

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

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

**REPLY COMMENTS OF
THE MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL**

Robert E. Branson
President and CEO
Dr. Fallon Wilson
Vice President, Policy
Danielle A. Davis
Tech and Telecom Policy Counsel
David Honig
President Emeritus and Senior
Advisor
MULTICULTURAL MEDIA,
TELECOM AND INTERNET
COUNCIL
1250 Connecticut Avenue NW, 7th Floor
Washington, DC 20036
(202) 261-6543
rbranson@mmtconline.org

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I. INTRODUCTION AND SUMMARY

The Multicultural Media, Telecom and Internet Council (“MMTC”) respectfully submits these reply comments in response to the Notice of Inquiry (“NOI”) published by the Commission in the above-referenced proceeding.¹ MMTC submits these reply comments to highlight the widespread and enthusiastic support in the record for the proposals advanced by MMTC in its opening comments concerning how best to prevent and eliminate digital discrimination. MMTC also seeks to address four arguments that have been raised by certain commenters in this proceeding. First, contrary to the assertions of certain commenters, digital discrimination is a live and ongoing phenomenon that is only cognizable if one views the issue through an institutional or structural lens. Second, defining digital discrimination solely with reference to discriminatory intent would stand at odds with the language and purpose of the Infrastructure Investment and Jobs Act of 2021 (the “Infrastructure Act”), which clearly permits consideration of disparate impacts. Third, the Commission should adopt the proposal advanced by NCTA to

¹ *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Notice of Inquiry, GN Docket No. 22-69 (rel. Mar. 17, 2022) (“NOI”).

create safe harbors on grounds of technical or economic feasibility, provided that such grounds are still critically assessed by the Commission. Finally, arguments that the Commission should only act to redress future instances of discrimination fail to account for the persisting impacts that historical digital redlining practices have on present-day communities.

II. THERE IS WIDESPREAD AGREEMENT AMONG KEY STAKEHOLDERS ON HOW THE COMMISSION SHOULD ADDRESS DIGITAL DISCRIMINATION

Key stakeholders agree that “equal access” must go beyond the availability of broadband and comprehensively address the barriers to access and adoption,² including non-technical

² Comments of the Lawyers’ Committee for Civil Rights under Law, GN Docket No. 22-69, at 15-16, 18-19 (filed May 16, 2022) (“Lawyers’ Committee Comments”); Comments of Asian Americans Advancing Justice, GN Docket No. 22-69, at 4-9 (filed May 17, 2022) (“AAJC Comments”); Comments of Black Women’s Roundtable, GN Docket No. 22-69, at 3-4 (filed May 16, 2022) (“BWR Comments”); Comments of League of United Latin American Citizens, GN Docket No. 22-69, at 2-4 (filed May 16, 2022); Comments of National Asian/Pacific Islander American Chamber of Commerce and Entrepreneurship, U.S. Black, U.S. Hispanic, and National LGBT Chambers of Commerce, GN Docket No. 22-69, at 1 (filed May 16, 2022); Comments of National Broadband Mapping Coalition, GN Docket No. 22-69, at 3, 6 (filed May 16, 2022) (“NBMC Comments”); Comments of National Digital Inclusion Alliance, GN Docket No. 22-69, at 3, 8 (filed May 16, 2022) (“NDIA Comments”); Comments of Microsoft, GN Docket No. 22-69, at 11-12 (filed May 16, 2022); Comments of National Urban League, GN Docket No. 22-69, at 4, 6 (filed May 16, 2022) (“NUL Comments”); Comments of Public Knowledge, GN Docket No. 22-69, at 9 (filed May 16, 2022) (“Public Knowledge Comments”); Comments of American Foundation for the Blind, GN Docket No. 22-69, at 2 (filed May 16, 2022) (“AFB Comments”); Comments of City of New York, GN Docket No. 22-69, at 2 (filed May 16, 2022) (“New York City Comments”); Comments of National Association of Telecommunications Officers and Advisors, GN Docket No. 22-69, at 3 (filed May 16, 2022); Comments of Next Century Cities, GN Docket No. 22-69, at 7 (filed May 16, 2022) (“Next Century Cities Comments”); Comments of Communications Workers of America, GN Docket No. 22-69, at 7 (filed May 16, 2022) (“CWA Comments”); Comments of Electronic Frontier Foundation et al., GN Docket No. 22-69, at 4-5 (filed May 16, 2022) (“EFF Comments”).

