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**The FCC Should Reject a Disparate Impact Standard:  
Targeted Subsidies Should Be Used to Address Deployment Gaps**

by

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**I. Introduction and Summary**

Following the release of a Notice of Inquiry soliciting comments on March 17, 2022,<sup>1</sup> the FCC is preparing to propose rules for preventing "digital discrimination" in broadband Internet access. To date, there is no evidence of intentional discrimination in broadband deployment on account of income, race, or ethnicity. Nonetheless, debate has arisen over whether the Commission's rules should go beyond preventing intentional discrimination to impose liability on broadband Internet service providers (ISPs) on the basis of disparate impact – that is, on the basis of practices that are acknowledged to be nondiscriminatory on their face, but which are claimed to result in adverse effects on legally protected groups.

The Commission should follow Congress's instructions in the Infrastructure Investment and Jobs Act of 2021 by barring intentional discrimination. To the extent that there are, in fact, any areas disparately impacted by broadband deployments or practices, whether unintended or

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<sup>1</sup> Notice of Inquiry, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GEN Docket No. 22-69, March 17, 2022.

beyond ISPs' control, Congress and the Commission ought to subsidize, on a targeted basis, buildouts to ensure equal access and take other properly targeted remedial measures that will accelerate broadband deployment to all Americans.

Section 60506(b) of the Infrastructure Investment and Jobs Act requires the Commission to adopt rules to facilitate equal access to broadband Internet services and to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin."<sup>2</sup> It also requires that the rules for facilitating equal access are to take into account "issues of technical and economic feasibility."<sup>3</sup>

In May and June of this year, the Commission received public comments regarding what those rules ought to look like. Notably, the proceeding appears to have yielded zero evidence of intentional discrimination by broadband ISPs in deploying network facilities or in their terms of service. As Public Knowledge acknowledges in its reply comments:

Service providers and industry association comments emphasize their efforts to avoid policies and practices of intentional discrim[i]nation. There is broad agreement that this is likely the case; no commenter has alleged or described any example of invidious or intentional discrimination directed at people or communities based on race, ethnicity, or religion.<sup>4</sup>

As explained below, both the law and sound reasons of policy dictate that the Commission reject application of any form of disparate impact analysis in implementing the Infrastructure Investment and Jobs Act of 2021.

## **II. Affirmative Evidence of Non-Discrimination in Broadband Internet Services**

There is affirmative evidence that digital discrimination, intentional or otherwise, is *not* taking place in the United States. An analysis by former FCC Chief Economist Glenn Woroch of Form 477 data regarding census-block-level wireline deployment indicates that, as of the end of 2020, the percentage of households with access to broadband service offerings at 100 Mbps/20 Mbps was 93.8% for non-white households compared with 88.8% for white households.<sup>5</sup> As of that same date, wireline broadband service at 100 Mbps/20 Mbps was available almost equally to households above and below the Federal Poverty Guidelines, with 90.5% availability for households above the line compared to 89.5% of households below the line.<sup>6</sup>

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<sup>2</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60506(b)(1), 135 Stat. 429, 1245-1246 (2021), codified at 47 U.S.C. § 1754(b)(1).

<sup>3</sup> Infrastructure Act, § 60506(b); 47 U.S.C. § 1754(b).

<sup>4</sup> Reply Comments of Public Knowledge, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Docket No. 22-69 (June 30, 2022), at 7.

<sup>5</sup> Declaration of Glenn Woroch, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Docket No. 22-69 (June 30, 2022), at 7 (attached to Reply Comments of AT&T, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Docket No. 22-69 (June 30, 2022)).

<sup>6</sup> *Id.*

The accessibility of wireless broadband Internet services to nearly all Americans also constitutes strong evidence of non-discrimination. According to data cited in the Commission's *2020 Communications Marketplace Report*, by the end of that year, about 99% of Americans had access to 4G LTE wireless broadband services from three or more competing providers.<sup>7</sup> And it has been estimated that the overall rate of nationwide 5G network deployment by the three major mobile broadband ISPs – AT&T, T-Mobile, and Verizon – is 42% faster than for 4G networks.<sup>8</sup> Indeed, T-Mobile reports that its 4G LTE and 5G networks currently cover 310 million Americans, or 95% of the population, with plans to expand 5G coverage to 99% of the population by 2026.<sup>9</sup> And T-Mobile, for example, reports that its brands currently serve 95% of Black consumers, 96% of Hispanic consumers, and 98% of Asian consumers nationwide.<sup>10</sup>

