Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

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Executive Summary

The Commission faces many tough choices as it works towards the statutorily-imposed deadline to codify rules prohibiting digital discrimination. Unfortunately for the Commission, the comments offered in response to its proposals contained in the *Notice*[1] are even more disparate than those that followed the *NOI*.[2] Though Section 60506[3] of the Infrastructure Investment and Jobs Act[4] ("IIJA") is a seemingly straightforward directive for the Commission to adopt rules that prohibit discrimination in the deployment and sale of broadband internet access service ("BIAS"), there is very little agreement in the record on how, exactly, the agency should proceed.

That a public notice would be met with differences of opinion is not unusual: interested parties almost always view the law through their own preferred lenses. Here, however, the gulf in views is extraordinary. Most ISPs argue that Section 60506 is little more than an unenforceable policy statement that is aimed at addressing a problem that does not exist. In opposition to this are many public interest commenters, some who see Section 60506 as requiring the Commission to massively expand the Universal Service Fund ("USF") to subsidize the overbuilding of broadband facilities in areas that are not "high cost."

This disparate, confused record reflects the policy vacuum created by the Commission's abdication of its Title II authority over broadband. Some commenters, who are rightly worried about the real-world consequences of discriminatory treatment and inequitable market outcomes, argue in essence for the Commission to shoehorn into Section 60506 all the Title II authority the agency voluntarily gave away five years ago. Industry is of course loath to see any legal obligations that resemble Title II, particularly the non-discrimination requirements found in Section 202. ISPs and their trade associations thus argue against nearly every proposal contained in the *Notice*, preferring digital discrimination rules that require little more than an ISP to self-certify that they are not intentionally discriminating against the protected classes denoted in Section 60506(b)(1). For completeness, industry further argues that the Commission has no legal authority to enforce any digital discrimination rules it does adopt, nor any authority to collect the data necessary to discover discriminatory practices.

To be fair, commenters in these two disparate camps do make many reasonable arguments supporting their positions. This likely indicates that the Commission, if it attempts to enforce its Section 60506 rules, will find itself drowning in litigation. Fending off industry litigation is an ordinary part of the Commission's functioning and should be expected, particularly in matters with such large stakes as Section 60506 implementation. However, the

[1] *See Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Proposed Rulemaking, FCC 22-98 (rel. Dec. 22, 2022) ("*Digital Discrimination NPRM*" or "*Notice*").

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

[3] 47 U.S.C. § 1754.

[4] Pub. L. No. 117–58, div. F, title V, § 60506, 135 Stat. 429, 1245 (Nov. 15, 2021).

public interest is best served when the Commission's rules are grounded in tested legal authority. Therefore, as we discuss in these reply comments, the Commission's long term success in bringing the benefits of equal access to all will require restoration of its Title II authority.

Achieving the outcome goals of Section 60506 will also require targeting market failures in an efficient and equitable manner. Congress's concerns about digital discrimination are primarily driven by the notion that users living in markets with robust facilities-based competition are more likely to enjoy better services offered under better terms than those living in monopoly markets; and that those monopoly markets are disproportionately inhabited by members of marginalized communities. Thus to "ensure that all people of the United States benefit from equal access to broadband internet access service" as Section 60506(a)(3) requires, the Commission must investigate and address any discriminatory market power abuses. Tackling the problem in this manner would be far more efficient and effective than an attempt to create facilities-based competition by rewarding an ISP accused of redlining with billions in new subsidies. Affordability is the primary cause of the digital divide, particularly in low-income households and communities of color. Uneconomic overbuilding is simply not an effective solution to this affordability problem.

Finally, we urge the Commission to reject arguments that it lacks the authority to collect the data that it and the public need to uncover, investigate and understand digital discrimination in deploying, and marketing, and offering broadband. While the third-party studies submitted in the record of this proceeding have probative value, there is a strong need for more comprehensive and rigorous analysis. The Commission should conduct and facilitate this research effort.

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The implementation of Section 60605 presents the Commission with many difficult questions concerning universal service policy, competition policy, the problems created by natural monopoly market power, and the extent of the agency's legal authority to intervene in the broadband market. Congress of course had already provided the Commission clear authority to address all of these matters – and a blueprint for doing so – in Title II of the Communications Act.

However, the Commission's misguided action to re-define broadband out of Title II in 2017 created a policy vacuum that neither it nor Congress envisioned. Indeed, Section 60506 – the product of a well-intentioned compromise enacted outside of legislative regular order – is arguably Congress's own attempt to address some of the void created by the Commission's wrongful abdication of the agency's Title II authority. Section 60506 indicates a Congress concerned with the problems of discrimination in the broadband market, and cognizant of a particular need to address this issue in concert with the IIJA's allocation of tens of billions of dollars supporting new ISP deployment and low-income user adoption.

