

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF NEXT CENTURY CITIES

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I. Introduction

Next Century Cities (“NCC”)¹ submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Inquiry on the prevention and elimination of digital discrimination.² The Infrastructure Investment and Jobs Act tasks the Commission with establishing rules to prevent and eliminate digital discrimination.³ The statute sets forth that all subscribers should be able to benefit from equal access to broadband Internet access service (“BIAS”) within the service area of a provider. To the extent that it is technically and economically feasible.⁴ Additionally, the statute requires the Commission take steps to ensure that all people of the United States are able to benefit from equal access to broadband service.⁵ How the Commission decides to define, identify, and enforce rules against digital discrimination can lead to a significant boon for consumers and the services they are able to access. However, if the Commission does not take a broad approach to both identifying and

¹ Next Century Cities is a nonprofit nonpartisan 501(c)(3) coalition of over 200 member municipalities that work collaboratively with local leaders to ensure reliable and affordable broadband access for every community.

² See *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Inquiry (2022) (Digital Discrimination NoI).

³ 47 U.S.C. § 1754.

⁴ *Id.*

⁵ *Id.*

enforcing rules against digital discrimination, countless consumers will continue to be left without Internet service.

II. Equal Access is not Equitable Access.

The Commission also seeks comment on the definition of “Equal Access.” Congress defined “Equal Access” as “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.”⁶ However, this definition does not address the underlying concerns present in digital discrimination. “Equal Access,” as currently defined, only requires service to be available for purchase and be meaningfully similar to services provided elsewhere. However, this says nothing about whether a consumer is actually able to utilize this service. While service may be available in a consumer's service area, if they cannot afford it, it is as if they do not have access at all.

Further, focusing on “equal access” rather than “equitable access” ensures that low-income consumers are not disproportionately disadvantaged. If the standard continues to be based on equal access to subscribe, the more money an individual makes, the better the deal they will likely receive. As the Commission moves forward, it must work closely with municipalities to craft a definition that allows municipalities the flexibility to address how digital discrimination presents in their communities. This allows the Commission the dexterity to address the widely variable ways in which digital discrimination occurs. Local officials are acutely aware of how historical disinvestment has led to a lack of digital infrastructure or low digital adoption rates.

⁶ See 47 U.S.C. § 1754(a).

III. Facilitating Equal Access

The Commission also seeks comment on its obligation to adopt rules to facilitate equal access under the IIA.⁷ By maintaining a broad definition of the word “facilitate” the Commission will retain broad discretion to adopt rules requiring access to be made available to areas subject to digital discrimination. In this instance, the Commission should consult with the communities affected by digital discrimination before implementing any rules. Similarly, the Commission must ensure that data collection measures are easily accessible and take into account every available data source rather than simply the Commission’s Form 477 data.

A. Defining Digital Discrimination

The definition of digital discrimination is key. If the FCC’s definition is too narrow, it will fail to encapsulate all the possible instances in which digital discrimination might occur. However, creating a definition that is too broad will also have detrimental effects, making enforcement unreasonably difficult.

The definition of equal access in the paragraph (a)(2) of the Communications Act⁸ does not provide a meaningful starting point for determining why a household lacks access to broadband. As stated, a community may have equal access to broadband, but that broadband may be unavailable to households due to affordability or digital literacy limitations. Further, the FCC’s current definition of service may in and of itself contribute to the digital discrimination challenges that some communities face. The commission should consider that “equal opportunity

⁷ 47 U.S.C. § 1754(b).

⁸ 47 U.S.C. § 1754(a)(2).

to subscribe” also take into account a consumer’s ability to obtain service, not just if service is available in their area.

Additionally, the Commission seeks comment on what the comparability of speeds, capacities, and latency is.⁹ comparing services across what is offered through marketing materials does not adequately ensure comparability of services. Often, speeds and latency figures that are realized by consumers are vastly different from what is advertised. Utilizing realized speeds as a measure of comparability is a clear indicator whether areas that have been potentially digitally discriminated against are receiving comparable service to areas that have not.

Finally, the Commission should consider the geographic area considered in “a given area” as the service area of a provider. While some providers claim that they serve an entire population in a certain geographic area. The ability of a consumer to engage that provider for service varies widely. Several municipalities have suggested that data generated at the block level would most accurately allow them to identify and address digital discrimination challenges in their communities. Further, these municipalities have highlighted that certain geographic designations such as zip code and census block may not provide accurate information as broadband connectivity can vary widely across them. Both zip code and census block areas can vary widely in size, making it difficult for local leaders in small and mid-sized communities to discern where

⁹ Digital Discrimination NoI at para. 13.

disparities exist.¹⁰ Since local leaders will be critical partners to the Commission in enforcement, their ability to identify discrimination when it occurs is paramount.

