

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

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

**COMMENTS OF NATIONAL DIGITAL INCLUSION ALLIANCE  
AND COMMON SENSE MEDIA**

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## I. INTRODUCTION

The National Digital Inclusion Alliance (NDIA) and Common Sense Media respectfully submit the following comments in response to the Commission’s Notice of Proposed Rulemaking In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination.

National Digital Inclusion Alliance (NDIA) is a non-profit, 501(c)(3) organization that advances digital equity by supporting community programs and equipping policymakers to act. NDIA works collaboratively with more than 1,100 digital inclusion practitioners in 48 states, the District of Columbia, two territories, and 12 tribal organizations. NDIA advocates for equitable internet access, tech devices, digital skills training, and tech support.

Common Sense Media is the nation’s leading independent nonprofit organization dedicated to helping kids and families thrive in a world of media and technology. We empower parents, teachers, and policymakers by providing unbiased information, trusted advice, and innovative tools to help them harness the power of media and technology as a positive force in all kids’ lives. Common Sense Media has an uncommon reach among parents and teachers, with over 100 million users and one million educators across its networks and platforms. We have a long and established track record of advocating for broadband connectivity for all children and families, in schools and at home, regardless of their socioeconomic status and geographic location.

NDIA and Common Sense Media commend Congress for addressing the urgent need for internet service provider transparency in Section 60506 of the Infrastructure Investment and Jobs Act (IIJA).<sup>1</sup> We also commend the Commission for acting quickly to implement this statute.

Before we respond to the Commission’s specific questions outlined in the NPRM, we would like to emphasize the following three vital overarching points the Commission should prioritize throughout its rulemaking process:

1. Individuals experience discrimination through both intentional and unintentional policies and practices. However, the Commission should not require individuals or communities to prove “intent” to show they experienced digital discrimination; evidence of discriminatory impact should be enough. The Commission should interweave this fundamental point throughout the entire set of rules it adopts.
2. Consumers and their lived experience should be what drives the rulemaking process. The Commission should consistently consult with consumers and those who serve them like digital inclusion practitioners and digital navigators to fully understand their experiences

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<sup>1</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), codified at 47 U.S.C. (IIJA)

and how the rules and processes developed can best serve them. All rules, processes, and materials should be crafted with consumers, and those who directly serve them, in mind.

3. The Commission must leverage data they collect through the consumer complaint processes to identify patterns and act on evidence of discriminatory impact. Furthermore, the complaint process must be transparent, and the system must be intuitive for filers. We offer recommendations to improve the process and use data the Commission collects through it.

## II. DISCUSSION

### A. Defining Digital Discrimination

In the IJJA, Congress found that "access to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States."<sup>2</sup> Recognizing this, Congress created a suite of broadband programs to address the main causes of the digital divide—the lack of infrastructure, the lack of affordable and transparent internet service offerings, and the lack of digital inclusion and adoption programming. Congress created these programs in one law and directed the Federal Communications Commission (FCC) and National Telecommunications and Information Administration (NTIA) to implement them in concert, understanding that the digital divide is a multifaceted issue and solutions must be comprehensive and collaborative between federal, state, territory, tribal, and local governments.

That is the context in which this proceeding occurs. And it is the context in which the Commission should define “digital discrimination of access.” As the IJJA makes clear, access to broadband *service* is different from access to broadband *infrastructure*—a fact Congress highlighted by including section 60506 in Title V: Broadband Affordability.

NDIA and Common Sense Media therefore urge the Commission to understand “access” to include technical and nontechnical aspects of broadband service, including physical access to infrastructure, pricing and affordability, contract terms and conditions, and quality of service. Congress itself supports this understanding, defining “equal access” in reference to comparable speeds, capacities, latency, and other quality of service metrics for comparable terms and conditions.<sup>3</sup>

The definition of digital discrimination should apply to provider policies or practices that differentially impact an individual or community’s ability to benefit from *all aspects* of broadband internet service. This must include nontechnical factors, such as customer service and advertising practices.

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<sup>2</sup> IJJA § 60101 (1), codified at 47 U.S.C. § 1701 (1)

<sup>3</sup> IJJA § 60506 (a)(2), codified at 47 U.S.C. § 1754 (a)(2)

We urge the Commission to strike the language “are intended” from the proposed definition. Digital discrimination can take place as a result of both intentional and unintentional policies or practices that differentially impacts individuals and communities. Thus, the Commission should adopt a definition that empowers these individuals and communities to remedy digital discrimination, even where no evidence of intent is found. Including discriminatory intent in the definition of digital discrimination will result in the drastic underenforcement of Section 60506. We strongly urge the Commission to not include discriminatory intent in the definition.