In our initial comments, we highlighted how the *Notice* "conveys confusion and uncertainty," a perhaps understandable outcome from an inquiry in which stakeholders offered "vastly differing answers to key questions."[5] The comments in response to the *Notice* are equally disparate, as if the responding parties viewed Section 60506 as a regulatory Rorschach test. Industry commenters largely see the new law as little more than an unenforceable list of policy

[5] *See, e.g.*, Free Press Comments at 5. Unless otherwise specified, all initial comments submitted in response to the *Digital Discrimination NPRM* were filed on February 21, 2023, in the above-captioned GN Docket No. 22-69.

aspirations that are already being met by the private market. Other commenters see Section 60506 as a strong basis of authority for the Commission to implement an expansive vision of a multi-facility universal service policy. The record is thus best summed up as parties on one side asking for the Commission to take actions – some of which are clearly within its Title II authority, with industry commenters on the other side rejecting many of the *Notice*'s proposals precisely because they require Title II authority.

For example, some industry commenters argue that the FCC has no authority to enforce the rules Congress instructed it to adopt pursuant to Section 60506(b), even though Section 60506(e) specifically instructs the Commission to "revise its public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination."[6] AT&T states that "[b]ecause Congress did not enact Section 60506 as part of the Communications Act, [Section 401 and Title V's forfeiture] Communications-Act-specific provisions are inapplicable," because such sanctions "apply only to violations of the Communications Act and 'any rule, regulation, or order issued by the Commission under [that Act].'"[7] AT&T views the fact that the IIJA specifies the availability of Title V remedies for complaints relating to the Affordable Connectivity Program ("ACP"), which the IIJA also enacted, and the lack of such a specification for rules adopted pursuant to Section 60506, as Congress's "deliberate decision not to extend the punitive provisions of Title V to violations of rules adopted" here.[8]

[6] 47 U.S.C. § 1754(e).

[7] AT&T Comments at 39 (quoting 47 U.S.C. § 503(b)(1)).

[8] *Id.* (referencing 47 U.S.C. § 1752(b)(9)(C)(ii)).

USTA shares AT&T's view of a powerless Commission, arguing that because "Section 60506 is not codified in Chapter 5 but is instead codified in Chapter 16 of Title 47," that "the Commission lacks any direct grant of authority to enforce its digital discrimination rules through monetary forfeitures and fines."[9] USTA goes further, arguing that the Commission even lacks indirect authority to enforce Section 60506 pursuant to Section 4(i) ancillary authority because "Congress intentionally placed Section 60506 outside the Commission's existing Communications Act authority" and that enforcing any Section 60506 digital discrimination rules "cannot be ancillary to the Commission's performance of its statutory responsibilities under the Communications Act because issues relating to digital equity and digital discrimination are not addressed by the Communications Act generally."[10] In UTSA's view, all Congress intended to do with Section 60506 is empower the Commission to cheerlead industry and bend even further to its deregulatory wishes.[11] While it is easy to understand why industry would make the remarkable claim that Congress enacted new law without intending it to have any effect or enforceability, these self-serving claims would make a mockery of the legislative process and – taken to their extreme – make that new law little more than a nullity.

[9] USTA Comments at 44-45.

[10] *Id.* at 46.

[11] *Id.* ("None of this is to say that the Commission lacks the statutory authority to play the important roles assigned to it by Congress in Section 60506. As discussed above, the Commission is to play critical roles in implementing Section 60506, such as by reducing barriers to deployment, convening parties, fostering intergovernmental coordination, encouraging action, and identifying trends based on review of BDC maps over time and aggregate complaints. The lack of authority to impose monetary forfeitures and penalties is simply Congress's recognition of the fact that a punitive approach to facilitating equal access would not be productive.").

Furthermore, many industry commenters go to great lengths to argue that digital discrimination does not exist; and even if it does exist, they claim that the rules the Commission adopts still must be so narrow and poorly-targeted as to be all but meaningless.

For example, some commenters assert that even if there's evidence of existing digital discrimination (in intent or in effect), the Commission can only concern itself with allegations of discrimination made after its adoption of Section 60506 rules.[12] But these industry comments clearly must not be read to mean that the Commission is powerless to investigate and remedy current discrimination. Even if it would be inconsistent with a "presumption against legislative retroactivity and retroactive rulemaking"[13] for the Commission to impose sanctions on ISPs for prior lawful actions in their deployments or service offerings, that does not mean that ongoing practices and effects such as the discriminatory application of service terms and conditions should fall outside the Commission's Section 60506 rules. Similarly, if the Commission were to find evidence of intentional or unintentional deployment discrimination that preceded adoption of Section 60506, it might not fine the ISP for those actions; but in such cases the Commission certainly would be acting reasonably if it took steps to ensure that the ISP ceases and remedies those practices.

Other industry representatives seek safe harbors that would create a presumption of compliance with Section 60506 rules based solely on a provider's status as a Section 214 Eligible Telecommunications Carrier ("ETC") for the purposes of receiving federal universal

[12] *See, e.g.*, AT&T Comments at 34 ("Whether the phrase 'discrimination of access based on' denotes intentional discrimination or disparate impact, Section 60506 authorizes the Commission to proceed only against current, not historical, practices. Nothing in the statutory language overcomes the strong presumption against legislative retroactivity and retroactive rulemaking.").

