

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

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

**Ex Parte Comments of the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION**

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The National Telecommunications and Information Administration (NTIA) is pleased to offer *ex parte* comments in response to the Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.¹ As the President’s principal adviser on telecommunications and information policy,² NTIA is charged with developing, coordinating, and effectively presenting Executive Branch views to the Federal Communications Commission (FCC or Commission).³ NTIA is deeply committed to the advancement of digital equity and is actively administering programs and engaging in research and policy development in this space. Key to the success of ongoing efforts at NTIA, the Commission, and throughout the federal government is a set of strong, clear, and practical rules that facilitate equal access to broadband, prevent digital discrimination of access, and work in concert with federal programs aimed at achieving universal broadband deployment, adoption, and usage. To that end, NTIA stands ready to work with the Commission to ensure that the digital discrimination rules issued in this proceeding maximize

¹ See Notice of Proposed Rulemaking (NPRM), adopted December 21, 2022, <https://docs.fcc.gov/public/attachments/FCC-22-98A1.pdf>.

² 47 U.S.C. § 901(b)(6), § 902(b)(2)(D).

³ *Id.* § 902(b)(2)(I), (J).

our collective ability to combat discrimination and close the digital divide; fully account for the unique circumstances presented by initiatives like the Broadband Equity, Access, and Deployment (BEAD) Program; and enable the Commission to take full advantage of the wealth of relevant data and related resources available from the Executive Branch.

I. INTRODUCTION AND SUMMARY

The Infrastructure Investment and Jobs Act (Infrastructure Act) and other recent laws have together set in motion a broad range of efforts throughout the federal government aimed at achieving universal deployment, adoption, and effective use of high-speed Internet service. NTIA, the Commission, and other agencies are now tasked with implementing various interconnected programs and mandates to address the varied barriers to digital equity in the United States. Congress’s decision to pair this digital discrimination rulemaking with \$65 billion in funding for broadband and digital equity reflects its recognition that we must take a multi-pronged approach to rooting out structural inequities in broadband service offerings that cannot be resolved by subsidies alone.⁴ Well-formulated rules to combat these inequities will complement the Infrastructure Act’s programs by ensuring that, long after broadband network buildouts are complete, policies and practices that disparately impact vulnerable communities will be halted and remedied.

⁴ This recognition is evident throughout the Infrastructure Act. For example, the Digital Equity Act defines “digital inclusion” as activities that promote both the availability and adoption of not just broadband Internet service, but also “Internet-enabled devices that meet the needs of the user” and “applications and online content designed to enable and encourage self-sufficiency, participation, and collaboration.” 47 U.S.C. § 1721(11). “Digital inclusion” is further defined to include access to digital literacy training, quality technical support, and information about practices to help maintain privacy and cybersecurity. *Id.* While the BEAD Program is primarily aimed at supporting the buildout of broadband infrastructure to unserved and underserved locations, it also lists a range of eligible non-deployment uses of funding, including data collection, computing devices, and broadband in multi-family buildings. 47 U.S.C. § 1702(f).

NTIA is the Executive Branch agency most squarely focused on achieving digital equity in the United States. Having studied barriers to Internet use for the last three decades,⁵ we are intimately familiar with the longstanding disparities that keep far too many Americans from realizing the full benefits of modern communications and information technologies. The Infrastructure Act represents a generational opportunity to address these disparities; maximum success in our shared mission requires NTIA, the Commission, and many others to work in concert as we advance the programs and policies that will move our nation toward digital equity. To that end, we address three important questions in this proceeding. Specifically, as detailed below, NTIA recommends that the Commission (1) include in its definition of “digital discrimination of access” policies and practices that disparately impact protected groups; (2) clarify that actions in compliance with a particular program’s requirements (including but not limited to the BEAD Program) are presumptively lawful under the digital discrimination rules; and (3) continue to focus FCC data collection efforts on information obtained from broadband ISPs, while leveraging the resources of other agencies for other data needs.