The Commission should not include “economic and technical feasibility” in the definition of digital discrimination. Digital discrimination can *result* from the infeasibility of serving an area. An area’s feasibility is a separate issue from whether or not it suffers from digital discrimination, and so feasibility should not be included in the definition of digital discrimination. This is because, as discussed below, a showing of disparate impact is enough to demonstrate that digital discrimination has occurred. Therefore, we oppose including the clause “not justified by genuine issues of technical or economic feasibility” in the definition of digital discrimination. The clause weakens the definition and potentially provides a permission structure for ISPs to continue digital discrimination. Section 60506 requires the Commission to consider issues of genuine technical or economic feasibility as potentially mitigating factors when instances of discriminatory impact occur, not as categorical exclusions to the definition of digital discrimination. We urge the Commission to understand section 60506 to require providers to “take whatever affirmative steps [are] necessary to make equal access economically and technologically feasible”<sup>4</sup> rather than incorporating technical and economic feasibility issues into the definition.

### *1. Disparate Impact and Disparate Treatment*

To effectively eliminate discrimination, NDIA and Common Sense Media urge the Commission to consider *disparate impact* (i.e. discriminatory effect) as sufficient to establish digital discrimination. We take this position because disparate treatment (i.e. discriminatory intent) is not the central question in 60506. Rather, the central question is whether the impact of discrimination prevents the Commission from fulfilling its Congressionally-mandated duty of providing connectivity to all, no matter their income, race, or location. Rational, profit-seeking actors will discriminate because, in some circumstances, it can be profitable to do so. Whether this is intentional or not is beside the point. The point, as discussed below, is that discrimination occurs and will continue to occur unless providers’ incentives are changed. The Commission should use this proceeding to create rules that make it rational for providers to serve everyone in their community, not just those that offer the highest returns. That is why Congress stated that,

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<sup>4</sup> Public Knowledge in the matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 34, (May 16, 2022).  
<https://www.fcc.gov/ecfs/document/105170672317930/1>

within a provider’s service area, “subscribers should benefit from equal access to broadband internet access service” and Congress directed the Commission to adopt “rules to facilitate equal access to broadband internet access service.”<sup>5</sup> This language is based on outcomes, not intentions. Likewise, the Commission's universal service mandate is based on outcomes, not intentions.

For example, to find that digital discrimination has occurred, the Commission need not conclude that providers made intentional decisions to avoid low-income communities *because* they are low-income communities. Rather, the Commission simply must find that households in a low-income neighborhood are paying the same price for DSL that households in more affluent neighborhoods pay for fiber to the home (FTTH) service.<sup>6</sup>

Furthermore, a discriminatory impact framework does not preclude the Commission from acting to *prevent* digital discrimination when a provider’s policies or practices are likely to produce inequitable outcomes for individuals or communities. Thus, in “circumstances in which an intentionally discriminatory policy or practice does not produce discriminatory effects”, the Commission should “address such a practice in order to satisfy its mandate to ‘prevent’ digital discrimination, regardless of its effect.”<sup>7</sup>

We reject arguments suggesting “there is no record of a history of discriminatory conduct in the telecommunications industry that could justify adoption of a disparate impact rule.”<sup>8</sup> As we previously noted, NDIA and others have documented occurrences of digital discrimination by identifying disparities in availability of broadband technologies, cost of service and speeds to certain areas within a community compared to other areas in the same community. We highlight that the poorly served areas align with neighborhoods that have historically experienced residential redlining and disinvestment, and continue to have high concentrations of low-income households and communities of color.<sup>9 10</sup> In these and other cases, the Commission should not be constrained by rules that only permit action when evidence of discriminatory intent is discovered as consumers were harmed whether intent was present or not.

We reject the argument that a disparate impact framework is in tension with other IIA programs.

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<sup>5</sup> IIA § 60506 (a)-(b), codified at 47 U.S.C. § 1754 (a)-(b)

<sup>6</sup> National Digital Inclusion Alliance, *AT&T's Digital Redlining* (2017)

[https://www.digitalinclusion.org/wp-content/uploads/dlm\\_uploads/2021/08/ATT-Redlining-Release.pdf](https://www.digitalinclusion.org/wp-content/uploads/dlm_uploads/2021/08/ATT-Redlining-Release.pdf)

<sup>7</sup> NPRM at 9

<sup>8</sup> NPRM at 12

<sup>9</sup> Greenlining, *On the Wrong Side of the Digital Divide* (2020)

<https://greenlining.org/publications/online-resources/2020/on-the-wrong-side-of-the-digital-divide/>

<sup>10</sup> Communications Workers of America and National Digital Inclusion Alliance, *AT&T's Digital Redlining Leaving Communities Behind for Profit* (2020)

[https://www.digitalinclusion.org/wp-content/uploads/dlm\\_uploads/2020/10/ATTs-Digital-Redlining-Leaving-Communities-Behind-for-Profit.pdf](https://www.digitalinclusion.org/wp-content/uploads/dlm_uploads/2020/10/ATTs-Digital-Redlining-Leaving-Communities-Behind-for-Profit.pdf)

IIJA's deployment and digital equity funds<sup>11</sup> prioritize covered populations,<sup>12</sup> unserved, and underserved areas.<sup>13</sup> The law is designed to incentivize deployment and digital inclusion programming in ways that resolve disparate impacts for historically underserved (and typically low-income) populations. It is in the interest of both providers and the public for ISPs to participate in IIJA's deployment programs, as these programs provide extraordinary resources for providers to expand access and digital inclusion programs to populations historically impacted by digital discrimination.

