

**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 THE GREENLINING INSTITUTE**

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February 21st, 2023

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The Greenlining Institute (“GLI”) submits these comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (“NPRM”) GLI works toward a future when communities of color can build wealth, live in healthy places filled with economic opportunity, and are ready to meet the challenges posed by climate change. Our multifaceted advocacy efforts address the root causes of racial, economic, and environmental inequities in order to meaningfully transform the material conditions of communities of color in California and across the nation. As an organization, we see closing the digital divide as a necessary step in equipping communities of color with the tools and connectivity that is necessary to survive and thrive in today’s society.

We commend the commission for their work to ensure that equality of access to broadband internet services is afforded to all Americans. In particular, recent action to connect underserved communities of color should be commended. We hope that this rulemaking process results in a federal statute that prevents further discrimination in the provision of internet services. The purpose of the Federal Communications Commission was explicitly expressed as ensuring that “wire communication” methods were available to all Americans at reasonable charges and mentions a desire to prevent discrimination by a variety of protected classes.<sup>1</sup>

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<sup>1</sup> 47 U.S.C. §151

Addressing digital discrimination and ensuring all Americans have access to equivalent levels of broadband service is in line with historical intent of the agency, and is critical to ensure the expenditure of current and future federal investments is done in a way which is equitable and serves the most marginalized within our country. In addition, the commission has a legal mandate to ensure broadband access for Americans, and could use this rulemaking process to encourage private investments in historically underserved communities alongside the deployment of federal broadband funds.<sup>2</sup> GLI looks forward to continued conversations with the commission to ensure that low-income communities of color have access to affordable and high quality broadband internet service that enables them to reach economic prosperity in an increasingly digital age.

### **Defining “Digital Discrimination of Access” is Key**

High-quality internet access provides an invaluable intermediary for Americans to tap into public resources and upwards economic opportunities. It is additionally under the purview of the commission to collect consumer data in order to ensure affordable and accessible broadband is available to all Americans. As such, we would also like to note that the impacts of digital discrimination go beyond merely the deployment of physical infrastructure and should encapsulate a wide range of discriminatory practices as they impact adoption, affordability, and actual usage of broadband services. In order to effectively capture the full spectrum of outcomes that allow digital discrimination of access, the commission should avoid the creation of an overly narrow definition that focuses only on immediate “access” to broadband service. Rather, the commission should move to encapsulate the right to digital access for all consumers, even those who would be otherwise categorized as “potential” rather than current customers. For many Americans, the choice to live without high-speed broadband service is one made by necessity through either lack of availability in their local area or lack of financial resources to pay for the service.

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<sup>2</sup> 47 U.S.C. § 1302 (a).

When determining whether or not a consumer has access to broadband internet services, the commission could consider the impact of both data caps on service as well as latency. Traditionally these two factors have not been considered as part of the definition of service however, for many low-income households who are forced to rely on portable hotspots or cellular data for internet access these two factors can greatly impact the ability of these consumers to navigate the internet in ways that allow economic prosperity and equitable access to their wealthier peers. When setting forth parameters of digital discrimination, the commission should establish a clear metric for a consumer to be considered “served” by a provider as they would with broadband speeds and other metrics of quality.

We strongly recommend the commission look further into how usage-based pricing of internet services is used to increase the barriers to high-speed broadband access for those on limited incomes. Research conducted by the Government Accountability Office in 2014 clearly highlights that data caps are particularly burdensome for low income consumers, and can result in consumers being charged excessive overage fees that make affordability a significant challenge.<sup>3</sup> When seeking to understand where digital discrimination is occurring, the FCC could utilize the collection of information related to the usage of data caps for both home Internet services and mobile data plans in situations that are exempt from typical network management practices in order to gauge where and which consumers are being unfairly targeted with excessive overage charges. Relatedly, the commission could use this same data to establish a clear framework for the industry to understand what is considered fair to include as a network management tool.