components of service.³ Moreover, use of granular, disaggregated data⁴ and an analysis of disparate impacts⁵ must inform any interpretation of discrimination. A number of commenters have also called for the creation of an Office of Civil Rights within the Commission,⁶ something that MMTC has long supported.⁷ MMTC urges the Commission to adopt rules reflecting all of these proposals.

III. CERTAIN PROPOSALS ARE MISGUIDED AND WOULD HARM THE PUBLIC INTEREST

A. Digital Discrimination Is an Ongoing Issue and Currently Prevents Consumers from Fully Participating in a Vital Component of American Society

Some commenters argue that there is no ongoing digital discrimination, citing a lack of discriminatory animus and a lack of awareness of instances of discrimination.⁸ However, such

³ NBMC Comments at 3-4; NDIA Comments at 3-4; AAJC Comments at 6; Public Knowledge Comments at 6-7, 9-10; Comments of Leadership Conference on Civil and Human Rights, GN Docket No. 22-69, at 5 (filed May 16, 2022) (“LCCHR Comments”); CWA Comments at 7; NUL Comments at 5; Lawyers’ Committee Comments at 18-19.

⁴ NDIA Comments at 5-7, 15-16; LCCHR Comments at 3-5; NUL Comments at 2; AAJC Comments at 2-3; New York City Comments at 2; Comments of City and County of San Francisco, GN Docket No. 22-69, at 7-8 (filed May 16, 2022).

⁵ BWR Comments at 2-3; NDIA Comments at 10-11; EFF Comments at 12; NUL Comments at 3-4; Public Knowledge Comments at 13-14, 21-23; New York City Comments at 1-2; CWA Comments at 7; AFB Comments at 2; LCCHR Comments at 1, 5-6.

⁶ *See, e.g.*, BWR Comments at 5; CWA Comments at 11; LCCHR Comments at 6; Lawyers’ Committee Comments at 38.

⁷ *See, e.g.*, Comments of the Multicultural Media, Telecom and Internet Council, MM Docket No. 98-204, MB Docket No. 16-410, at 9 (filed Jan. 29, 2017); Comments of the Multicultural Media, Telecom and Internet Council, MB Docket No. 14-50, at 11 n.53 (filed Aug. 6, 2014).

⁸ Comments of USTelecom—The Broadband Association, GN Docket No. 22-69, at 13-17 (filed May 16, 2022) (“USTelecom Comments”) (arguing that unequal access reflects difficulties in broadband deployment, not discriminatory animus, and stating that providers look at factors including geography, demand, competition, and the cost to build to inform deployment decisions); Comments of AT&T, GN Docket No. 22-69, at 5 (filed May 16, 2022) (“AT&T Comments”) (asserting that AT&T is not aware of any instances in which providers have engaged in discrimination based on racial composition of neighborhoods or other unlawful criteria).

interpretations of “digital discrimination” are too narrowly construed and fail to capture how most discrimination occurs. Discrimination at the institutional or structural levels often functions without a particular actor demonstrating or documenting an intent to discriminate.⁹ Public Knowledge proposed a more apt definition that captures how digital discrimination actually operates: “[A]ny time when one community has better broadband service than another, when the meaningful difference between the communities is the demographic characteristics, including the economic status, of its residents.”¹⁰

Using this more accurate definition of discrimination, service providers’ network deployment and upgrade decisions reveal that discrimination in broadband access is both common and systemic.¹¹ For instance, when providers deploy fiber in major metropolitan areas such as Oakland and Los Angeles, low-income neighborhoods are often left out despite the fact that these neighborhoods are densely populated, which is a factor that generally provides a strong economic and network rationale for fiber deployment.¹² Moreover, because income and race have historically been highly correlated traits, discriminating on the former is often synonymous

⁹ Comments of the Multicultural Media, Telecom and Internet Council, GN Docket No. 22-69, at 15 (filed May 16, 2022) (“MMTC Comments”).

