

Comments for the Record



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

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Comments of Jeffrey Westling^[1]

This NOI begins a congressionally mandated examination of equal access to broadband, as well as potential deployment discrimination by broadband providers.^[2] Promoting access to high-speed broadband is an important goal of the Federal Communications Commission (FCC), and the record in this proceeding will shed valuable insights into current gaps in coverage, as well as what may be causing these gaps.

At the outset, it is important to highlight that broadband providers do not intentionally discriminate against any group of potential subscribers.^[3] Broadband deployment requires significant resources and, therefore, potential returns on that investment.^[4] When a market lacks a business case for deployment, providers will likely invest fewer resources into expanding their networks into those areas. Firms will maximize profits by serving any customer regardless of race, ethnicity, gender, or any other factor if that offering can generate more revenue than it costs to deploy. If disparate deployments impact communities differently, the FCC can and should investigate why it is happening.

The FCC should also be careful not to distort markets. Broadband deployment requires significant resources and comes with risks; if the FCC prescribes overbearing rules to address the problem, the solutions could run counter to the agency's goals of facilitating equal access. As the FCC begins to study equal access and digital discrimination, it should focus on the data to answer these questions: Does a disparity exist, which factors led to the disparity, and which solutions can limit that disparity? The following comments briefly discuss specific considerations in the NOI, which will help frame how the FCC should think about these issues as it drafts specific rules.

Promoting Equal Access to Broadband

Equal access and digital discrimination, though related, differ in scope and meaning. As defined by the Infrastructure Investment and Jobs Act, digital discrimination can limit equal access, but facilitating equal access requires a much broader examination of the deployment process.^[5]

Equal access does not mean a uniformity of offerings across every market

The statute defines “equal access” as the “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] From the very plain meaning of the statute, equal access cannot mean a broadband provider offering the same service at the same price in all locations, as the statute limits offerings to a given area.

Different markets have varying characteristics that affect the offerings an Internet service provider can provide. For example, in a particularly rural area with few customers, the high cost of deployment may make full gigabit speed service uneconomical, as the cost of the infrastructure and the deployment just can’t be recouped by the limited number of households. At the same time, a market with a significant base of businesses that require gigabit speeds may justify advanced deployments. The statute rightly acknowledges that these two areas drastically differ and requiring the same offerings in both locations would not make economic sense.[7]

Instead, the key language in the statute is “the equal opportunity to subscribe to an offered service.”[8] If a provider offers a service to the public, but specifically excludes individuals who would otherwise be eligible to subscribe to the service, then those individuals do not have equal access to the service. The distinguishing factor, then, is whether the service is offered in an area, not whether other markets offer different plans or subscriptions to consumers.

Congress also did not mean to so narrowly constrain the term “equal access” to render it meaningless. The term area could drastically change depending on how the FCC decides to interpret it. As explained above, the proper meaning can’t be so broad that every single American resides in the same area, as this would essentially mean that all Americans must have access to the highest quality broadband offered somewhere in the United States. At the same time, the FCC shouldn’t so narrowly interpret the term area so that an individual household constitutes an area. Making such an interpretation would render the statute effectively meaningless, as a provider could simply not offer that service to the area of the household.

As the FCC considers the definition of equal access and specifically what constitutes an area, it should approach the problem from an economic lens. Providers offer services based on the demand of communities: If a community would pay for higher speed networks, the providers will invest the resources necessary to upgrade the networks.[9] As long as all people within that community can subscribe to that service, consumers in that market will have equal access to broadband. If providers lack an economic justification for investing in a given area because of a lack of potential return on investment, that area is likely a distinct market.

The FCC should consider how to facilitate equal access holistically, considering how specific rules will affect investment into the communities it seeks to support

The market should be the primary tool for creating equal broadband access. According to data from USTelecom, currently 98% of United States households have at least one fixed, high-speed broadband offering, and 93% have offerings of over 100 Mbps download speeds[10] And 92% of households take advantage of these offerings and subscribe to a plan.[11] To achieve this coverage, broadband providers have invested over \$700 per household annually and \$1.9 trillion in communications capital expenditures since 1996.[12] Clearly, market forces are driving significant investment into infrastructure deployment.

The FCC can further facilitate equal access by limiting risk and uncertainty providers face when making investment decisions. For example, the White House supports reclassification of broadband as a Title II telecommunications service to ensure the FCC has the authority to oversee the broadband industry and potentially impose utility-style regulation on broadband.[13] While undoubtedly well intentioned, this approach

will likely deter investment into networks, driving providers to continue to focus on the most profitable areas and skip riskier investments to areas or communities that may not generate the same revenue.[14] If the goal of the FCC is to ensure that all communities have access to high-speed broadband, then it should incentivize investment into all areas of the country, not deter private investment from broadband providers.

Apart from the general regulatory regime, the FCC should also continue to work on streamlining the deployment process. When deploying, broadband providers need to obtain permits, acquire access rights, deal with environmental regulations, and work with the local government to actually deploy the infrastructure into the public rights-of-way.[15] And for wireless deployments, the provider must also obtain the operating rights for that location in a band suitable for broadband operations. These processes require time and money to navigate, further hurting the business case for deployment.[16] While streamlining these processes will not make every deployment economically feasible with the flip of a switch, reforms will help justify further investments into unserved and underserved areas, further facilitating equal access in these communities especially when paired with the influx of Federal subsidy dollars.[17]

Preventing Digital Discrimination Based on Specific Factors

The above recommendations focus on facilitating equal access more broadly, but the Infrastructure Investment and Jobs Act specifically tasks the FCC with targeting digital discrimination.[18] As the agency interprets digital discrimination, it should consider the distinction between equal access and digital discrimination, focusing on the intent and practical effect of deployment decisions.