Similarly, we reject the argument that a disparate impact framework will chill new investment. In fact, we argue the opposite; the current system chills new investment. Providers have already made substantial investments in areas where they expect strong returns. The other areas, those with weaker expected returns, are where new investment is needed. This investment will not materialize on its own, and so we urge the Commission to issue rules that change providers' calculations and direct new investments where it is needed most.

In enforcing the rules, the Commission should acknowledge the timelines for ISPs to meet their deployment commitments under IIJA and other federally funded programs. Working to meet a deployment commitment is fundamentally different than, for example, consistently initiating network cycle upgrades in one area but not another, resulting in service offerings that are effectively incomparable.

## 2. *Other Components of the Definition*

NDIA and Common Sense Media urge the Commission to apply its rules preventing digital discrimination by any entity—subsidiary, parent company, or other—that provides internet service, regardless of the technology used. Further, ISPs must ultimately be responsible for *any* discriminatory policies or practices enacted by an entity working on their behalf; such policies and practices should not be limited to technical aspects of broadband service.

The Commission should avoid establishing cross-cutting standards and interpretations of comparability across different services, such as fixed broadband, mobile broadband, and the varying technologies used to deliver them. Different service types and technologies have different natures and capabilities and should thus be evaluated independently using relevant performance metrics.<sup>14</sup>

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<sup>11</sup> IIJA § 60301-60307, codified at 47 U.S.C. § 1721-1726 (Digital Equity Act)

<sup>12</sup> IIJA § 60302 (8), codified at 47 U.S.C. § 1721 (8)

<sup>13</sup> IIJA § 60102 (a)(1), codified at 47 U.S.C. § 1702 (a)(1)

<sup>14</sup> National Digital Inclusion Alliance in the matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 4 (May 16, 2022) <https://www.fcc.gov/ecfs/document/1051651281207/1>

To fulfill its directive under IIJA, the Commission must also act to *prevent* digital discrimination. Thus, the Commission must contemplate a variety of policies and practices likely to differentially impact an individual or community's ability to benefit from *all aspects* of broadband internet service. In addition to preventing deployment discrimination, we urge the Commission to apply scrutiny to the following variables to discover patterns of discriminatory practices and disparate impacts:

- **Pricing:** For example, pricing structures that are meaningfully disassociated from the quality of the broadband offered (e.g., tier flattening<sup>15</sup>).
- **Performance:** For example, the actual speed and reliability of services offered in one area should be similar to those offered in another.
- **Customer service:** For example, customer service protocols that privilege individuals participating in or seeking plans on higher price tiers, or practices privileging consumers residing in some neighborhoods and not others.
- **Network maintenance:** For example, unaddressed network degradation, outages, and network cycle upgrades occurring disproportionately in some geographic areas relative to others.
- **Contract terms and conditions:** For example, price and duration of service contracts, fees, available service bundle options, data caps, promotional offerings, or consumer premises equipment rental agreements that impact consumers differently.
- **Marketing:** For example, predatory practices that target low-income consumers, or other marketing practices offering discounts and perks to individuals or consumers based on protected classes.

The above list, which is not exhaustive, should be the basis for the Commission's research into discrimination patterns. Data from the consumer complaint process should supplement this research.

We urge the Commission to evaluate economic and technical feasibility on a case-by-case basis and reject safe harbors in these rules. The adoption of safe harbors would allow ISPs to sidestep the necessary processes by which all disparate impact complaints, no matter how seemingly non-discriminatory, would be subject to a review process to discover the nature and impact of the discrimination. We agree that a "bright line safe harbor approach be more likely to excuse conduct that, on an individualized review, may not be justified[]"<sup>16</sup>

We urge the Commission to require service providers to document and prove the technical or economic feasibility constraints that result in discriminatory outcomes. The Commission should

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<sup>15</sup> Angela Siefer, Bill Callahan, "Tier Flattening: AT&T and Verizon Home Customers Pay a High Price for Slow Internet" (National Digital Inclusion Alliance, 2018) at 2.

<https://www.digitalinclusion.org/wp-content/uploads/2018/07/NDIA-Tier-Flattening-July-2018.pdf>

<sup>16</sup> NPRM at 19



construe these terms narrowly to avoid creating an “exemption that swallows the rule.”<sup>17</sup> We also urge the Commission to consider how these providers might use the Universal Service Fund (USF) and other government funding opportunities to overcome feasibility issues.<sup>18</sup> To the degree that service providers rely on profitability models based on assumptions about demand for internet service in a given area, economic feasibility analyses should consider the availability of consumer subsidies, which increase demand and encourage deployment.<sup>19</sup>

We encourage the Commission to understand that digital discrimination may occur against both communities and individuals, and that the two may manifest differently but are nevertheless inseparable and interrelated. Rectifying digital discrimination at the community level involves rectifying individual instances of digital discrimination, and vice versa. We do not suggest a different method for rectifying each kind of harm; rather, we simply ask the Commission to rectify both.

