** the Commission to "prevent" and "eliminate" digital discrimination entirely through injunctive relief—probably not the result AT&T and its allies would prefer.

Fortunately, the common sense approach dictated by cases such as *Burwell*, *Landsgraf*, *American Hospital Association*, and *CN National Bank* offer a more sensible reading of the statute. Congress did not intend to distinguish between orders enforcing Sections 151-646 versus enforcing other statutes—either because all statutes directed to the Commission automatically amend the Communications Act or because there is no rational reason for Congress to withhold enforcement power when it delegates a task to the Commission.[110] Rather, Congress intended

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[108] 47 U.S.C. § 401(b).
[109] 47 U.S.C. § 416.
[110] "[T]his interpretation produces a most chopped-up statute, conferring Commission jurisdiction over such curious and isolated matters . . . but denying Commission jurisdiction over

both Section IV enforcement and Section V forfeitures as available remedies, and distinguished between the procedures for collecting forfeitures from the swifter procedures for obtaining injunctive relief from the courts. The latter interpretation—that Congress did not intend to limit availability of Section V forfeitures depending on the statute enforced unless explicitly intending to alter the Commission's general authority for that specific statute—is the more sensible and consistent interpretation, and therefore the one the Commission should adopt.

Finally, AT&T's assumption that Congress intended to exclude statutory provisions directed to the Commission from Section V because of *expressio unis* suffers from an additional flaw. To apply the *expressio unis* principle, it must be clear that Congress actually considered a broader alternative but selected a narrower one.[111] Title V and Sections 501 and 502 are among the original provisions of the Act.[112] The very notion of a "freestanding provision," could not have existed. Congress could not possibly have distinguished between one form of Commission directed statute and another because no amendments to the Act even existed.

There is, however, one interpretation of a "freestanding provision" that Congress would have potentially excluded from Title V and forfeiture remedies. The Clayton Act gives the FCC authority to enforce the Clayton Act against common carriers.[113] Action taken pursuant to this Clayton Act authority would not be action taken under the Communications Act, and therefore would not use the remedies of Title V but would instead use the remedies provided under the Clayton Act. To the extent the Commission must read the words "under this chapter" as excluding something, excluding Clayton Act enforcements would at least make sense. It is

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much more significant matters. We think it highly unlikely that Congress created such a strange hodgepodge." Iowa Utility Bd., 525 U.S. at 383 n.8.

[111] *See* Congressional Research Service, "Statutory Interpretation: General Principles and Recent Trends," (September 24, 2014)

[112] 47 U.S.C. § 501-502.

[113] 15 U.S.C. § 21(a).

rational to assume that Congress intended the FCC to act *either* under the Clayton Act or the Communications Act, but not to combine enforcement of the Clayton Act with the remedies of the Communications Act. Certainly such a reading is more logical than a reading that Congress intended to distinguish between "freestanding" statutes and "amendments."[114]

C. Adopting AT&T's Construction of Section of 501 Is Inappropriate Because There Are Simpler Ways to Explain Why the Statute Includes the Phrase "Under This Chapter."

In any event, even accepting AT&T's assertion that the Communications Act is limited to 47 U.S.C. §§ 151-646,[115] a literal reading of the statute (and therefore application of the cherished rule against surplusage) belies AT&T's interpretation that Title V remedies are unavailable for violations of rules or regulations implementing other provisions. Section 501, which applies Title V to violations of the statute, limits itself to "any act, matter or thing under this chapter."[116] But Section 502, which applies Title V penalties for violations of the Commission's rules and regulations, states that Title V penalties are available for any knowing or willful violation of "any rule, regulation, restriction or condition made or imposed by the Commission ***under the authority*** of this chapter."[117] How do we explain the difference in wording between "this chapter" in Section 501 and "under the authority of this chapter" in Section 502 to avoid the dreaded surplusage?

Section 154(i) authorizes the Commission to make such rules and issue such orders "necessary in the execution of its functions."[118] Section 201(b) provides the Commission with general rulemaking authority not merely for Title II, but for any statute administered by the

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[114] The same rationale applies to USTelecom's citation to Section 503(b)(1)(B).
[115] AT&T Comments at 38.
[116] 47 U.S.C. § 501.
[117] 47 U.S.C. § 502 (emphasis added).
[118] 47 U.S.C. § 154(i).