⁵ Since 1994, NTIA has partnered with the U.S. Census Bureau to field the NTIA Internet Use Survey, which is the longest-running and most detailed survey of households and individuals on computer and Internet use in the United States. See <https://www.ntia.gov/data>. Results from these surveys have persistently shown that historically disenfranchised populations, including many of those specified in the statute that prompted this proceeding, are disproportionately less likely to use the Internet at all, and are also less likely to have the same level of devices and services as their counterparts. See, e.g., <https://www.ntia.gov/blog/2022/new-ntia-data-show-enduring-barriers-closing-digital-divide-achieving-digital-equity> (demonstrating, for example, that African Americans and Hispanics were consistently less likely to use the Internet between 1998 and 2021, that persons in low-income households were substantially less likely to have both fixed and mobile Internet services in 2021, and that members of racial and ethnic minority groups were less likely to have a PC or tablet computer).

II. “DIGITAL DISCRIMINATION OF ACCESS” MUST INCLUDE POLICIES AND PRACTICES THAT DISPARATELY IMPACT ONE OR MORE MARGINALIZED GROUPS’ ACCESS TO BROADBAND SERVICES

The NPRM asks whether the Commission should define “digital discrimination of access” with reference to disparate *impact*, disparate *treatment*, or both.⁶ NTIA urges the Commission to include both concepts in its definition of digital discrimination. A broadband provider’s practice or policy should be deemed discriminatory if it facially discriminates between or among groups *or* disparately impacts marginalized groups notwithstanding the absence of any overtly disparate treatment. The core concern in this area is the reality experienced by individuals and communities, including whether fast, reliable, and affordable high-speed Internet service is made available to them on an equal footing with their counterparts.

While disparities in service could result from intentional discriminatory treatment based on the statute’s protected characteristics—which should certainly be prohibited—they may more commonly result from business decisions and institutional behaviors that were set in motion without any discriminatory intent. Indeed, ISPs and industry groups have been careful to point out that documented evidence of disparate *treatment* in this area is nearly non-existent.⁷ Nevertheless, marginalized groups’ access to and adoption of broadband Internet service has historically lagged behind—sometimes well behind—that of other groups.⁸ Thus, only a definition of digital discrimination that includes policies and practices that have disparate *impacts* can adequately protect less-connected communities.

⁶ NPRM at ¶ 14 et. seq.

⁷ NCTA Comments at 5, ACA Connects at 9, USTelecom Comments at 15-16. Some commenters assert that there is also little evidence of digital discrimination under a disparate impact standard. The record, though, contains substantial disagreement on this point and on studies deployed to support or refute it. Public Knowledge et al. Comments at 61.

⁸ See *supra* note 5.

The record underscores the ways in which even well-intended policies can cement and expand existing inequities in broadband access and adoption. For example, the ACLU explains that private-sector broadband providers' otherwise legitimate profit-seeking behavior can result in disparate impacts.⁹ Public Knowledge, meanwhile, offers real-world examples demonstrating that providers can profitably deploy to all segments of the market, undermining claims that sound business decisions inevitably produce discriminatory outcomes.¹⁰ The Leadership Conference on Civil Rights et al. summarize other comments supporting the claim that digital discrimination does indeed exist.¹¹

The Commission should resist claims that a disparate impact framework would introduce uncertainty and divert resources from network maintenance and improvement.¹² Including disparate impact in the definition of digital discrimination can in fact provide clear expectations for providers to meet, particularly when paired with specifically identified protected characteristics such as those mentioned in the Infrastructure Act (*i.e.*, income level, race, ethnicity, color, religion, or national origin).¹³ For example, Public Knowledge, *et al.*, provide a

⁹ ACLU Comments at 9-10 (“Companies exist to make a profit, and profit-seeking behavior can lead to disparate impact because companies will inevitably invest in the communities they deem the most profitable.... Regardless of a provider’s intent, this profit seeking behavior negatively impacts low-income and marginalized consumers.”).

¹⁰ Public Knowledge, et al. Comments at 42 (urging the Commission to ask, “What is the rate of return for the overall service area, not merely specific neighborhoods”); *id.* (“Traditionally, telephone and cable providers subject to franchising requirements expected to offset lower returns in poorer or higher-cost communities with higher rates of return from more lucrative parts of the market.... Even if deployment to a specific neighborhood might result in a loss for that specific neighborhood, it is still economically feasible provided the market as a whole is profitable”).

¹¹ The Leadership Conference et al. Reply Comments at 2.

