



The Leadership Conference
on Civil and Human Rights

Officers
Chair
Judith L. Lichtman
National Partnership for
Women and Families
Vice Chairs
Derrick Johnson
NAACP
Thomas A. Saenz
Mexican American Legal
Defense and Educational Fund
Secretary
Fatima Goss Graves
National Women's Law Center
Treasurer
Lee A. Saunders
American Federation of State,
County and Municipal Employees

Board of Directors
Gloria L. Blackwell
AAUW
Ray Curry
International Union, UAW
Jocelyn Frye
National Partnership for
Women and Families
Jonathan Greenblatt
Anti-Defamation League
Mary Kay Henry
Service Employees International Union
Damon Hewitt
Lawyers' Committee for
Civil Rights Under Law
Sherrilyn Ifill
NAACP Legal Defense and
Educational Fund, Inc.
David H. Inoue
Japanese American Citizens League
Benjamin Jealous
People for the American Way
Virginia Kase Solomon
League of Women Voters of the
United States
Samer E. Khalaf
American-Arab
Anti-Discrimination Committee
Joni Madison
Human Rights Campaign
Marc Morial
National Urban League
Janet Murguía
UnidosUS
Christian F. Nunes
National Organization for Women
Rabbi Jonah Pesner
Religious Action Center
of Reform Judaism
Rebecca Pringle
National Education Association
Lisa Rice
National Fair Housing Alliance
Anthony Romero
American Civil Liberties Union
Liz Shuler
AFL-CIO
Fawn Sharp
National Congress of American Indians
Maria Town
American Association of
People with Disabilities
Randi Weingarten
American Federation of Teachers
John C. Yang
Asian Americans Advancing Justice |
AAJC

President and CEO
Maya Wiley

May 16, 2022

Jessica Rosenworcel
Chair
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69

Dear Chair Rosenworcel:

On behalf of The Leadership Conference on Civil and Human Rights and its Media/Telecommunications Task Force, we write in response to the Notice of Inquiry¹ implementation of the nation's newest civil rights law prohibiting digital discrimination. The Leadership Conference and our task force members are uniquely qualified to offer a valuable civil rights perspective on how to implement this new law.

I. Introduction and summary

The Leadership Conference is a coalition charged by its diverse membership of more than 230 national organizations to promote and protect the rights of all persons in the United States, and The Leadership Conference's Media/Telecommunications Task Force is committed to ensuring that all communities, especially the historically underserved, have access to affordable, reliable, high-quality advanced communications services. High-speed broadband has become an integral platform for education, employment, health care, economic development, civic participation, and communications with family and friends. The lack of access to broadband internet service among communities of color, low-income households, and rural communities means that many vulnerable households are disproportionately excluded from full participation in our society and, thus, raises a critical equity and civil rights concern. Congress agrees, and in the Infrastructure Investment and Jobs Act, the Federal Communications Commission (FCC or Commission) and the U.S. Department of Justice have been tasked with "eliminating" digital discrimination.²

In these comments, The Leadership Conference:

- highlights for the Commission existing studies that document the disparate deployment and access to high-speed broadband internet;
- emphasizes the need for detailed public data that can be used to track and identify discrimination;

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

² Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, §60506(b)(2) (2021), codified at 47 U.S.C. § 1754(b)(2).

- urges the Commission to adopt interpretations that maximize the anti-discrimination protections of the statute;
- asks the Commission to increase its resources for analyzing and identifying digital discrimination, and specifically, to augment the capacity of the Enforcement Bureau;
- create an Office of Civil Rights; and
- suggests anti-discrimination legal schemes that may be valuable in interpreting the new law.