Commission.[119] Section 303(r) provides the Commission with general rulemaking authority over wireless licensees.[120] Section 613(c)[121] gives the Commission authority to formulate rules governing the joint ownership of cable systems and "systems of mass communication," which includes broadband access service.[122] Part 15 obligates all users of unlicensed spectrum to obey all Commission rules as a condition of using unlicensed spectrum.[123] A violation of a rule formulated by the Commission under either the general rulemaking authority of Section 154(i) or Section 201(b), or under the technology specific authority of 303(r) or 613(c), or promulgated by rule in Part 15, or issued under ancillary authority rather than direct authority, are all "rule[s], regulation[s], restriction[s], or condition[s] under ***authority*** of this chapter."[124] While this is a rather literal reading, this is not a particularly "damning criticism when it comes to statutory interpretation."[125]

Finally, AT&T points to some statutes that Congress has explicitly said shall be enforced under the Communications Act. For example, as AT&T observes, the ACP contains a provision stating that in enforcing compliance with the ACP, the Commission may impose forfeitures under Section 503.[126] Under the doctrine of avoiding surplusage, argues AT&T, Congress' failure to include such a provision in Section 60506 (or, for that matter, Section 60504) demonstrates Congress' desire to withhold enforcement authority from the Commission.[127]

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[119] Alliance for Community Media v. FCC, 529 F.3d 763, 773-775 (6th Cir. 2008) (analyzing Iowa Utility Bd.)
[120] 47 U.S.C. § 303(r).
[121] Codified at 47 U.S.C. § 533(c).
[122] *See* 47 U.S.C. § 309(i)(3)(C)(i).
[123] 47 C.F.R. §15.1(a).
[124] 47 U.S.C. 502.
[125] NCTA Comments at 666.
[126] Section 60502(a)(3)(B)(ii).
[127] AT&T Comments at 35-42.

But, as noted above, reviewing authorities should apply the surplusages doctrine carefully, keeping in mind that there may be many reasons—including sloppy drafting of large and complicated statutes[128]—for an apparently redundant or unnecessary provision. In the first instance, reviewing authorities should consider whether a benign or unremarkable explanation accounts for an apparent redundancy. In particular, when one explanation would run contrary to other statutory canons,[129] or would fundamentally alter an established legislative scheme,[130] or would produce an absurd, unjust or disruptive result,[131] courts have urged adopting the less disruptive explanation—even if this produces some redundancy.[132]

Here, the relevant statutes that explicitly state that this provision shall be enforced as a provision of the Communications Act generally have simpler explanations that do not require adopting the radical and disruptive new principle that Congress withholds enforcement power by implication rather than by explicit statement. For example, the ACP program initially began life as a temporary program as part of the second Covid Pandemic relief package—the Emergency Broadband Benefit program.[133] Congress explicitly limited the EBB to the duration of the "emergency period relating to Covid-19." This naturally created ambiguity over the FCC's ability to enforce the requirements of the program when the program expired. Congress therefore clarified that the FCC's enforcement power was not temporary and did not expire when the

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[128] *See* Burwell, 576 U.S. 491.
[129] *See* Pisarz v GC Servs., L.P., No. 16-4552 (FLW), 2017 U.S. Dist. LEXIS 42880 (D.N.J. Mar. 24, 2017), at *21. Hagler, 2014 U.S. Dist. LEXIS 139241, at *8 ("But the proposition that many includes only one is not as logically inevitable as the proposition that one includes multiple ones, so its application is much more subject to context and to contradiction by other canons.").
[130] *See* Burwell, 576 U.S. 492-493.
[131] *See* Clinton v. City of New York, 524 U.S. 417, 429 (1998).
[132] Pietras v. Curfin Oldsmobile, Civil Action No. 05 C 4624, 2005 U.S. Dist. LEXIS 26510 (N.D. Ill. Nov. 1, 2005)("The court is mindful of the canon favoring an interpretation that does not render statutory provisions redundant. But this canon must yield here because interpreting § 1681m to avoid the redundancy would lead to absurd results.")(citations omitted).
[133] *See* Consolidated Appropriations Act of 2021 Pub. L. 116-260, Div N, Title IX, § 904(g).

