

IN THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

Implementing the Infrastructure Investment
and Jobs Act: Prevention and
Elimination of Digital Discrimination

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GN Docket No. 22-69

COMMENTS OF THE R STREET INSTITUTE

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R Street Institute, on behalf of itself, submits these comments in response to the Notice of Proposed Rulemaking relating to the implementation of Section 60506 of the Infrastructure Investment and Jobs Act (IIJA).¹

Introduction

Last Summer, in the Infrastructure Investment and Jobs Act, Congress stated that it is the “policy of the United States that [...] subscribers should benefit from equal access to broadband internet service.”² This was defined as “equal opportunity to subscribe to an offered service that provides comparable speeds, capacities latency, and other quality of service metrics.” The statute calls on the Commission to promulgate rules to “facilitate equal access [...] taking into account the issues of technical and economic feasibility.” This included “preventing digital discrimination of access, and steps the agency should take to “eliminate discrimination.”³ On Dec. 22, 2022, the Federal Communications Commission (FCC) released a Notice of Proposed Rule Making “seek[ing] to identify and address the harms experienced by historically excluded and marginalized communities; provide a grounding for meaningful policy reforms and systems improvements; and establish a framework for collaborative action to promote and facilitate digital opportunity for everyone.”⁴ The NPRM raised a series of questions addressing definitions, enforcement, and scope of rules. The FCC asked almost 460 questions in the record to ascertain what the appropriate course of action should be, in light of the Infrastructure Investment and Jobs Act.⁵ In the statute, the FCC was given a two-year clock to adopt “final rules to facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility... including... preventing digital discrimination.”⁶ The statute is open-ended and leaves the agency with fairly broad discretion regarding how to implement this congressional directive, consistent with FCC rules and federal statutes.

Earlier this year, R Street published a blog post in response to the Infrastructure Investment and Jobs act and noted that “the term ‘discrimination’ is broadly defined, and discriminatory factors may be more complicated than they initially appear. Facilitating equal access should focus on adoption, rather than overbuilding existing infrastructure, as overbuilding in low-income communities will not address adoption rates.”⁷ According to an ITIF study there was “no apparent relationship between race and connectivity” and “low connectivity rates in urban neighborhoods are mostly due to a lack of uptake.”⁸

¹ 47 U.S.C. § 1754(a).

² *Id.*

³ *Id.*

⁴ “Implementing the Infrastructure Investment and Jobs Act; Prevention and Elimination of Digital Discrimination,” Notice of Proposed Rulemaking, GN Docket No. 22-69, (2022).

⁵ *Id.*

⁶ *Id.*

⁷ Jonathan Cannon, “Reducing Digital Discrimination by Avoiding Digital Red Herrings,” R Street Institute, April 9, 2022. <https://www.rstreet.org/commentary/reducing-digital-discrimination-by-avoiding-digital-red-herrings>.

⁸ Joe Kane and Jessica Dine, “Broadband Myths: Do ISPs Engage in Digital Redlining?,” ITIF, April 13, 2022. <https://itif.org/publications/2022/04/13/broadband-myths-do-isps-engage-digital-redlining>.

We agree with the comments from US Telecom stating that the Commission should not use this proceeding as a push towards rate regulation, or other wish list policy ambitions.⁹

While there are a plethora of novel issues raised in the Notice of Proposed Rulemaking, these comments will focus on forward-looking rules, adoption, and access and appearances of discrimination.

I. Forward-Looking Rules

The IJJA called upon the agency to promulgate rules to facilitate equal access, considering technical and economic feasibility. The Commission shall ensure “[f]ederal policies promote equal access to robust broadband internet by prohibiting deployment discrimination.” There are a number of federal funding programs that focus on building out broadband access to unserved and underserved areas. The Commission should utilize these funding programs, as well as programs like the Affordable Connectivity Program to improve both access and adoption rates. These actions can help achieve the agency’s goal of bridging the digital divide, and avoid misperceptions around digital discrimination. Leveraging existing programs and developing forward looking digital literacy programs can achieve Congress’s intent, without the need for requiring specific actions by service providers, or imposing rules and regulations that will stifle deployments.

Lastly, the Commission should not focus on fixed broadband as a one-size-fits-all approach to closing the digital divide. With fixed-wireless broadband comparable mobile wireless, and new entrants like low earth orbit (LEO) satellites, more and more Americans are accessing broadband services.¹⁰

As the Commission drafts a rulemaking, it should be mindful of the impact rules could have on the tremendous forward progress made in bridging the digital divide.

II. Market Realities of Broadband Adoption and Deployment

When addressing the issue of “digital discrimination,” there must be evidence to support that the lack of buildout was discriminatory. There are a number of factors as to why an area may lack equal access to broadband. As AT&T notes, in order to achieve universal broadband, “the Commission and the states [must] maintain the investment-friendly, light-touch regulatory policy that has governed broadband service for most of the past quarter century.”¹¹ However, should the Commission seek to move forward with more restrictive enforcement mechanisms, it should utilize safe-harbors and identify mitigating factors that dissuade the agency of evidence of digital discrimination.

As ICLE noted in a study, “consumer income and the affordability of broadband services are key factors influencing whether those who enjoy broadband access will ultimately adopt broadband service.”¹² Less adoption leads providers to reconsider whether it will be economically feasible for providers to deploy

⁹ Comments of U.S. Telecom, p. 8.

¹⁰ “Internet/Broadband Fact Sheet,” Pew Research Center, April 7, 2021. <https://www.pewresearch.org/internet/fact-sheet/internet-broadband>.

