



April 20, 2023

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

Re: Prevention and Elimination of Digital Discrimination, GN Docket 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 Proposed Rulemaking implementing the civil rights provisions of the Infrastructure Investment and Jobs Act.¹

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 its Media/Telecommunications Task Force is committed to ensuring that all communities, especially the historically underserved, have access to affordable, reliable, and 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 were charged with “eliminating” digital discrimination.²

In these reply comments, The Leadership Conference:

- emphasizes the existence of digital discrimination and the evidence provided in the record;
- reaffirms the need for a disparate impact standard by discussing the prevalence of digital discrimination, the benefits that stem from a disparate impact standard, and the legal justification for a disparate impact framework;

¹ Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Notice of Proposed Rulemaking, GN Docket No. 22-69 (rel. Jan. 20, 2024) (“NPRM”).

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).

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President and CEO
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- suggests the FCC investigate the use of artificial intelligence by internet service providers; and
- urges the FCC not to allow economic feasibility considerations to gut the prohibition on digital discrimination.

I. The record reflects that low-income communities and communities of color have experienced digital discrimination

Commenters in the record have presented extensive evidence of digital discrimination by citing studies,³ highlighting the current disparities in broadband access,⁴ discussing the historic relationship to housing redlining,⁵ and more. The record is clearly replete with commenters⁶ affirming the existence of digital discrimination, and the commission does not have to dig deep in the record to find it.

For example, Starry states that “digital discrimination exists when a lack of competitive, affordable service options in the area prevents a consumer, a class of consumers, or a community or neighborhood, from accessing high-quality broadband by enabling discriminatory practices and similar barriers associated with receiving service” and “digital discrimination also can exist when policies and practices disproportionately affect certain consumers’ ability to access robust broadband service.”⁷ Starry’s experience is in line with that of civil rights,⁸ public interest,⁹ municipal government,¹⁰ and state government commenters.¹¹ The allegations by some commenters that digital discrimination does not exist are belied by this evidence.¹²

Further, in passing the digital discrimination statute, Congress acknowledged that the FCC must remedy digital discrimination, and it has given the FCC the authority to do so. The plain text of the statute requires the FCC to issue rules, requires those rules to prevent digital discrimination, requires the FCC to identify further necessary steps to eliminate digital discrimination, and requires the FCC to prohibit deployment discrimination, among other mandates.¹³ There is little doubt — based on both the text of the statute and the evidence presented in the record — that Congress acknowledged, in a bipartisan manner,

³ *Comments of The Leadership Conference on Civil and Human Rights, American Association of People with Disabilities, American Civil Liberties Union, Common Cause, Communications Workers of America, et al.*, GN Docket 22-69 at 6-8 (2023)(Leadership Conference Comments).

⁴ *Comments of the National Urban League, National Coalition on Black Civic Participation, Black Women’s Roundtable & National Action Network*, GN Docket 22- at 2 (2023) (National Urban League Comments).

⁵ *Comments of the Electronic Frontier Foundation, et al.*, GN Docket 22-69 at 5-9 (2023).

⁶ *Comments of National Digital Inclusion Alliance and Common Sense Media*, GN Docket 22-69 at 2-4 (2023).

⁷ *Comments of Starry, Inc.*, GN Docket 22-69 at 2-3 (2023)(Starry Comments).

⁸ National Urban League Comments at 2.

⁹ *Comments of Public Knowledge*, GN Docket 22-69 (2023).

¹⁰ *Comments of the City of Long Beach*, GN Docket 22-69 (2023).

¹¹ *Comments of the People of the State of California & California Public Utilities Commission*, GN Docket 22-69 (2023).

¹² E.g., *Comments of the U.S. Chamber of Commerce’s Chamber Technology Engagement Center*, GN Docket 22-69 at 1 (2023); *Comments of TechFreedom*, GN Docket 22-69 at 6 (2023).