Significantly, the broadband market's competitive conditions provide strong incentives for broadband ISPs to serve as many customers as they can. Annual capital investments in network facilities by broadband ISPs are enormous, with USTelecom reporting \$86 billion in broadband provider capex in 2021,<sup>11</sup> and CTIA reporting nearly \$35 billion in capex by wireless providers last year.<sup>12</sup> Thus, broadband ISPs have obvious financial incentives to maximize returns on their investments by retaining existing subscribers and by adding new subscribers. In today's market environment, dangers of foregone revenue opportunities, reduced competitiveness vis-à-vis market rivals, and massive loss of goodwill significantly diminish the likelihood that a broadband ISP would even contemplate engaging in discriminatory practices.

### **III. The Infrastructure Act's Text and Supreme Court Precedents Support an Intent-Based Understanding of "Digital Discrimination"**

Despite the lack of any evidence of discrimination, a debate ensued among some commenters over whether the FCC's forthcoming rules ought to define digital discrimination using an intent-based standard or a disparate impact standard that would apply even in the absence of any evidence of discriminatory intent. Some commenters, including Public Knowledge, urged the Commission to adopt a disparate impact standard.

The text of the Infrastructure Act requires an intent-based definitional standard for digital discrimination. Section 60506(b) authorizes the Commission to adopt rules that prevent digital discrimination "based on" specific categories, such as income level, race, and religion.<sup>13</sup> The Infrastructure Act's inclusion of the words "based on" in connection with

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<sup>7</sup> FCC, *Communications Marketplace Report, 2020 Communications Marketplace Report*, GN Docket 20-60 (released December 31, 2020), at ¶ 73 & Fig. II.A.34 (cited in Comments of CTIA, *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (May 16, 2022), at 4).

<sup>8</sup> *See* Comments of CTIA, GN Docket No. 22-69 at 4.

<sup>9</sup> Comments of T-Mobile USA, Inc., *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69 (May 16, 2022), at 3-4.

<sup>10</sup> Comments of T-Mobile USA, Inc., GN Docket No. 22-69, at 4.

<sup>11</sup> US Telecom, "2021 Broadband Capex Report," (July 18), available at: <https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf>.

<sup>12</sup> CTIA, "2022 Annual Survey Highlights" (September 13, 2022), at 3, available at: <https://api.ctia.org/wp-content/uploads/2022/09/2022-Annual-Survey.pdf>.

<sup>13</sup> Infrastructure Act, § 60506(b); 47 U.S.C. § 1754(b).

suspect or prohibited classifications and – most significantly for statutory interpretation – the *absence* of any broader catchall terms such as "results in" or "otherwise adversely effects" indicates that proof of intent is a necessary element of any successful claim of "digital discrimination."

The Supreme Court's jurisprudence expressly recognizes that Congress's inclusion of such catchall terms in anti-discrimination laws like Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), and the Fair Housing Act (FHA) means that those statutes are directed to the consequences of actions and not to actors' state of mind. In *Smith v. City of Jackson* (2005),<sup>14</sup> a plurality of the Court emphasized that Title VII and the ADEA include language "prohibit[ing] such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' race or age."<sup>15</sup> For that reason, the Court found those statutes authorized the use of a disparate impact standard, or at least are sufficiently ambiguous that they provide a basis for deferring to the interpretation of the agency administering the statutes.<sup>16</sup>

The Court reaffirmed this jurisprudential position in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015):

Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions.<sup>17</sup>

Moreover, in *Inclusive Communities Project*, the Court concluded that Congress was aware of the judicial precedents regarding catchall terms and disparate impact liability when it enacted amendments to the FHA.<sup>18</sup> Congress undoubtedly also was aware of *Inclusive Communities Project* when it enacted the Infrastructure Act and *declined* to include in the statute any such terminology. As a result, the Infrastructure Act confers no authority on the Commission to adopt a disparate impact standard for digital discrimination in broadband deployment.

Additionally, application of a disparate impact standard would be at odds with the Infrastructure Act's requirement that the Commission is required to "tak[e] into account the issues of technical and economic feasibility when" adopting rules to prevent digital

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<sup>14</sup> 544 U.S. 228 (2005).

<sup>15</sup> 544 U.S. 228, 235 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)) (emphasis added).

<sup>16</sup> See 544 U.S. 243-247 (Scalia, J., concurring in part and concurring in the judgment); *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 582 (2015) (Alito, J., dissenting) (discussing the *Smith* plurality and describing the ADEA's "otherwise prohibited" language as "*essential*" to Justice Scalia's "controlling opinion" in *Smith*") (emphasis in the original).