¹² *See, e.g.*, ACA Connects Comments at 21 (claiming that a disparate impact framework “would expose BSPs to enormous burdens and uncertainty in all aspects of their business by subjecting a vast array of operational decisions to scrutiny under an unclear standard” which in turn “would divert resources from maintaining and improving their networks and ultimately interfere with the statute’s overarching objective of facilitating equal access to broadband service”). *See also* T-Mobile Reply Comments at 11 (agreeing with ACA Connects Comments). *See also* AT&T Comments at 19 and 27-28; Verizon Comments at 17; USTelecom Comments at 34-35.

¹³ 47 U.S.C. § 1754(b)(1).

helpful framework for assessing the economic feasibility of deployment in an area, in a way that the Commission can use to guide its rulemaking.¹⁴ It is also important to note that Section 60506 is not retroactively applicable, and only serves to prohibit digital discrimination moving forward.¹⁵ At its core, the point of implementing a disparate impact standard is precisely to achieve Congress’s goal of ensuring “that all people of the United States benefit from equal access to broadband internet access service,” and specifically that they have “the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions.”¹⁶ Given this statutory objective, what matters most is not whether discrimination results from affirmatively disparate treatment or from treatment that impacts different communities differently. Rather, what matters is identifying and remedying unequal access to broadband service, whatever its causes may be.

Some commenters argue that variations in service are unavoidable because “service quality is variable based on environmental and other factors that are beyond any provider’s

¹⁴ See Public Knowledge et al. Reply Comments at 40-45, including prompts to consider: “What is the rate of return for the overall service area, not merely specific neighborhoods?...Profitability must be measured on a reasonable multi-year basis, not on the basis of a single quarter or other short-term measure....The Commission should not permit underinvestment as a cost-saving measure unless the costs are equally distributed in the marketplace,” and considerations such as “Systemic failure to reinvest after a natural disaster, catastrophic event, or other de facto discontinuance.... [and] Equal service throughout a claimed service area.”

¹⁵ See Public Knowledge et al. Reply Comments at 13-17, including that it “does not direct the FCC to impose legal consequences for past actions—it only prospectively looks to eliminate digital discrimination and ensure universal broadband access,” as well as, “Accomplishing this might mean correcting past mistakes to ensure that broadband is built out to people who may have been unfairly passed over in the past, and to ensure that future buildout decisions do not take into account unlawful criteria. But buildout requirements are not some sort of punishment or legal consequence for past actions—they are a common tool in communications policy. For example, the FCC imposes buildout requirements on most wireless licensees.”

¹⁶ 47 U.S.C. § 1754(a).

control.”¹⁷ This argument conflates questions of blameworthiness with questions of how best to identify and remedy lingering inequities. While service quality can indeed be influenced by environmental and other difficult-to-control factors, this fact simply underscores the importance of assessing how disparities can (even unintentionally) result from provider policies and practices. Variability in service quality might be due entirely to a storm’s fortuitous path or, alternatively, to the combination of that path and a provider’s practices and policies with respect to network investments and upgrades. If such practices and policies are facially neutral (for example, based on revenue opportunities in different areas) but lead to outages or limitations felt disproportionately by marginalized communities, only a disparate impact framework will allow the Commission to address and remedy them. By adopting such a framework, the Commission can help ensure that providers take proactive steps to mitigate the disparities caused by environmental and other external factors.

To the extent parties suggest that a disparate impact standard will leave broadband providers liable for factors truly beyond their control, this claim misses the mark. The Infrastructure Act’s digital discrimination provision makes clear that the Commission’s final rules must “tak[e] into account the issues of technical and economic feasibility presented by” the goal of providing “equal access to broadband internet access service.”¹⁸ Thus, if there exist areas where environmental or other factors truly preclude feasible provision of service, the Commission both can and, per the statute, *must* account for those factors. The same holds for

¹⁷ T-Mobile Reply Comments at 14. *See also* NCTA Comments at 11; Verizon Comments at 29; Verizon Reply Comments at 16.