II. Current data and reports illustrate existing digital discrimination.

As the Commission acknowledges in its NOI, significant recent research documents examples and instances of digital discrimination by Internet Service Providers (ISPs).³ For example, an analysis of Lumen's wireline footprint revealed that 39 percent of households in Lumen's footprint do not have access to speeds that meet the FCC's definition of broadband.⁴ The study found that the company targets wealthy areas for technology upgrades rather than lower income areas: 42 percent of households with access to fiber are in census blocks with median incomes above \$75,000 while only 7 percent of Lumen's fiber network is in census blocks with median incomes below \$35,000.⁵ Further, in counties with higher populations of Native Americans (more than 25 percent of households), only about 5.2 percent have access to fiber-to-the-home service and 50 percent only have Digital Subscriber Line (DSL) access.⁶ A study of AT&T's 21-state network found that for 28 percent of the households in its network footprint, AT&T's internet service does not meet the FCC's 25/3 Mbps benchmark to be considered broadband, and that AT&T prioritizes network upgrades to wealthier areas, leaving lower income communities with outdated technologies.⁷ Households with fiber available have median income 34 percent higher than those with DSL only.⁸

The disparity in Lumen's network deployment may be significantly worse than reported to the FCC. This is a result of the FCC's Form 477 broadband deployment measurement method in which, if even one household in a census block has access to broadband service at a particular speed, the FCC considers the entire census block to have access to that speed.⁹ The FCC acknowledged the many problems with its Form 477 data and took early steps to improve its data maps, adopting the Digital Opportunity Data

³ NOI at 12.

⁴ "Lumen's Digital Disparity: Underinvestment in Infrastructure Discriminates Against Lower-Income, Rural, and Native American Customers," Communications Workers of America in partnership with National Digital Inclusion Alliance (June 2021), https://cwa-union.org/sites/default/files/20210624_lumen_report.pdf.

⁵ *Id.*

⁶ *Id.*

⁷ "AT&T's Digital Redlining Leaving Communities Behind for Profit," Communications Workers of America and the National Digital Inclusion Alliance (Oct. 2020), <https://cwa-union.org/sites/default/files/20201005attdigitalredlining.pdf>

⁸ *Id.*

⁹ FCC data showed 100 percent broadband access in Ferry County, WA. However, Microsoft estimates that same county's coverage at two percent. See Steve Lohr, *New York Times*, "The Digital Divide is Wider Than We Think," Dec. 4, 2018, <https://www.nytimes.com/2018/12/04/technology/digital-divide-us-fcc-microsoft.html> (Lohr, *New York Times*).

Collection and new processes for data collection.¹⁰ While examples of uneven deployment are clear in the data available, more granular data would aid the Commission in its analysis of the nature and scope of digital discrimination. The FCC's forthcoming efforts to collect more accurate data on broadband deployment are welcome. Such data, if it can be combined with census tract data and other data sets, would help the FCC and the public analyze how deployment overlays with other demographic characteristics.

More granular studies that already exist can and should inform the Commission's efforts. In 2020, the Greenlining Institute mapped out internet accessibility throughout California and found that areas that were redlined by banks in the past face digital discrimination today.¹¹ The study found that ISPs in California invest millions deploying next generation high-speed internet networks in wealthy neighborhoods while ignoring low-income communities and communities of color.¹² In addition, Greenlining interviewed California residents in Oakland and Fresno who had limited or no access to the internet to get a better picture of what life is like in the digital divide. The USC Annenberg Research Network for International Communication and the USC Price Spatial Analysis Lab examined data on broadband deployment sourced from the California Public Utility Commission, which annually collects service availability information from all ISPs at the census block level, combining this data with demographic data from the American Community Survey (ACS) 5-year estimates.¹³ The study found that, although ISPs made considerable infrastructure investments across Los Angeles County, broadband investments were not equally distributed: broadband competition and gigabit-level broadband service were more likely in the more affluent communities.¹⁴ These results largely validated the hypothesis that broadband infrastructure upgrades were skewed against less affluent areas and communities of color, and suggested that broadband underinvestment is most severe in low-income Black communities.

With these significant data and reporting on digital discrimination, combined with additional research on the topic, the Commission should be skeptical of claims that digital discrimination does not exist or efforts to minimize or obfuscate the Commission's important charge from Congress "to ensure that all people of the United States benefit from equal access to broadband internet access service," with the intention of preventing and identifying steps the Commission should take to eliminate "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin."¹⁵

¹⁰ See Federal Communications Commission, Report and Order and Second Further Notice of Proposed Rulemaking, WC Docket No. 19-195, WC Docket No. 11-10 (Rel. Aug. 6, 2019).