program expired. When Congress made the EBB permanent as the Affordable Connectivity Program, it essentially copied the previous language—including the enforcement provision. This is exactly the sort of "inartful drafting" the Supreme Court has cautioned against relying upon for deeper meaning.[134]

The Communications Assistance to Law Enforcement Act (CALEA),[135] cited by AT&T is another example more easily explained by the unique nature of that statute. As the Commission observed, Congress struck a delicate balance between the DoJ and the FCC with regard to administration and enforcement of the statute.[136] Section 629(a) assured that it would be the FCC as the expert on telecommunications, rather than the DoJ as the expert on law enforcement, that would exercise regulatory authority for implementing CALEA. Additionally, Congress introduced a novel tool of allowing carriers to formulate their own plans for compliance, subject to FCC approval. Congress therefore clarified in Section 629(d) that the Commission would enforce compliance with the policies in the same way it enforced compliance with actual rules adopted under the Communications Act.

Another example of a statute including such language to avoid potential confusion can be found in the Secure and Trusted Communications Network Act of 2019,[137] which significantly expanded the range of penalties the Commission could impose depending on the violation. It therefore made sense for Congress to clarify that in the first instance the Commission would enforce the statute as it enforces other provisions of the Communications Act, but then, where appropriate, impose the additional penalties authorized by 47 U.S.C. § 1606(b).

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[134] *See* Burwell, 576 U.S. 491.
[135] Pub. L. 103-414.
[136] F.C.C, Notice of Proposed Rulemaking and Declaratory Ruling, *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295 at ¶5 (rel. Aug. 9, 2004).
[137] Pub. L. 116-124.

D. The Arguments Against Section V Enforcement Powers Are Internally Contradictory, But If Accepted Would Not Foreclose Injunctive and Punitive Relief.

Finally, the argument that Section 1754 does not permit the FCC to use its Section V authority as advanced by proponents contains numerous internal contradictions. Nor does it provide for the "rewards and preemption only" approach urged by AT&T and others. As an initial matter, reading Section 1754 as a "freestanding" provision would deprive the Commission of the very rulemaking power necessary to create the rules ordered by Congress. As explained in *Iowa Utility Bd*, the authority of the Commission to create the rules implementing Section 251 flowed not from Section 251, but from the Commission's general rulemaking authority under Section 201(b).[138] The majority explicitly rejected the argument put forward in the Thomas dissent that Section 251(b) itself provided the necessary authority to act.[139] Like the provisions of Title V, Section 201(b) only permits general rulemaking "as may be necessary in the public interest to carry out the provisions of this chapter."[140] If Section 1754 is genuinely a "freestanding provision" and not part of the Communications Act, then Section 201(b) is as foreclosed to the Commission as Sections 501, 502, and 503. This would either leave the Commission unable to create the rules Congress has ordered it to create, or would require the Commission to rely on its less limited power under 154(i).[141] But if Section 154(i) can provide the authority to create the rules required by Section 1754, it can also authorize the Commission to create penalties "necessary for the execution of its functions."[142] Either way, under AT&T's

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[138] *Iowa Utility Bd.* 525 U.S. at 380.
[139] At n. 9 (observing that provisions requiring rulemaking such as Section 251(e) "require the Commission to exercise its [201(b)] rulemaking authority" rather than serving as an independent source of authority).
[140] 47 U.S.C. § 201(b).
[141] 154(i) merely requires that any action taken be (a) "necessary to the execution of its functions;" and, (b) not be "inconsistent with this chapter."
[142] 47 USC § 154(i).

"freestanding provision" theory, the Commission either lacks the authority to create rules as well as penalties, or it has the authority to create penalties as well as rules.