¹⁸ *See* 47 U.S.C. § 1754(b).

other factors legitimately outside the provider’s control.¹⁹ What the Commission must *not* do is allow a provider to blame geography, bad weather, or other factors for a purported inability to provide adequate service to communities in need when the provider’s own practices and policies also contributed to a given gap or disruption.²⁰

Finally, the Commission should recognize, as it suggests in the NPRM, that a broad range of service characteristics should be subject to digital discrimination rules. These include quality of service (*e.g.*, speed, latency, and reliability), terms of service, promotional conditions, and pricing.²¹ Certain providers and industry groups have argued that the phrase “terms and conditions” should be interpreted to exclude pricing on its own. For example, Verizon states that “throughout Title 47, Congress repeatedly distinguishes between pricing (using the terms

¹⁹ NTIA recognizes, for example, that disparate adoption levels alone are not necessarily evidence of digital discrimination of access, as Internet use is linked with a wide range of factors, some of which may be beyond the control of Internet service providers. For example, NTIA Internet Use Survey data have consistently shown that people in lower-income households are significantly less likely to use a PC or tablet than their higher-income counterparts, without which the utility of a home fixed broadband connection may be greatly reduced. *See* <https://www.ntia.gov/data/explorer#sel=pcOrTabletUser&demo=income&pc=prop&disp=chart>. That said, demographic disparities in broadband adoption within a provider’s footprint—particularly where the magnitude of a disparity is typically large compared with that seen in other, relatively similar areas—may at times suggest a need for closer examination of provider policies and practices.

²⁰ NTIA also notes the long and problematic history of marginalized communities—including members of the classes named in this statute—being compelled by institutional forces (and sometimes by the threat or imposition of violence) to settle in areas that are more likely to have undesirable environmental characteristics, some of which are associated with lower Internet service quality. Minority communities, for example, are more likely to live in flood-prone areas (which could lead to Internet service disruptions) in part due to urban planning policies. *See, e.g.*, “The Wrong Complexion For Protection”: How Race Shaped America's Roadways And Cities, NPR, *available at* <https://www.npr.org/2020/07/05/887386869/how-transportation-racism-shaped-america>. Moreover, forced relocation of indigenous peoples contributed to their position in remote and environmentally unstable areas (which makes both deployment and service quality more difficult to maintain). *See How loss of historical lands makes Native Americans more vulnerable to climate change*, NPR, *available at* <https://www.npr.org/2021/11/02/1051146572/forced-relocation-native-american-tribes-vulnerable-climate-change-risks>. NTIA acknowledges that fully remedying these massive inequities is beyond the scope of this statute, but urges both the Commission and providers to do everything in their power to address the impacts of this history on historically disadvantaged communities’ access to broadband service offerings.

²¹ NPRM at ¶ 32 (“For example, can practices and policies related to certain terms and conditions of service, such as those concerning speeds, data caps, throttling, late fees, equipment rentals and installation, contract renewal or termination, customer credit or account history, promotional rates, or price, constitute or lead to digital discrimination?”).

‘pricing’ or [‘]rates’) on the one hand, and ‘terms and conditions’ on the other,” and that “the Commission itself distinguishes repeatedly between pricing and ‘terms and conditions.’”²² NTIA respectfully disagrees with this analysis. In 1999, for example, the Supreme Court upheld an FCC decision that interpreted a statutory reference to “terms and conditions” to encompass “rates” as well.²³ In the Court’s view, the FCC’s interpretation was “not only reasonable,” but “the most readily apparent” construction.²⁴ That is true here as well. Individual provisions must be interpreted in the manner that renders the statute a harmonious whole.²⁵ As detailed above, the Infrastructure Act’s broadband provisions are replete with evidence that Congress sought to eradicate disparities in broadband access and adoption. Amidst this holistic effort to remedy past discrimination, Congress would not have barred discrimination with respect to broadband speeds or reliability but preserved ISPs’ ability to perpetuate discriminatory pricing on the basis of characteristics set forth in the statute.

As a matter of policy, moreover, we urge the Commission to include pricing practices as a possible source of the digital discrimination that Congress directed the Commission to prevent

²² Verizon Comments at 21-23. *See also* NCTA Reply Comments at 25-28; USTelecom Reply Comments at 31; CTIA Comments at 10.

²³ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999) (upholding Commission implementation of statutory text providing that “[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same *terms and conditions* as those provided in the agreement,” 47 U.S.C. § 252(i) (emphasis added), by adopting a rule providing that “[a]n incumbent [local exchange carrier] shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same *rates, terms, and conditions* as those provided in the agreement,” 47 C.F.R. § 51.809(a) (1997)) (emphasis added)).