¹³ *Comments of Lawyers’ Committee for Civil Rights Under Law*, GN Docket 22-69 at 4 (2023).

that digital discrimination exists and gave the FCC a clear directive to address digital discrimination and take affirmative steps to further close the digital divide.

II. Strong digital discrimination rules would improve competition and facilitate adoption among marginalized and low-income communities

Commenters who oppose a disparate impact standard offer a range of responses to the suggestions in the record presented by public interest and civil rights groups. Among these claims is the suggestion that such a standard would deter deployment.¹⁴ However, these claims are contradicted by the record, which shows that strong digital discrimination rules would spur competition and facilitate adoption among marginalized and low-income communities.

A. Strong digital discrimination rules would not deter deployment

Contrary to industry arguments, disparate impact standards are not vague — they are the law of the land under several statutes and corporations are fully capable of planning their investment accordingly. Further, the resources invested in non-discrimination would be well worth it, not a ‘distraction,’ as some in the record claim.¹⁵ Providers claim that companies will fear deployment choosing an “all or nothing” approach.¹⁶ In essence, providers are claiming that the only way they can avoid discriminating is to stop deploying at all. Their willingness to make such a claim, and a claim that Congress countenanced “uneven” deployment, demonstrates that serious federal oversight and enforcement is needed to ensure everyone receives non-discriminatory treatment.

Moreover, as Starry highlighted in its comments, without competition, discrimination is more likely — and the digital discrimination rules provide an opportunity to increase competition in the marketplace.¹⁷ Low-income neighborhoods in cities like Washington, D.C. are more likely to pay the same price for slower internet plans as higher income neighborhoods pay for faster plans.¹⁸ Digital discrimination rules will help to drive down prices and reduce long-standing systemic barriers that hinder access to broadband.¹⁹ The removal of these barriers will benefit both consumers and small broadband service providers through increased consumer choice and awareness.²⁰ Greater competition can help facilitate service to low-income families and historically marginalized communities, not deter it.²¹ These rules will offer an opportunity for smaller providers to expand their footprint and a chance for the FCC to

¹⁴ *Comments of T-Mobile USA, Inc.*, GN Docket 22-69 at 4-5 (2023); *Comments of CTIA*, GN Docket 22-69 at 3 (2023)(CTIA Comments).

¹⁵ *Id.*

¹⁶ CTIA Comments at 21.

¹⁷ Starry Comments at 2-3.

¹⁸ Chelsea Cirruzzo and Cuneyt Dil, “D.C.’s Low-Income Households Are Routinely Offered Slower Internet Plans,” *Axios* (Nov. 28, 2022), <https://www.axios.com/local/washington-dc/2022/11/28/dc-low-income-households-slower-internet-plans>.

¹⁹ Starry Comments at 2-3.

²⁰ *Id.*

²¹ *Id.*

understand if there is overinvestment in wealthier and whiter communities at the expense of low-income communities of color.²²

Providers have had ample public funding made available to them for deployment, and it is critical that these funds are used in a non-discriminatory manner. The federal government has made available a historic amount of funding for broadband deployment aimed at closing the digital divide,²³ and this money is bolstered by grant programs in more than 44 states to cover the cost of broadband deployment where it may not be economically feasible.²⁴ All 50 states have already received their planning funds from the federal government, marking a significant milestone in the rollout of these funds.²⁵ Tremendous steps are being taken to close the digital divide, and government estimates show tens of millions of people gaining access to broadband as a result.²⁶ Pairing strong digital discrimination rules with the influx of funding will ensure that deployment is done equitably and benefits all consumers. Federal funding should not go to providers who discriminate, and these rules will help to ensure that these funds do not do so.

III. The recommended disparate impact framework aligns well with current agency policies and practices

Other commenters in the record suggest that a disparate impact standard would not be enforceable or that it is not legally permissible in this situation. However, the facts in the record and the history of disparate impact standards suggest otherwise. The statute fits squarely within the historical legacy of disparate impact rules and how language similar to that of Section 60506 has been interpreted by the Supreme Court — with a long history of effective enforcement by the federal government.

