BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

COMMENTS OF USTELECOM—THE BROADBAND ASSOCIATION

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Executive Summary

High-speed broadband is essential for almost all facets of our everyday lives as well as our nation's economic security. USTelecom applauds the many private and public initiatives that are underway to close the digital divide, including the many programs established in the Infrastructure Investment and Jobs Act. USTelecom and its members staunchly support the goal of equal access to broadband and have been leading the way by investing in new and upgraded technologies, participating in affordability programs, and launching their own affordability and digital equity initiatives.

As leaders in the effort to close the digital divide, USTelecom members are uniquely situated to offer suggestions for how the Commission can facilitate equal access. The Commission's overarching goal in doing so should be to provide clarity and certainty for all stakeholders. Providers must be able to invest and innovate without the government second guessing their reasonable business decisions. Thus, the Commission's rules must be forward looking and focused on efforts to facilitate equal access. Moreover, it is critical that the Commission view its task of facilitating equal access through the lens of the entire Infrastructure Act, which provides historic levels of funding for broadband deployment, adoption and digital equity programs. The guiding principles to which the Commission should hew in fulfilling its statutory mandate are as follows:

Equal Access Is the Opportunity to Subscribe to a Provider's Available Offerings on Comparable Terms

- The statute dictates that equal access rules adopted by the Commission ensure that consumers have access to *available* offerings with comparable quality and terms.
- Equal access does not mean that all Americans must have access to the same type and level of broadband service in all areas as it is not technically or economically feasible to do so in a country as vast and topographically diverse as ours.
- Similarly, "comparable" does not mean identical and there must be flexibility for what constitutes comparability.

Digital Discrimination Must Be an Intent-Based Inquiry

- Digital discrimination is a distinct subset of equal access and the two concepts must not be conflated.
- Intent is an essential component of digital discrimination, whether it takes the form of denying service or of deployment decisions based on a prohibited characteristic.
- A disparate impact standard cannot be adopted because the statutory language lacks effects-based language.
- Uneven deployment does not equal digital discrimination, rather it is a natural result of the difficulties inherent in deploying a broadband network.

Rules to Facilitate Equal Access Should Be Focused on Encouraging Continued Investment by Removing Barriers to Deployment and Adoption

- There are many positive policy changes the Commission can make to remove barriers to deployment, including freeing providers of legacy services from expensive and burdensome Section 214 discontinuance rules and carrier of last resort obligations, particularly in areas where there is a new government-funded provider.
- The Commission should also preempt state laws that impede deployment, including non-cost-based charges for access to rights of way and unreasonable delays for access.
- The Commission can also ensure that deployment and affordability programs can be maintained over the long term by significantly expanding the Universal Service Fund contributions base.

Create A Fair and Efficient Complaint Process

- It is important that the Commission establish a mechanism for the public to raise concerns about digital discrimination.
- However, digital discrimination is a very complex issue and the Commission cannot treat every complaint submitted as requiring a provider to investigate and respond.
- A far more fair and efficient process is for the Commission to determine if a formal investigation is warranted. The provider should not have to respond unless and until a formal investigation is opened.

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COMMENTS OF USTELECOM—THE BROADBAND ASSOCIATION

I. INTRODUCTION

USTelecom—The Broadband Association[1] (USTelecom) respectfully submits these comments in response to the Federal Communications Commission's (Commission) Notice of Inquiry on the Prevention and Elimination of Digital Discrimination.[2] USTelecom recognizes the immensely important role that broadband plays for all Americans. The COVID-19 pandemic has made clearer than ever that high-speed broadband is a cornerstone of American life, connecting people to education, healthcare, employment and virtually every other aspect of our daily lives and our nation's economic security. USTelecom's members have been on the front lines of efforts to close the digital divide for decades, investing billions in private capital to deploy and upgrade networks throughout the country, including the hardest to serve remote areas.[3]

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[1] USTelecom is the premier trade association representing service providers and suppliers for the communications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its diverse membership ranges from international publicly traded corporations to local and regional companies and cooperatives, serving consumers and businesses in every corner of the country.

[2] *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination,* Notice of Inquiry, GN Docket No. 22-69, FCC 22-21 (Mar. 17, 2022) ("NOI").

[3] *See 2020 Broadband Capex Report*, USTelecom (Sept. 22, 2021), https://ustelecom.org/wp-content/uploads/2021/09/USTelecom-2020-Broadband-Capex-Report.pdf (in 2020, America's communications

USTelecom and our members firmly support the pursuit of equal access for broadband. While we assume there is unanimity in this objective, we know a wide variety of perspectives and proposals will be presented. As a result, the Commission must proceed from the outset with the goal of providing clarity and certainty for all stakeholders. Providers must have a clear understanding of the rules of the road so that they can innovate and invest with confidence without having their business decisions second-guessed by the government. Thus, the Commission's rules must be forward-looking, not retroactive, and should be focused on positive policy actions that incentivize deployment. The Commission must also provide certainty for consumers that intentional discrimination that prevents equal access will not be permitted. And, the Commission should ensure that complaints are handled fairly and efficiently.