¹¹ AT&T Reply Comments, p. 2, GN Docket 22-69. <https://www.fcc.gov/ecfs/document/1063001686231/1>.

¹² Eric Fruits and Kristian Stout, “The Income Conundrum: Intent and Effects Analysis of Digital Discrimination,” International Center for Law and Economics, Nov. 14, 2022. <https://laweconcenter.org/wp-content/uploads/2022/11/The-Income-Conundrum-Intent-and-Effects-Analysis-of-Digital-Discrimination.pdf>.

to a given area.¹³ Access does not equal adoption, according to a GAO report that found nearly a third of households with access to broadband do not subscribe to it.¹⁴

The Bead program is one of the single largest investments in Broadband infrastructure. Combined with the Affordable Connectivity Program, it has helped connect 16,170,077 households as of Feb. 13, 2023.¹⁵ Notably, of those subscribers, 54.6 percent opted to use the ACP subsidy for Mobile Broadband, and 44.6 percent chose to use ACP for a fixed broadband connection.¹⁶ As T-Mobile noted in its comments, “[a]mong adults who do not have an in-home broadband subscription, 71% say they are not interested in having a fixed connection at home.”¹⁷ Adoption is one of the largest single barriers to bridging the digital divide. AT&T, in their reply comments, suggests that availability may not be the single barrier to subscribing to broadband service. According to the 2020 census, 88.8 percent of white households have access to 100/20 wireline broadband compared to 93.8 non-white households.¹⁸ Broadband availability is five percentage points higher for non-white households than for white households, and are nearly identical for those above and below federal poverty guidelines.

It is worth highlighting that while inflation has increased the price of goods across the board, the price of broadband service has decreased by as much as 14.7 percent for the most popular tier of broadband service, all while speeds have increased 127.7 percent for download and 249.3 percent upload since 2015.¹⁹ This all happened with unprecedented private investment in broadband with over \$86 billion in 2021 alone.²⁰ As part of the Bipartisan Infrastructure law, the ACP provided eligible households a \$30 per month discount on their internet subscriptions; as a result, many providers offered plans at zero cost to consumers.²¹

While access and affordability continue to grow, adoption rates still lag. To address this deficit, the agency should explore digital literacy programs instead of overburdensome enforcement that will likely reduce broadband investment, which is antithetical to Congressional statutory intent.

The FCC earlier last year finally released their long-awaited updates to broadband mapping. These maps hope to “provide the best picture available to date of where broadband is and is not available across the country.”²² In order for the agency to determine which locations are served, underserved, or unserved it

¹³ *Id.*

¹⁴ *Id.*; U.S. Gov’t Accountability Off., GAO-22-104611, Broadband: National Strategy Needed to Guide Federal Efforts to Reduce Digital Divide (May 31, 2022).

¹⁵ ACP Enrollment and Claims Tracker, Universal Service Administrative Corporation.

<https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker>.

¹⁶ Additional ACP Data, Universal Service Administrative Corporation, last accessed Feb. 16, 2023.

<https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker/additional-acp-data>.

¹⁷ T-Mobile comments p. 11.

¹⁸ AT&T reply comments, p. 7. <https://www.fcc.gov/ecfs/document/1063001686231/1>.

¹⁹ “2022 Broadband Pricing Index,” US Telecom, last accessed Feb. 16, 2023. <https://ustelecom.org/research/2022-bpi>.

²⁰ 2021 Broadband Capex Report, Broadband Providers Invested \$86B in Communications Infrastructure, US Telecom, 2021. <https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf>.

²¹ “Get Internet,” The White House, last accessed Feb. 16, 2023.

https://www.whitehouse.gov/getinternet/?utm_source=getinternet.gov.

²² Jessica Rosenworcel, “The New Broadband Maps Are Finally Here,” Federal Communications Commission, Nov. 18, 2022. <https://www.fcc.gov/news-events/notes/2022/11/18/new-broadband-maps-are-finally-here>.

is critical to identify these areas, factoring in coverage from both fixed, fixed-wireless, wireless and satellite offerings. According to Speedtest.net, the median country speed for mobile is 79.72 download and 9.29 upload.²³ The agency cannot address “equal access” if it does not know which communities have access to a broadband connection. Another deficit from this data collection is that it fails to include future or current buildouts funded either by carriers with private investment, or through one of the numerous federal funding vehicles including, but not limited to BEAD, RDOF, ReConnect and ARPA.

If networks are being built in these areas, or federal funding seeks to achieve these ends, it seems unlikely a heavy-handed enforcement mechanism will address the congressional statutory intent. As AT&T said “Requiring a provider to build everywhere as soon as it builds somewhere would discourage further investment anywhere.”²⁴ The Commission can meet its statutory obligations to prevent digital discrimination by maintaining the Commission’s precedent of a light-touch regulatory approach that brings together the massive public and private investment in broadband and focusses on digital literacy and adoption.

Conclusion

The agency stands at a crossroad. It can choose to prescribe a heavy-handed framework that would open the floodgates to private rights of action and overburdensome regulations that would chill future investment or deployments. Alternatively, it could, within existing statutory authority, apply the tools at its disposal to address areas that lack wider adoption and develop programs to connect those left on the wrong side of the digital divide.

Respectfully submitted,

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²³ “Speedtest Global Index,” Speedtest, last accessed Feb. 16, 2023. <https://www.speedtest.net/global-index/united-states#fixed>.

²⁴ AT&T Reply Comments, p. 12. <https://www.fcc.gov/ecfs/document/1063001686231/1>.