A. Agencies across the federal government have deep experience enforcing disparate impact standards

Agencies across the federal government are able to effectively enforce disparate impact standards.²⁷ For example, the Equal Employment Opportunity Commission has brought lawsuits under a disparate impact standard, including a 2018 lawsuit against CSX Transportation regarding the use of a strength test that

²² *Comments of The Greenlining Institute*, GN Docket 22-69 at 5 (2023).

²³ Kathryn de Wit, “Infrastructure Bill Passed by Senate Includes Historic, Bipartisan Broadband Provisions,” Pew (Aug. 21, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/08/30/infrastructure-bill-passed-by-senate-includes-historic-bipartisan-broadband-provisions>.

²⁴ Kathryn de Wit, “How States Grants Support Broadband Deployment,” <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/12/how-state-grants-support-broadband-deployment>

²⁵ Sean Gonsalves, “All States Now Have ‘Internet for All’ Planning Funds; Eyes Now on FCC Maps,” Institute for Local Self Reliance (Jan 3, 2023), <https://ilsr.org/all-states-now-have-internet-for-all-planning-funds-eyes-now-on-fcc-maps/>.

²⁶ Adam Scavette, “The End of the Digital Divide? The Future of Broadband Post-Infrastructure Investment and Jobs Act,” Federal Reserve Bank of Richmond (Mar. 3, 2022), https://www.richmondfed.org/research/regional_economy/regional_matters/2022/rm_03_03_2022_broadband.

²⁷ Title VI Legal Manual, Department of Justice (Feb. 3, 2021), <https://www.justice.gov/crt/fcs/T6Manual7>.

caused an unlawful discriminatory effect on female workers.²⁸ While the FCC has not enforced a disparate impact standard before, the commission has a strong enforcement record. The commission's recent enforcement actions include fines against parties for making unlawful robocalls,²⁹ fines against providers for Affordable Connectivity Program violations,³⁰ and fines against network operators who backed out of Rural Digital Opportunity Fund (RDOF) commitments.³¹ Further, the FCC has previously clawed back awarded funds and revoked licenses.³² Simply put, the FCC is more than capable of effectively enforcing digital discrimination rules based on disparate impact should it take advantage of all of the tools available at the commission's disposal.³³

B. A disparate impact standard would be in line with the Supreme Court's interpretation of other civil rights statutes

Finally, the suggestion that a disparate impact standard is legally impermissible under the statute is inconsistent with both the plain meaning of the statute and the intention of Congress, while also misapplying the holding in the *Texas Dep. of Housing and Community Affairs v. Inclusive Communities Project, Inc. (Inclusive Communities)*.³⁴

Section 60506 provides the commission with a mandate to adopt "rules to facilitate equal access to broadband internet service" and identify steps to eliminate "digital discrimination."³⁵ The language used by Congress is not based on the intent of any given broadband providers; rather, it is results-oriented and refers to the consequences of actions taken by providers.³⁶ This results-oriented language is similar to that used in the Fair Housing Act (FHA), which the Supreme Court has confirmed embraces disparate impact liability.³⁷ In *Inclusive Communities*, the Supreme Court held that the FHA permitted disparate impact claims because the statute's "results-oriented language" turns on the availability of housing, not the

²⁸ Press Release, U.S. Equal Employment Opportunity Commission, CSX Transportation to Pay \$3.2 Million To Settle EEOC Sex Discrimination Case (June 13, 2018), <https://www.eeoc.gov/newsroom/csx-transportation-pay-32-million-settle-eeoc-disparate-impact-sex-discrimination-case>.

²⁹ News Release, Federal Communications Commission, FCC Proposes Largest Robocalling Fine Under TCPA (Aug. 24, 2021), <https://www.fcc.gov/document/fcc-proposes-largest-robocalling-fine-under-tcpa>.