¹⁰ Public Knowledge Comments at 6; *see also supra* note 5 (citing sources supporting a consideration of disparate impact to evaluate digital discrimination).

¹¹ *See* CWA Comments at 3-6 (referencing Commission data that documents the systemic nature of digital discrimination and citing several other studies in support); EFF Comments at 3 (citing several studies demonstrating broad systemic discrimination against low-income consumers).

¹² *See* Ernesto Falcon, *The FCC and States Must Ban Digital Redlining*, Elec. Frontier Found. (Jan. 11, 2021), <https://www.eff.org/deeplinks/2021/01/fcc-and-states-must-ban-digital-redlining>; Vinhcent Le & Gissela Moya, *On the Wrong Side of the Digital Divide, Life without Internet Access, and Why We Must Fix It in the Age of Covid-19*, Greenlining (June 2, 2020), <https://greenlining.org/publications/online-resources/2020/on-the-wrong-side-of-the-digital-divide>; Hernan Galperin et al., Univ. of S. Cal., *Who Gets Access to Fast Broadband? Evidence from Los Angeles County 2014-17* (Sept. 2019), <http://arnicusc.org/wp-content/uploads/2019/10/Policy-Brief-4-final.pdf>.

with discriminating on the latter.¹³ That is, despite the proffered business rationales providers make for their deployment decisions, their disregard for the societal conditions in which those decisions are made mean that their decisions ultimately may serve to perpetuate digital discrimination.¹⁴

B. The Desire to Define Digital Discrimination Solely with Reference to Discriminatory Intent Could Produce Rules that Cannot Prevent or Eliminate Most Instances of Digital Discrimination

The language and purpose of the Infrastructure Act support rules that are aimed at discriminatory impact.¹⁵ Certain commenters, however, argue that the Commission's interpretation of digital discrimination should focus on discriminatory intent based solely on the six characteristics enumerated in subsection 60506(b)(1) of the Infrastructure Act (income, race, ethnicity, color, religion, and national origin).¹⁶ But such an approach falls short of the requirements of the law and would limit the Commission's ability to address digital discrimination.

¹³ See Liz Mineo, *Racial Wealth Gap May Be a Key to Other Inequities*, Harv. Gazette (June 3, 2021), <https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities>.

¹⁴ See also EFF Comments at 11-12.

¹⁵ *Id.* at 14; Lawyers' Committee Comments at 24-28.

¹⁶ See Comments of the Wireless Internet Service Providers Association, GN Docket No. 22-69, at 15-17 (filed May 16, 2022) (proposing that the Commission require proof of discriminatory intent and restrict assessment factors to the six enumerated factors, which do not include affordability); Comments of Verizon, GN docket No. 22-69, at 10-11 (filed May 16, 2022) (proposing that the Commission require a showing of intentional denial of access based on the six enumerated factors); USTelecom Comments at 3, 13 (arguing that a disparate impact lens is unsupported by the statute's text); Comments of CTIA, GN Docket No. 22-68, at 22 (filed May 16, 2022) ("CTIA Comments") (arguing that Section 60506 is proscriptive and that the Commission should focus on future acts of intentional discrimination based on the six enumerated factors); AT&T Comments at 6 (arguing that the Commission's authority under Section 60506 is limited to prohibiting intentional discrimination).