²⁴ 525 U.S. at 396. In 2004, the Commission reversed the specific rule at issue, but the superseding rule *also* interpreted the statutory “terms and conditions” language to not exclude “rates” as well. *See* 47 C.F.R. § 51.809(a) (2004) (“An incumbent [local exchange carrier] shall make available . . . any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, *upon the same rates, terms, and conditions* as those provided in the agreement. . . .”) (emphasis added).

²⁵ *See, e.g., Lindh v. Murphy*, 521 U.S. 320, 336 (urging statutory reading that “accords more coherence” to the provision at issue).

with these rules. Indeed, disparities in pricing between different communities may exacerbate the digital divide and lead to discriminatory outcomes. Recent NTIA analysis shows that millions of offline households find affordability of home broadband service to be a significant barrier,²⁶ and the enrollment of over 20 million households in the Commission’s Affordable Connectivity Program further reinforces this reality.²⁷ Congress set out a specific list of demographic groups protected by this statute, including low-income individuals (who may be particularly sensitive to even minor disparities in broadband pricing) and racial and ethnic minorities (who as previously noted are disproportionately likely to live in environments where networks are costlier to maintain, among other challenges). Without addressing pricing as a possible source of discrimination, the Commission will be hard pressed to meet its statutory mandate to prevent digital discrimination of access.

III. BEAD RECIPIENTS’ ACTIONS IN COMPLIANCE WITH PROGRAMMATIC REQUIREMENTS SHOULD BE PRESUMPTIVELY COMPLIANT WITH DIGITAL DISCRIMINATION MANDATES

The Infrastructure Act is replete with provisions aimed at ensuring equity and non-discrimination in access to high-speed Internet services. Section 60506(c), which gave rise to this proceeding, prohibits digital discrimination based on income level, race, ethnicity, and other relevant factors. Section 60102, which established the BEAD Program, likewise directs NTIA to require both Eligible Entities (*i.e.*, the 50 states, the District of Columbia, and U.S. territories)

²⁶ See, e.g., New Analysis Shows Offline Households Are Willing to Pay \$10-a-Month on Average for Home Internet Service, Though Three in Four Say Any Cost is Too Much, <https://ntia.gov/blog/2022/new-analysis-shows-offline-households-are-willing-pay-10-month-average-home-internet>.

²⁷ USAC ACP Enrollment and Claims Tracker, <https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker/>.

and their subgrantees to distribute funding in an equitable and non-discriminatory way.²⁸ We urge the Commission to recognize the consistency between BEAD and the mandate against digital discrimination of access, and accordingly to treat actions taken in strict compliance with BEAD program requirements as presumptively also compliant with digital discrimination rules.

We disagree with commenters that suggest that compliance with BEAD or other grant programs may not align with the Commission’s rules implementing Section 60506, as providers will not control the areas where their project bids are ultimately accepted.²⁹ It is, of course, true that the competitive nature of the BEAD Program limits a provider’s control over which specific locations it will and will not serve using BEAD funding. The Program’s design requires states and territories to ensure that each unserved location will be served and that, to the extent there is sufficient funding, every underserved location is provisioned with service offering at least 100 Mbps/20 Mbps service. It does not, however, guarantee that any particular applicant will win funding to serve a given location. It is possible, then, that a provider will bid to serve a wide range of locations within a state or territory, but win funding for only a subset of locations that happen to be in wealthy or otherwise privileged areas. Absent other evidence, such a distribution is not probative of discrimination. Thus, NTIA suggests that, to the extent providers are acting in

²⁸ Infrastructure Act § 60102(g)(2)(C). Other federal grant programs aimed to support broadband development such as ReConnect and Capital Projects Fund also prioritize rural, Tribal, and low-income communities. *See* 87 FR 47690, USDA Rural Utilities Service Funding Opportunity Announcement for Rural eConnectivity Program (ReConnect Program); US Department of the Treasury Capital Projects Fund (CPF) <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/capital-projects-fund>.