¹¹ "On the Wrong Side of the Digital Divide," Greenlining Institute (June 2020), <https://greenlining.org/publications/online-resources/2020/on-the-wrong-side-of-the-digital-divide/>

¹² *Id.*

¹³ "Who gets access to Fast Broadband? Evidence from Los Angeles County 2014-17," USC Annenberg Research Network for International Communication and the USC Price Spatial Analysis Lab (SLAB) (Oct. 2019), [https://arnicusc.org/publications/who-gets-access-to-fast-broadband-evidence-from-los-angeles-county-2014-17./](https://arnicusc.org/publications/who-gets-access-to-fast-broadband-evidence-from-los-angeles-county-2014-17/)

¹⁴ *Id.*

¹⁵ 47 U.S.C. § 1754(b)(1). As we explain below, the Commission should also add other protected classes via rulemaking consistent with the Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA).

III. Public data are essential.

The FCC should go beyond the use of Form 477 data by drawing on outside data sources like the U.S. Census Bureau's American Community Survey (ACS) data and state broadband maps, as well as data from other internal FCC programs and proceedings. As stated above, the issues with Form 477 data are well documented and more public data are needed to get a complete picture of broadband availability in underrepresented and marginalized communities.¹⁶ Without these additional public data, it will be very difficult for the FCC to evaluate whether broadband access is truly equal and identify the areas in which it is not.

ACS data are an invaluable resource the FCC can draw upon for this proceeding. The dataset allows the FCC to look at the number of people who have in-home broadband access within demographic and geographic subgroups. A 2021 study from the Annenberg Institute and Brown University found that using ACS data versus Form 477 data offered a very different picture of broadband access in urban and suburban communities that were formerly redlined or divided by the Home Owners' Loan Corporation (HOLC) into neighborhoods of varying desirability.¹⁷ While models using FCC data showed almost no difference in ISP-reported service availability across HOLC neighborhood grades and a number of common broadband technologies over time, models using ACS data showed disparities in-home broadband access across HOLC neighborhood grades.¹⁸

State broadband maps will also prove to be a critical piece of the picture. States often utilize different data collection methods and mapping technology to develop their maps, and their results frequently differ from the FCC's.¹⁹ These maps can help to correct deficiencies or quality issues in the FCC's data and get one step closer to the true picture of the state of broadband access for unserved and underserved populations.

Ongoing FCC proceedings, like the Broadband Consumer Label, and existing FCC programs, like the Affordable Connectivity Program (ACP) and Lifeline, will also provide additional data that will assist the Commission in identifying cases of digital discrimination. For example, pricing and quality of service data obtained from the Broadband Consumer Label proceeding will be invaluable in helping the FCC understand which consumers pay more for the same or lesser broadband service compared to those in other geographic areas.²⁰ In addition, ZIP code level enrollment data from ACP and Lifeline will allow the FCC to identify which ZIP codes have a larger percentage of the population enrolled in the program,

¹⁶ FCC data showed 100 percent broadband access in Ferry County, WA. However, Microsoft estimates that same county's coverage at two percent. Lohr, New York Times, *supra*.

¹⁷ Benjamin Skinner, Hazel Levy, Taylor Burtch, "Digital Redlining: The Relevance of 20th Century Housing to 21st Century Broadband Access and Education," Brown University Annenberg Institute at 25 (Oct. 2021), <https://www.edworkingpapers.com/sites/default/files/ai21-471.pdf>.

¹⁸ *Id.*

¹⁹ Francella Ochillo, Ryan Johnston, Corian Zacher, Lukas Pietrzak, "Broadband Mapping Across the US: Local, State, and Federal Methods & Contradictions," Next Century Cities (May 2021), <https://nextcenturycities.org/wp-content/uploads/Next-Century-Cities--Report-on-Broadband-Mapping-Across-the-US-May-2021.pdf>.

²⁰ Notice of Proposed Rulemaking, CG Docket No. 22-2 (Rel. Jan 27, 2022); *see also* Statement of Chairwoman Jessica Rosenworcel, Re: Empowering Broadband Consumers Through Transparency, CG Docket No. 22-2, (January 27, 2022), <https://docs.fcc.gov/public/attachments/FCC-22-7A2.pdf>.

and compare this with the types of services available.²¹ It would be even more valuable if the FCC overlaid ACP enrollment data with compatible ACS data.