Supreme Court precedent dictates that where an antidiscrimination statute’s text “refers to the consequences of actions and not just to the mindset of actors,” where consistent with statutory purpose, the statute “should be construed to encompass disparate-impact claims.”¹⁷ Here, the Infrastructure Act contemplates the consequences of actions.¹⁸ Subsection 60506(b) is written from the subscriber’s perspective, with a focus on the subscriber’s “equal opportunity to subscribe” and the consequences that providers’ actions have on that opportunity.¹⁹ Such an interpretation is also consistent with Congress’s intent that all subscribers “benefit from equal access.”²⁰ The statute’s broad language, which outlines the scope of protections and the scope of activities that can be regulated, supports a discriminatory impact standard.²¹ The statute’s emphasis on income, comparability, and the equal opportunity to subscribe demonstrates that the Commission has the power to regulate a wide range of practices and policies that result in discrimination. These factors would be “rendered merely illusory” if the Commission could not

¹⁷ *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 533 (2015) (summarizing the holding of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the instruction of *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) (plurality opinion)).

¹⁸ MMTC Comments at 17-19.

¹⁹ *Id.*

²⁰ Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 60506(a) (2021) (“Infrastructure Act”) (“It is the policy of the United States that, insofar as technically and economically feasible—subscribers should benefit from equal access to broadband internet access service. . .”).

²¹ See New York City Comments at 2 n.7 (noting that the Commission has authority to list certain other protected categories as examples of the broad categories identified in the statute); CWA Comments at 7 (“It is clear, particularly with Congress’s emphasis on income, that Congress intended for the Commission to identify a wide range of practices and policies that lead to disparate treatment of people based on the characteristics protected. And when considering ‘other factors’ in subsection (c)(3), the FCC should include discrimination on the basis of other protected characteristics such as sex, age, disability, sexual orientation, gender identity or expression, familial status, domestic violence survivor status, or homelessness.”); Lawyers’ Committee Comments at 32 (noting that the Commission is not restricted by the enumerated factors in subsection 60506(b)(2) and should consider a broad range of factors).

consider the circumstances and effects that pose hurdles to consumers who seek to access the internet.²²

In addition, a focus on discriminatory intent fails to reflect how discrimination occurs in practice. Social science research has found that individuals unconsciously discriminate based on implicit biases.²³ Such discrimination results in disparities but does not often leave behind evidence of discriminatory intent.²⁴ Even where discriminatory intent does exist, it is often undocumented or obscured through the use of proxies such as credit scores.²⁵ Discriminatory intent is thus “near impossible to prove,” and any definition of “digital discrimination” requiring it would render the Commission’s efforts in this proceeding largely ineffective.²⁶

The evidentiary thresholds of an intent standard also do not adequately address how providers perpetuate the access gap, which stems from the drastically unequal opportunities and outcomes present within American society.²⁷ To the extent the Commission does consider intent, the analysis must factor in how discrimination actually occurs in practice. Providers are aware of these existing and historical disparities but have often failed to address them in their policies and practices.²⁸ When providers do so, they act with reckless disregard with respect to

²² Lawyers’ Committee Comments at 24.

²³ See, e.g., Brief for Sociologists, et al. as Amici Curiae Supporting Respondent, *Tex. Dep’t of Hous. and Cmty. Aff. v. The Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015) (No. 13-1371), 2014 WL 7405800, at *31-32 (discussing implicit bias in the context of housing discrimination).

²⁴ MMTC Comments at 15.

²⁵ NDIA Comments at 11; see also Michelle Singletary, *Credit Scores Are Supposed to Be Race-Neutral. That’s Impossible*, Wash. Post (Oct. 16, 2020), <https://www.washingtonpost.com/business/2020/10/16/how-race-affects-your-credit-score> (explaining that the factors included in creating an individual’s credit score are biased, resulting in Black consumers having disproportionately lower scores).

²⁶ NDIA Comments at 11.

²⁷ *Id.*

²⁸ See *supra* Section III.A.

providing all consumers an equal opportunity to subscribe. As a result, the Commission must be able to infer intent from the disparate impact of providers' actions and their affirmative decisions to not address those impacts.