In the bipartisan Infrastructure Investment and Jobs Act (Infrastructure Act),[4] Congress entrusted the Commission with the important task of adopting rules "to facilitate equal access to broadband internet access service."[5] Those rules must also prevent "digital discrimination of access based on income level, race, ethnicity, color, religion or national origin,"[6] to the extent it exists. And, in evaluating the causes of any disparities in broadband deployment, the Commission must consider "technical and economic feasibility" as a key part of its analysis.[7]

The Commission's task is a significant one and must be focused on achieving the clear policy adopted by Congress – that insofar as technically and economically feasible, all

providers' capex was $79.4 billion, bringing the cumulative total to $1.9 trillion in communications capex since the Telecommunications Act was passed in 1996).

[4] Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 429, 117th Cong. (2021), https://www.govinfo.gov/content/pkg/BILLS-117hr3684enr/pdf/BILLS-117hr3684enr.pdf ("Infrastructure Act").

[5] Infrastructure Act, § 60506(b).

[6] *Id.* at (b)(1).

[7] *Id.*

consumers should have the "equal opportunity to subscribe" to broadband service offerings.[8] The statute is clear that equal access refers to a subscriber's *opportunity* to subscribe to an *offered service* with comparable service quality and on comparable terms in a given area.[9] One of the objectives the Commission must consider in adopting rules to facilitate equal access is to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion or national origin."[10] Thus, the Commission's rules to facilitate equal access must address digital discrimination, but the two issues are not the same and must not be conflated.

No consumer should be subject to intentional discriminatory actions. But, in determining whether such discrimination has occurred, the language of the Infrastructure Act and precedent clearly establishes that disparities in deployment alone are insufficient to support a finding of digital discrimination and thus requires more than disparate impact. Despite significant industry investment, there are many reasons for uneven deployment that are not the result of intentional discrimination. And where deployment gaps remain, the contributing factors are multifold and complex. That is why the statute requires the Commission to account for technical and economic feasibility in its analysis and the Commission's construction of the term "digital discrimination" must make clear that only an *intentional* decision to deny access based on a prohibited characteristic constitutes digital discrimination. A lack of access to high-speed broadband in a community, absent discriminatory intent by a provider, is not digital discrimination.

The Commission cannot and should not seek to "facilitate" equal access by imposing mandatory build obligations or other unfunded mandates on providers. Instead, the Commission

[8] Infrastructure Act, § 60506(a)(2).

[9] What comparable terms are will of course vary depending on the key aspects of an offering, such as price. For example, "comparable terms" cannot mean that Gigabit broadband must be priced comparably to services at lower speeds, such as 200 Mbps.

[10] *Id.* at (b)(1).

should facilitate equal access by identifying reasonable avenues to accelerate broadband deployment and ensure that consumers have equal access to such connections, including, and beginning with, the programs established in the Infrastructure Act. It is critical that the Commission look at its task of ensuring equal access in the context of the *entire* Infrastructure Act, legislation that provided $65 billion in broadband funding aimed at connecting all Americans, a historic, once-in-a-generation federal investment unlike any we have ever seen:

- $42.5 billion for the Broadband Equity, Access, and Deployment (BEAD) Program, targeted at deploying broadband in unserved and underserved locations;[11]
- $14.2 billion for the Affordable Connectivity Program to ensure low-income Americans are able to afford access to the same services as the broader population;[12]
- $2.75 billion for digital equity grant programs to ensure all consumers have an equal opportunity to subscribe to broadband service;[13] and
- $1 billion for middle mile infrastructure.[14]

This is in addition to the $350 billion American Rescue Plan Act State and Local Fiscal Recovery Funds Program and the $10 billion Capital Projects Fund administered by the Treasury Department. Even before this funding was announced, several USTelecom members announced plans to aggressively expand their next-generation deployments in the coming

[11] Infrastructure Act §§ 60101-60105.

[12] Infrastructure Act §§ 60501-60506.

[13] Infrastructure Act §§ 60301-60307.

[14] Infrastructure Act § 60401.

years.[15] USTelecom members were also some of the first to step up to the plate and offer the Emergency Broadband Benefit Program and its successor, the Affordable Connectivity Program (ACP). Several have also gone beyond the call and created low-cost offerings that make high-quality broadband free or close to free for qualified individuals.[16]

Further still, USTelecom members are working to close the digital divide through digital equity programs. Some examples of these tremendous efforts include:

- AT&T is building 20 AT&T Connected Learning Centers in under-resourced communities across the U.S. to provide students and families free access to AT&T Fiber internet, Wi-Fi and computers, as well as education, tutoring and mentoring resources.[17]
- Consolidated Communications launched Consolidated Connects, a new educational grant program to support innovative student learning at K-12 schools across the company's service area.[18]

[15] *See*, *e.g.*, Verizon Communications Inc. Investor Day Transcript at p. 8 (Mar. 3, 2022) (detailing Verizon's aggressive fiber investment historically and going forward), https://www.verizon.com/about/sites/default/files/2022-03/Investor-Day-2022-Transcript.pdf; Diana Goovaerts, *AT&T targets fiber boost after WarnerMedia deal*, Fierce Telecom (May 17, 2021), https://www.fiercetelecom.com/operators/at-t-targets-fiber-boost-after-warnermedia-deal#:~:text=He%20noted%20AT%26T%20is%20aiming,of%20C%2Dband%20spectrum%20to; Linda Hardesty, *Frontier plans 495,000 new fiber passings in 2021*, Fierce Telecom (Apr. 30, 2021), https://www.fiercetelecom.com/operators/frontier-plans-495-000-new-fiber-passings-2021.