²⁹ *See* Comments of T-Mobile USA, Inc. at 31 (“[H]olding a provider liable for its current deployments while they are on their way to completing build-out in other areas is counterproductive.”). *See also* USTelecom Reply Comments at 14, Verizon Reply Comments at 20. AT&T posits, for example, that “a provider’s participation in Infrastructure Act programs might [therefore] skew its deployment ratios for households inside and outside of protected classes and thus subject the provider to an increased risk of liability” under a disparate impact standard. AT&T NOI Comments at 18 (May 16, 2022). USTelecom argued that “the constant threat of disparate impact liability would overhang every deployment decision made by a broadband provider and chill investment.” USTelecom NPRM Comments at 26 (February 21, 2023).

strict compliance with the requirements set forth in the BEAD Notice of Funding Opportunity (NOFO) and by participating Eligible Entities, the Commission should not use the distribution of locations in which they have “won” funding as the sole basis for a finding of digital discrimination.³⁰ We further encourage the Commission, as appropriate, to apply this principle to participation in other federal funding programs where similar conditions apply.

The Infrastructure Act makes clear that the BEAD Program must not be ambivalent as to equity concerns generally or digital discrimination in particular, and the BEAD NOFO effectuates this mandate in numerous ways—another reason the Commission should institute a presumption of compliance. For example:

- BEAD Program subgrantees (i.e., the entities using BEAD funds to deploy broadband) must, among other things, serve target populations that include low-income households and tribal lands.³¹
- Eligible Entities must each “develop a comprehensive local coordination approach” that will start during initial planning and continue throughout the BEAD program. This requirement includes mandatory coordination with local and Tribal governments, community organizations, and others, and must result in “full representation and inclusion of unserved, underserved, and underrepresented communities throughout the planning and deployment processes.”³²
- Eligible Entities are permitted to “fund deployment of Wi-Fi infrastructure to multi-family buildings that lack high-speed broadband access in their entirety or contain units that lack such access,” and, when doing so, are instructed to prioritize buildings that have a high proportion of unserved households or are located in low-income neighborhoods. Moreover, they are specifically allowed to fund such deployment as part of their efforts to deploy to unserved and underserved locations, which must be completed before moving on to other allowable uses of funds.³³

³⁰ Of course, receipt of BEAD funding also should not immunize a provider from such a finding on other grounds.

³¹ BEAD Program Notice of Funding Opportunity, Part IV. “Program Structure, Sequency and Requirements.”

³² *Id.* at 51-53.

³³ *Id.* at 41.

- Under the terms of the program, “an Eligible Entity cannot have a Five-Year Action Plan that does not address digital equity,” and must ensure that its Initial Proposal and Final Proposal is integrated with its State Digital Equity Plan.³⁴
- The initial 20 percent of grant funds allocated to each Eligible Entity must be used to fully fund deployment projects in low-income areas that also include at least 80 percent unserved locations.³⁵
- Per statute, Eligible Entities are also required to prioritize unserved residential locations, followed by underserved projects, and finally eligible community anchor institutions.³⁶
- In addition to deployment, participants are also encouraged to engage in outreach and educational efforts that reach unserved and underserved users.³⁷
- Finally, BEAD Program subgrantees must agree by contract or other binding commitment to abide by the non-discrimination requirements set forth in the Notice of Funding Opportunity, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the American with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, The Age Discrimination Act of 1975, Title VII of the Civil Rights Act of 1964, “and any other applicable non-discrimination law(s)” as well as various Executive Orders.³⁸

In short, the Infrastructure Act’s position on digital equity and nondiscrimination is consistent across its provisions, the BEAD NOFO implements this intent, and that legislation and the BEAD Program must be read to implement Congress’s insistence on closing equity gaps.

IV. THE COMMISSION SHOULD FOCUS ITS DATA COLLECTION EFFORTS ON THE BDC AND OTHER ISP DATA WHILE LEVERAGING OTHER AGENCIES’ EXISTING RESOURCES TO MEET OTHER NEEDS

The Commission asks what data sources and methods it should use to help identify potential cases of digital discrimination and seeks comment on validity and applicability of

³⁴ *Id.* at 10.

³⁵ *Id.* at 46.

³⁶ 47 U.S.C. § 1702(h)(1)(A)(i).

³⁷ BEAD Program Notice of Funding Opportunity, Part IV. Program Structure, Sequency and Requirements.