Discriminatory pricing is another metric the commission should consider when assessing the ability of a consumer to access broadband services. Access should mean it is equally available on equal terms to consumers. Thus, lower income areas should not be paying higher costs for equivalent services because this is not only unequal access, but also allowing for the creation of a higher barrier of entry to the service based on income which is typically understood

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<sup>3</sup> Nov 2014 GAO report, “Broadband Internet: FCC Should Track the Application of Fixed Internet Usage-Based Pricing and Help Improve Consumer Education” <https://www.gao.gov/products/gao-15-108>

to be a protected class. Ubiquitous deployment among all income brackets of high quality and high-speed equipment should be the goal for providers of broadband internet.

In regard to the arguments made by ISPs that the application of this standard would have a chilling effect on future deployment, we encourage the commission to consider the rates at which ISPs will soon have to replace older legacy equipment, as well as the increased costs of service provision for providers to service areas without fiber optic equipment. While the cost of initial adoption of fiber optic technology is higher than legacy products or some fixed wireless products, fiber optic technology is understood to be the best option for most consumers in terms of speed, quality, and cost of service provision.<sup>4</sup> Additionally, the cost-of-service provision for an ISP will only continue to increase in low-income communities without fiber optic equipment thus creating an argument against disinvestment being the best business case. Equitable investment in fiber broadband will come at a high upfront cost to service providers but would likely still be able to create a positive return on investment albeit on a longer timescale. Being cognizant of the need for ISPs to make profit in order to pay back the initial cost of deployment, the commission should seek to identify and better understand if it is truly cost prohibitive to invest in (and earn money in) low-income communities, or if service providers are merely choosing to provide service to higher income communities that are being additionally subsidized. In order to fulfill the goal of preventing digital discrimination, the FCC could additionally include in its criteria a way to understand if overinvestment is being made in wealthier and whiter communities at the expense of low-income communities of color. Rather than merely looking at where the providers are not deploying enough, it would be in the best interest of consumers to also understand where overinvestment is being made, as well as the financial risk associated with making these investments in communities that already have near complete adoption.

### **The Commission Should Consider both Disparate Impact and Disparate Treatment**

When developing the framework to address digital discrimination the commission should prioritize developing guidelines that are commensurate with the scope of the challenge. Thus, the

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<sup>4</sup> Brookings Report, "Striking a deal to strengthen broadband access for all"  
<https://www.brookings.edu/research/striking-a-deal-to-strengthen-broadband-access-for-all/>

Commission should follow a dual-pronged approach in tracking both disparate impact and intent, with a particular focus on how disparate impact has led to current day inequities in multiple points of access such as differential service quality and pricing by community. While we support disparate intent to the extent that the commission can find it, disparate intent alone would put the average consumer at a strategic disadvantage in regard to the burden of proof required to prove the intent of ISPs. We do not oppose the FCC's use of this metric in addition to disparate impact but would encourage a focus on disparate impact as the main metric used to ascertain whether or not digital discrimination has occurred. Upholding a standard of enforcement for disparate impact would allow the commission to hold ISPs to a clear standard and could discourage the implementation of business practices that lead to highly inequitable outcomes for low-income communities of color across the country. Adoption of the disparate impact standard in the wake of the Civil Rights Act of 1964 allowed for a whole of government approach that targeted discrimination in public goods such as education and housing. It would be consistent to apply this similar treatment to digital public infrastructure and services such as broadband internet.