B. Identifying Digital Discrimination: Anecdotal and Data Driven Evidence is Necessary.

The Commission also seeks comment on the data sources that would help enable it to identify occurrences of digital discrimination.¹¹ Across the nation, many municipalities have already begun to collect demographic information and anecdotal evidence from their communities to identify where digital discrimination is occurring. For example, cities such as Oakland that have departments dedicated to race and equity have already begun researching the ways in which racial equity has impacted their community.¹² This kind of data is freely available to help state, local, and federal initiatives targeted at bridging the digital divide. Other California communities have also begun collecting digital equity data. The city of Long Beach found that households of color lacked an Internet subscription at twice the rate of white residents.¹³ In the city of Chula Vista, the city found that the most disconnected included residents with disabilities, those experiencing homelessness and housing insecurity, job seekers, those who are low-income and unbanked, migrants and refugees, people who did not speak English, older adults and students.¹⁴ San Francisco also found that the most persistent use, access, and skill gaps existed for residents

¹⁰ U.S. Census Bureau, Glossary, <https://www.census.gov/programs-surveys/geography/about/glossary.html> (“Blocks in suburban and rural areas may be larger, more irregular in shape, and bounded by a variety of features, such as roads, streams, and transmission lines. In remote areas, blocks may even encompass hundreds of square miles.”); Matt Stiles, *The ZIP Code Turns 50 Today; Here Are 9 That Stand Out* (July 1, 2013), <https://www.npr.org/sections/thetwo-way/2013/07/01/197623129/the-zip-code-turns-50-today-here-are-9-that-stand-out> (“This rural area in Tonopah, Nev., has the largest ZIP code in the lower 48 states. At 10,000 square miles, it’s a little larger than the state of Maryland.”).

¹¹ Digital Discrimination NOI at para. 26.

¹² See e.g., City of Oakland, Oakland Equity Indicators (2018), <https://cao-94612.s3.amazonaws.com/documents/2018-Equity-Indicators-Full-Report.pdf>.

¹³ 6 Long Beach Digital Inclusion Roadmap, 11 (June 2021), <https://longbeach.gov/globalassets/ti/media-library/documents/digital-inclusion/long-beach-digital-inclusion-roadmap-final-june-2021>.

¹⁴ City of Chula Vista, *Chula Vista Adopts Groundbreaking Plan to Close Digital Divide* (May 26, 2020), <https://www.chulavistaca.gov/Home/Components/News/News/3133/8221?arch=1>.

who are low-income, senior, limited English proficiency, or have a disability.¹⁵ These types of findings are not solely limited to California. Many communities are able to express which residents are unable to connect and the identifiers above are often at the core of those affected.

Similarly, the 3rd District of Kansas City, Missouri, has a well-documented history of redlining and segregation.¹⁶ Available data shows that the 3rd District has the least Internet Connectivity among the Kansas City Council Districts.¹⁷ While there have been some revitalization efforts, particularly in the historic 18th and Vine District,¹⁸ but this is a relatively small geographic area within the 3rd District. There is much more thought and work that must be done to promote vibrant and sustainable local economies and generational wealth throughout the 3rd District.

The Commission is also uniquely positioned to make recommendations on state and local information collection practices ensuring any data collected by states or municipalities is usable by the Commission.

Further, in 2018, the Government Accountability Office released a report discussing the Federal Communications Commission's overstatement of broadband availability, which included insights from Tribal leaders.¹⁹ Many of the participants reiterated that collaboration between tribal leaders

¹⁵ San Francisco Digital Equity Strategic Plan, 13 (2019), https://sfmohcd.org/sites/default/files/SF_Digital_Equity_Strategic_Plan_2019.pdf.

¹⁶ Diane Euston & Tim Reidy, *Dissecting the Troost Divide and racial segregation in Kansas City*, Martin City Telegraph (June 30, 2020), <https://martincitytelegraph.com/2020/06/30/dissecting-the-troost-divide-and-racial-segregation-in-kansas-city/>.

¹⁷ Charlie Keegan, *Initiative closes digital divide in Kansas City, Missouri's urban core*, KSHB (Mar. 01, 2022), <https://www.kshb.com/news/national/two-americas/initiative-closes-digital-divide-in-kansas-city-missouris-urban-core>.

