

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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 FREE PRESS**

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## EXECUTIVE SUMMARY

Though Congress has long recognized the utility nature of advanced telecommunications services, prior to 2020 it had allocated very little fiscal support towards achieving the bipartisan goals of universal broadband deployment and adoption. The shortcomings of this fiscally stingy policy framework were exposed when the COVID-19 pandemic made it clear that broadband connectivity is a fundamental necessity for living, learning and working. Therefore, in late 2021, Congress finally appropriated the substantial resources needed to help close the broadband deployment and adoption digital divides.

When Congress created the \$42.5 billion Broadband Equity, Access, and Deployment Program (“BEAD”) and \$14.25 billion Affordable Connectivity Program (“ACP”) in the Infrastructure Investment and Jobs Act (“IIJA”), it also enacted Section 60506 of that law, which directs the Federal Communications Commission (“FCC” or “Commission”) to “prevent[ ] digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.” Congress enacted this non-discrimination statute based on mounting evidence that low-income people and people of color are more likely to live in monopoly broadband areas, and are not able to enjoy the benefits of competition available to people living in more affluent areas.

Of course, Congress had to expressly craft this non-discrimination statute because of the Trump-era FCC’s capricious decision to once again abandon the agency’s Title II authority over broadband and all two-way telecommunications services. That abandonment of authority and responsibility continues to have far-reaching consequences, some of which are evident in the FCC’s Notice of Proposed Rulemaking implementing Congress’s Section 60506 directive. This notice itself is at times vague and uncertain, which reflects the broad range of interpretations of Section 60506 offered by industry and advocates alike. The Commission’s Title II repeal created a void that interested parties – with very different motivations – are trying to fill.

The widely different interpretations of Section 60506 are themselves a strong indicator that the Commission must adopt broad rules against digital discrimination, and address alleged violations on a case-by-case basis, without unnecessarily limiting its authority by pre-defining “safe harbors” for discriminatory actions. The Commission’s proposed definition of “digital discrimination of access” is well-suited to this purpose, as it recognizes the harms of discrimination, whether intentional or structural in nature.

Furthermore, the plain language of the law makes it clear that Congress gave the Commission the authority to act to remedy discriminatory harms. That is true whether such harms are caused by discrimination in deployment, or by discrimination in the marketing for or the offered “terms and conditions” of an already-deployed broadband product. This of course includes instances where ISPs impose discriminatory prices and conditions on customers living in monopoly areas that currently lack robust fiber and cable competition.

Congress recognized that the economics of fiber overbuilding are much different than the economics of cable broadband deployment. For example, while a typical cable ISP can upgrade its network to the multi gigabit-delivering “DOCSIS 4” technology for a per-location cost between \$100 and \$200, the cost for a DSL incumbent to upgrade to fiber-to-the-home (“FTTH”)

technology is 10-times higher (or more, in less densely populated areas). These vastly different economic realities lead to disparities in fiber upgrades, disparities that often leave low-income communities and communities of color once again facing digital divides.

In these comments, we explain that while the law requires the Commission to address the harms of digital discrimination, it does not require the Commission to ignore these harms by accepting all ISP claims that “economic feasibility” motivated their discriminatory actions. Nor does the law require the Commission to reward ISP redlining actions by granting those who discriminate billions in new subsidies to upgrade all of their networks. As we discuss herein, the best way to address monopoly harms is to identify and sanction the monopoly providers who impose discriminatory terms and conditions.

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## I. Introduction

With Section 60506<sup>1</sup> of the bipartisan Infrastructure Investment and Jobs Act<sup>2</sup> (“IIJA”), Congress once again made a strong policy statement that Broadband Internet Access Service (referred to herein as “BIAS,” “Internet access” or simply “broadband”) should be available on an equitable basis to everyone in the U.S. Congress also instructed the Commission to identify and prevent discrimination based on economic and demographic characteristics of individuals and communities.<sup>3</sup> Yet despite this seemingly straightforward directive, the Commission at times conveys confusion and uncertainty in the instant *Notice*.<sup>4</sup>

This confusion is understandable, as Section 60506 is at times lacking in detail. This necessitated a broad *NOI*,<sup>5</sup> which commenters responded to in great detail, and with vastly differing answers to key questions. Views on Section 60506 range from seeing it as requiring universal overbuilding<sup>6</sup> to merely stating a policy goal that private markets have largely already met.<sup>7</sup>

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<sup>1</sup> 47 U.S.C. § 1754.

<sup>2</sup> Pub. L. No. 117–58, div. F, title V, § 60506, 135 Stat. 429, 1245 (Nov. 15, 2021).