IV. The FCC should adopt broad interpretations of the digital discrimination statute.

Civil rights protections deserve maximum breadth. While much of the evidence in existing reports discussed above involves discrimination in broadband deployment, the new civil rights protection against digital discrimination is broader. Congress used the term digital discrimination in the title of the whole provision and directs the FCC to adopt rules prohibiting digital discrimination and to develop rules accepting complaints of digital discrimination in subsections 1754(b) and (e).²² The term “digital” is much broader than “deployment.” Congress uses and clearly defines deployment discrimination but left the term digital discrimination up to the Commission to interpret. The Commission should interpret equal access to broadband internet access described in subsection (a) to be a subset of the digital anti-discrimination rules that Congress directs the FCC to adopt in subsection (b).

The Commission should address digital discrimination that prohibits both disparate impact and intentional discrimination. It is clear, particularly with Congress’ 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. Equal access to service alone is insufficient if service is still unequal.²³ 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.

More specifically, the FCC should interpret the “equal access” definition that includes “speeds, capacities, latency, and other quality of service metrics” to be non-exhaustive and to include non-technical aspects of service quality, such as customer wait times, service outages or other service quality metrics. Similarly, “terms and conditions” should include all policies and practices affecting a subscriber. The technical and economic feasibility constraints for “a given area” should be developed so that providers cannot define their service areas in order to avoid compliance with the statute.

Section 1754 is particularly valuable because it prohibits discrimination on income level. The FCC should interpret that prohibition to include the average income level of an area as well as the actual or perceived income level of a subscriber. Income level discrimination should include discrimination on the basis of credit score or creditworthiness, if the subscriber has the ability to pay. For example, Congress found in the ACP program that certain practices, such as credit checks and utility cut-offs were prohibited.²⁴ The Commission should examine which practices prohibited by the consumer protection rules in the Affordable Connectivity Program could cause digital discrimination based on income.

²¹ Universal Service Administrative Company, ACP Enrollment and Claims Tracker, <https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker/#enrollment-and-claims-by-zipcode-and-county>.

²² 47 U.S.C. § 1754.

²³ *E.g.*, *McLaurin v. Oklahoma State Board of Regents*, 339 U.S. 637 (1950).

²⁴ See the Commission’s codification of the statutory consumer protection rules at 47 C.F.R. § 54.1810.

V. Enhance FCC Capacity

A. The Commission should allocate staffing and resources to ensure digital discrimination is uncovered and remedied and create an Office of Civil Rights.

The FCC needs to further augment its human resources and analytics tools to both adopt robust rules to implement the digital discrimination statute and to enforce those rules after they are adopted. For example, the FCC has not had legal responsibility to enforce civil rights statutes in the past and it should hire staff immediately—perhaps via detail from another agency—and permanently to be sure that it has the expertise it needs to understand civil rights enforcement. New hires who have worked on enforcement related issues in fair housing, employment, federal benefits, or disability discrimination would be well-suited to ensure that the FCC is able to adopt robust rules and create enforcement and data collection procedures that will make non-discrimination a reality. As explained in detail above, robust data will be necessary to identify discrimination. So, too, will be the expertise in analyzing data for civil rights and disparate impact analysis. This analysis is unique and not necessarily within the capacity of data experts with other backgrounds and experience. A collaboration between data analytics experts without civil rights training and civil rights experts without modern data analytics training may be required.

Creating an independent Office of Civil Rights would enable the FCC to consolidate and strengthen its civil rights expertise and resources. Not only could such an office house experts with skills and knowledge in civil rights for the purpose of enforcing the digital discrimination statute, but it could resource the whole agency with regard to any proceeding that impacts civil rights and the equitable treatment of all people in the U.S. While there are important functions performed by the consumer and governmental affairs staff for particular communities such as people with disabilities and Native Americans and Tribal governments, these skills are different from those that would be performed by an Office of Civil Rights. For example, resolving individual disputes or encouraging participation by those communities is different from legal and quantitative analysis that could proactively identify systematic problems and recommend or initiate rulemakings or enforcement proceedings to remedy them. Some of these functions are blended in the existing Disability Rights Office and the Office of Native Affairs and Policy, but those offices are undertaking a variety of tasks and have not necessarily been allocated the authority and resources that are required to take a more proactive role. Intergovernmental consultation may belong in the Consumer and Governmental Affairs Bureau, but civil rights enforcement does not. Similarly, the Office of Communications Business Opportunities performs an important role in assisting entrepreneurs from historically underrepresented communities to find business opportunities in the communications sector, but it is not resourced with skills for a broad civil rights enforcement mandate—particularly with respect to consumers in historically vulnerable communities.