[13] *Id*.

service support.[14] NTCA goes even further, arguing that "any carrier that serves in an area with population and other characteristics substantially similar to those found in regions in which ETCs operate" should be granted a presumption of operating in compliance with Section 60506, because "the very conditions that warrant receipt of high-cost support are the very conditions that would render providing service in that region without such support economically infeasible."[15] This is bootstrapping at best. While it is true that ETCs operate pursuant to certain universal service and non-discrimination obligations, ETC status does not equate to a precertification that all of a carriers' current and future practices automatically comply with those obligations. Carriers with ETC status are still subject to the rules that govern that status, and can be sanctioned for violating those rules. What's more, the idea that any carrier operating in high-cost areas – ETC designated or not – should be presumed to be acting in a non-discriminatory manner is nonsensical. An ISP, whether or not it has secured ETC status or received subsidies, may still build and market broadband services in a discriminatory manner, a practice that Section 60506 was clearly enacted to prevent.

Despite Section 60506 directing the Commission to adopt rules that prevent digital discrimination in the "terms and conditions" of broadband offerings, many industry commenters urge the Commission to adopt narrow rules that only consider deployment discrimination. For example, USTA presents the circular argument that Section 60506's "qualifier 'of access' denotes that digital discrimination can only relate to broadband access," and to USTA, "access" means "deployment." As many broadband policy practitioners can surely attest, the term "broadband access" can be, and often is used to refer to both availability and adoption. Indeed,

[14] *See, e.g.*, WISPA Comments at 16-17; NTCA Comments at 29-30; T-Mobile Comments at 30-31.

[15] NTCA Comments at 29.

practitioners routinely describe programs aimed at increasing broadband affordability as ones promoting low-income "access" and in doing so plainly mean adoption of an already deployed service.[16]

The Commission should ignore these self-serving calls to narrow the plain meaning of the statute to encompass deployment alone. Congress directed the Commission to prohibit digital discrimination and promote equal access by adopting rules that prohibit ISPs from discriminating against current or would-be subscribers, requiring that ISPs offer "comparable terms and conditions" to all.[17] If a service is deployed to a location but then the "terms and conditions" are discriminatory in a way that results in non-adoption, then that is clearly an outcome incongruous with the plain language and intent of Section 60506.

Industry's efforts to diminish the reach of Section 60506 actually serve to highlight the need for the Commission to fully restore its regulatory authority over broadband. For example, USTA argues that this "proceeding also cannot be used as a backdoor to rate regulation."[18] Thus in USTA's view, if an ISP with monopoly power exercises that power in a discriminatory manner by charging unreasonably high prices for low quality service, the FCC lacks Section 60506 authority to address that discriminatory abuse of power. This, according to USTA, is because

[16] *See, e.g.*, AARP, "Higher Incomes Now Eligible for Discounts on High-Speed Internet," (Apr. 4, 2023) ("Inflation in the past year has caused a rise in income levels to qualify for the federal government's Affordable Connectivity Program (ACP), a $14.2 billion initiative to help bring high-speed internet access to households that earn up to 200 percent of federal poverty guidelines."); *see also*,Joseph Hayes *et al.*, "California's Digital Divide," Public Policy Institute of California (June 2022) ("Low-income households were less likely to have access to broadband and devices in 2020."); Anna Read and Kelly Wert, "Enrollment Hurdles Limit Uptake for FCC's Affordable Connectivity Program," Pew Charitable Trust, (Feb. 28, 2023) ("Low-income applicants face challenges in qualifying for initiative intended to help more get access to broadband services.").

[17] 47 U.S.C. § 1754(a)(2).

[18] USTA Comments at 17.

"Congress has granted the Commission authority to regulate rates and charges in specified circumstances," and "has not granted that authority here [in Section 60506]." Those "special circumstances" are, according to USTA's assertion, those that fall under the Commission's Title II Section 202(a) authority.

This citation to Title II, as an out-of-reach source of legal authority that would otherwise empower the Commission to adopt enforceable rules prohibiting unjust or unreasonable ISP price discrimination, is perhaps unintentionally instructive. The Commission's ability to carry out all of its Congressional mandates in a coherent and efficient manner requires following Congress's blueprint carefully laid out in the Communications Act. Title II is a timeless, logical, and carefully considered framework for achieving and maintaining universal service, in a competitive non-discriminatory telecom marketplace. And this framework is one that operates using both regulation and carefully considered deregulation.

On this latter point, it should come as no surprise that USTA finds substantial new deregulatory intent in Section 60506, even when there is a tenuous connection at best to that law's purpose of preventing discrimination. Indeed, the trade association views the mere acceptance of free government money as a rationale for the Commission to eliminate the last remaining Title II regulation that currently applies to ILECs.[19] We agree that where actual competition exists – especially where competition is supported by subsidies – a request for the Commission to revisit a carriers' regulatory obligations (and benefits) would be warranted. But requests for regulatory forbearance cannot be granted on an "automatic" basis; the Act requires

[19] *See, e.g.*, USTA Comments at 14-15 and note 47 ("[W]here a provider receives and makes use of funding to deploy high-speed broadband via the BEAD program or from other federal funds, the incumbent carrier in the area should automatically be permitted to discontinue its legacy service, without the need for regulatory approval because the infrastructure is capable of providing or enabling voice service once deployed.").

the Commission to grant such requests only after a carefully considered Section 10 forbearance analysis.[20]