Broadband providers do not intentionally discriminate among potential subscribers based on factors like race or ethnicity.[19] Broadband providers are rational economic actors and will deploy infrastructure to areas that will generate enough revenue to offset the costs of deployment and the provision of services to that area. To the extent that the record generates evidence to the contrary, the FCC can and should address this behavior from bad actors.

The more difficult scenario for the FCC will be when deployment has a discriminatory effect. The infrastructure law tasks the FCC with prohibiting deployment discrimination based on the income level of an area or the predominant race or ethnicity composition of an area.[20] The key language is “based on.” Broadband providers look primarily at potential return on investment when deciding whether to deploy infrastructure and base their investing decisions on that analysis. This also means, however, that a decision based on potential return on investment can overlap with other factors such as income level or race, even if the decision isn’t based on that factor.

That doesn’t mean the FCC should ignore the practical effect. Congress clearly acknowledged that even though it might not be economically feasible, the goal of the agency and the broadband industry should be to connect all Americans to high-speed broadband internet.[21] If deployments, though economically rational, disparately impact a specific race, ethnicity, religion, etc., the FCC can and should examine why this effect has occurred and consider market-based policies to address the gap, should the existing subsidy programs fail to address the problem. At the same time, Congress specifically included its “based on,” requirement, which looks more toward the intent of the provider: Distorting the market and adding risk into investment may make it more difficult to get unconnected Americans online.

Conclusion

Promoting equal access to broadband services is a laudable goal and one mandated by Congress. The FCC has a challenging process ahead of it, and undoubtedly this proceeding will generate significant interest and debate. As the FCC considers the record and begins to promulgate rules, it should carefully consider the specific language of the Infrastructure Investment and Jobs Act and be careful not to disincentivize deployment into the areas that need investment the most. I look forward to working with the FCC as it navigates these difficult questions.

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[2] *Implementing the Infrastructure Investment and Jobs act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Inquiry (Mar. 17, 2022), <https://www.fcc.gov/document/fcc-initiates-inquiry-preventing-digital-discrimination>.

[3] Joe Kane & Jessica Dine, “Broadband Myths: Do ISPs Engage in Digital Redlining?” *Information Technology & Innovation Foundation* (Apr. 13, 2022), <https://itif.org/publications/2022/04/13/broadband-myths-do-isps-engage-digital-redlining>.

[4] “Economics of Broadband Networks: An Overview,” *National Telecommunications and Information Administration* (Mar. 2022), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-03/Economics%20of%20Broadband%20Networks%20PDF.pdf>.

[5] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

[6] 47 U.S.C. § 1754(a)(2).

[7] *Id.*

[8] *Id.*

[9] Will Rinehart, “A Look at Rural Broadband Economics,” *American Action Forum* (Aug. 14, 2018), <https://www.americanactionforum.org/research/a-look-at-rural-broadband-economics/>.

[10] “US vs. EU Broadband Trends 2012 to 2020,” *USTelecom* pp. 1-2 (Apr. 1, 2022), <https://ustelecom.org/research/us-eu-broadband-trends>.

[11] *Id.* at p. 7.

[12] *Id.* at p. 11; 2020 Broadband Capex Report, *USTelecom* (Sept. 22, 2021), <https://www.ustelecom.org/2020-broadband-providers-pump-another-79-4-billion-into-americas-connectivity-infrastructure/>.

[13] Executive Order on Promoting Competition in the American Economy, White House § 5(1)(i) (July 09, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

[14] Doug Brake, “What Financial Data Shows About the Impact of Title II on ISP Investment,” *Information Technology & Innovation Foundation* (June 2, 2017), <https://itif.org/publications/2017/06/02/what-financial-data-shows-about-impact-title-ii>.

[15] See Joe Kane et al., “2018 Broadband Scorecard Report,” *R Street Institute* (Nov. 29, 2018), <https://www.rstreet.org/2018/11/29/2018-broadband-scorecard-report/>.

[16] See, e.g., *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79 et al., Declaratory Ruling and Third Report and Order (Sept. 27, 2018), <https://www.fcc.gov/document/fcc-facilitates-wireless-infrastructure-deployment-5g>.

[17] Jeffrey Westling, “Ensuring Federal Broadband Spending Connects America’s Unserved Communities,” *American Action Forum* (Mar. 30, 2022), <https://www.americanactionforum.org/insight/ensuring-federal-broadband-spending-connects-americas-unserved-communities/>.

[18] 47 U.S.C. § 1754(b)-(c).

[19] Jonathan Cannon, “Reducing Digital Discrimination by Avoiding Digital Red Herrings,” *R Street Institute* (Apr. 29, 2022), <https://www.rstreet.org/2022/04/29/reducing-digital-discrimination-by-avoiding-digital-red-herrings/>.

[20] 47 U.S.C. § 1754(b)-(c).

[21] 47 U.S.C. § 1302, § 1754(a).