<sup>17</sup> 576 U.S. 519, 534-535.

<sup>18</sup> 576 U.S. at 536.

discrimination.<sup>19</sup> If Congress had favored a consequentialist approach by establishing disparate impact liability, it is highly unlikely, indeed, almost inconceivable, that it also would have required that due regard be given to ordinary business judgments about network deployments based on costs, demand, and return on investment. But Congress did require the Commission's rules to recognize and take into account the legitimacy of those technical and economic feasibility judgments by broadband ISPs, and this recognition confirms an intent-based standard for digital discrimination, not one based on disparate impact effects.

Also, a disparate impact standard is incongruous with the priorities and decisionmaking authority for subsidy awards under the Infrastructure Act's Broadband Equity, Access, and Deployment (BEAD) Program. Under the BEAD program, states – and not broadband ISPs – are responsible for making specific subsidy subgrant awards to broadband ISPs. Those awards are made in light of the Act's priorities, particularly regarding deployment to unserved areas, which are most likely to be rural areas. Thus, broadband ISPs do *not* have authority over which of their proposed projects will receive funding approval. Undoubtedly, the decisions by states – as well as other factors outside of a broadband ISP's control, including the local infrastructure siting prohibitions or well-known unreasonable permitting delays – likely will have a significant impact on broadband access outcomes in service areas. Those factors make application of a disparate impact liability standard against broadband ISPs' deployment efforts particularly unjustified.

Importantly, an intent-based standard is sufficiently robust to address any alleged harms through case-by-case adjudication by the Commission. Intentional discrimination encompasses not only overtly discriminatory actions, but also actions that are predicated upon facially neutral criteria that are, in fact, only a pretense or ruse to cover for willful, invidious discrimination.

#### **IV. Any Areas With Actual Gaps in Broadband Access or Adoption Should Be Targeted for Subsidies Under a Market-Friendly Framework That Promotes Rapid Deployment**

The FCC's forthcoming rules for preventing digital discrimination, including its procedures for filing and adjudicating complaints alleging discrimination, should focus exclusively on intentional harm. To the extent that future complaints yield actual evidence that specific broadband ISPs' deployment practices are causing disparate impact on access based on income level, race, ethnicity, color, religion, or national origin within their service areas, then the Commission ought to call attention to the disparity. And instead of holding ISPs liable for a result that they never intended, that they sought to avoid, and that likely was outside their control, the better remedy in situations needing special attention is to target those areas with subsidies to overcome any technical or economic barriers to broadband deployment and ensure equal access for all.

Subsidies targeted to any identified gaps in broadband access or adoption should be part of a broader market-oriented policy framework that promotes continued strong infrastructure investment and removal of regulatory barriers to deployment of network facilities.

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<sup>19</sup> Infrastructure Act, § 60506(b); 47 U.S.C. § 1754(b). See also § 60506(b); § 1754(a) (containing policy statement regarding equal access "insofar as technically and economically feasible").

Encouraging the streamlining of infrastructure permit approval processes by local governments – and preempting unreasonable process delays and obstacles – will help speed deployment of fiber, cable 10G, and 5G wireless services to all Americans and close any such gaps. More timely repurposing of additional spectrum for commercial wireless services also will hasten access to fixed and mobile 5G wireless networks. By taking such steps to promote the continued investment and success of the competitive marketplace, the Commission would help ensure equal access to broadband.

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### **Further Readings**

Michelle P. Connolly, "[NTIA's BEAD Program Needs Revisions to Succeed](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 50 (October 3, 2022).

Seth L. Cooper and Andrew K. Magloughlin, "[The FCC Should Preserve and Expand Its Broadband Infrastructure](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 30 (June 8, 2022).

Andrew Long, "[Future Guidance Can Fix NTIA's Flawed 'Fiber-First' Approach](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 27 (May 24, 2022).

Seth L. Cooper, "[Fixed Wireless Access Is Boosting Rural Broadband and Consumer Choice](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 21 (April 25, 2022).

Andrew Long, "[Overlapping Broadband Appropriations Demand Agency Coordination: New FCC Maps Can Track Grants, Avert Waste](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 12 (March 2, 2022).

[Comments of the Free State Foundation](#), *In the Matter of Infrastructure Investment and Jobs Act Implementation*, NTIA Docket No. 220105-0002 (February 3, 2022).