[16] *See Access from AT&T,* https://www.att.com/internet/access/ (offering speeds up to 100 Mpbs for $30 a month or less for ACP-qualified individuals); *Frontier Fiber Internet Affordable Connectivity Program*, https://www.getfrontierfiber.com/acp-offer (offering up to 100 Mpbs for $29.99 a month for ACP-qualified individuals) (last visited May 10, 2022); Verizon, *Fios Forward*, https://www.verizon.com/home/fios-forward (offering speeds up to 300 Mbps for no out-of-pocket cost for ACP-qualified individuals) (last visited May 10, 2022); Cincinnati Bell, *Internet For All*, https://info.cincinnatibell.com/acp (offering speeds up to 100 Mpbs for $30 a month for ACP-qualified individuals) (last visited May 10, 2022).

[17] *AT&T Connected Learning*, https://about.att.com/csr/home/society/education.html (last visited May 10, 2022).

[18] Consolidated Commc'ns, *About Us*, https://www.consolidated.com/about-us/community-matters/company-giving/consolidated-connects (last visited May 10, 2022).

- Great Plains Communications Grants Program provides multiple statewide scholarships to improve the educational process and provide resources to add new units and projects into the curriculum.[19]
- Verizon Innovative Learning supports Verizon's digital inclusion goal to help provide 10 million youths with digital skills training by 2030, providing students free technology, access, and a next generation, tech-infused curriculum. In addition, Verizon has programs that provide digital skills training to adults in rural communities with a specific focus on people of color and partnerships with 11 historically black colleges and universities to provide 15,000 adults with basic digital skills.[20]

These important efforts, and other community-based efforts of USTelecom's local and regional providers, all align with recommendations from consumer and public interest groups on how best to promote digital equity and inclusion.[21]

America's broadband providers are hard at work to close the digital divide and ensure all Americans have access to broadband, investing nearly $80 billion of their own capital annually in their networks.[22] This is why the United States has far more facilities-based competition and

[19] Great Plains Commc'ns, *Nebraska and Indiana State College System Scholarships*. https://gpcom.com/scholarships-grants/ (last visited May 10, 2022).

[20] *Verizon Innovative Learning*, https://www.verizon.com/about/responsibility/digital-inclusion/verizon-innovative-learning (last visited May 10, 2022).

[21] *See, e.g.*, National Urban League, *The Lewis Latimer Plan for Digital Equity and Inclusion* at 11 (Mar. 30, 2021) , https://nul.org/sites/default/files/2021-04/NUL%20LL%20DEIA%20041421%20Latimer%20Plan_vFINAL_1136AM.pdf (noting a lack of digital readiness and affordability effects adoption); Benton Institute for Broadband and Society, *The Impacts of COVID-19 on Digital Equity Ecosystems* (Nov. 18, 2020), https://www.benton.org/blog/impacts-covid-19-digital-equity-ecosystems (noting that digital skills training is essential to digital inclusion).

[22] *See* USTelecom, *2020 Broadband Capex Report*, (Sept. 22, 2021), https://ustelecom.org/wp-content/uploads/2021/09/USTelecom-2020-Broadband-Capex-Report.pdf.

broadband adoption than the European Union, for example.[23] There can be little doubt that the "light touch" regulatory framework for broadband is working and we are well on our way to connecting all Americans to quality, high-speed broadband. And Infrastructure Act funding will aid in closing the gaps in the hardest to reach, most expensive to serve locations that have remained unserved or underserved, while also addressing broadband affordability for low-income households and other efforts to get all Americans online.

Given the breadth of our members' experience deploying broadband networks throughout the country, USTelecom is uniquely situated to offer insights on how the Commission can facilitate equal access while recognizing the technical and economic hurdles providers face in deployment. The Commission's efforts should recognize state efforts to implement the BEAD program and the new broadband deployment that program will create. The Commission should also focus on encouraging continued investment and expansion of broadband availability and adoption by removing barriers to deployment rather than engaging in a retrospective, punitive exercise that re-litigates the business judgment that drove previous deployments. Rather, once the Broadband Data Collection (BDC) is completed, the Commission should make available targeted funding where necessary and create a regulatory environment that encourages investment and innovation with appropriate consumer protection requirements. Such efforts include, but are not limited to, ensuring the long-term sustainability of the Universal Service Fund (USF), making the ACP permanent, removing barriers to deployment, and promoting digital literacy and digital equity.

[23] *See* USTelecom US vs EU Broadband Trends 2012-2019 at 3 (Apr. 21, 2021), https://www.ustelecom.org/research/us-vs-eu-broadband-trends-2012-2019/.