<sup>3</sup> Prior to and contemporaneously with passage of Section 60506, Congress has issued similar mandates and policy statements in a host of different sections of the Communications Act. *See, e.g.*, 47 USC §§ 151, 201, 202, 214(e)(3), 254, 1302, 1305, 1306, 1752.

<sup>4</sup> *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*”).

<sup>5</sup> *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*”).

<sup>6</sup> *See, e.g.*, *NOI Comments of Public Knowledge* at 29. Unless otherwise specified, all initial comments submitted in response to the *NOI* were filed on May 16, 2022, in the above-captioned GN Docket No. 22-69.

<sup>7</sup> *See, e.g.*, *NOI Comments of ACA Connects* at 31 (“*ACA Comments*”) (arguing that Section 60506 is a “forward-looking mandate,” and that the “definition of ‘digital discrimination’ should reflect the unique nature of broadband service provision and track industry’s record of not discriminating over many decades in providing service to their subscribers”).

Section 60506's broad language aimed at remedying unjust discrimination, the Commission's very open-ended notices, and individual commenters justly motivated but vastly different suggestions for defining "digital discrimination," are all the predictable and messy consequences of the Commission abandoning its Title II authority over broadband.

Title II of the Communications Act centers the principles of non-discrimination, affordable universal service, competition, and public safety. Contrary to industry's revisionist history, Title II is not simply a framework for monopolies offering telephone service, but a robust blueprint for achieving these universal service, non-discrimination, public safety and competition goals – a framework that Congress intended to apply to today's mass market broadband services.

Until the Commission defined away its regulatory authority, telecommunications services were governed by a legal framework that required universal deployment, buttressed by subsidies, monopoly tariffs and carrier of last resort obligations. That framework also required that terms and conditions be just, reasonable and not unreasonably discriminatory. Perhaps the technological evolution in the last mile and the move from pure monopoly to duopoly in wired two-way residential services necessitated a change in the universal service policy approach. But those changes were anticipated, authorized and ordered with the 1996 amendments to the Communications Act. But for the Commission's continued unwillingness to follow the law as written, it would not now need to pose the same blank-slate questions it does in the *Notice* about providers' discriminatory intent, or questions about economic and technical feasibility. If it faced such questions, the Commission's possible responses would be guided by clear, judicially reviewed authority to promote universal service and non-discrimination in broadband deployment and adoption.

While we will not dwell on the classification issue in these comments, it is important for the Commission to understand the policy difficulties the Pai FCC's improper classification decisions created. Those difficulties are evident in the wide open and at times confused nature of the *Notice*. That wholly unnecessary abdication of authority will have real-world impacts on the very same universal service and non-discrimination goals that the Commission, Congress and many commenters all seem to support. This is because if the Commission adopts and enforces policies that afford people and communities meaningful protections against discrimination, industry will surely rush to the courts to see that they are overturned.<sup>8</sup> And if the Commission merely adopts the loophole-ridden rules that industry desires, the outcome for users and communities is much the same as it would be after those challenges.

Given that it was enacted as a part of the IIJA, there should be no controversy that the non-discrimination obligations and protections of Section 60506 apply to the broadband networks and services subsidized through other sections of the IIJA.<sup>9</sup> But the Commission also must cut through the classification and authority uncertainty and ambiguity of its own making, and adopt rules that afford broad non-discrimination protections to all users and communities in the deployment and offering of broadband internet access service. In particular, the Commission has the obligation and authority to ensure outcome equality for every user in every community, particularly those areas where carriers possess monopoly market power.

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<sup>8</sup> Paragraph 71 of the *Notice* is particularly telling and indicative of a future court battle. In response to a novel argument from AT&T, the Commission asks “whether we lack authority to enforce rules adopted consistent with Congressional direction in section 60506?”

<sup>9</sup> 47 U.S.C, §§ 1702, 1705, 1752.

## **II. Congress Directed the Commission to Address Discrimination Throughout the Entire Broadband Product Chain, From Deployment Through Marketing to Provisioning Service to End Users.**