The FCC should be sure that its staff is equipped to monitor and assess compliance with the digital discrimination statute and can bring resources to bear to document non-compliance. Even where staff may not be assigned to an Office of Civil Rights, the FCC should be sure its existing enforcement staff are skilled and available to monitor and enforce its new civil rights law. The FCC currently has about a dozen field offices. Much field office work focuses on wireless and broadcast interference with an emphasis on

public safety.²⁵ It is possible that field offices could be used to investigate on-the-ground availability and functionality of broadband and digital services, including marketing, service quality and the like. The FCC should be sure that its staff is equipped to monitor and assess compliance with the digital discrimination statute and can bring resources to bear to document non-compliance.

B. The FCC should ensure full and robust enforcement.

The FCC should use the full panoply of its enforcement tools for the digital discrimination law. The FCC may issue subpoenas, cease-and-desist letters, monetary forfeitures and enter into consent decrees.²⁶ The full Commission and the Enforcement Bureau may pursue these sanctions depending on existing authority. In considering and adopting its digital discrimination rules, the FCC should fully involve the Enforcement Bureau as a key player in the rule-creation process. The FCC should ensure that it lays out procedures and policies that will lead to maximum enforcement of the digital discrimination law.

The FCC should ensure that it makes the most effective use of its ability to collect financial penalties. The FCC's financial penalties are set by statute and have often been criticized as too small to deter illegal conduct by large multi-billion dollar communications corporations.²⁷ Moreover, the FCC often has trouble collecting fines once they are assessed because it must rely upon the Department of Justice if a company refuses to pay its monetary forfeiture.²⁸ The FCC should define instances of non-compliance on a granular level so that it will be able to collect substantial fines. Given that the U.S. Attorney General also has authority under the digital anti-discrimination law, the FCC should work with the DOJ to ensure that civil rights fines will be collected if they are not paid once they are assessed.

The FCC must also be sure that it has capacity to monitor and ensure that any consent decrees are fully complied with. In the past, for example, FCC regulatees have not complied with obligations under consent decrees or Commission orders because the Commission was not monitoring their obligations.²⁹ In addition, in the past, the FCC's consent decrees do not clearly state which kinds of conduct are prohibited and therefore are not effective in developing case law that stands as guidance for future conduct by other entities.³⁰

²⁵ FCC Enforcement Bureau, Enforcement Overview at 7 (April 2020), https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf.

²⁶ *Id.* at 10-22.

²⁷ Levi Sumagaysay, "The FCC's track record on essentially meaningless fines," Protocol, February 28, 2020, <https://www.protocol.com/fcc-fines-wireless-companies>.

²⁸ Alex Byers "FCC proposes millions in fines, collects \$0" Politico, Nov. 23, 2015, <https://www.politico.com/story/2015/11/fcc-fine-enforcement-scrutiny-216121>.

²⁹ For example, Fox did not seek extension of its temporary waiver of a Commission rule but nonetheless the rule was not enforced against that licensee. Opposition to oppose Fox Television Stations, Inc.'s Request for Temporary Waiver of the Newspaper-Broadcast Cross-Ownership Rule, MB Docket No. 07-260 at 1-2 (March 8, 2017), <https://www.fcc.gov/ecfs/search/search-filings/filing/1030972941727> (describing expiration of temporary waiver and subsequent FCC continuation of waiver despite licensee failing to comply with terms of waiver).

³⁰ See, e.g., Univision Transaction, BTCCT-20060718AGO et al., 22 FCC Rcd 5842, ¶ 42, Appendix D, FCC 07-24 (March 27, 2007); Jim Puzanghera, "FCC to fine Univision \$24 million," Los Angeles Times, Feb. 25, 2007, <https://www.latimes.com/archives/la-xpm-2007-feb-25-fi-univision25-story.html>.