³⁸ *Id.* at 60-61.

various research efforts.³⁹ Given NTIA’s wealth of experience in broadband-related data collection and analysis and our longstanding relationship with the U.S. Census Bureau, NTIA stands ready to assist the Commission in identifying and effectively utilizing the most suitable data sources for shedding light on potential instances of discrimination.

Executive Branch agencies possess substantial data, expertise, and related resources, including both some that the Commission has already identified⁴⁰ and others that are less well-known. For example, NTIA has been partnering with the Census Bureau team that created the Community Resilience Estimates project, which leverages “access to granular microdata [to map] the risk assessment of local populations down to the neighborhood level and allows national and community leaders to more efficiently respond to emergencies.”⁴¹ This same team created the first-ever estimates of the covered populations defined under the Digital Equity Act, as well as the associated Digital Equity Act Population Viewer. More recently, it employed small area modeling techniques to estimate the total covered population for every census tract and county in the United States.⁴² This team also launched the ACCESS BROADBAND Dashboard, which maps 21 different variables that will be important to track for future broadband program evaluation and related research.⁴³ Through this ongoing partnership, NTIA has become highly familiar with Census Bureau capabilities around small area estimation, data linkage, and other

³⁹ NPRM at ¶ 50-51.

⁴⁰ *Id.* at ¶ 51 n.212 (citing the American Community Survey).

⁴¹ About Community Resilience Estimates, U.S. Census Bureau, <https://www.census.gov/programs-surveys/community-resilience-estimates/about.html>.

⁴² See Digital Equity Act of 2021, U.S. Census Bureau, <https://www.census.gov/programs-surveys/community-resilience-estimates/partnerships/ntia/digital-equity.html>. Unlike direct estimates from the American Community Survey, which for small geographies are only available using five consecutive years’ worth of data, the covered population small area estimates are for a single year.

⁴³ Partnership with National Telecommunications and Information Administration, U.S. Census Bureau, <https://www.census.gov/programs-surveys/community-resilience-estimates/partnerships/ntia.html>.

methods that could enable the Commission and others to better understand disparities in broadband service offerings and the impacts of different policies and practices.

Given the substantial range of available data sources and tools, we strongly recommend that the Commission remain focused on its unique strengths: the Broadband Data Collection (BDC), other efforts to gather information from Internet service providers, and other statutory roles assigned to the Commission. The Commission’s extensive relationships with Internet service providers position it well to serve as the primary collector of the data that can be used in analyzing potential cases of digital discrimination. NTIA agrees, for example, that the Commission should use BDC data (likely in combination with relevant demographic data provided by the Census Bureau) to help identify situations where individuals or communities within the protected classes may have been differentially impacted by provider policies and practices.⁴⁴ Similarly, and taking into account provider participation in BEAD and other broadband subsidy programs, the Commission’s Broadband Funding Map⁴⁵ could serve as an important data source for understanding how and to which providers funds are being distributed. Beyond these existing resources, efforts to identify potential instances of digital discrimination could be bolstered by collecting additional data from Internet service providers and making existing data more broadly accessible. For example, little is currently known about variations in broadband pricing, terms, and conditions across different communities and demographics, and the Commission would be well-positioned to collect that information directly from the providers.⁴⁶

⁴⁴ NPRM at ¶ 51.

⁴⁵ Federal Communications Commission, Broadband Funding Map, <https://fundingmap.fcc.gov/>.

⁴⁶ See, e.g., Free Press Comments at 17 (urging the Commission “to collect granular data not just on advertised prices, but on actual prices offered and charged”); Electronic Frontier Foundation et al. Comments at 28-29 (arguing

In contrast, there are other areas of inquiry where the Commission would be best served by relying on the capabilities and data products available from other agencies. For example, both the NTIA Internet Use Survey and the Census Bureau’s American Community Survey (ACS) collect data from households and individuals on Internet adoption and use. These data collections each fill important needs for a range of data users, and could aid the Commission’s efforts to combat digital discrimination.⁴⁷ To the extent there are gaps in household survey data on Internet use,⁴⁸ we urge the Commission to work with NTIA to address those issues rather than embarking on a separate effort.⁴⁹

Finally, while NTIA is not prepared to endorse or refute any particular research study, we recommend that the Commission remain open to evaluating all evidence, including external academic studies, on the merits. Calls to preemptively rule out the use of outside research in digital discrimination inquiries seem to misunderstand the nature of these studies and how they might be used in practice. For example, numerous commenters point to the use of several-year-

that “[t]he Commission’s definition of ‘comparable terms and conditions,’ and deliberation on prohibited practices in relation to digital discrimination must consider how pricing, contracts, and data caps impact consumer access and usage of broadband along the protected classes Congress laid out in the bipartisan infrastructure law.”).