Industry is also strongly opposed to the Commission's "and/or" approach to defining digital discrimination as either intent or disparate impact. CTIA argues that the "Commission should apply a disparate treatment approach to digital discrimination, *i.e.*, an approach that is based on intent, not effect."[21] USTA claims that by "choosing the term 'based on,' Congress provided the Commission with clear direction to prohibit intentional acts that arise because of the specified characteristics."[22] In USTA's view, the phrase "based on" refers to the carrier's motive, but not the effect of the carrier's actions. In its comments, NCTA did acknowledge "the legitimate concerns civil rights groups and others may have that an intent-based statute that is interpreted and applied too narrowly might not capture disparities that are the result of discrimination."[23] Nonetheless, it still urged the Commission to adopt rules that would be powerless to address discriminatory outcomes when those outcomes cannot be proven to be intentional.

Some carriers that argue for an intent-only framework do, however, see a role for the Commission to address outcome discrimination even if intent cannot be demonstrated; but

[20] The large amount of new broadband funding allocated and appropriated in recent years (*e.g.*, A-CAM, Rescue Act, IIJA) is intended to foster deployment of new high quality telecommunications facilities in areas that lack such services. However, this rapid and robust level of investment may also attract unscrupulous actors who may not be suited to fill the role of a "Carrier of Last Resort" ("COLR"). The Commission's abdication of Title II authority has created substantial uncertainty around COLR regulation and the role that state authorities may have in ensuring that their residents have reliable access to essential telecommunications services.

[21] CTIA Comments at 3.

[22] USTA Comments at 22 (emphasis in original).

[23] NCTA Comments at 2-3.

somewhat comically, only so long as it rewards them for discrimination instead of punishing them. AT&T suggests that non-intentional discrimination is an outcome that should be addressed by giving ISPs more taxpayer money for free.[24] The public interest and the Commission's statutory goals would be better served by the agency first developing a thorough understanding of the different market outcomes that are produced by allegedly "unintended" digital discrimination, and then addressing disparities using the most appropriate regulatory tools. For example, if members of a low-income community are subjected to monopoly terms and conditions by an ISP that faces no meaningful competition, it would make little sense to subsidize a fiber over-builder rather than sanctioning the monopoly ISP for charging discriminatory rates. If the outcome is discriminatory in impact but the monopoly ISP's rates are just and reasonable, the appropriate policy intervention would be to subsidize subscribers' ability to afford the service, not give any ISP funding to build or overbuild without any guarantee that rates would drop to an affordable level as a result.

While many industry Commenters who prefer an intent-only standard cite *Inclusive Communities*, and suggest that Section 60506 lacks certain phrasing found in other disparate-impact statutes,[25] it is difficult to read Section 60506 as an intent-only statute. Section 60506 authorizes the Commission to adopt rules prohibiting digital discrimination, but also directs use of federal and state policies to "promote" and "facilitate" equal access, in part through "eliminating" digital discrimination. It is reasonable to view these more expansive instructions to

[24] AT&T Comments at 6 ("I]nsofar as [Section 60506] imposes obligations on private parties, it targets only intentional discrimination against the protected classes; any unintended disparities are properly addressed through subsidy programs instead.").

[25] *See, e.g.*, NCTA Comments at 20; USTA Comments at 22-31; AT&T Comments at 20-23; CTIA Comments at 19; NTCA Comments at 13-15; T-Mobile Comments at 16-20; Verizon Comments at 13-17;

facilitate equal access as "effects-based" language. Of course, reclassification of broadband internet access services under Title II would render moot any concerns about intent vs. impact. With Title II authority, the Commission would have the tools required to ensure equal access for all by declaring unlawful any and all unreasonably discriminatory practices.

Finally, some industry representatives balk at the proposal for the Commission to collect data that could be used to uncover and understand any instances of digital discrimination. USTA bizarrely argues that because Congress authorized the Commission to create the broadband "nutrition label" in the IIJA, "the Commission may not read silence in Section 60506 as sufficient to authorize testing"[26] that would help it "to identify when a consumer's broadband internet access is differentially impacted with respect to the technical aspects of available service."[27] There is no basis for this assertion, that somehow the label's existence precludes any and all other testing or data collection the Commission might undertake, either in the statute or legislative record on the broadband nutrition label. Moreover, the label will focus primarily on price data, yielding relatively little technical data that would be needed to detect many types of digital discrimination. The Commission routinely requires carriers to submit various types of performance data, on both a voluntary and mandatory basis, and need not find new authority to do so in Section 60506.[28] That USTA believes the Commission lacks such authority again counsels for the restoration of Title II.

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[26] USTA Comments at 51.

[27] *Notice* ¶ 46.

[28] For example, since 2011 the Commission has worked with a third-party vendor (SamKnows) and major ISPs to collect and verify real-world broadband performance data for the agency's Measuring Broadband America ("MBA") program. *See, e.g.*, Federal Communications Commission, "Measuring Fixed Broadband – Eleventh Report" (Dec. 31, 2021).