We urge the Commission to understand section 60506 as a directive to prevent digital discrimination against subscribers and non-subscribers (non-subscribers are potential subscribers). Section 60506 explicitly directs the Commission to work with the Attorney General to prevent and eliminate deployment discrimination; thus, the digital discrimination rules should not be narrowly applied to only those individuals actively subscribed to broadband internet service. An individual’s subscriber status should not bear on their ability to bring forward a claim of digital discrimination.

To determine “differential impact,” the Commission should examine both the technical and nontechnical aspects of broadband. Technical aspects should include service characteristics such as speeds, capacities, latency, data caps, throttling frequency, down time, and other performance metrics. Non-technical aspects should include pricing, terms and conditions, customer service, marketing, promotional offers, equipment fees, and other factors that impact adoption.

For technical aspects, we acknowledge some circumstances may temporarily create “differential impact,” like network outages and periods of network degradation. In these situations, the affected ISP should face relaxed standards for digital discrimination. However, when these issues become chronic, they may indicate a pattern of unequal investment and should be considered discriminatory.

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<sup>17</sup> Public Knowledge in the matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 29 (May 16, 2022).

<sup>18</sup> National Digital Inclusion Alliance in the matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 12 (May 16, 2022)

<sup>19</sup> Clark, K., Fazlullah, A., Garner, D., Golnabi, S., Hill, H., Kalmus, M., McQuiggan, M., and Salmirs, E. (2022). *Closing the digital divide benefits everyone, not just the disconnected: An analysis of how universal connectivity benefits education, health care, government services, and employment.* (p. 30)

[https://www.common sense media.org/sites/default/files/research/report/2022-cs-bcg-closing-digital-divide\\_final-release-3-for-web.pdf#page=34](https://www.common sense media.org/sites/default/files/research/report/2022-cs-bcg-closing-digital-divide_final-release-3-for-web.pdf#page=34)

For non-technical aspects, the Commission should consider practices that create additional burdens on some individuals and not others (e.g., where credit checks are required) or provisions that result in more favorable terms for some individuals or groups (e.g., flexibility with contracts). We encourage the Commission to leverage and carefully examine all available data sources to compare services, terms, conditions, and other non-technical factors.

We encourage the Commission to review and reassess both the technical and nontechnical standards on a biennial basis, at a minimum.

Section 60506 prohibits discrimination of access based on income level, race, ethnicity, color, religion, or national origin. We urge the Commission to include the following statuses and identities in the ‘listed characteristics’: disability status, age, sex, sexual orientation, gender identity and expression, familial status, domestic violence survivor status, homelessness, English language proficiency and citizenship status. Through additional research, the Commission may unearth patterns of discrimination impacting those who have been historically marginalized but do not fall into the ‘listed characteristics’ in Section 60506. We urge the Commission to ensure that these additional historically marginalized groups are protected from digital discrimination.

## **B. Geographic Units of Analysis: Identifying Areas of Digital Discrimination**

To assess whether digital discrimination has occurred, the Commission needs to define (1) the “given area” in which a provider is expected to offer equitable access to broadband service, and (2) the “units of comparison” within the given area between which access can be compared.

These definitions are fundamental to this proceeding. If they are too narrow, then current networks will be deemed sufficient and no discrimination will be found. If they are too broad, then providers will face unrealistic pressure to offer service beyond their means.

However, a definition that does not identify discrimination in the current broadband landscape will be unsatisfactory. With the IJA and 60506, Congress was not asking whether digital discrimination exists but rather directing the Commission to rectify its effects, thus establishing that digital discrimination indeed exists and has adverse effects. Congress acknowledged these effects in 60101 (3)—“the digital divide disproportionately affects communities of color, lower-income areas, and rural areas”—and mandated action in 60506 (a)(3)—“the Commission should take steps to ensure that all people of the United States benefit from equal access to broadband internet access service.”

When defining the “given area,” we urge the Commission to consider five factors:

- The provider’s legally defined service area, be it a “franchise” area,<sup>20</sup> “service area,”<sup>21</sup> or “license” area.<sup>22</sup>
- The metropolitan/micropolitan statistical area in which the provider offers service (collectively referred to as core based statistical areas (CBSAs)) where they exist, and in a given county for areas outside of CBSAs.
- The area in which the provider suggests they offer (or could offer) service, as evidenced by marketing material; service area attestations to federal, state, or local agencies (e.g., FCC Broadband Data Collection); grant applications; and other documented information.
- Input from local stakeholders, which, IJJA makes clear, is vital to closing the digital divide. As the National Broadband Mapping Coalition points out, “the Commission should engage with local communities and governments to solicit input on how they identify their service areas in different contexts.”<sup>23</sup>
- Geographic contiguity, i.e. providers should offer an economic or technical rationale for any “holes” in their coverage that leave some households with worse service than those in the surrounding area.

When defining the “units of comparison,” we urge the Commission to use the most granular feasible geographic unit. We believe the maximum size for “units of comparison” should be the Census tract, but smaller units—such as point-level data, street segments, or Census blocks—should be used where possible. Such granularity is essential for detecting digital discrimination. Large units will obscure discrimination by averaging it across many households. Smaller units will provide greater resolution, increasing the likelihood that variation (i.e. potential discrimination) can be detected within a “given area.”