A similar contradiction lies in AT&T's insistence that Section 1754 authorizes the Commission to preempt states to encourage deployment. But as both the D.C. Circuit and the Ninth Circuit have made clear, state preemption must have a clear locus of authority in the Communications Act.[143] As a "freestanding provision" cut off from the Commission's general authority, what is the locus of the Commission's authority to preempt the states? Alternatively, if Section 1754 provides authority for preemption, it follows that it must also provide authority to create penalties for non-compliance. Title V does not, after all, affirmatively *prohibit* the Commission from applying forfeitures. It merely states that when it seeks forfeitures for a violation of "this chapter," it must do so subject to the limits and procedures of Title V.

Alternatively, even if one were to read Title V as not merely unavailable to "freestanding" provisions, but affirmatively prohibiting forfeitures for "freestanding provisions" (which would require the peculiar reading that while Title V applies only to provisions of the "true" Communications Act, it also includes an implied prohibition on authority vested by "freestanding" provisions), but somehow still leaves the Commission sufficient independent authority to create the required rules, it follows that Section 1754 (possibly in combination with Section 154(i), possibly on its own) must also provide the Commission with the authority to "prevent" and "eliminate" digital discrimination (and "facilitate equal access to broadband") as discussed above, whatever limitations one finds in Title V, they do not prevent the Commission from using the federal courts to secure obedience to its orders (even those generated by "freestanding provisions") pursuant to Title IV, 47 U.S.C. § 401(b). Nor does any limit on the

[143] ACA Connects v. Bonta, 24 F.3d 1233 (9th Cir. 2022); Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019).

availability of Title V diminish the obligation of "every person" to obey any order of the Commission, regardless of whether the authority comes from "this chapter" or a "freestanding provision." 47 U.S.C. § 416(c). Rather than enforce via the threat of forfeitures, the FCC would of necessity enforce its rules (and remedy violations) via injunctive relief.[144]

In other words, accepting AT&T's argument would create "a most chopped up statute."[145] Either it renders Section 1754 a nullity by cutting it off from the FCC's general rulemaking authority under Section 201(b), or the Commission has sufficient authority to create both rules and enforcement mechanisms. But in no case can AT&T reach the result it wants—a statute compelling the FCC to eliminate digital discrimination strictly through showering carriers with gifts.

IV. PROPER ENFORCEMENT ACTION WILL REQUIRE A MIX OF TOOLS.

While the Commission must look to the past for lessons on how to achieve universal equal access to broadband, the Commission must also embrace the fact that much of what it will do here is new. The Commission must therefore embrace a wide range of potential enforcement mechanisms and remedies rather than limiting itself to traditional forfeiture. This includes the use of injunctive relief and requirement to share or otherwise extend facilities.

A. Authority to Issue Injunctive Relief, Including Orders to Extend Facilities.

The Commission has a number of tools Congress provided in 1934 so that the Commission could fulfill its mandate of bringing telephone service to all Americans. This includes the direct authority (enforced by a federal district court) to require companies to "furnish facilities" so that customers can receive service "upon terms and conditions as favorable

[144] While Public Knowledge et al. supports the availability of injunctive relief to compel carriers to serve redlined communities and to cease discriminatory practices (see discussion of remedies *infra*), Public Knowledge et al. does not believe this should be the ***only*** form of relief. Still, if the Commission accepts AT&T's argument, injunctive relief may be the only relief available.
[145] *Iowa Utility Bd.*, 525 U.S. at 381 n.8

as those given by said carrier to any other person."[146] This is not to say that Section 406 is applicable here. But it underscores the power that Congress has given the Commission in the past to ensure universal service. While the Commission may not have had cause to use this power in decades, we face a situation comparable to that faced by the Commission at its founding, when telephone service rather than broadband was the utility in question.

The Commission has previously found that it has the authority to issue injunctions:

> The Supreme Court affirmed the Commission's authority to impose interim injunctive relief pursuant to section 4(i) in Southwestern Cable, see 392 U.S. at 181, and the Commission has utilized such authority in the past. See Time Warner Cable, A Division of Time Warner Entertainment Company, L.P., MB Docket No. 06-151, Order, 21 FCC Rcd 8808 (2006); AT&T Corp. v. Ameritech Corp., File No. E-98-41, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998); see also Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22566, para. 159 & n.464 (1997) (stating that the Commission has authority under section 4(i) of the Act to award injunctive relief).[147]