### **A. Section 60506 Gives the Commission Broad Authority to Adopt Non-Discrimination Rules.**

In its report contained in Appendix B of the *Notice*, the DEI Working Group reviews the legislative history of Section 60506. It notes that Section 60506 “appears to draw upon the language in the Anti-Digital Redlining Act of 2021 (H.R. 4875) introduced by Representative Yvette Clarke.”<sup>10</sup> The DEI Working Group report further notes that Rep. Clarke’s proposal “was in response to what some communities experienced in their neighborhoods,” specifically allegations of “digital redlining.”<sup>11</sup> The central example for this allegation is well-known in broadband policy circles: AT&T’s selective upgrades of its ADSL networks in Cleveland, Ohio to short-loop fiber-to-the-node VDSL technology. Research conducted by Connect Your Communities and the National Digital Inclusion Alliance indicated that very few of the city’s Census block groups with poverty rates above 35 percent contained Census blocks where AT&T reported deployment of VDSL service on FCC Form 477.<sup>12</sup> This finding led to a formal complaint in 2017<sup>13</sup> against AT&T for various violations of the Commission’s rules and various sections of Title II of the Communications Act, which was jointly withdrawn and dismissed with

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<sup>10</sup> *Notice*, App. B, at 86-88.]

<sup>11</sup> *Id.* at 86.

<sup>12</sup> See Bill Callahan, “AT&T’s Digital Redlining Of Cleveland,” NDIA (Mar. 10, 2017). At the time of the NDIA analysis, FCC Form 477 collected deployment data at the most-granular Census geographic level: the Census block. The Census however does not collect and publish household income data at the block level. Therefore, analysis of the relationship between income (or poverty) and deployment must happen at the block group or tract level. The Census Bureau’s American Community Survey (“ACS”) publishes income and poverty data at the block group level only in its 5-year estimates, while tract-level data is available in the annual ACS estimates. Researchers must decide whether to trade the increased granularity of block-group data for the more up-to-date tract-level income and poverty data. See “Understanding and Using American Community Survey Data: What All Data Users Need to Know,” United States Census Bureau (Sept. 2020).

<sup>13</sup> *In the matter of Joanne Elkins, Hattie Lanfair, Rachelle Lee, Complainants, v. AT&T Corp., Defendant*, EB Docket No. 17-223 (Aug. 24, 2017).

prejudice shortly after the Commission once again abandoned its Title II authority.<sup>14</sup> In response to a subsequent CWA study that found similar patterns in AT&T's fiber-to-the-home deployments, AT&T denied redlining, noting that its "investment decisions are based on the capacity needs of our network and demand for our services."<sup>15</sup>

Thus, as the DEI Working Group reports notes, Congress enacted Section 60506 against this backdrop of allegations of redlining, and it did so in legislation in which Congress also allocated an historic amount of government funds to build broadband networks and subsidize subscriptions for low income households. However, as the DEI Working Group report also points out, Section 60506 differs in many ways from the Anti-Digital Redlining Act of 2021. A major difference is that Rep. Clarke's bill would have required the Commission to first conduct an inquiry that would enable it to fully understand where and why certain ISPs are engaging in differential deployment, before proceeding to rules that required ISPs to universally deploy within a given geographic area (determined by the Commission), unless granted an exemption.

Section 60506 is much less detailed. It perhaps implies a universal service obligation, but is silent as to the geographic extent of any such obligation.<sup>16</sup> Importantly, the policy statement in Section 60506(a), and subsection (b)'s directive for the Commission to adopt rules, both contain references to technical and economic feasibility. (Though that is not mentioned in subsection (c), where Congress specifically mentions discrimination in deployment). In contrast, the Anti-Digital Redlining Act of 2021 did not mention technical or economic feasibility, but instead

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<sup>14</sup> *In the matter of Joanne Elkins, Hattie Lanfair, Rachelle Lee, Complainants, v. AT&T Corp., Defendant*, EB Docket No. 17-223, and *Edward Garner Taylor, Esq. and Ray Taylor, Complainants, v. AT&T Corp., Defendant*, EB Docket. No. 17-270, Joint Motion to Dismiss with Prejudice (Feb. 20, 2018).

<sup>15</sup> See Mike Robuck, "CWA calls out AT&T's lack of fiber in its DSL footprint," *Fiercetelecom* (Oct. 5, 2020).

<sup>16</sup> 47 U.S.C § 1754(a)(1) does offer a statement of policy that "subscribers should benefit from equal access to broadband internet access service within the service area of a provider of such service," but nowhere in this or other subsections is "service area" defined.

instructed the Commission to “[d]etermine what factors would permit an ISP to not deploy to the entirety of a clearly defined geographic area with comparable robust broadband service, taking into account that deployment planning for areas may proceed in differing stages.” That earlier bill also would have instructed the Commission to “establish a process by which a provider may request an exemption from a requirement to deploy robust broadband to the entirety of a clearly defined geographic area upon a showing that factors other than income level, race, color, religion, or national origin are the causes of the inability to deploy broadband.”<sup>17</sup> The Anti-Digital Redlining Act of 2021 then envisioned that after a finding of a violation of the anti-redlining rule, the Commission would order the ISP to complete deployment of the service to the entirety of the given area, at just, reasonable and affordable rates, only subject to the exception that the ordered deployment “not threaten the commercial viability of the ISP.”<sup>18</sup>