To the degree the FCC's analysis and review of its existing authority leads it to conclude that it requires greater capacity to assess and collect more substantial fines and forfeitures, a longer statute of limitations and a speedier enforcement process more consistent with modern practices, the FCC should seek such authority from Congress. The civil rights community stands ready to help support such changes to ensure civil rights and consumer protection laws are enforced.

VI. Legal framework options.

The Commission should thoroughly explore a number of legal frameworks that have been used to address discrimination based on race and other protected characteristics, as well as its own nondiscrimination law. The following are useful resources for consideration.

A. The FCC should affirmatively monitor the industry and build on models like the Community Reinvestment Act.

Some civil rights statutes, such as the Community Reinvestment Act (CRA), require on-going self-assessment and reporting by regulatees. The CRA requires the federal banking regulators to encourage financial institutions to help meet the credit needs of the communities in which they do business, including low- and moderate-income neighborhoods.³¹ The model enables regulators to withhold various regulatory approvals if a regulated bank does not comply with the CRA during its regular assessment and reporting process. The regular reporting and performance evaluation results in reports for each regulated entity evaluating their compliance. While the impact of the CRA has overall been positive, over time it has had less impact. Therefore, the FCC should look to the recent proposed reforms developed by the civil rights community to improve CRA implementation as its starting point.³² It should also consider approaches that are not dependent on regulated entities requesting regulatory approvals, a structure that does not provide for comprehensive and consistent compliance. This has been one of the weaknesses of the CRA process.

B. Sections 202 and 208 nondiscrimination tests and standards of proof.

While the Commission's authority is new, and the directive from Congress to enforce the new statute is imperative, the FCC has already enforced nondiscrimination rules in some areas.³³ It is important to keep in mind that several nondiscrimination rules have been in place for many years, and much of the infrastructure that provides broadband service was originally deployed subject to nondiscrimination rules. As illustrated above, and as is evidenced through Congress' bipartisan adoption of a nondiscrimination rule, the previous efforts have not been sufficient. Nonetheless, some of the FCC's prior caselaw under Sections 202 and 208—which, respectively, establish a non-discrimination standard and the right to file a

³¹ Board of Governors of the Federal Reserve, What is the Community Reinvestment Act?, https://www.federalreserve.gov/consumerscommunities/cra_about.htm

³² Comments of the National Community Reinvestment Coalition Comments to the Federal Reserve Regarding the Advanced Notice of Proposed Rulemaking (Docket Number R-1723 and RIN Number 7100-AF94) (Feb. 2021), <https://ncrc.org/ncrc-comment-on-federal-reserve-boards-advance-notice-of-proposed-rulemaking-regarding-the-community-reinvestment-act-february-2021/>

³³ See, e.g., 47 U.S.C. §§ 151, 201, 202.

complaint—apply to telecommunications and could be useful as the FCC implements the digital non-discrimination law.

Under Section 202, “[c]ourts have fashioned a three-step analysis to determine whether a carrier has violated this section. The first inquiry is whether the services are ‘like’; if they are, the next inquiry is whether there is a price difference between them; and if so, the third inquiry is whether the difference is reasonable.”³⁴ The burden is on the complainant to establish the first two elements. If the complainant makes this showing, the burden shifts to the carrier to justify the price disparity as reasonable.³⁵ Under the three-part test, the Commission follows a “functional equivalency” test to determine which products are “like,” which “examine[s] both the nature of the services and the customer perception of the functional equivalency of the services” to determine whether the differences are “functionally material” or “of practical significance” to customers.³⁶ Civil rights organizations support shifting the burden to the provider once an initial showing is made in the context of a formal complaint process. Moreover, a complainant should be permitted to dispute any reasonable submission from the carrier and should be permitted to suggest alternatives, such as alternate pricing, that would still allow the carrier to meet its profit objectives. This right would be in line with the three-part disparate impact testing in fair housing.³⁷

Under existing FCC caselaw, unjust offerings under Section 202 can be successfully brought if either the price or the product unjustly or unreasonably discriminates.³⁸ Moreover, refusing to offer a service to one customer that is offered to another customer is also a violation of Section 202.³⁹