In addition, Section 1754 is written in broad, sweeping language. As the Supreme Court has emphasized repeatedly, statutes written in broad language are designed by Congress to convey broad authority and broad discretion.[148] Such an injunctive order would have the added advantage that the injured party could seek enforcement independently in the local federal district court.[149]

Injunctive relief may not simply be for the carrier to extend or upgrade facilities, or to add staff to properly service a community. For example, injunctive relief might require that a

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[146] 47 U.S.C. § 406. *See also* 47 U.S.C. §§ 401(b), 416.
[147] *In re Formal Complaint of Free Press and Media Access Project Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, 13060 n. 245 (2008).
[148] *Iowa Utility Bd.*, at 397. *See also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380-81 (2020); *NCTA*, at 664 ("statutes written in broad, sweeping language should be given broad, sweeping application").
[149] *See* 47 U.S.C. § 401(b).

large ISP that has refused to serve a particular community—or refused to upgrade its service—provide interconnection and wholesale transport to an ISP willing to provide service. Relief might include disgorgement for discriminatory pricing, or damages paid directly to individuals harmed by the discriminatory conduct. These remedies are consistent with other remedies provided for in the Communications Act.[150]

B. Forfeitures, Consent Decrees, and Declaratory Rulings

Nevertheless, injunctions to cure the specific discriminatory conduct are only one tool, and should not necessarily be the tool of first resort. The Commission's traditional enforcement tools of forfeitures and consent decrees are generally effective—this is why the Commission uses them. Forfeitures can be particularly useful when applied on a per-day basis, depending on the number of people impacted by the conduct and the length of delay between when the carrier is told to fix the problem and when the carrier actually fixes the problem.

C. Permission to Overbuild Territory and Spectrum Sharing Requirements

The Commission should consider allowing competing ISPs to apply for grants to overbuild the general service area where ISPs consistently fail to adequately serve portions of the market resulting in a disparate impact on a protected group. Generally, the Commission will be limited in this remedy to grants made from funds it controls, but the Commission should work with other agencies to coordinate grantmaking to provide overbuilding funds where incumbent ISPs fail to provide equal access to broadband. The rule against overbuilding is only justified on the grounds that: (a) overbuilding diverts funds from unserved or underserved communities; and, (b) government should not fund competitors in the private sector.[151] But a carrier that engages in

[150] *See* 47 U.S.C. §§ 207 (private right to sue for damages at the Commission or in court); 227(3) (TCPA private right of action) 551(f) (Cable Privacy Act private right of action).
[151] To be clear, Public Knowledge vigorously disagrees with the policy and in no way endorses these justifications.

digital discrimination is not serving the community. It is blocking others who *are* willing to serve the entire community while denying equal access to broadband within the service area. If an ISP will not adequately serve a portion of the community, then the Commission should allow a rival ISP willing to serve the *entire* community to apply for funds to do so.

By the same logic, the Commission should consider allowing rival wireless carriers to share spectrum in the license area where a wireless carrier persistently fails to serve the entire community. Licensees hold their licenses as trustees for the public and their community of service. Section 309(j)(3) and 309(j)(4) make it incumbent on the Commission to design rules governing auctioned spectrum that ensure that women and minorities enjoy the benefits of wireless technologies and have the opportunity to participate in the provision of wireless services. Mandating that licensees that engage in discrimination allow another wireless provider willing to serve the entire community equally to share spectrum will not only facilitate equal access to broadband, but will fulfill the Commission's obligations under 47 U.S.C. § 309(j).

V. THE FCC SHOULD NOT DEFER TO PROVIDERS WHEN DETERMINING WHETHER DEPLOYMENTS ARE FEASIBLE, BUT SHOULD PROVIDE A GENERAL LIST OF CONSIDERATIONS FOR GUIDANCE .