C. The Commission Should Adopt NCTA's Proposal to Create Safe Harbors for Technical and Economic Infeasibility

MMTC supports the proposal offered by NCTA to establish safe harbors for situations in which differences in broadband availability can be deemed presumptively unattributable to digital discrimination.²⁹ As NCTA noted, by conditioning its equal-access mandate on technical and economic feasibility, the Infrastructure Act requires "[t]he Commission . . . [to] take real-world practicalities into account in fulfilling Congress's charge."³⁰ Challenges to broadband deployment may arise where, for example, deployment is restricted by countervailing rights to property, homes are set back at a distance from the street that make providing a long line drop uneconomical, or inhospitable terrain makes installing infrastructure cost-prohibitive.³¹ In these and perhaps other circumstances, the failure to provide broadband should be presumptively excused as falling within a safe harbor to the equal-access requirement in the Infrastructure Act.

To be clear, however, the Commission should not simply take claims of technical and economic feasibility on face value. Instead, service providers seeking to claim coverage under a safe harbor should have the burden of demonstrating that deployment in a particular case is actually technically or economically infeasible.³² For example, many geographies, including low-income areas, are profitable to serve in the long term, so the Commission should consider a

²⁹ See Comments of NCTA—The Internet and Television Association, GN Docket No. 22-69, at 21-25 (filed May 16, 2022).

³⁰ *Id.* at 21.

³¹ *Id.* at 22.

³² NDIA Comments at 8-9, 19-20.

longer time horizon when assessing whether a particular broadband deployment plan is economically feasible.³³

D. Assertions that the Commission Lacks Authority to Both Prevent and Eliminate Digital Discrimination Are Incorrect

One commenter argues that subsection 60506(b)(1) of the Infrastructure Act is prospective in nature and that the Commission lacks authority to address the consequences of past discrimination.³⁴ However, the text of Section 60506 requires the Commission to both “prevent” and “eliminate” digital discrimination,³⁵ giving the Commission authority to address both discrimination that has not yet occurred and discrimination that already exists.³⁶

Moreover, a focus solely on future acts of discrimination will not address the persisting impacts of historical digital redlining and discrimination, or any currently existing

³³ See CWA Comments at 8-9 (noting that the law does not require the Commission to adopt certain commenters’ expectations of short-term profits on a service and that most areas in the country are economically feasible to serve over a longer time frame); NDIA Comments at 12 (arguing that economic feasibility analyses should consider long-term financial projections and available government funding opportunities); Public Knowledge Comments at 33-34 (asserting that economic feasibility analyses should consider profitability over the entire service area over the entire expected life of the network, noting that the marginal cost of adding additional units to the network is virtually zero, network upgrades tend to pay for themselves over time, and operating costs are relatively modest); EFF Comments at 15-17 (noting that many low-income areas are profitable to serve in the long-term); see also Public Knowledge Comments at 33 n.61 (citing Ernesto Falcon et al., *Frontier’s Bankruptcy Reveals Why Big ISPs Choose to Deny Fiber to So Much of America*, Elec. Frontier Found. (Apr. 30, 2020), <https://www.eff.org/deeplinks/2020/04/frontiers-bankruptcy-reveals-cynical-choice-deny-profitable-fiber-millions>)) (noting that Frontier’s filings in its bankruptcy proceedings showed that its fiber investments would earn a profit within ten years, even if they were initially costly to deploy).

³⁴ CTIA Comments at 22.

³⁵ Infrastructure Act § 60506(b)(1)-(2) (requiring the Commission to “prevent[] digital discrimination of access” and “identify[] necessary steps for the Commissions [sic] to take to eliminate discrimination”).

³⁶ See NDIA Comments at 9; Public Knowledge Comments at 12-15; Lawyers’ Committee Comments at 5.

discrimination.³⁷ In order to achieve the goals of preventing and eliminating discrimination as Congress intended, the statute must be read both retroactively and proactively.

IV. CONCLUSION

Congress has given the Commission a meaningful opportunity to address digital discrimination. The record strongly supports the Commission adopting strong rules and policies that prevent and eliminate digital discrimination in the United States.

Respectfully submitted,

Robert E. Branson

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Vice President, Policy
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President Emeritus and
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³⁷ See AAJC Comments at 4; BWR Comments at 2-3; NDIA Comments at 9, 14-15; Next Century Cities Comments at 6; Lawyers' Committee Comments at 6-8.