⁴⁷ The NTIA Internet Use Survey includes dozens of detailed questions about devices, technologies, and locations of Internet use, as well as the challenges faced by unconnected households, and can provide important background information about the particular barriers encountered by various demographic groups. And while the ACS includes only three questions about a household’s Internet subscribership and use, it has an enormous sample size that enables examination of geographies and demographics with relatively small populations, which can be useful to an investigation of digital discrimination claims.

⁴⁸ *See, e.g.*, National Urban League Dec. 14 *Ex Parte* at 2 (suggesting the Commission partner with other agencies and institutions “to help create and distribute a national digital equity survey that will yield granular quantitative and qualitative data about what is keeping historically underserved communities offline.”).

⁴⁹ In addition to concerns around duplication of efforts, we caution that there are many challenges associated with undertaking this type of data collection. For example, even the Census Bureau, which has centuries of experience in conducting surveys of the public, has been experiencing declining response rates in recent years. *See, e.g.*, ACS Response Rates, <https://www.census.gov/acs/www/methodology/sample-size-and-data-quality/response-rates/index.php>; Current Population Survey (CPS) Non-Response Rates, <https://www.census.gov/programs-surveys/cps/technical-documentation/methodology/non-response-rates.html>. Note that the NTIA Internet Use Survey is fielded as a periodic supplement to the CPS.

old data sources as inherent flaws in various studies,⁵⁰ and in some cases justify this position by citing other research suggesting material improvements in the state of broadband deployment over time.⁵¹ This view ignores the reality that rigorous, peer-reviewed research takes several years to complete, that the publication of key federal datasets necessarily lags initial data collection, and—perhaps most importantly—that studies can continue to be enormously valuable and informative (including as indicators of possible digital discrimination) long after data collection. NTIA also urges the Commission to reject claims that research studies are of limited utility because some research focuses on relatively small geographic regions rather than the nation as a whole or a provider’s entire footprint.⁵² As some commenters point out, digital discrimination will most often be detectable at the local level, rather than through national statistics.⁵³ We therefore strongly recommend that the Commission consider studies like these in the same fashion and under the same terms as it would consider any other evidence that may be presented with a complaint of digital discrimination, rather than making sweeping determinations about research during this rulemaking.

⁵⁰ *See, e.g.*, USTelecom Comments at 55 (arguing that a Brown University Annenberg Institute study “relies on outdated data” because it focused “on circumstances from 2014 to 2019”); AT&T Comments at 31 (dismissing several reports using data collected between 2014 and 2017 in part by claiming that “to the extent [these] articles analyze actual deployment data at all, the data is extremely stale”).

⁵¹ For example, AT&T claims that “nationwide coverage of 100/20 Mbps service increased from 64% to 90% just in the four years between 2016 and 2020” based on analysis by Prof. Glenn Woroch. AT&T Comments at 31, citing Woroch NOI Decl. ¶¶ 6, 21. NTIA notes that, even in the updated version of his analysis, Prof. Woroch relies in part on datasets that were not much more recent than some of those found in other studies in this docket, including 5-year ACS estimates for the 2016-2020 period. Woroch Supp. Decl. at 2.

⁵² For example, AT&T asserts that “localized analyses... cast no light on whether there are systematic deployment disparities; to make that determination, it is necessary to evaluate overall deployments, not subsets of deployments.” AT&T Comments at 32.

⁵³ *See, e.g.*, National Digital Inclusion Alliance and Common Sense Media Reply Comments at 4-5.

V. CONCLUSION

For the reasons stated above, NTIA respectfully urges the Commission to adopt a broad definition of “digital discrimination of access” encompassing both disparate treatment and disparate impact; specify that actions in compliance with the BEAD Program and similarly situated programs are presumptively compliant with digital discrimination rules; and continue to focus its data collection efforts on information obtained from broadband ISPs, while leveraging the resources of other agencies for other data needs.

Respectfully Submitted,

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