The provenance of Section 60506 is instructive, but not definitive.<sup>19</sup> The House version of what became the Infrastructure Investment and Jobs Act contained no provisions concerning broadband other than the “Dig Once Act,” which was not in the final law. Indeed, the IJJA was the product of backroom negotiations over omnibus legislation drafted under substantial time constraints, the now all-too-common method that Congress employs to get bills to the President’s desk.<sup>20</sup>

Nothing in the legislative history suggests precisely how the 117th Congress wanted the Commission to implement Section 60506, nor even if Congress ever considered any of the

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<sup>17</sup> Anti-Digital Redlining Act of 2021, H.R. 4875, 117th Congress (2021-2022), at Sec. 4(a)(3).

<sup>18</sup> *Id.* at Sec. 6(a).

<sup>19</sup> *See, e.g., DOE v. Chao*, 540 U.S. 614, 622-23 (2004) (finding relevance in the fact that Congress had removed language that would have achieved the claimant’s result).

<sup>20</sup> *See, e.g.,* Alexander Bolton, “Transit funding, broadband holding up infrastructure deal,” *The Hill* (July 22, 2021).

detailed questions that the Commission now must decide. In the absence of any substantive legislative history, the Commission has no choice but to interpret the law before it as it is written, and to interpret the law's lack of specificity on certain matters as an indication that such questions are those the Commission is best suited to decide. This is of course no simple task, as the universe of argued interpretations of Section 60506 is broad. Some commenters argue that Section 60506 is a universal service mandate, not just for low-income consumers (who were subsidized in part via the IJJA's creation and funding of the AffordableConnectivity Program, or "ACP") and not just for deployment in unserved areas (which are poised to be subsidized via the IJJA's creation and funding of the "BEAD" program), but also an unfunded universal overbuilding requirement. Some industry commenters of course view Section 60506 very differently, as merely setting policy goals for the BEAD program, and directing the Commission to adopt rules that it cannot meaningfully enforce.

We suggest that in the absence of legislative precision, the Commission has very broad authority to enact the rules it deems necessary to facilitate equal access to broadband service. In interpreting Section 60506, the Commission should not preemptively constrain its authority or the potential relief the law offers. The issue of digital discrimination is not new, but the specific mandate from Congress for the Commission to understand and prevent it as defined in Section 60506 is of course novel.<sup>21</sup> Therefore, in order to faithfully implement Section 60506, the Commission must adopt rules that enable it to proceed in an incremental and meaningful fashion. It must learn via investigation, and also from the information in informal and formal complaints, about the nature and prevalence of digital discrimination and its root causes. Approaching the first step of identifying specific instances of digital discrimination and its causes will enable the

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<sup>21</sup> *Notice* ¶ 91 (noting the "novel structure and language of section 60506").

Commission to then proceed to enforce its Digital Discrimination rules in a manner that is faithful to all of Congress’s telecommunications policy goals.

**B. The Commission’s Proposed Definition of “Digital Discrimination of Access” is Appropriate.**

In the *Notice* the Commission proposes to define “digital discrimination of access” (which is undefined in Section 60506) “as one or a combination” of two separate meanings. First, as “policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers’ access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin.” Second, as “policies or practices, not justified by genuine issues of technical or economic feasibility, that are intended to differentially impact consumers’ access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin” (emphasis added). We agree with the Commission that this “and/or” approach to adopting Section 60506 rules is appropriate given the statute’s text and plain meaning.

As the Commission notes,<sup>22</sup> it believes that it needs to adopt a definition of “digital discrimination of access” because the term is not defined in Section 60506(b) – the subsection of the IJA in which Congress instructs the Commission to adopt rules “facilitating equal access” – nor anywhere else in the law.<sup>23</sup> This is a reasonable, practical and useful interpretation of a necessary step to implement Section 60506. Though we note that a reasonable reading of Section 60506(b)’s use of the phrase “digital discrimination of access” would be that it is a key action or

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<sup>22</sup> *Notice* ¶¶ 12-13.