Finally, the Commission must not use this proceeding as a back door way to accomplish other policy objectives, such as price regulation or other competition objectives. And, in revising its public complaint process,[24] the Commission should ensure a fair and efficient process for all involved and not create an unsustainable system where providers are given the Herculean task of responding to every complaint submitted by a member of the public, regardless of whether it is grounded in fact and supported by accurate and reliable data.

II. EQUAL ACCESS REFERS TO THE ABILITY TO SUBSCRIBE TO A BROADBAND OFFERING ON COMPARABLE TERMS WHERE AVAILABLE

Equal access refers to the opportunity for a consumer to subscribe to a provider's "offered service" available in a given area that provides comparable service metrics with comparable terms and conditions. In other words, where a provider makes an offer available and the required network technology has been deployed, all consumers in that area should have access to that same offering with comparable service characteristics and on comparable terms where technically and economically feasible. There are many reasons consumers in an area might not have *access* to a service offered by a particular provider, but that does not mean they don't have *equal access* as defined by the statute. The plain language of the Infrastructure Act makes clear that "equal access" refers to a subscriber's "opportunity to subscribe to an offered service" with comparable service quality and on comparable terms in a given area.[25] If service isn't offered because a network has not been deployed or upgraded in a given area, it does not mean that one lacks equal access. Therefore, rules adopted by the Commission must be tied to the goals of the statute: that the Commission take actions that will facilitate consumers having

[24] Infrastructure Act § 60506(e).

[25] Infrastructure Act, § 60506(a)(2).

access to available offerings with comparable quality and terms and make clear that a lack of access due to intentional discrimination based on one of the statutorily-identified characteristics is prohibited.

However, merely because a provider has not deployed – or upgraded – a specific technology in a given area does not mean a subscriber lacks equal access. For example, an area where it is feasible to deploy fixed wireless at 100/20 Mbps should not be seen as lacking equal access, particularly if fiber deployment at 1 Gigabit is not technically or economically feasible in that area. In defining the contours of what it means to have equal access, the Commission must be mindful that equal access cannot mean that all Americans are subject to a one-size-fits all approach to broadband service. It is not feasible, technically or economically, in a nation as vast and as topographically diverse as ours. What is feasible to deploy in a flat, densely populated metropolis will be different from what is technically feasible in a mountainous area. Consequently, there should not be, and the statute does not permit, any rigid standard requiring that all Americans have access to the same type and level of broadband service in the name of "equal access."[26] While that may be an appropriate objective, it is not what is required for purposes of this inquiry. Indeed, the Infrastructure Act explicitly acknowledges that the funds made available through the BEAD program must be available for multiple types of technology in recognition of the fact that different areas of the country will be served in different ways.[27] Instead, the Commission should, as discussed below,[28] facilitate all Americans having access to

[26] NOI para. 19.

[27] *See* Infrastructure Act § 60102(h)(1)(iii) (noting that no providers may be excluded from participation); Infrastructure Act § 60102(h)(4)(A)(i)(1) (noting that the minimum speed requirement is 100/20 Mbps, allowing for deployment by fiber and fixed wireless technologies as appropriate).

[28] *See infra*, Section IV.

broadband offerings by removing barriers to deployment and providing support as necessary to increase demand for broadband service.

Comparable service metrics means that service characteristics are generally consistent across a given area for the same service.[29] Similarly, "comparable terms and conditions" simply means that the material terms and conditions of a service contract offered for a certain service in a given area are similar.[30] However, as the Commission has recognized, "comparable" does not mean "identical:" the methodology adopted by the Commission for the reasonable comparability benchmark used for pricing in Universal Service Fund areas is, for example, the estimated average monthly rate in urban areas plus twice the standard deviation of rates for terrestrial fixed broadband service plans at a specified speed tier.[31]

III. PREVENTING DIGITAL DISCRIMINATON IS ONE PART OF THE BROADER GOAL OF ACHIEVING EQUAL ACCESS AND REQUIRES AN INTENT-BASED INQUIRY

As part of its role in adopting broader rules that "facilitate equal access" the Commission must "prevent[] digital discrimination of access based on income level, race, ethnicity, color, religion or national origin."[32] The NOI, consistent with the statute, proposes that digital discrimination be understood as "a lack of equal access to broadband *based on* one of the listed characteristics."[33] That is the correct construction—digital discrimination under Section 60506 means intentionally denying access to broadband based on a prohibited characteristic. It can take the form of denying service with comparable quality and on comparable terms in a given area or

[29] NOI para. 13.

[30] NOI para. 15.

[31] *See* FCC, *2022 Urban Rate Survey – Fixed Broadband Service Methodology*, available at https://www.fcc.gov/economics-analytics/industry-analysis-division/urban-rate-survey-data-resources.

[32] Infrastructure Act, § 60506(b)(1).

[33] NOI para. 22 (emphasis added).

in decisions regarding deployment. Whichever form it takes, intent is a necessary component. And while intentional discrimination should be addressed when identified, there is no reliable evidence to support a conclusion that it is presently occurring. Rather, there is every reason to believe discrimination is not a driver of the existing digital divide.