¹⁸ See e.g. Carlos Moreno, *As private money pours into 18th and Vine, residents worry about a 'plastic Disneyland'*, NPR (Feb. 23, 2022), <https://www.kcur.org/housing-development-section/2022-02-23/as-private-money-pours-into-18th-and-vine-residents-worry-about-a-plastic-disneyland>; 18th & Vine Historic District, African American Heritage Trail of Kansas City, MO, <https://aahtkc.org/18thandvine>.

¹⁹ See generally FCC's Data Overstate Access on Tribal Lands (2018), <https://www.gao.gov/assets/gao->

and federal agencies is imperative.²⁰ The historic exclusion of Tribal leaders from data collection processes has created information gaps on broadband availability. These gaps will only continue to widen if the Commission does not work closely with Tribal leaders to understand where digital discrimination is occurring on Tribal lands.

Next Century Cities' member communities have highlighted specific data they believe the Commission should collect. Local leaders have suggested that the Commission collect realized connection and latency speeds in relation to the advertised speed and price of the plan purchased. In addition, other local officials have suggested the collection of accurate information on how many service providers offer services in a given location. These providers can be wireline or wireless depending on the types of service majorly offered in a given location. Finally, municipal officials have highlighted the need for the FCC to collect Capital and Operating expenditure costs for providers in their area. This will provide much-needed transparency for local officials who are working diligently to understand the decisions many Internet service providers make in and around their communities.

Working with every stakeholder at a local, state, and Tribal level ensures that the Commission's conclusions are supported by a variety of data. Decisions can no longer be simply based on the biased data historically provided by the industry. Having a clear understanding of broadband accessibility is key to meaningfully addressing digital discrimination.

C. Practices are a More Meaningful Indicator of Discrimination than Intent.

[18-630.pdf](#)

²⁰ *Id.* at 29-30.

Historically, technology has followed wealth. The newest technologies are deployed in the wealthiest areas first and low-income areas are often left with the bare minimum if they receive service at all.²¹ In cities and towns across the country, one block can make the difference between a consumer choosing their preferred service provider, and not being able to connect at all.²² While service providers may not intentionally choose to keep these people disconnected, the way in which services are deployed perpetuates a model that is unsustainable.

The Department of Housing and Urban Development prohibits:

[U]sing different qualification criteria or applications, or sale or rental standards or procedures, such as income standards, application requirements, applications fees, credit analysis or sale or rental approval procedures or other requirements, because of a protected characteristic.²³

The Commission could utilize this standard to prohibit the provision of broadband based on the average income level of an area. The IJJA establishes that one aspect of facilitating equal access is preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.²⁴ Here, a provider may not intend to leave low-income or communities of color disconnected, but in practice, this is often the case.²⁵ As the Commission determines how to prohibit digital discrimination it must take into considerations the

²¹ See Ernesto Falcon, What Low-Income People Will Lose with a Deadlocked FCC, EFF (Apr. 26, 2022), <https://www.eff.org/deeplinks/2022/04/what-low-income-people-will-lose-deadlocked-fcc>.

²² *Id.*

²³ See 47 CFR §§ 73.2080(a), 76.73(a).

²⁴ 47 U.S.C. § 1754(b)(1).

²⁵ Shara Tibken, *The broadband gap's dirty secret: Redlining still exists in digital form*, CNET (June 28, 2021), <https://www.cnet.com/home/internet/features/the-broadband-gaps-dirty-secret-redlining-still-exists-in-digital-form/>.

income-level of unserved communities and the demographics of the consumers that live there. The Commission asks whether it should adopt rules to require, encourage, or otherwise incentivize certain entities to take affirmative steps to prevent digital discrimination.²⁶ In this instance putting in place hard and fast requirements will ensure that providers have clear guidelines on what will and will not constitute digital discrimination.

Further, the Commission seeks comment on whether it should adopt rules that would allow individuals to bring claims of digital discrimination against providers. Promulgating rules that empower states, municipalities, and consumers to affirmatively bring claims against service providers for digital discrimination allows the Commission to more easily respond to digital discrimination. States, municipalities, and residents are able to clearly see where service is and is not available in their communities. Allowing them to affirmatively bring this to the attention of the Commission furthers the Commission's goals of identifying and eradicating digital discrimination.