³⁰ Diana Goovaerts, "FCC Proposes to Fine Q Link Wireless \$62M Related to ACP," Fierce Telecom (Jan. 18, 2023), <https://www.fiercewireless.com/wireless/fcc-fines-q-link-wireless-62m-alleged-acp-fraud>.

³¹ Diana Goovaerts, "FCC Fines Charter, LTD Broadband, More Than \$3 Million for RDOF Defaults," Fierce Telecom (July 25, 2022), <https://www.fiercetelecom.com/telecom/fcc-fines-charter-ltd-broadband-more-3-million-rdof-defaults>.

³² Jon Brodtkin, "FCC Cancels Starlink's \$886 Million Grant from Ajit Pai's Mismanaged Auction," Ars Technica (Aug. 10, 2022), <https://arstechnica.com/tech-policy/2022/08/fcc-rejects-starlinks-886-million-grant-says-space-x-proposal-too-risky/>; News Release, Federal Communications Commission, FCC Revokes China Unicom Americas' Telecom Services Authority (Jan. 27, 2022), <https://www.fcc.gov/document/fcc-revokes-china-unicom-americas-telecom-services-authority>.

³³ Leadership Conference Comments at 8-10 (discussing how the FCC can effectively enforce the digital discrimination rules).

³⁴ *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 533-35 (2015).

³⁵ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), codified at 47 U.S.C. (IIJA)

³⁶ National Urban League Comments at 4.

³⁷ *Comments of the County of Santa Clara, California*, GN Docket 22-69 at 9-11 (2023).

actor's intent, and noted that "catchall phrases looking to consequences, not intent" are relevant to determining whether an anti-discrimination statute creates disparate impact liability.³⁸

The interpretation of this language as an explicit policy directive is found across the record, and it highlights the broad consensus among civil rights and public interest groups that a disparate impact approach is consistent with the plain meaning of the statute and the intention of Congress.³⁹

III. The commission must look into the use of AI by ISPs

ISPs use algorithms for network optimization, deployment decisions, maintaining networks, assisting customers, and more.⁴⁰ However, little is known about the potential for algorithmic bias to negatively affect broadband accessibility.⁴¹ ISPs provide insufficient transparency into these practices while relying on a technology that has well-documented bias.⁴² And while algorithmic bias is well-documented across emerging technology, there is little publicly available data on the algorithms and methodologies that ISPs use to determine broadband access.⁴³ When most consumers seek broadband, they enter an address onto an ISP website to gauge what level of service the ISP will offer them. The information customers receive includes price, speed, and availability based on the consumer's geographic area.⁴⁴ ISPs rely on algorithms to determine these service offerings, but there is little information available outside of ISPs to monitor these practices for discrimination.⁴⁵ This system makes it easy for ISPs to, at best, fail to detect, and at worst, obscure discriminatory pricing. Often, marginalized and low-income communities unknowingly receive the worst service deals. For these reasons, it is imperative that the FCC investigate the use of AI technology by ISPs and the role that it plays in digital discrimination — and explicitly include algorithmic discrimination in its rules implementing the law.

³⁸ Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 533-35 (2015).

³⁹ Comments of Lawyers' Committee for Civil Rights Under Law, GN Docket 22-69 at 9-10 (2023)

⁴⁰ Daniela Levi, "6 Common Uses of AI in Telecommunications," TechSee (Mar. 3, 2018), <https://techsee.me/blog/artificial-intelligence-in-telecommunications-industry/>.

⁴¹ Episode 1: How Can Tech Address Inequality? Talking About Algorithmic Discrimination and Broadband Access with Dr. Nicol Turner-Lee of the Brookings Institution, How Tech Becomes Law (Nov. 17, 2021), <https://www.howtechbecomeslaw.org/episodes/episode-1>.

⁴² Nicol Turner Lee, Paul Resnick, and Genie Barton, "Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms," The Brookings Institution (May 22, 2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/>.