A. Digital Discrimination Requires Intent

A disparate-impact test cannot be adopted in this context. As an initial matter, courts have been reluctant to expand disparate-impact liability beyond the context in which it arose: traditional civil rights statutes.[34] For that reason, and others discussed below, the Fair Housing Act, which is part of the Civil Rights Act,[35] is an inapt analogy.[36] The Commission should instead be focused on an intent-based standard, which precedent shows is the right way to construe the language of the Infrastructure Act.

The statutes that the United States Supreme Court has recognized as reaching disparate impact liability have effects-based language such as "results in" or "have the effect of" or "otherwise adversely affect" or "otherwise make unavailable." For example, Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affec*t his status as an employee,

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[34] *See Washington v. Davis*, 426 U.S. 229, 246 (1976) (refusing to apply Title VII disparate-impact standard to a constitutional equal protection claim and explaining that "extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription"); *United States v. Green*, 599 F.3d 360, 377 (4th Cir. 2010) (similarly rejecting a proposed "expansion of the" constitutional prohibition against the discriminatory exercise of peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), "beyond the intentional discrimination boundaries dictated by the Supreme Court and into the realm of discriminatory effect.").

[35] *See* Title VIII of Civil Rights Act of 1968, 42 U.S.C. §3601 et seq.

[36] NOI para. 22.

because of such individual's race, color, religion, sex, or national origin."[37] The phrase "otherwise adversely affect" which "focuses on the effects of the action on the employee rather than the motivation for the action of the employer" allows for disparate-impact liability.[38] The language of the Age Discrimination in Employment Act (ADEA) mirrors Title VII: making it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's age."[39]

The Fair Housing Act of 1968 has analogous language to Title VII and the ADEA: it is unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[40] The phrase "otherwise make unavailable" is of "central importance" to allowing disparate-impact liability because, like "otherwise adversely affect" in Title VII and the ADEA, that phrase "refers to the consequences of an action rather than the actor's intent."[41] Other statutes which allow for disparate-impact liability refer to "results" or "effects" directly.[42]

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[37] 42 U.S.C. §2000e-2(a)(2) (emphasis added).

[38] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015) (quoting *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005)) (internal quotation marks omitted).

[39] 29 U.S.C. § 623(a)(2) (emphasis added).

[40] 42 U.S.C. § 3604(a) (emphasis added).

[41] *Inclusive Cmtys.*, 576 U.S. at 534.

[42] Voting Rights Act of 1965 § 2, 52 U.S.C § 10301(a) (prohibiting any voting practice "which results in a denial or abridgement of the right . . . to vote on account of race or color"); American With Disabilities Act of 1990, 42 U.S.C. §§ 12112(b)(3)(A), 12182(b)(2)(A)(i) (barring "standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability"); *Bd. of Educ. of City Sch. Dist. v. Harris*, 444 U.S. 130, 138-39 (1979) (finding The Emergency School Aid Act of 1972 allows disparate-impact liability by prohibiting federal aid to an agency which "had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instruction or other personnel for minority groups," because that language "clearly speaks in terms of effect or impact.").

By contrast, statutes that do not impose disparate-impact liability lack phrases such as "results in" or "otherwise adversely affect" or "have the effect of", and are instead more akin to the "based on" language of the Infrastructure Act.[43] Indeed, "[i]f Congress had wanted to use an 'effects' standard, it certainly could have done so, either directly or by incorporating language analogous to [Title VII], which has been repeatedly construed . . . to provide for such a standard. It chose not to do so."[44] Similarly, here Congress adopted the intent-based – not results based – language, charging the Commission to adopt rules prohibiting discrimination "based on" the identified attributes. Thus, an intent-based standard must be adopted for digital discrimination.

B. Rational Carrier Deployment Decisions That Result in Uneven Deployment Are Not Digital Discrimination

Under section 60506, preventing digital discrimination is a distinct subset of the broader goal of achieving equal access and the two concepts must not be conflated. Rather, the statutory structure which makes them distinct must be followed. While digital discrimination can result in unequal access, a lack of access does not equate to digital discrimination. This is precisely why Congress instructed the Commission to address equal access and digital discrimination in different ways: *facilitating* equal access while *prohibiting* intentional discrimination. Unfortunately, these concepts are sometimes conflated[45] and a lack of access is attributed by

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[43] *See, e.g.*, Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d ("No person in the United States shall, *on the ground of* race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.") (emphasis added); Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 ("No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program . . . .") (emphasis added); Age Discrimination Act of 1975, 42 U.S.C. § 6102 ("no person in the United States shall, *on the basis of* age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity . . . ."); 28 CFR § 44.200(a)(1) (the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1), which prohibits discrimination "*because of* . . . national origin[,]" reaches only intentional discrimination).

[44] *See* Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37,401, 37.404 (Oct. 6, 1987) (discussing Immigration Reform and Control Act).