We urge the Commission to look at the Home Mortgage Disclosure Act (HMDA) data collected and reported by the Consumer Financial Protection Bureau (CFPB) as a model. The CFPB utilizes and publishes record level loan data reported by loan providers for HMDA compliance but generalizes the location to census blocks, allowing for rich analysis while still protecting individual privacy.

### **C. Data Sources: Identifying Patterns of Digital Discrimination**

We reiterate it is imperative for the Commission to enhance its data collection processes and proactively collect and analyze data to unearth discrimination patterns. Independent research may aid the Commission in discovering digital discrimination, and we recommend the Commission consider such studies to guide its effort in investigating claims of discriminatory policies and practices.

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<sup>20</sup> 47 U.S.C. § 522(9).

<sup>21</sup> 47 U.S.C. § 214(e)(5).

<sup>22</sup> 47 U.S.C. § 301.

<sup>23</sup> The National Broadband Mapping Coalition NOI comments at 6

The NPRM cites studies other commenters cited and asks for perspectives about the conclusions advanced in each. Multiple assertions and conclusions in the Information Technology and Innovation Foundation (ITIF) study “Broadband Myths: Do ISPs Engage in Digital Redlining?”<sup>24</sup> are important to address including but not limited to the following:

- “We begin from the uncontroversial premise that broadband providers seek to maximize their profits.”
- “For decisions to spend potentially millions of dollars to deploy broadband into a neighborhood, attributes of a given area and of the people in that area are relevant to the economic viability of deployment...areas of high poverty or low digital literacy are going to, by definition, have lower broadband take-up rates”
- “Top-line data supports the hypothesis that income, rather than race, is the driving factor in broadband connectivity.”<sup>25</sup>

None of these statements are exculpatory in the context of Section 60506, which prohibits discrimination on the basis of income. The aspiration to “maximize profits” does not shield a service provider from claims of discrimination when their policies and practices deny equal access to broadband internet service. The goals of “universal service” and “maximum profit” are irreconcilable, and Congress has repeatedly made it clear that the Commission should pursue the former.

The study’s discussion of profit considerations should prompt the Commission to use caution in construing “economic and technical feasibility.” If service providers are permitted to claim that offering service is not economically feasible because it does not contribute to maximum profit generation, then almost any practice can be justified. Further, the study cites upfront costs associated with fiber deployment as a reason to expect service providers to “ensure customers with sufficient income and willingness to buy their service.”<sup>26</sup> We reiterate that inappropriately short profitability models which fail to capture long-term return potential over the life of the infrastructure investment carries significant discriminatory impact, as low-income areas may not always yield immediate profits.<sup>27</sup> In evaluating claims of economic and technical feasibility, we urge the Commission to consider the “entire service area” over the “entire life of the network.”<sup>28</sup>

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<sup>24</sup> Joe Kane and Jessica Dine, *Broadband Myths: Do ISPs Engage in Digital Redlining?* (Information Technology and Innovation Foundation, 2022)

<https://itif.org/publications/2022/04/13/broadband-myths-do-isps-engage-digital-redlining/>

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ernesto Falcon, Cory Doctorow, Katherine Trendacosta, “Frontier’s Bankruptcy Reveals Why Big ISPs Choose to Deny Fiber to So Much of America”, (Electronic Frontier Foundation, 2022)

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

<sup>28</sup> NPRM citing Public Knowledge Dec. 5 Ex Parte at 3-4 <https://www.fcc.gov/ecfs/document/105170672317930/1>

The ITIF study also cites NTIA’s adoption survey data to support the conclusion there is not enough demand to justify bringing service to some areas. The study cites survey data showing 60 percent of households without home broadband cited “no need/interest” as the main reason.<sup>29</sup> However, a more thorough analysis has shown that this survey question, and therefore the conclusions drawn by ITIF, are overly simplistic and fail to reflect the nuanced factors that lead households not to subscribe to broadband service. The report, “*Measuring the Gap: What’s the Right Approach to Exploring Why Some Americans Do not Subscribe to Broadband?*” describes the methodological issues with this particular NTIA survey question and why those issues result in incomplete and easily misinterpreted responses.<sup>30</sup> *Measuring the Gap* goes on to cite research from the Pew Research Center and the California Emerging Technology Fund, both of which found that survey respondents cited cost as a top reason for not subscribing to home broadband when respondents were given more than one option for not subscribing to home broadband.<sup>31</sup>

Finally, the ITIF analysis of NTIA’s adoption data has a number of other issues:

First, as the pandemic demonstrated, it is not always possible for consumers to predict when they will need broadband. Essential services, like education, healthcare, and employment, are increasingly moving online. Even if a household currently feels it does not need broadband, that may change when, for example, their child’s school begins communicating with parents via an online portal or their bank closes the local branch.