It is clear from the record that if the Commission attempts to take any action against an ISP for violating Section 60506, it will find itself in court. Many industry commenters suggest that enforcement of Section 60506 would raise a so-called "major questions doctrine" issue, and point to barriers to such action potentially raised by the recent Supreme Court decision in *West Virginia v EPA*.[29] That industry presents a litigious posture and disputes the Commission's authority to do anything other than grant incumbents regulatory favors is nothing new, and the Commission should not be discouraged from making its own reasonable interpretations of the purposes and reach of Section 60506. But if the Commission's policies aimed at promoting equal access are destined for judicial review, the public interest and market certainty would be best served if those policies were firmly rooted in Title II's strong and settled legal authority.

II. Achieving Equal Access in a Broadband Market Characterized by Natural Monopoly Economics Requires Data-Driven Analysis and Regulation of Carriers that Exercise Monopoly Market Power

A. The Commission Should Not Fund the Overbuilding Projects of Carriers Accused of Deployment Discrimination.

Above we noted that AT&T argued "any unintended disparities are properly addressed through subsidy programs."[30] This view of Section 60506 as a part of universal service policy also appears in comments submitted by organizations representing the interests of broadband subscribers and other end-user communities.[31]

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[29] AT&T Comments at 12; CTIA Comments at 13; T-Mobile Comments at 26; USTA Comments at 40; Verizon Comments at 23.

[30] AT&T Comments at 6.

[31] *See, e.g.*, Public Knowledge Comments at 45, 76-77; *see also* Lawyers Committee Comments at 29 ("[T]he purpose of this statute is to provide universal service by ensuring everyone can achieve equal access. That means sometimes providers may have to serve consumers that are not profitable or are not profit-maximizing, and they should be required to do so as long as it does not substantially imperil the fiscal health of the provider.").

While Section 60506 does direct the Commission to "take steps to ensure that all people of the United States benefit from equal access to broadband internet access service," that does not mean that Congress instructed the Commission to create a new overbuilding universal service obligation. Universal service has never been a policy that requires all carriers to deploy universally (throughout their service areas, or otherwise).[32] It would be a dramatic expansion to redefine universal service as a policy requiring the subsidization of multiple facilities-based providers at a single location. Doing so would in essence require a carrier that deployed anywhere to deploy everywhere, with ratepayers underwriting their capital and operational costs.

There's no plausible reason to think Congress intended to use Section 60506 to drastically expand the scope of universal service policy in such an inefficient manner. The purpose of Section 60506 is to ensure everyone enjoys the benefits of equal access. Those benefits are measured in terms of availability, quality, reliability, price, and other customer service features. Ensuring everyone can enjoy those benefits does not require subsidizing the deployment of multiple facilities-based carriers. And doing so would be highly inefficient and ultimately ineffective, as the greater barrier to low-income broadband adoption is not availability, but affordability.[33]

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[32] "Service area" is a loose concept that differs based on the regulatory status of the carrier. For ILECs it could mean anything including a wire center, LATA, or study area. For MSOs it could mean franchise area. For mobile wireless carriers the service area could encompass the geographic extent of their spectrum licenses (where neither universal service nor spectrum licensing terms have ever required full deployment). But the term "service area" has no agreed-upon definition for non-incumbent wireline carriers, or for fixed wireless ISPs using unlicensed spectrum.

[33] The November 2021 Census Bureau's Current Population Survey ("CPS") indicates that while only 18 percent of respondents overall who do not subscribe to home broadband cite affordability or value as the most important reason for their non-adoption, a whopping 60 percent of non-adopters in the bottom family income quintile cite affordability or value as their most important reason for not subscribing to any home broadband service (mobile or fixed).

Congress created the current universal service system to preserve and promote access to adequate facilities at reasonable charges as the 1996 Telecom Act introduced competition into the local telephone market. This intervention dismantled the prior system of preserving universal service via implicit cross-subsidies, and thus required the creation of a system of explicit subsidies for Carriers of Last Resort. While a central purpose of the 1996 Act was to promote facilities-based competition, Congress gave the Commission a suite of regulatory and deregulatory tools to promote competition and market entry.[34] Subsidies were never intended to be used for overbuilding, and current Commission universal service policy operates accordingly.[35] That's not to say Congress envisioned a future market of maximal competition and market entry that would produce benefits for all subscribers in the absence of other regulatory oversight and interventions. Indeed, Congress intended for deregulation of dominant carriers to be governed by Section 10 analysis determining that the outcome of such forbearance would still ensure just and reasonable outcomes protecting consumers and the public interest writ broad.Congress thus retained the Act's core non-discrimination requirements (*e.g.*, Sections 201,

[34] *See, e.g.*, 47 U.S.C. §§ 251, 252, 256.

[35] *See, e.g., Connect America Fund* et al., WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 319 (2011) ("[W]e conclude that this prior policy of supporting multiple networks may not be the most effective way of achieving our universal service goals. In this case, we choose not to subsidize competition through universal service in areas that are challenging for even one provider to serve.").