[45] *See, e.g.*, "studies" cited in NOI n. 84 which claim insufficient deployment based on digital discrimination but without any credible proof.

some parties, erroneously, to digital discrimination. The term "digital discrimination" is sometimes used as a catchall to explain why an area does not have broadband. This is just not the reality. There are many reasons an area might not have broadband, such as the high-cost to deploy, refusal of localities to issue required permits, supply-chain issues, or an inability to get access to the premises. Deployment also occurs over time, not simultaneously to all areas, for many reasons which have nothing to do with discriminatory animus.

First, building broadband networks is extremely difficult and expensive work. That is precisely why Congress appropriated billions of dollars for infrastructure deployment and why the statute explicitly recognizes that "economic and technical feasibility" must be at the center of the Commission's inquiry.[46] Providers do not have unlimited capital and some providers, particularly providers of legacy services, have outdated obligations that impede their ability to invest in new technology. It is logical that their decisions not to enhance their existing network will be, at least partially, influenced by requirements to maintain an expensive legacy network. Likewise, providers may not expand into a neighboring community where a competitor has already achieved a strong foothold in a community, particularly if the costs to deploy are high or if other impediments to deployment (such as the need to negotiate access to multiple tenant environments) are present. That doesn't mean they won't do so at some point, but it may not be where they initially invest. If broadband infrastructure deployment was a low-cost, non-capital intensive effort, and if the terrain and topology and the regulatory approval process was the same in every community, broadband deployment would be even more extensive than it currently is. But that is not reality.

[46] Infrastructure Act, § 60506(b)(1).

In addition to the high cost of deployment, there are numerous regulatory and procedural hurdles that providers must overcome to deploy, including required approvals from government and private actors. The costs and the procedural steps are significant, meaning that once a provider decides to serve an area it can still take months or even years before service is turned up. For example, a municipality may require that fiber be buried and that sidewalks and streets be replaced sidewalk-to-sidewalk and curb-to-curb, which create delays and additional costs. Local environmental permits, historic preservation approvals, or access to rights of way from private and public actors can also take over a year to secure. These are just a few of the many hurdles providers face in their quest to deploy broadband.

As the Commission is well-aware, access issues also present technical challenges. Failing to serve a location because a landlord denies building access or a property owner denies right of way to access another property cannot constitute digital discrimination. If a landlord has an exclusive agreement with another provider, it will refuse to allow the competitor access, making it technically infeasible to deploy. While the Commission's multi-tenant environment proceeding[47] may help with this issue, it remains to be seen whether it will solve it entirely.

Broadband is also a constantly evolving service. What one thinks of as adequate broadband today is far different than it was five years ago and the most prevalent speeds of ten years ago (fixed and mobile) are unrecognizable compared to today's networks. All networks are likely to become outdated at some point. And as networks become ready for an update, it is physically and economically impossible to upgrade all of that infrastructure at the same time. Unlike the copper telephone network of the past, broadband infrastructure can take many forms

[47] *Wireline Competition Bureau Seeks to Refresh the Record on Improving Competitive Broadband Access to Multiple Tenant Environments*, GC Docket No. 17-142, Public Notice, DA 21-1114 (2021) ("MTE Public Notice").

and can evolve in ways that make prior deployments obsolete. A provider can deploy cutting edge broadband service in an area only to see technology advances that make what was once a state-of-the-art network an outdated relic of the past. Think copper versus fiber or 3G versus 5G. Copper was state of the art when it was deployed, and subsequent technological advances allowed for performance enhancements to copper networks through bonding and new electronics. Now copper-based transmission technology is considered outdated because its bandwidth capabilities are dwarfed by fiber technology. Similarly, 3G was also once state of the art, but is now considered slow and outdated compared to LTE and 5G. This is the natural evolution of networks as technology changes and our understanding of broadband changes. But service providers cannot flip a switch and upgrade entire networks all at once.

Relatedly, particularly for those companies that were historically identified as the local telephone company or "ILEC," deploying broadband is not simply a choice to build a greenfield network where there is no existing service. Instead, existing laws regulate the decisions made by the provider to maintain a legacy network in addition to building new infrastructure in the same area, effectively overbuilding itself, until it is able to either migrate services or obtain regulatory permission to discontinue them. Requirements that make it difficult to retire technology or discontinue service can easily make the transition to newer technologies more expensive and more complicated than a provider starting from scratch. The presence of Section 214 discontinuance approval requirements, carrier-of-last-resort (COLR) obligations, and ETC requirements (all of which generally apply only to ILECs) mean that incumbent carriers are doing all they can to expand their next generation networks with one arm effectively tied behind their backs. Completing that process over large geographic areas is not something that happens overnight, meaning some customers will gain access to new next generation technology while

others remain connected to a legacy network for a period of time. The networks get upgraded based on the technical and economic feasibility of doing so.

Deciding where and how to deploy a network is one with serious financial and business ramifications for any company. Providers look at a multitude of factors, including geography, demand, competition, and the cost to build. The Commission should not attempt to step into the shoes of experienced providers and second-guess their business judgment. Should the Commission do so, it risks chilling investment in contravention of the Infrastructure Act's goal of driving broadband deployment to every American.