Industry commenters put forward a reading of technical and economic feasibility that would effectively excuse the deployment patterns that Congress enacted Section 1754 to remediate.[152] The Commission can only implement the law and carry out Congress' directive if it does not simply accept providers' assurances about whether deployments are technically and economically feasible. Likewise, the Commission should ignore the standard parade of horror stories that providers will find themselves paralyzed with uncertainty and unable to invest simply because the Commission enforces Section 1754 through case-by-case adjudication rather than adopting a safe harbor. Nevertheless, it will be useful to all stakeholders—consumers as well as

[152] *See e.g.* AT&T Comments at 25-26, USTelecom Comments at 36-41.

providers—for the Commission to provide guidance on how it will evaluate "issues of economic and technical feasibility."[153]

A. The Commission Must Not Defer to Providers When Determining Feasibility.

USTelcom appears to argue that the mere assertion of technical or economic feasibility should suffice to excuse digital discrimination, arguing that the Commission cannot require that feasibility issues be "genuine" because "the word 'genuine' does not appear in the statutory text, and the Commission cannot rewrite it."[154] It finds the entire discussion "incorrect and unnecessary" given providers' "deep commitment to infrastructure investment," but concedes that the Commission "already has rules that require truthful and accurate statements to be submitted to the agency."[155] But the question of whether a particular deployment is or is not feasible within the meaning of the statute is a complex legal, economic, and policy question, not one of simple "misrepresentation." By specifying that these issues must be "genuine," the Commission is merely clarifying to providers what the statutory scheme already makes clear: that the Commission, not the very entities whose behavior this statute was intended to correct, will determine whether deployments are "feasible" under this statute.

USTelecom shows how unwise it would be to trust providers to determine what technical and economic feasibility mean by asserting that it is impermissible for the Commission to consider "infeasibility" in its rules, incorrectly asserting (1) that the mere use of the word creates a presumption that deployments are feasible, and (2) that the Commission cannot create such a presumption. But the statute directs the Commission to "tak[e] into account the issues of technical and economic feasibility"—this requires the Commission to craft its rules, including burdens of proof, in the way the record supports and that best achieves the statute's policy

[153] 47 U.S.C. § 1754(b).
[154] Comments of USTelecom 37.
[155] *Id.* at 38.

objectives. USTelecom appears driven to assert that the Commission has no authority to do anything but repeat the exact words of the statute in its rules, inventing the principle that the Commission's use of words like "genuine" or "infeasible" is not allowed.[156] But the statute directs the Commission to "identify[] necessary steps for the Commission to take" to eliminate digital discrimination. If the Commission determines that specifying that feasibility issues must be "genuine" and that providers must demonstrate that deployments are "infeasible" are necessary, then it is not only permitted, but statutorily required to do so.

NCTA's argument for rules that are permissive for providers assumes that there is no daylight between "providers' exercise of business judgment" and an "impossibility" standard.[157] But this is not the case. First, the statute is directed, among other things, at income-based discrimination. If a provider's business judgment is that it should not deploy to an area because of its income level, then the Commission would be expressly forbidden by the statute from accepting it. But as Public Knowledge et al. explained in their comments, the Commission can be guided by its precedent in other contexts in determining questions of economic and technical feasibility, and can adopt presumptions of feasibility while using a case-by-case approach to allow providers to provide relevant evidence.

Verizon correctly observes that the Commission should draw on its Communications Act precedent when considering the concepts of technical and economic feasibility.[158] But its analysis of that precedent is incomplete. When implementing the Satellite Television Extension and Localism Act Reauthorization Act, the Commission was considering specific requirements on a small number of satellite carriers with known technical characteristics. Its rules reflected this, but

[156] The hollowness of this argument can be shown by just replacing "infeasible" with "not feasible," which means the same thing. At most USTelecom's announced principle of statutory construction would add to a document's word count.
[157] *See* Comments of NCTA 30.
[158] Comments of Verizon at 27.

still allocated to carriers "the burden to demonstrate that the resulting carriage from a market modification is technically and economically infeasible."[159] Verizon also cites the FCC's observation that "it would be unrealistic and unwarranted to impose upon carriers an obligation to offer services which are dependent upon certain technical capabilities not yet fully available."[160] This is consistent with what Public Knowledge et al. wrote in their comments, that providers should be able to show that a specific technology cannot support a given deployment.[161] Of course, Commission precedent also shows that the inquiry does not end there. For example, after finding that one technological requirement would not be feasible, the Commission required the providers to use a workaround: "It currently is not always technologically feasible for providers of interconnected VoIP services to automatically determine the location of their end users without end users' active cooperation. We therefore require providers of interconnected VoIP services to obtain location information from their customers."[162] As further explained in the comments from Public Knowledge et al, Commission precedent shows that the Commission takes into account all relevant factors when considering questions of economic and technical feasibility, and does not simply allow providers to answer the question for themselves.