Second, people move. If the preferences of current residents dictate infrastructure deployment, then some properties (and their future residents) may be permanently consigned to the digital divide. Notably, the “no need/interest” demographic is the oldest—mean age of 60.5—and the least likely to have school-aged children—88% do not.<sup>32</sup> This demographic often struggles with fear of technology and a lack of digital skills, which may be expressed as “no need/interest” in broadband. Even if the survey accurately captures their sentiments, the Commission should not give them undue weight when making decisions about infrastructure that will serve generations.

Third, internet access is correlated with a demand for more internet access. Another prominent difference between the “no need/interest” demographic and the “too expensive” demographic is that the latter has much more experience with the internet—nearly double the rate of both

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<sup>29</sup> ITIF citing National Telecommunications and Information Administration, *Digital Nation Data Explorer* (NTIA, June 2020)

<https://www.ntia.gov/data/digital-nation-data-explorer#sel=noNeedInterestMainReason&demo=&pc=prop&disp=chart>.

<sup>30</sup> John B. Horrigan, *Measuring the gap: What’s the Right Approach to Exploring Why Some Americans Do not Subscribe to Broadband?* at 2 (2020).

<sup>31</sup> *Ibid.*, 7

<sup>32</sup> National Telecommunications and Information Administration (NTIA), *Switched Off: Why Are One in Five U.S. Households Not Online?* <https://www.ntia.doc.gov/blog/2022/switched-why-are-one-five-us-households-not-online>

“previous home internet use” and “internet use at other locations.”<sup>33</sup> This confirms our experience that a person learns to value the internet the more they use it.

We urge the Commission to carefully and critically evaluate *any* research that claims consumers are not interested in broadband internet service.

We believe other research can be more useful to the Commission. Specifically, the Markup report<sup>34</sup> and research conducted by Consumer Reports<sup>35</sup> and California Community Foundation<sup>36</sup> provide templates for how the Commission should conduct analyses. We suggest the Commission be proactive with such analysis so the public does not bear the burden of identifying discriminatory impact. However, we also suggest that anyone—the Commission, consumers, or third parties—should be able to submit evidence of discrimination. And we reiterate that evidence of discriminatory *impact* is sufficient to find digital discrimination.

### *1. Leveraging Existing Data and Identifying New Data Sources*

The Commission should evaluate adoption data to determine patterns of unequal access. The Commission should also consider data from the Broadband Data Collection (BDC), the Broadband Data Act mapping process, and data from other sources—most notably demographic data from the Census Bureau. In general, the Commission should consider any data that is credible and relevant like the recent research published by The Markup Report or by Consumer Reports. At this point, it is not possible to identify or predict what all of those sources might be. The Commission, however, should continuously identify, collect, and incorporate new data sources that may become available. The Commission should also conduct an internal scan to identify existing data it collects or will collect for other programs and proceedings (e.g. Broadband Labels that may be relevant and support identification of instances or patterns of digital discrimination. Should gaps in the available data that are pertinent to and necessary for evaluating digital discrimination patterns be identified, the Commission should launch data collection and analysis processes to fill those data gaps.

The Commission should also make more detailed data from the existing informal complaint

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<sup>33</sup> Ibid.

<sup>34</sup> Leon Yin and Aaron Sankin, *Dollars to Megabits, You May Be Paying 400 Times As Much As Your Neighbor for Internet Service* (The Markup 2022). See also [github](#) data repository for the report

<sup>35</sup> Jonathan Schwantes, *Broadband Pricing: What Consumer Reports Learned from 22,000 Internet Bills*, (Consumer Reports 2022) [https://advocacy.consumerreports.org/wp-content/uploads/2022/11/FINAL\\_report-broadband.november-17-2022-2.pdf](https://advocacy.consumerreports.org/wp-content/uploads/2022/11/FINAL_report-broadband.november-17-2022-2.pdf)

<sup>36</sup> California Community Foundation and Digital Equity Los Angeles, *Sounding the Alarm: Disparities in Advertised Pricing for Fast, Reliable Broadband* (2022). <https://static1.squarespace.com/static/6165cb6ecbf6d70401a212f6/t/6345ca9c147af0682276fb3d/1665518251184/Broadband+Pricing+Disparities+Report+-+Oct+2022.pdf>

process publicly accessible—including but not limited to: more granular location data for complaints (e.g., census tract), provider, complaint description, and narrative. The Commission should also publish ACP complaint and “broadband access experience” data—both of which are collected but are not currently published as publicly available data.

Because the FCC’s informal complaint process is already a self-selecting group of those who know about and take the time to submit a complaint, the Commission should consider alternative sources for collecting complaints and other data on potential discrimination. One such example would include the Commission gathering customer complaint data submitted directly to providers.

NDIA and Common Sense Media support the Commission’s proposal to make digital discrimination data available to the public through the Consumer Complaint Data Center. The Commission may use fields and tags to allow for differentiation and segmentation of data for exporting and analysis. However, to the greatest extent possible, all broadband complaint data should be available as a single dataset to allow for full and robust analysis. This data should be anonymized, but not aggregated. The Commission should look to Home Mortgage Disclosure Act<sup>37</sup> reporting for guidance on publishing record-level data with demographic information, while protecting privacy.