202 and 208) for all carriers, regardless of the state of market competition or forbearance from other parts of the Act.[36]

Awarding deployment subsidies to ILECs for the purpose of upgrading their DSL networks to fiber in areas where cable ISPs already operate – areas that the ILEC would be alleged to have redlined – is plainly nonsensical. Not only would such a policy serve to encourage future redlining by handsomely rewarding the practice financially, it would be an incredibly inefficient method to achieve Section 60506's goals.[37]

As we argued in our initial comment, if incumbent "ISPs' terms and conditions are worse in the portions of their service areas where they do not face FTTH competition than they are in the areas where they do face such competition, and those monopoly areas are disproportionately demographically different from the areas where they do face competition, then that is digital discrimination." And the appropriate response to this disparate treatment, one authorized by Congress in Section 60506, is for the "Commission to act to eliminate that discrimination by taking action against the monopoly ISP."[38] This approach would be a far more targeted and efficient method of ensuring that everyone can enjoy the benefits of equal access than would be the expensive subsidization of fiber overbuilding.

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[36] *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶¶ 15, 17 (1998) ("[S]ections 201 and 202 lie at the heart of consumer protection under the Act. Congress recognized the core nature of sections 201 and 202 when it excluded them from the scope of the Commission's forbearance authority under section 332(c)(1)(A). [...] Consistent with the centrality of sections 201 and 202 to consumer protection, the Commission has never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market.").

[37] We note that even under Title II there is no requirement for overbuilding.

[38] Free Press Comments at 39.

Indeed, as NTCA recognized in its comments, "affordability remains the highest barrier to adoption."[39] There are plenty of areas where cable company ISPs have deployed DOCSIS 3.1 services offering multiple gigabits of transmission capacity, but far too many residents of those areas lack the financial means to subscribe to these services. Those struggling to afford broadband would not be helped nearly enough by a program that subsidized a fiber provider to overbuild in their neighborhood.[40] These households need direct financial support and more affordable service offerings,[41] such as the support offered from ACP and the reduced-price plans offered by some ISPs to qualifying low-income households.[42]

A policy that subsidizes a carrier's overbuilding costs after it was found to have engaged in digital discrimination would perversely incentivize other carriers to avoid equitable deployments. This is perhaps why some commenters seem to argue that Section 60506 should be viewed as an unfunded universal overbuilding requirement. For example, EFF argues that "ISPs are not rate regulated and therefore are not guaranteed a minimum return on investment." This factual observation is then followed by an argument that "[p]roviders are not entitled to collect windfall profits by engaging in digital discrimination. The fact that a broadband project would

[39] NTCA Comments at 8.

[40] While there may be some pricing benefits in areas where an ILEC upgrades its DSL to FTTH to better compete against cable ISP incumbents, these benefits seem to be fleeting, and certainly do not result in carriers better serving consumers at all levels of demand. *See, e.g.*, Free Press Comments at 39, note 82 (noting that "while duopoly competition is in theory and in practice better for the customer than monopoly, these benefits are not nearly as robust as would be expected in a fully competitive market.").

[41] *See, e.g.*, Comments of the Information Technology & Innovation Foundation at 7.

[42] For example, AT&T's "Access from AT&T," Charter's "Spectrum Internet Assist," Comcast's "Internet Essentials," Cox's "Connect2Compete," T-Mobile's "Connect Every Student," and Verizon's "Forward" are all programs that offer eligible low-income households a discounted broadband service plan.

not collect the amount of profit that a provider might prefer does not make that broadband project technically infeasible."[43]

We agree that there's nothing in this or any law that would entitle an ISP to engage in digital discrimination. Enforcement of Section 60506 first requires that an allegation of digital discrimination meet the statutory definition, which is subject to considerations of economic and technical feasibility. While the need for a provider to earn a positive or preferred minimum rate of return is not a matter related directly to technical feasibility,[44] it is related to economic feasibility. In fact, because ISPs are not rate-regulated, if the Commission were to order without subsidy any deployments that are below a carrier's cost-of-capital or even their target internal rate of return, such action would surely engender a takings claim. Indeed, the reason Congress created the $42.5 billion BEAD program is that certain locations continue to see no broadband deployment despite high demand, and this lack of deployment is due to poor economics: carriers have not deployed in these areas because these investments would not be sufficiently profitable.

Unsubsidized overbuilding requirements could also undermine the legislative intent of Section 60506. An ISP forced to make a material level of unsubsidized deployments with expected returns that lie below their cost of capital would then find it more difficult to borrow

[43] EFF Comments at 23.

[44] The ability for fiber overbuilders to argue a defense of technical feasibility is yet another reason why the Commission should use its Section 60506 authority to address the discriminatory pricing practices of ISPs with monopoly power. The pace of fiber deployment is limited by resource and labor availability. Even if all U.S. ILECs committed to full FTTH deployment, it would likely take them at least 12 to 15 years to deploy across their entire footprint, and that's assuming no other issues of economic or technical feasibility. This reality of a relatively slow pace of deployment will make it easier for carriers to raise a technical feasibility defense against any allegation of deployment discrimination. Carriers will likely argue that Section 60506's exceptions for technical and economic feasibility and the inherently slow nature of fiber deployment requires the Commission to grant substantial deference to their location prioritization decisions.

new capital at reasonable interest rates.[45] This would ultimately result in less market entry or upgrades in all locations.

B. The Commission Should Collect Comprehensive Data that Facilitates High-Quality Market Analysis on Digital Discrimination.