C. Data Cited in the Record Does Not Establish Digital Discrimination

The Commission asks for comment on several studies that purport to show evidence of digital discrimination. As a threshold matter, these studies are flawed and cannot be relied on in this proceeding. While, the Commission "acknowledge[s] the work done to document" instances of digital discrimination,[48] none of the materials cited establish discrimination and are analytically flawed and rely on anecdotal assessments.[49] More to the point, each incorrectly equates correlation with causation. Even when parties simply cite demographics in a particular area as evidence of discrimination, there are many other reasons why deployment might not have occurred, such as onerous permitting rules and difficult neighborhood advisory groups, building access issues, and inside wiring problems.[50]

Worse still, some claims of digital discrimination appear to be made specifically in order to push a certain competition policy agenda, suggesting digital discrimination is occurring

[48] NOI para. 28.

[49] *See* NOI n. 84.

[50] *See* MTE Public Notice.

because there is only one provider in an area.[51] Efforts to identify and remedy digital discrimination cannot be used as a proxy for competition policy.

Moreover, determining that these types of decisions constitute digital discrimination would be contrary to long-standing Commission policy. The Universal Service Fund has historically been designed to fund deployment in areas that lack broadband at all, and has explicitly resisted providing funds for a second competitor.[52] Build mandates or requiring a provider to deploy in an area already served under the guise of curing digital discrimination when federal funds cannot be used to fund deployment in that same area would be an absurd result and go far beyond the statutory authority of the Commission. Indeed, "equal access" cannot be defined to mean the availability of high speed broadband from multiple providers, when Congress just dedicated $42.5 billion to ensuring that all Americans have at least one high speed broadband option. If multiple broadband options were essential to secure "equal access" – a policy goal included in that very same legislation – then Congress surely would have directed additional funding toward such an outcome.

IV. FACILITATING EQUAL ACCESS REQUIRES FORWARD-LOOKING POLICY CHANGES AIMED AT REMOVING BARRIERS TO DEPLOYMENT AND ADOPTION

Equal access rules, including those designed to prevent digital discrimination, must be forward looking. Rather than focusing on punitive measures for past deployment decisions, the Commission should make clear that any intentional discrimination is prohibited and focus its

[51] *See* Comments of The Utility Reform Network ("TURN") in the California PUC, Instituting Rulemaking Regarding Broadband Infrastructure Deployment and to Support Service Providers in the State of California (July 2, 2021), at 5 (urging the PUC to determine that digital discrimination is "occurring in areas where residents do not have two providers of wireline broadband services that offer downstream services of at least 100 Mbps"), available at https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M390/K886/390886163.PDF.

[52] *See, e.g. Rural Digital Opportunity Fund*, Report and Order, WC Docket Nos. 19-126, 10-90, 35 FCC Rcd 686, para. 13 (Feb. 7, 2020) ("RDOF Order") (excluding areas with access to 25/3 Mbps to ensure universal service support is targeted to areas that presently lack any service at all).

attention on forward-looking, positive policy actions it can take to facilitate access to high-speed broadband for all Americans.

A. New Equal Access Rules Must Be Forward-Looking

As a key threshold matter, any rules the Commission adopts, whether couched as facilitating equal access or preventing digital discrimination, should not apply to prior broadband deployments and service offerings. They must be prospective, not retroactive. "When an agency engages in formal rulemaking, the rules it promulgates are analogous to legislation and are construed to apply only prospectively (unless Congress has expressly authorized it to promulgate a retroactively applicable rule)."[53] This general rule rests on "deeply rooted" principles of equity and due process.[54] There is no "unambiguous directive" in the Infrastructure Act that would allow for the equal access provision to apply retroactively.

Thus, to penalize providers for prior broadband deployments, or decisions not to deploy in a particular area (for any of the many reasons identified above) that were previously lawful would give the bill (and related FCC rules) impermissible retroactive effect.[55] Providers deploy networks and offer services based on the technical, economic, and regulatory environment at the time those decisions are made. Providers cannot be liable for potential violations of rules that were not in place when deployments and offerings were made.

B. The Commission Can Facilitate Equal Access by Promoting Policies That Remove Barriers to Deployment and Incentivize Investment

The NOI asks what it means to "facilitate equal access."[56] At bottom, facilitating equal access requires the Commission to continue removing barriers to deployment and providing

[53] *Afanador v. Garland*, 11 F.4th 985, 991 (9th Cir. 2021).

[54] *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994).

[55] *Id.* at 263 (a rule has retroactive effect where it alters the past legal consequences of past actions).

[56] NOI para. 18.

funding for areas where private investment alone is not sufficient so that all Americans have access to high-speed, high-quality broadband service. The heart of equal access is ensuring broadband availability for all, the overarching objective of the equal access provision and the Infrastructure Act as a whole.

The Commission can do so in several ways. As an initial matter, the Commission should move as quickly as possible to complete the BDC maps. The BDC maps are critical to determining where broadband access is still lacking in order to ensure funds are targeted to those currently lacking access. As noted above, the historic levels of funding for broadband deployment appropriated by Congress have the potential to close the digital divide and ensure equal access for all, but it must be used efficiently and consistent with the priorities set out in the BEAD.