B. The Commission Should Provide Guidance on Economic Feasibility Claims.

As Public Knowledge et al. noted in its initial comments that the Commission has a wealth of experience in determining feasibility claims in a wide variety of contexts.[163] In some

[159] Report and Order, Amendment to the Commission's Rules Concerning Market Modification, 30 FCC Rcd 10406, ¶ 4 (2015).
[160] Report and Order, Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, 8 FCC Rcd 6885, ¶ 63 (1993).
[161] Public Knowledge et al. Comments at 42.
[162] E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 46 (2005).
[163] Public Knowledge et al. Comments at 41-46.

ways, the question of technical feasibility is easiest to determine. The dimensions of modern communications technology for wireless and wireline are well understood by the expert agency. In urban areas in particular, deploying fiber or other wireline technology will rarely present a technical problem. It is in the realm of economic feasibility that carriers will most likely defend their refusal to deploy or chronic underinvestment.

It is here that the Commission's experience in areas such as tariffing, settlement fees, and wireless performance metrics other proceedings that traditionally required "just and reasonable rates" can provide valuable lessons from the past. Preventing cherry picking/redlining and to ensure that customers pay the same price for the same service lies at the core of the Commission's mission. At the same time, however, the Commission cannot mechanically apply the traditional tools of the past. Public Knowledge et al. does ***not*** propose using actual ratemaking or cost averaging to resolve complaints. Rather, Public Knowledge et al. believes that these provide useful lessons for developing rules of thumb to provide guidance for the Commission, which the Commission should in turn communicate to the public to set expectations.

But the Commission should not be bound by the past. Other factors must be considered as well. As an initial matter, the Commission must consider the overall purpose of the statute to ensure equal access throughout the service. Therefore, a starting place for economic feasibility must be the marketplace as a whole. Additionally, as noted previously by Public Knowledge et al., the Commission should consider whether various programs, such as ACP, would make service to the area sufficiently profitable to become economically feasible. Participation would remain voluntary for carriers, but a carrier that refuses to participate in a subsidy program that would make service economically feasible cannot then use such a refusal to justify a failure to

serve an area on the basis of economic infeasibility. Finally, the Commission should look to whether the ISP claims to serve the area on the FCC's Form 477 or any other state or federal survey of service. If the ISP claims to serve an area, it should serve all portions of the area equally. This is especially warranted because if the ISP claims to serve an area, it prevents others from seeking a subsidy to build into the area itself.

Taking all these together, Public Knowledge et al. suggests the following as examples of the kind of guidance the Commission should offer.

What is the rate of return for the overall service area, not merely specific neighborhoods? As shown in the Markup study, chronic underinvestment based on income-level or race tends to occur within the scope of a larger urban market.[164] Traditionally, telephone and cable providers subject to franchising requirements expected to offset lower returns in poorer or higher-cost communities with higher rates of return from more lucrative parts of the market. Clearly this approach was "economically feasible" based on the substantial profits of both industries during their respective haydays. The same expectation should apply here. Even if deployment to a specific neighborhood might result in a loss for that specific neighborhood, it is still economically feasible provided the market as a whole is profitable. Put another way, if you want to serve the Washington, DC market, that includes deploying equal access in Anacostia as well as in Georgetown.[165]

Profitability must be measured on a reasonable multi-year basis, not on the basis of a single quarter or other short-term measure. When a company evaluates entering a market, it does not

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[164] Leon Yin & Aaron Sankin, Associated Press, The Markup, Poor, Less White US Neighborhoods Get Worst Internet Deals (2022). Available at: https://apnews.com/article/broadband-internet-speed-inequality-01a99247a08b355e89cc54595aecdafa

[165] As Verizon notes in its own comments, it has a history of doing precisely this. Other carriers can follow this example.

expect to immediately turn a profit. Indeed, given traditional network economics where companies expect to have huge expenses up front and then extremely low marginal costs, network operators generally expect to take years to recoup investment. In tariffing, it was not uncommon to use a 15 year (or even longer) time frame for determining a reasonable rate of return.