In their comments, several ISPs and their trade associations argued that the third-party studies cited in this proceeding alleging evidence of digital discrimination are flawed.[46] While we agree that these studies have certain limitations – as all studies do – the Commission should treat these analyses as a starting point for further investigation into the existence of and causes of digital discrimination.[47]

Industry critiques of studies that only looked at incumbent telephone company fiber deployment patterns are valid, but that does not mean these studies lack probative value. Indeed, some of this work prompted other researchers to examine the differences in offerings by both incumbent cable and telephone company ISPs in neighborhoods where fiber does and does not compete with DOCSIS 3.1. The initial studies focusing solely on ILEC FTTH deployment patterns also prompted further research into both cable and ILEC deployment patterns generally.

For example, in its comments, the California Public Utilities Commission submitted a new study examining AT&T's and Comcast's deployments, looking for differences in availability of higher-speed services as a function of the median household income of the residents in these

[45] An unfunded overbuilding mandate also could place certain carriers in jeopardy of violating Section 254(k), as such a mandate could result in these carriers cross-subsidizing the losses from the overbuilds into competitive areas with profits earned from non-competitive areas.

[46] AT&T Comments at 28; USTA Comments at 53-55; Verizon Comments at 9, note 29.

[47] All studies have particular limitations, which does not necessarily indicate the quality of the analysis, but may, for example, impact the generalizability of the findings. Quality research always acknowledges the limitations in methodology and in interpreting the results, as well as questions deserving further investigation.

areas.[48] The study's authors state that their analysis indicates that "low-income households make up a disproportionate share of those households without access to broadband service."[49] The study's authors clearly describe their methodology and note some of the study's limitations.[50] We believe there are additional issues that warrant caution in interpretation.[51] But the results have probative value – for policymakers and advocates wishing to further investigate deployment

[48] CPUC Comments, at Appendix A.

[49] *Id.* Appendix A at 17.

[50] *Id.* Appendix A at 8 (noting use of Form 477 block-level data, and the focus only on AT&T and Comcast in the examined areas).

[51] The CPUC study examined AT&T and Comcast broadband availability by speed at the block-level and how that deployment varied across three different thresholds of "low-income" households. However, the Census Bureau does not collect household income at the block-level, only at the much less granular and thus more heavily populated block group-level. The researchers did not aggregate the block-level deployment data up to match the block group-level household income data. Free Press has previously presented econometric analysis of deployment as a function of an area's income and its racial/ethnic composition, looking for differences in deployment patterns across areas of varying racial and ethnic diversity while controlling for income. Our research utilized tract-level median household income data (even less granular than block group-level) because we wanted income data for the single year period of our analysis, and block-group level income data was only available at the 5-year average. Our analysis found that the "differences in broadband deployment for areas inhabited by people of color are primarily (but not totally) driven by income differences. When we examine the impact of a block's racial/ethnic composition but control for income, it's only in rural census tracts that blocks with a higher proportion of white population have more ISPs on average." We noted however that "the aggregation of block-level deployment data to tract-level population averages, in order to combine it with tract-level income data, reduces the explanatory power of the data by combining low-income blocks with higher-income blocks in the same tract." *See* S. Derek Turner, Free Press, "Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption," at 117-18 (2016).

patterns and their underlying causes, as well as ISPs that dispute any notion of discriminatory deployment.[52]

The California Community Foundation's ("CCF") October 2022 study is one of the more unique studies introduced in the record, and offers an important look into how deployment patterns can impact users living in areas where cable ISPs face little meaningful competition. This study found "a clear and consistent pattern of [Charter] reserving its best offers – high speed at low cost – for the wealthiest neighborhoods in LA County."[53] USTA believes the study "lack[s] analytical rigor or probative value" because it focused "on pricing by a single cable provider in Los Angeles county and relies on data from only 165 addresses in a county with 1.5 million housing units."[54]

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[52] The CPUC analysis created a "disproportionality" metric "by comparing the proportion of low-income unserved households to the overall proportion of low-income households in the service territory." This metric indicates increasing disproportionality as the metric becomes more negative. While the CPUC did find disproportionality in both Comcast's and AT&T's deployments overall, at the highest tier of speeds this disproportionality becomes less severe in the lowest income areas. For example for Comcast, the disproportionality metric for deployment of 100/20 Mbps service is -2.4% in block groups with median incomes below $35,000, but -6.1% in block groups with median incomes below $81,280 (*see* CPUC Comments, Appendix A at Table 8). For AT&T's symmetrical 100 Mbps tier, the disproportionality metric in block groups with median incomes below $35,000 is only -0.5%, but -1.5% in block groups with median incomes below $81,280 (*see* CPUC Comments, Appendix A at Table 5). The study's authors do not attempt to explain possible causes for these seemingly divergent results, but we suggest they could be driven by limitations in the data sets, and the substantial differences in the size of the analysis groups. (The location counts are far smaller in the lowest income tier compared to the highest.) The lack of reporting of statistical significance test or effect sizes also limits the interpretation of these results. However, the findings generally comport with the expected outcomes based on microeconomics, that infrastructure deployment is impacted by income, which impacts demand and thus the potential addressable market. This economic reality is one that the Commission must address, regardless of whether or not such deployment patterns are deemed "economically feasible."