C. *The Fair Housing Act has been used to address utility discrimination.*

The Fair Housing Act (FHA) prohibits discrimination in the sale, renting, or advertising of dwellings based on race, color, religion, sex, disability, familial status, and national origin. In recent years, the FHA has been used to address discriminatory water debt collection practices such as disconnections and liens.⁴⁰ The FHA terms have been recognized to be “broad and inclusive” and subject to “generous construction”⁴¹ and the FHA proscribes practices that “otherwise make unavailable or deny” housing on the basis of protected characteristics.⁴² Loss of water service affects the habitability of a home and water liens can lead to foreclosure. In LaGrange, Georgia, the Georgia State Conference of the NAACP sued the City of LaGrange, Georgia, which provides electricity, gas, and water utility service to its residents, using the Fair Housing Act to challenge utility policies that resulted in disproportionate discriminatory impact on

³⁴ *Nat'l Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 127 (2d Cir. 2001).

³⁵ *Id.* at 129-133.

³⁶ *In the Matter of Cellexis International*, 16 FCC Rcd 22887, 22892 (2001).

³⁷ Schwemm, Robert G. and Bradford, Calvin, “Proving Disparate Impact in Fair Housing Cases After Inclusive Communities,” (2016). Law Faculty Scholarly Articles. 594. https://uknowledge.uky.edu/law_facpub/594; U.S. Dept. of Justice, Title VI Legal Manual, Proving Discrimination—Disparate Impact, Section VII.C.3, <https://www.justice.gov/crt/fcs/T6Manual7#W>.

³⁸ *AT&T v. Central Office Tel.*, 524 US 214, 234 118 S.Ct. 1956 (1998).

³⁹ *See, e.g., In re American Trucking Assn., Inc.* 41 FCC.2d 2 (1973).

⁴⁰ Coty Montag, “Lien In: Challenging Municipalities’ Discriminatory Water Practices Under the Fair Housing Act,” 55 *Harvard Civil Rights-Civil Liberties Law Review*, 200 (2020), <https://harvardcrcl.org/wp-content/uploads/sites/10/2020/09/Montag.pdf>.

⁴¹ *Traffican v. Metro.Life Ins.Co.*, 409 US 205, 209, 212 (1972).

⁴² 42 U.S.C. § 3604(a). *See United States v. Gilbert*, 813 F.2d 1523,1528 (9th Cir. 1987).

Black and Latino residents. The plaintiffs alleged that the municipalities policy of denying utility service over unpaid unrelated fines and fees (e.g., parking tickets) disproportionately affected Black residents. The plaintiffs also alleged the policy of requiring a Social Security Number to open a utility account discriminated against Latino residents. The 11th Circuit held that the Fair Housing Act claim could proceed⁴³ and the city of LaGrange settled soon thereafter.⁴⁴ Similarly, in *Pickett et al v. City of Cleveland*, the plaintiffs sued the City of Cleveland, the provider of water service, alleging violations of the Fair Housing Act, along with other claims. The Fair Housing Act claim involved the disparate impact of the city’s water lien policy on Black residents. In ruling on a motion to dismiss, the U.S. District Court of the Northern District of Ohio found that the plaintiffs had sufficiently alleged a prima facie case of disparate impact through its data analysis on the conversion of unpaid water bills into tax liens, thus satisfying the “robust causality requirement”.⁴⁵

D. Affirmatively Furthering Fair Housing (AFFH)

The Fair Housing Act was created to end discrimination and segregation in the U.S. and is enforced by the department of Housing and Urban Development (HUD). To ensure cities, counties, and states funded by HUD do not encourage use of protected characteristics like race, color and disability to discriminate in the sale, renting or advertising of dwellings, the Affirmatively Furthering Fair Housing (AFFH) provision of the Fair Housing Act was created.⁴⁶ AFFH requires HUD and its grantees to affirmatively further the policies and purposes of the Fair Housing Act. This obligation requires recipients of HUD funds to take meaningful actions, in addition to combating discrimination, which overcome segregation and discrimination, and promote inclusive communities free from barriers that restrict access to housing opportunity based on protected characteristics.⁴⁷

The FCC could require broadband and digital service providers to affirmatively take meaningful actions to end digital discrimination. This affirmative provision could be implemented similar to HUD’s provision by making it clear that grantees must not take any action that is materially inconsistent with the obligation to end digital discrimination and digital segregation, and grantees must not engage in digital discrimination themselves, take actions that perpetuate digital segregation, or diminish equitable access to broadband resources and opportunities.