#### **E. Consumer Complaint Process: Recommendations for Leveraging Data and Improving User Experience**

The Commission must revise the consumer complaint process to effectively adjudicate digital discrimination complaints and to collect, analyze, and proactively initiate investigations of digital discrimination. We support changes to the consumer complaint process to accommodate individuals and organizations submitting complaints through the informal pathway, and the addition of a formal complaint pathway in which the filer seeks to open a proceeding with the complaint as a party seeking corrective action.

Across all pathways, the complaint process should be intuitive and simple to navigate for all users, including those who do not speak English. The complaint system in its current form is highly segmented and unclear where users should file certain complaint types. How complaints are used is also currently unclear. We urge the Commission to redesign the Consumer Complaint Portal by incorporating a human-centered design approach that identifies and engages users in the process. We further recommend that the Commission engage digital navigators, digital

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<sup>37</sup> “The Home Mortgage Disclosure Act:Download HMDA Data”, Consumer Financial Protection Bureau, [https://www.consumerfinance.gov/data-research/hmda/historic-data/?geo=va&records=first-lien-owner-occupied-1-4-family-records&field\\_descriptions=labels](https://www.consumerfinance.gov/data-research/hmda/historic-data/?geo=va&records=first-lien-owner-occupied-1-4-family-records&field_descriptions=labels)

inclusion practitioners and user experience experts, such as the United States Digital Service<sup>38</sup> to redesign the portal.

### *1. Complaint Pathway for Individuals (Informal Submissions)*

The Commission seeks comment on adding a dedicated pathway for digital discrimination complaints. We caution that creating a dedicated pathway for digital discrimination complaints may have the adverse, unintended effect of creating a separate dataset from the larger broadband complaint dataset—this may make it more difficult for the Commission and members of the public to identify instances of digital discrimination, as some complaints will be filed as discrimination and others will not. Furthermore, consumers may not always characterize their experiences as “discrimination”; thus, if a dedicated pathway is adopted, we urge the Commission to preserve the general “Internet Complaints” pathway, and update the data fields within that process. We urge the Commission to ensure complaint submissions from all pathways can be easily merged, forming a single dataset of informal complaints, with discrimination as a field/tag applied to records. This would allow for filtering/sorting while allowing for analysis of the full dataset. The burden of identifying which pathway to submit the complaint should not be placed on the complainant. The Commission should have a system and the quantitative and qualitative analysis tools to merge and analyze complaints from different sources to identify patterns and instances of digital discrimination.

The Commission should ensure the complaint process is designed to capture technical and nontechnical aspects of broadband service, and ensure that subfields are designed to capture granular details of consumers’ experience. For example, if “billing” is selected as a category, then a new sub-field option might include “unclear charges.” The Commission should seek the expertise of digital navigators and digital inclusion practitioners to update the field options to ensure the process is intuitive to filers.

The Commission should allow complainants to submit demographic data if they choose, but not require it—in other words, the fields should be labeled as ‘optional’ in the submission form. The Commission should clearly state how such data will and will not be used should the filer decide to submit their demographic data. The Commission should also include information to help the filer understand that demographic information can assist the Commission in identifying and preventing digital discrimination. The Commission should not establish a hard rule that not submitting demographic data means that a complaint cannot be used to uncover digital discrimination—instead, the Commission should both review individual complaints and conduct robust analyses of the full dataset to proactively identify and prevent potential discrimination.

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<sup>38</sup> The United States Digital Service (USDS) is a technology advisory unit housed within the Executive Office of the President of the United States. This unit partners with federal agencies on information technology matters. USDS has developed a strong track record in improving government service user interfaces.



We urge the Commission to maintain trust with the public through transparency in the complaint process, or risk the consequence of consumers becoming indifferent or uninterested in using the system. Currently, it appears the Commission functions strictly as a pass-through in the complaint process in which the consumer submits a complaint and the Commission forwards the complaint along to the provider. From the complaint site, it is unclear what, if any, follow-up the Commission does with the provider or with the consumer who submitted the complaint. The Commission should state plainly the process it takes once it receives a complaint. This would clarify the Commission's role, the value of the process, and increase the Commission's credibility with consumers.

In addition to improving the functionality of the complaint system, the Commission should minimize elements of the complaint process that may intimidate filers. Some individuals may fear reprisal by their service provider, and so we urge the Commission to allow filers to choose whether their complaint is sent to a provider.

## 2. *Complaint Pathway for Organizations (Informational Submissions)*

The complaint process should serve consumers and organizations submitting claims on behalf of impacted communities. Third parties such as community-based organizations, research institutions, and public interest groups are well positioned to advocate in the interest of impacted communities. In the interest of supporting robust analyses of informal complaint data, data submitted by organizations should be combined with, or at least be compatible with, the individual complaint data the Commission collects, such that all complaint data can be analyzed together. We strongly advise the Commission to consolidate the data, as fragmentation will impair the Commission's ability to identify trends and weaken the effectiveness of the complaint process. As with informal complaints submitted by individuals, third party organizations should also be given the option to opt out of submitting demographic information when submitting a complaint on behalf of communities.