The Commission should not permit underinvestment as a cost-saving measure unless the costs are equally distributed in the marketplace. Carriers, particularly large publicly traded carriers, may make poor investments in other areas and therefore need to cut costs—especially to enhance short-term share price. The same is true after an acquisition, where "synergies" or "efficiencies" frequently translate into layoffs. Carriers should not be allowed to select areas for future underinvestment because of the desire or need to reduce capital or operating expenditures based on protected criteria. Carriers should show that they have made an effort to "share the pain" equitably throughout the service area.

Systemic failure to reinvest after a natural disaster, catastrophic event, or other de facto discontinuance. Natural disasters that destroy wide swaths of communications infrastructure have sadly become all too common. While it may take months for carriers to rebuild systems, the Commission should carefully examine whether carriers display a pattern of rebuilding or upgrading destroyed systems in whiter, wealthier communities compared to the repair efforts in low-income communities and communities of color. In particular, the Commission should make clear that "economic infeasibility" does not permit a carrier to abandon a community or neighborhood where it previously offered service.

Equal service throughout a claimed service area. Where a carrier affirmatively claims to the Commission that it offers service in a particular geographic area for purposes of the broadband

maps, it must serve all would-be subscribers within the claimed area equally. This is not only consistent with the requirement that the Commission "facilitate equal access to broadband," but will also serve the important purpose of discouraging carriers from inflating their service claims. A statement by a carrier that it serves an area for purposes of measuring national broadband deployment is a commitment to serve the entire area. Carriers unable or unwilling to make that commitment should not claim to serve the relevant geographic area.

As a final observation, the Commission should embrace the fact that it will gain experience through the adjudication process and that it will develop precedent that will further guide both providers and the public.[166] While basic principles of fundamental fairness and administrative law require that parties have basic notice of what conduct will be punished, this generally impacts the nature of the remedy rather than acting as a prohibition on adjudication. Were it otherwise, agencies that proceed primarily by adjudication could not act. As the courts have explained, all adjudications are, to some degree, retroactive (in contrast to rulemakings, which are generally proactive). Remedies where the relief is prospective rather than retrospective generally do not impermissibly attach new legal consequences to previous actions, and therefore do not violate the rule against retroactivity.[167]

This is, of course, another reason to have multiple methods of enforcement. The Commission may begin with what amount to declaratory rulings with instructions to providers to cease conduct now adjudicated as violating the Commission's rules. As discussed above, this does not constitute retroactivity simply because it upsets previous expectations.[168] Providers who

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[166] *See* NTCA, 567 F.3d at 670 (observing that case-by-case adjudication "makes sense in the context of fact specific disputes" and that "bedrock Administrative law puts the choice between proceeding by general rule or by *ad hoc* litigation primarily in the informed discretion of the administrative agency").
[167] Landsgraf, 511 U.S. at 269.
[168] *See* Part III *supra*.

continue the discriminatory behavior, including efforts to dodge these rulings in a transparently evasive manner, could be subject to harsher penalties.

CONCLUSION

Section 1754 delegated to the Commission broad authority to address the great communications challenge of our generation—ensuring that all Americans have equal access to the communications utility of the 21st Century. ISPs have done their best convince the Commission to constrain and undermine this authority. Rather than recognize Section 1754 as a rebuke of past policies that created the current digital divide, ISPs urge the Commission to view it as a seal of approval for continuing a policy that amounts to hopes, prayers and subsidies. Instead of seeing this as a call to arms and radical change, ISPs argue that Congress intended the Commission to stay the course.

The Commission should reject this invitation to continued indolence. Since the 1996 Act, the Commission has relied on a policy of deregulation, subsidy and preemption of the states. The time for a "carrots only" policy has passed. The Commission must adopt meaningful rules with real teeth if it expects to fulfill its responsibility of facilitating equal access to broadband for all Americans.

Respectfully Submitted,

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