[53] *See* California Community Foundation, Digital Equity Los Angeles, "Slower and More Expensive – Sounding the Alarm: Disparities in Advertised Pricing for Fast, Reliable Broadband," (Oct. 2022).

[54] USTA Comments at 53-54.

We disagree that the CCF study "lacks probative value," as it clearly demonstrates differential pricing in areas that lack a strong competitor to the incumbent cable ISP, Charter. The CCF study found that Charter extended better-priced promotional offers to people living in areas where AT&T (the incumbent telephone company ISP for the studied locations) had deployed fiber-to-the-home service than the offers Charter made to locations without AT&T FTTH service, and it also found that these better offers were in more-affluent neighborhoods. While the study only collected data for a small number of addresses in Los Angeles County and was limited to AT&T and Charter offerings, this does not render the study without probative value. Indeed, these were the prices faced by families living in these particular lower-income LA County neighborhoods, and despite the relatively small sample size there is no suggestion that Charter offered markedly different prices to other locations in these same neighborhoods. Thus it seems without question that these residents are missing out on what little competitive benefits may come in other LA County neighborhoods with duopoly competition.

It is true that the CCF study is limited in its geographic scope and may have missed offerings of other ISPs with insignificant market shares; but it is clear that this study offers evidence deserving further analysis and policy debate. The study's findings should not be surprising, as they reflect the outcome expected based on basic microeconomic principles: buyers facing only one dominant market provider will likely be offered worse terms than buyers with two or more viable sellers (who do not coordinate).

In the context of this proceeding, many commenters are focused on ILEC's geographic FTTH deployment decisions. But it is equally valid to ask the question: are cable company ISPs exploiting their monopoly market positions in those areas where they are truly the only option

for very-high speed internet service? And if so, does this exercise of monopoly power disproportionately impact the populations identified in Section 60506(b)(1)?

These research questions are best answered by the Commission. Current third-party research may lack the full rigor that a court would require, but it is probative and is filling the void left by the Commission's failure to collect robust data about deployment and price competition in the U.S. broadband market. Indeed, the Commission often fails to properly analyze the data it does collect,[55] and continues to sit idle on the recommendations of the National Broadband Plan to conduct such competition analysis and make full datasets available to third-party researchers under protective order.[56]

As we noted above, it is clear from industry commenters that they will take the Commission to court if it attempts to enforce Section 60506. The Commission should not cower in the face of this inevitability; it should anticipate it by initiating its own robust and rigorous

[55] *See, e.g.*, Comments of Free Press, *In the Matter of Modernizing the FCC Form 477 Data Program*, WC Docket 11-10, at 12-13 (filed Mar. 30, 2019) at 12-13 ("The kind of analysis [which used the raw Form 477 subscribership data] [presented] in Chapter Four of the Broadband Plan provides useful information about local market competition and the impacts on price and speed offerings. This new insight could be highly influential in the policymaking process, but it is important to note that the specific referenced econometric model in Chapter Four of the Plan is just one among dozens of possible model specifications that could be used to ask questions of the raw Form 477 data. While there is no doubt that the Commission itself can and should continue to explore this new treasure trove of data, it has thus far failed to do so outside of the National Broadband Plan, and therefore the full utility of the Form 477 data is not being realized. We therefore strongly urge the Commission to use Form 477 census tract subscribership data to calculate one-firm, two-firm, three-firm, and four-firm concentration ratios for each Census Tract. The Commission must also calculate the Herfindahl-Hirschman Index (HHI) values for each tract." (internal citations omitted)).

[56] *See, e.g.*, Comments of Free Press, *In the Matter of Establishing the Digital Opportunity Data Collection*, WC Docket 19-195, at 8-13 (filed Sept. 23, 2019) ("[I]t is critical for the Commission to finish the job of implementing the National Broadband Plan's recommendation that outside researchers be granted confidential access to the full, disaggregated Form 477 subscribership data. Though the Commission may have forgotten, it already directed the Wireline Competition Bureau to develop a system so that outside researchers can access confidential disaggregated Form 477 subscribership data, but the Bureau never acted on this directive.").

digital discrimination studies. Doing so will serve the purpose of identifying and understanding actionable instances of digital discrimination, while ensuring that ISPs who do abuse their market power in a discriminatory manner are not able to escape consequences based on the understandable limitations in third-party research.

III. Conclusion

The Commission has the authority and mandate to study, understand, and eliminate digital discrimination. With Section 60506 and prior legislation, Congress empowered the Commission with the tools needed to ensure every person can enjoy the benefits of equal access to broadband. Therefore the Commission must act to protect people living in monopoly areas from discrimination, and ensure that the benefits of broadband competition are enjoyed by all. The best way to address monopoly harms is to identify and sanction the providers who impose discriminatory terms and conditions. The Commission should not encourage and reward deployment discrimination by expanding USF to support ILEC fiber upgrades in already-served areas. Finally, in order for the Commission to effectively carry out its Section 60506 duties, it should immediately conduct more rigorous study of the digital discrimination issue.

Respectfully Submitted,

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