⁴³ Nicol Turner Lee, Paul Resnick, and Genie Barton, "Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms," The Brookings Institution (May 22, 2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/>.

⁴⁴ Comments of Asian Americans Advancing Justice | AAJC, GN Docket 22-69 at 3 (2023).

⁴⁵ Comments of Asian Americans Advancing Justice | AAJC, GN Docket 22-69 at 3 (2023).

IV. The commission must not allow economic feasibility considerations to gut the prohibition on digital discrimination

While many commenters urge the commission to adopt rules that take into account technical and economic feasibility,⁴⁶ we urge the commission to further explore the relationship between economic feasibility and digital discrimination before doing so. A key factor to the commission's understanding of digital discrimination is the economic feasibility of broadband deployment. In satisfying the obligation to facilitate equal access to broadband internet access service, the commission is required to consider "the issues of technical and economic feasibility presented by that objective."⁴⁷ As a result, the commission must develop technical and economic feasibility constraints so that providers cannot avoid compliance with the statute.

When taking into consideration economic feasibility, the commission must recognize that it is not required under the law to adopt existing industry expectations of short-term profits on a service. For example, Frontier's Modernization Plan, which calls for a fiber build targeting "highest IRR project opportunities based on available reinvestment cash flows," is instructive.⁴⁸ In an April 2021 investor presentation, Frontier indicated that its fiber expansion plan will include 3.4 million locations with a 24 to 30 percent program Internal Rate of Return (IRR), while it is evaluating an additional 6.7 million locations within its copper footprint that would yield a 14 to 20 percent IRR.⁴⁹ In a pre-bankruptcy filing in January 2020, Frontier stated that it would accept a 10 percent IRR on its deployments funded under the FCC's RDOF program. The company also disclosed it is targeting a 10-year payback period to achieve its targeted IRR.⁵⁰ The wide range of IRR targets demonstrates that ISPs surgically evaluate geographic areas for investment and prioritize those that enable them to deliver the highest possible returns to investors.

Economic feasibility cannot be used as a rationale for uneven deployment justified by a provider's desire to achieve a certain level of return on a short timeline. Most areas in the country are economically feasible to serve when adopting a longer time frame; it becomes a matter of when the provider expects profitability. Once deployed, fiber is expected to last between 30 to 70 years, and the cost of maintenance, repair, and upgrade are significantly lower than cable, DSL, or wireless. This longevity of infrastructure gives providers a much longer window to recover their investment and make a profit, turning economic feasibility into a question of reasonable return on investment.

⁴⁶ *Comments of CTIA*, GN Docket 22-69 at 2 (2023).

⁴⁷ 47 U.S.C. § 1754(b).

⁴⁸ See Frontier's December 2020 Quarterly Investor Update, slide 21, https://s1.q4cdn.com/144417568/files/doc_financials/2020/q3/FTR-Q3-2020-Investor-Update-Final.pdf.

⁴⁹ Frontier Communications, Investor Presentation (Apr. 2021), slide 15, https://s1.q4cdn.com/144417568/files/doc_financials/2021/q1/Frontier-Emergence-Investor-Presentation-vFF.pdf.

⁵⁰ Frontier Communications, Presentation to Unsecured Bondholders (Jan. 2020), slides 17, 116, https://www.sec.gov/Archives/edgar/data/20520/000114036120007104/nc10009883x2_ex99-1.htm.



V. 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 the civil rights provisions of the Infrastructure Investment and Jobs Act. 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-Chair Cheryl Leanza, United Church of Christ Media Justice Ministry, at cleanza@alhmail.com, Anita Banerji, senior director of the media and tech program at The Leadership Conference, at banerji@civilrights.org, or Jonathan Walter, media and tech policy counsel at The Leadership Conference, at walter@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
Common Cause
Communications Workers of America
Japanese American Citizens League
NAACP
National Consumer Law Center, on behalf of its low-income clients
National Fair Housing Alliance
United Church of Christ Media Justice Ministry