Adopting clear rules defining which practices constitute digital discrimination and allowing states, municipalities, and consumers to bring claims of digital discrimination are two the Commission can take. These steps will inherently help combat the historic practices that unfairly disadvantage low-income and communities of color. This model has allowed too many communities to be left behind or be subjected to obsolete connectivity technologies. In order to truly address digital discrimination, there must be a fundamental shift in the ways in which we view infrastructure deployment.

²⁶ Digital Discrimination NoI para. 31.

D. Technological and Economic Feasibility are not a One-Size-Fits-All Safe Harbor.

The IJA requires the Commission to take into account technical and economic feasibility when adopting rules to facilitate equal access to BIAS.²⁷ However, this safe harbor cannot be so overly broad that it defeats the very purpose of the Commission's rules to eliminate digital discrimination. For some areas, such as Alaska and the Rocky Mountains, weather and temperature conditions can make it difficult to deploy wireline service for many months of the year.²⁸ For others, population density may be so low that there is no conceivable way in which service deployment would be profitable. However, these areas should not be relegated to second-class service or no service at all.

Not all service providers are created equal, for some it may be easier to take on a difficult deployment project. Others may not have the financial resources to serve a hard-to-reach or low population density area. In these situations, large providers are positioned better to sustain marginal losses over a period of time than are smaller providers or cooperatives.

IV. The Burden Cannot Be Placed on State and Municipal Governments to Prevent Digital Discrimination

Digital discrimination has existed long before the COVID-19 pandemic shed significant light on how disparate deployment practices have left low-income and communities of color at a disadvantage. Many municipal officials are working diligently to develop equitable services that fill connectivity gaps, however, they cannot shoulder the entire burden alone. The Commission

²⁷ 47 U.S.C. § 1754(b).

²⁸ Shourjya Mookerjee, *Building out Alaska's broadband infrastructure*, GCN (Nov. 30, 2021), <https://gcn.com/state-local/2021/11/building-out-alaskas-broadband-infrastructure/316311/>; National Snow and Ice Data Center, *All About Frozen Ground*, https://nsidc.org/cryosphere/frozenground/whereis_fg.html#:~:text=24%20percent%20of%20the%20land.and%20other%20higher%20mountain%20regions (last visited May 5, 2022).

must work in tandem with state, local and Tribal partners to ensure that it understands exactly how digital discrimination impacts communities across the nation.

Far too often, localities are stripped of the bargaining power and tools they need to provide a meaningful check on broadband providers' infrastructure deployment. Here, a similar issue arises. Municipal officials are once again working to hold providers accountable and connect the historically disinvested portions of their communities while lacking critical resources and oversight authority.

The Commission can help municipal officials by empowering them to hold providers accountable for service to an entire community instead of only the most affluent or densely populated areas. Local governments are uniquely positioned to oversee equitable digital infrastructure investment in their communities. Federal and state resources paired with flexible funding guides and community-centered policies can buttress a communities' digital equity planning.

V. Consumer Complaint Process

The Infrastructure Investment and Jobs Act also requires that the Commission review its public complaint process to accept complaints related to digital discrimination.²⁹ In its current iteration, the Commission's Consumer Complaint Center provides a portal for consumers to submit informal complaints about various issues.³⁰

²⁹ 47 U.S.C. § 1754(e).

³⁰ Consumer Complaint Center, FCC, <https://consumercomplaints.fcc.gov/hc/en-us> (last accessed May 4, 2022).

NCC members agree that there are several changes the Commission can make to the current complaint process to accept complaints from those who are victims of digital discrimination. NCC members noted that including a separate, easily identifiable link to a digital discrimination complaint form would help consumers be certain they are providing complaints through the correct form. In addition, the establishment of a call center would be instrumental in receiving complaints from those who do not have access to a broadband connection. In some instances, consumers may be unable to access a paper form online, and a paper complaint may not have the same follow up as an online or phone submitted complaint.

NCC members also agreed that there must be separate complaint submission portals for consumers filing individually and for municipal officials or community organizations filing on behalf of multiple residents. Differentiating between consumers and state, local, or Tribal governments allows government entities to submit data and work more closely with the FCC to address digital discrimination.

VI. Conclusion

Digital discrimination is a significant problem that is not only limited to the availability of infrastructure. Disparities in service deployments have led to unaffordable service in some communities while leaving others without the tools or digital skills necessary to engage in our digital society. By engaging with municipal leaders in meaningful discussions about the conditions they face, the Commission can gather a clear understanding of the impact of digital discrimination on communities. Digital discrimination is a symptom of engrained historic disinvestment practices. Now that we have identified the issue, it is time to take clear, purposeful steps to eliminate it.