An example that the commission could consider would be the Disparate Impact Standard used by the Department of Justice.<sup>5</sup> The commission could then evaluate whether digital discrimination had occurred by looking at data related to quantifiable metrics such as adoption rates, broadband pricing, and investments made by service providers in equipment modernization efforts such as the installation of fiber. In the context of broadband provision, the commission could redefine adversity to refer to instances in which consumers of color are paying higher prices compared to white neighbors, or if there is less per capita investment in neighborhoods with more racial diversity. It would be critical for consumers to have the opportunity to challenge their available service quality without the burden of proving the intent of ISPs. In particular, there should be an opportunity for the commission to request information from providers and consider whether there are alternative business decisions that could achieve similar financial returns with less discriminatory impacts. In major metropolitan areas with similar population

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<sup>5</sup> Section VII: Proving Discrimination – Disparate Impact, see “Establishing an Adverse Disparate Impact” [https://www.justice.gov/crt/fcs/T6Manual7#:~:text=To%20establish%20an%20adverse%20disparate,and%20\(4\)%20establish%20causation.](https://www.justice.gov/crt/fcs/T6Manual7#:~:text=To%20establish%20an%20adverse%20disparate,and%20(4)%20establish%20causation.)

density, a decision to chronically invest in nearly identical density communities with vastly different racial proportions could show both disparate impact and intent.

### **Improved Data Collection is Needed to Identify Discrimination**

In order to appropriately identify digital discrimination, the commission will need to collect additional consumer level data from internet service providers. For the purposes of this specific rulemaking, we additionally recommend the commission consider the definition of a “subscriber” to encompass those who currently receive service, those who previously received service, and those who would otherwise be prospective customers of a specific service provider. When collecting data, increased granularity is the overall goal in order to appropriately be able to identify instances of digital discrimination in broadband service provision. In this vein, we request that the commission collect and retain subscriber level data on pricing and speeds at a consumer level rather than at a zip code level. While zip code level data is helpful to garner a bird’s eye view of broadband access across the nation at regular intervals it does not provide the needed granularity to pinpoint issues (such as discriminatory pricing or service provision) at the local level. In order to identify instances of discrimination on a smaller scale, we must go beyond collecting zip code level data because zip codes are not defined geographic areas, they are rather an aggregate of addresses and they do not provide the necessary information for determining digital discrimination on a granular (ex. household) basis. Additionally, subscriber level data would help us with identifying digital discrimination at a more exact level because of decreased margins of error within smaller datasets. The margins of error on zip code data is too large, and thus the largest level unit we would find acceptable would be census tract level collection of pricing data.

### **Enforcement is Needed to Direct Investments to Low-Income Communities**

GLI believes that the commission should follow its standard enforcement procedures including but not limited to letters of inquiry, notices of apparent liability, and forfeiture orders. In addition, we support the commission if they so choose to use the burden-shifting analysis model for enforcement of digital discrimination. With the use of this model, the burden of proof would rest fairly on the providers to articulate the business case for what would otherwise be identified as discriminatory business practices. It could then be under the discretion of the FCC’s

investigative units to discern if the intent was discriminatory or not. In cases where the commission is able to prove that providers have engaged in discriminatory business practices, it would be crucial for the commission to not only have the ability to impose financial penalties but to also collect them. Monetary forfeitures should be used as an opportunity to incentivize improved business practices within the industry. Due to the fact that low-income communities of color often lack the financial resources to go through the formal complaint process, the commission should allow nonprofit organizations and local governments to work on the behalf of consumers to assist in the process of identifying and rectifying instances of digital discrimination. Lastly, the commission must implement a transparent complaint process for consumers to search and find public reporting of the complaints filed and resolved with service providers.

## **Conclusion**

Understanding that the commission is currently undergoing the rulemaking process for multiple policy decisions such as broadband labeling, and is also seeking to collect consumer testimonials, the promotion of all current FCC efforts related to digital discrimination should be communicated together for full impact. Coordination across multiple issue areas is important to ensure that consumers and stakeholders at the state and local levels are aware of their new rights. Access to affordable and high-quality broadband internet is a necessity for all Americans to achieve economic prosperity in an increasingly digital world. In particular, this is most true for low-income communities of color who have traditionally been locked out of wealth building activities. The Greenlining Institute is optimistic that the full implementation of this rulemaking in line with Congressional intent will allow for more Americans to benefit from the numerous advantages that a high-speed internet connection facilitates.

Dated: February 21st, 2023