The Commission should provide publicly available resources to instruct organizations on any standards imposed on the type of data they will accept in claims of digital discrimination. For example, if the Commission were to require that speed test data be conducted on certain platforms, the Commission should state the requirement clearly. Organizations invest a significant amount of time and resources in conducting research to serve communities; we respectfully ask the Commission to honor their commitment to communities by ensuring that any standards for submission are written clearly and prominently displayed in the complaint system.

We encourage the Commission to act on information alleging digital discrimination and maintain transparency throughout the process. The entity submitting the complaint should be kept informed on all stages of the investigation. Organizations must be able to tell community members what happens next in any complaint process. Organizations risk losing trust with

communities if they socialize the complaint process only to have consumers left in the dark about the status of the submission.

3. *Formal Complaint Pathway (Complainant Seeking Investigative Proceeding, Commission-Ordered Corrective Action and Party Status)*

We encourage the Commission to establish a structured complaint process for formal complaints. A formal process gives representatives, organizations, and governments flexibility in pursuing violations of digital discrimination rules.

**F. Outreach: Strategies for Raising Awareness of Digital Discrimination Rules**

Once the digital discrimination rules are adopted, the Commission should conduct outreach, awareness, and education campaigns across the country to ensure communities, digital inclusion practitioners, advocates and consumers fully understand the rules, their importance, how to navigate the complaint process, and how to engage with the Commission on the issue.

The Commission should actively focus its outreach efforts in communities most impacted by digital discrimination. The Commission should intentionally acknowledge the sovereign status of Tribes and include them early in the rulemaking process and should intentionally target outreach and education efforts in Tribal lands and communities of color.

We urge the Commission to dedicate funds for the mass marketing and outreach efforts to educate consumers, digital inclusion practitioners, and advocates on the digital discrimination rules and complaint process. The Commission should create a “Consumer Bill of Rights,” stating the rules in plain language that is accessible to a wide variety of audiences with input from digital navigators and digital inclusion practitioners.

As individuals may be more likely to utilize the complaint process if they understand what their rights are, the Commission should launch a “Know Your Rights” campaign complete with marketing and user-friendly educational materials, to raise awareness of the rules and the “Consumer Bill of Rights.”

The Commission should partner with other Federal agencies, state and local governments and Tribes to raise awareness and distribute the materials. In addition to sharing marketing and educational materials, the Commission should partner with federal agencies to establish standard distribution pathways through consumer facing programs such as SNAP, Medicaid, or through state and local departments such as the Department of Motor Vehicles. In addition, the Commission should provide ongoing training and technical assistance on how to navigate the rules and complaint process for digital inclusion practitioners, community based organizations, community anchor institutions, and other consumer advocate groups through workshops,

webinars, or other means. The Commission should empower and equip trusted community-based organizations with the necessary tools and resources to support community members navigate the digital discrimination rules and complaint process.

#### **G. Affirmative Obligations: Service Provider Communication Requirements**

NDIA and Common Sense Media agree with commenters expressing that ISPs should offer information explaining to consumers what the pathway is for submitting a complaint.<sup>39</sup> We agree with EveryoneON that ISPs should display the consumer complaint hotline and web address on consumer internet service “bills, emails, and any other forms of communication.”<sup>40</sup> The Commission seeks comment on the burdens this creates for ISPs. Any burdens associated with including this information on ISP communications is outweighed by the need to inform consumers about their rights. Given the current under-utilization and obscurity of the consumer complaint process for internet service complaints, we urge the Commission to take every opportunity to raise awareness of the digital discrimination rules and the process for submitting complaints for violations of the rules.

#### **H. Strategies for Staff Structure: Commission Organization**

The Commission should ensure the Agency has dedicated staff to manage all aspects of implementing the digital discrimination rules. The staff should be available to evaluate data, identify patterns of digital discrimination, manage the consumer complaint process from start to finish including supporting consumers in submitting complaints, and any other tasks and duties that may arise. Whether the Commission establishes a stand-alone division or distributes the work to existing offices, we leave to the discretion of the commission. However, the Commission should create a clear point of contact and ensure consumers, digital inclusion practitioners, local and state governments, and public interest groups can easily identify the point of contact and the process for submitting complaints and navigating the digital discrimination process. The Commission should also ensure the staff dedicated to the digital discrimination work interact with and are not siloed from Commission staff in other bureaus. The Commission should develop an internal process clearly defining ownership and responsibility for all aspects of the internal digital discrimination work and process. All Commission staff should understand and be trained on how to identify digital discrimination--and the actions they should take--should they encounter it in their work. Finally, should the Commission require more support in determining its organizational structure, we recommend the Commission consult with subject matter experts in governmental organizational management such as the School of Government at the University of North Carolina at Chapel-Hill (UNC-CH) or Harvard Business School.

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<sup>39</sup> NPRM at 44

<sup>40</sup> EveryoneOn in the matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 2 (May 16, 2022) <https://www.fcc.gov/ecfs/document/10516066282855/1>