E. Equal Credit Opportunity Act (ECOA)

The Equal Credit Opportunity Act (ECOA) is a federal law that prohibits creditors from discriminating against persons applying for credit on the following basis: race; color; religion; national origin; sex; marital status; age (provided the applicant is old enough to contract); receipt of public assistance income;

⁴³ *Georgia State Conference of the NAACP et al v. City of LaGrange, Georgia*, 940 F.3d 627 (11th Cir. 2019).

⁴⁴ Hunter Riggall, “LaGrange settles utilities lawsuit alleging discrimination”, *The LaGrange Daily News* (Nov.2, 2020), available at <https://www.lagrangenews.com/2020/11/02/lagrange-settles-utilities-lawsuit-alleging-discrimination/>

⁴⁵ *Albert Pickett, Jr. et al v. City of Cleveland*, Case No.:1:19 CV 2911, Order (N.D. Ohio filed Sept. 29, 2020).

⁴⁶ Housing and Urban Development department, Affirmatively Furthering Fair Housing Interim Final Rule Fact Sheet. Available at https://www.hud.gov/sites/dfiles/FHEO/documents/10_6_21_AFFH_IFR_Fact_Sheet.pdf

⁴⁷ National Fair Housing Alliance, Notice of Proposed Rulemaking, HUD’s Affirmatively Further Fair Housing Proposed Rule, March 16, 2020. Available at <https://nationalfairhousing.org/wp-content/uploads/2020/03/NFHA-Comments-on-HUDs-2020-Proposed-AFFH-Reg-3.16.20.pdf>

and exercise of rights under the Consumer Credit Protection Act.⁴⁸ More specifically, the ECOA applies to credit transactions. Under ECOA credit is defined to include the right granted by a creditor to defer payment of a debt; incur debt and defer its payment; or purchase property or services and defer payment.⁴⁹ Once a transaction is determined to involve credit, all stages of that transaction—from the initial credit request through collection efforts—are covered by ECOA’s prohibition against discrimination.⁵⁰ Under ECOA, creditors must follow certain procedures to implement the Act’s prohibitions against discrimination including, limiting the information that can be sought in the application process and placing restrictions on when a spouse can be required to co-sign an application. ECOA regulations require notice when action has been taken on an application and require notice as to an applicant’s right to a copy of any appraisal of the value of the applicant’s home.⁵¹ Both the general rule against discrimination and the procedural requirements have a broad scope (with certain itemized exceptions) and creditor is defined broadly to include those arranging and participating in loans.⁵² The scope and approach of ECOA could be valuable in implementing the new law.

VI. Conclusion

Today, nondiscriminatory access to digital services and products is a necessity, not a luxury. Policymakers and the public now recognize the importance of digital services and products and broadband access, as vast numbers of essential services and civic institutions have moved online. Congress has spoken: digital discrimination has no place in the United States. The civil rights community stands ready to act as a close partner to the Commission as it undertakes the extremely important task of carrying out Congress’ direction.

Thank you for your consideration of our recommendations on the implementation of this country’s newest civil rights law. We look forward to working with you on this issue and others of importance to our country. If you have any questions about this letter, please contact Media/Telecommunications Task Force Co-Chairs Cheryl Leanza, United Church of Christ Media Justice Ministry, at cleanza@alhmail.com, and Yosef Getachew, director of media and democracy program, Common Cause at YGetachew@commoncause.org, or Anita Banerji, The Leadership Conference media/tech senior program director, at banerji@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights

Asian American Advancing Justice | AAJC
Common Cause

⁴⁸ 42 U.S.C. § 1691. *See also* Reg. B, 12 C.F.R. §§ 1002.2(z), 1002.4. For more information on ECOA, see National Consumer Law Center, Credit Discrimination Ch 2 (7th ed 2018).

⁴⁹ 15 U.S.C. § 1691a(d).

⁵⁰ National Consumer Law Center, Credit Discrimination, Ch. 2 (7th ed 2018).

⁵¹ *Id.*

⁵² *Id.*



Communications Workers of America
National Action Network
National Consumer Law Center, on behalf of its low-income clients
National Hispanic Media Coalition
UnidosUS
United Church of Christ Media Justice Ministry