The Commission should use its authority to preempt laws that create barriers to broadband deployment. Specifically, the Commission should use its authority under Section 253(a)[57] and clarify that its 2018 action to remove regulatory barriers that unlawfully inhibited infrastructure deployment was not limited to small wireless facilities.[58] Thus, right of way access fees charged by municipalities must be cost-based and any state or local charges for fiber deployment that are not cost-based, as well as any locality's failure to act upon reasonable requests for access in a timely manner must be preempted under Section 253(a). Similarly, the Commission should consider what steps it can take to ensure permitting is streamlined at the

[57] 47 U.S.C. 253(a) (requiring the Commission to remove barriers to broadband deployment by prohibiting states and local governments from imposing requirements "that may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.").

[58] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018).

federal and local levels, which is a critical factor for success of infrastructure deployment.[59] Particularly in light of the substantial new funds awarded by Congress to close the digital divide, the Commission should take all appropriate measures to encourage municipalities to partner with providers to accelerate broadband deployment.

The Commission should also continue to encourage deployment of next generation technologies by further streamlining its Section 214 discontinuance process. Where a provider receives funding to deploy high-speed broadband via the BEAD program or from other federal funds, the incumbent provider in the area should be automatically granted discontinuance of its wireline service, both voice and broadband. Allowing an incumbent provider to discontinue outdated and expensive to maintain legacy equipment frees up capital for investment in next generation technologies. Facilitating reforms to outdated and unfair COLR obligations is another important piece of this puzzle. The ILEC universal service compact came with funding. Where there is no longer funding, there should no longer be an ILEC-specific obligation. Either states should remove COLR obligations in recognition of the modern marketplace, or COLR obligations should transfer to the newly funded provider. The Commission should consider the use of its forbearance and preemption tools to address these barriers.

Finally, the Commission should ensure that its Universal Service Fund is financially sound by significantly expanding the contributions base so that its deployment and affordability programs can be maintained for the long term. Funds disbursed via the BEAD program and

[59] *See e.g. The Biden-Harris Permitting Action Plan to Rebuild America's Infrastructure, Accelerate the Clean Energy Transition, Revitalize Communities, and Create Jobs*, The White House (May 11, 2022), available at https://www.whitehouse.gov/wp-content/uploads/2022/05/Biden-Harris-Permitting-Action-Plan.pdf; Remarks on a Modern American Industrial Strategy By NEC Director Brian Deese, Economic Club of New York (Apr. 20, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/20/remarks-on-a-modern-american-industrial-strategy-by-nec-director-brian-deese/ (noting importance of coordinated decisions on permitting for success of infrastructure projects).

other federally funded programs will certainly result in additional broadband deployment across the country, but such funding is not designed to address any shortfall between the cost of maintaining and operating broadband networks over the long term and available revenue. The Commission can also help ensure affordability is not a hurdle to adoption by making the ACP permanent.[60] Possible avenues to fund the ACP after the $14.2 billion Congress allocated are depleted include funding it through an expanded contributions base or asking Congress for an appropriation. The Commission should explore these options in its report to Congress on the Future of USF.

V. THE COMPLAINT PROCESS MUST BE FAIR AND EFFICIENT

The Infrastructure Act also directs the Commission to "revise its public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination."[61] Importantly, Congress entrusted the Commission with establishing a framework for handling and investigating complaints.

To the extent the Commission uses its Consumer Complaint Center[62] to accept complaints about digital discrimination, it should not adopt the same procedure used for telecom billing or service issues as well as ACP complaints where the Commission serves the complaint on the provider and the provider must respond within thirty days. While it is important that the Commission establish a mechanism for the public to raise concerns about digital discrimination, given the complexity of digital discrimination inquiries and findings, the Commission cannot simply treat every allegation submitted by the public as a complaint requiring detailed investigation and response. Given that members of the public, not just customers, can also

[60] NOI para. 15.

[61] Infrastructure Act § 60506(e)

[62] FCC, *Consumer Complaint Center*, https://consumercomplaints.fcc.gov/hc/en-us (last visited May 10, 2022).

submit complaints the volume has the potential to be overwhelming. It would be inefficient and unsustainable to require a provider to devote the time and resources necessary to respond to every complaint, no matter how baseless. This increased volume would also overwhelm Commission staff who would need to coordinate with the complainant and the provider, as they do under the current system. A more efficient and fair process for all involved is for the Commission to review complaints that come in and decide if an investigation is warranted. The provider should not have to respond unless and until an investigation is opened. In the meantime, however, the Commission can analyze the complaint data to identify trends that indicate the need for further action.

VI. CONCLUSION

USTelecom and its members are committed to closing the digital divide and ensuring equal access for all Americans. We offer these comments based on our practical experience as broadband providers and our understanding of the complexities of broadband deployment. The comments and proposals articulated herein are intended to assist the Commission in crafting policies and rules to promote equal access by closing the digital divide while ensuring the investment in broadband is not chilled by onerous, complex, and ambiguous rules. USTelecom and its members are ready and willing to work with Commission staff and other stakeholders on the practical implementation issues that will inevitably arise from this proceeding.

Respectfully submitted,

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