<sup>23</sup> 47 U.S.C. § 1754(b)(1) (“[T]he Commission shall adopt final rules to facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility presented by that objective, including – (1) preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin[.]”).

outcome that Congress instructed the Commission to “identify[ ]”<sup>24</sup> and “prevent[ ]”<sup>25</sup> in order for the Commission “to facilitate equal access to broadband internet access service.” And “equal access” could reasonably be defined in turn by resort to the statute alone too, and in a broad fashion, 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.”<sup>26</sup>

The Commission’s proposal to adopt two separate definitions of “digital discrimination of access” that can be present in isolation or in concert is responsive to the record in the *NOI*. Collectively, the record reflects two schools of thought: it frames this as a binary choice for the Commission between adopting rules that prohibit discriminatory intent or rules that prohibit discriminatory impact.

By rejecting this binary and adopting an “and/or” approach, the Commission preserves its broad authority to investigate and act upon complaints of intentional discrimination without regard to outcome. Yet the “and/or” approach that defines discrimination as impact too, without regard to intent, is necessary for the faithful implementation of Section 60506. Intent is very difficult for complainants to discover and prove, and the harms of discrimination are no less real if it was the result of structural factors and implicit bias.

Carriers who profess certainty that they do not discriminate on the basis outlined in Section 60506 have nothing to fear from the Commission’s decision to adopt an “and/or” definitional approach. Section 60506(a) and Section 60506(b) in particular afford them the opportunity to justify impact-only discrimination that is based on “issues of technical and

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<sup>24</sup> *Id.* § 1754(b)(2).

<sup>25</sup> *Id.* § 1754(b)(1).

<sup>26</sup> *Id.* § 1754(a)(2).

economic feasibility.” Other provisions in the law likewise make it clear that the Commission has the mandate to promote equal access, prevent unreasonable discrimination, facilitate universal deployment, and promote competition in telecommunications services.<sup>27</sup> The Commission understands that achieving these outcome goals in concert requires continuous policy iteration and care when intervening in private markets. And the ultimate reach of its rulemaking and enforcement authority here will inevitably be defined by judicial review.<sup>28</sup>

**C. Section 60506 Directs the Commission to Adopt Rules to Address Digital Discrimination in the Marketing and Provisioning of Broadband Services, Including Rules that Prohibit Discriminatory Pricing.**

Section 60506 is clearly aimed at addressing discrimination throughout the broadband product chain, from deployment to marketing to ongoing provisioning to end users. Congress envisioned outcomes where all people have access to high-quality broadband service at affordable prices.<sup>29</sup> Section 60506(a)(1) states that “subscribers should benefit from equal access to broadband internet access service,” defining equal access in subsection (a)(2) 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” (emphasis added). In the *Notice*, the Commission asks what “types of policies and practices should fall within the statutory phrase ‘terms and conditions,’ and whether that phrase includes pricing?”<sup>30</sup>

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<sup>27</sup> *Id.* § 1302(a).

<sup>28</sup> The language of Section 60506 is structured in a manner that affords the Commission broad authority to adopt rules to “facilitate equal access” to broadband, “including” but not limited to identifying and preventing digital discrimination of access. *See Notice* ¶ 91.

<sup>29</sup> The title of the subchapter of the U.S. code that contains Section 60506 is “Broadband Affordability.” *See* 47 U.S.C. Chapter 16, Subchapter IV.

<sup>30</sup> *Notice* ¶ 33.

We understand why the Commission feels the need to ask such an obvious question, because some ISP representatives preposterously suggest that the “terms and conditions” of a service do not include its price.<sup>31</sup> The Commission should reject any suggestions that Congress, by not specifically mentioning price in the clause “for comparable terms and conditions,” intended for the Commission to ignore this critical aspect of the broadband product market.

First, we note that many ISP advertisements contain disclaimers in various forms that direct potential customers to, for example, “see terms and conditions” for more information. Within those terms and conditions are the prices for services offered by the ISP.

For example, at the time of the writing of these comments, Frontier is running a web ad campaign that shows a strike-through of the price “\$54.99” then replaces it with a price of “\$44.99,” with a disclaimer in smaller print beneath the second price explaining that the latter is the price “per month with Auto Pay.” But beneath that in even smaller print is yet another disclaimer that the advertised offering is “[s]ubject to availability. Install charge may apply. See terms and conditions.” The potential user can access those terms and conditions by clicking on the advertisement. Once there, that potential user will see the aforementioned prices again, with lengthy explanations of the conditions necessary to obtain the service at that lower price, plus other potential charges and one-time fees, as well as lengthy explanations concerning the technical aspects of the advertised service.

Potential customers who search on Google for “AT&T fiber” are met with a paid-search ad, titled “Check Availability – Reliable & Fast AT&T® Internet,” which takes the potential customer to a web page that contains various images and text. The first instance on the page of the service’s price comes under a carousel of various tiers, each of differing headline

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<sup>31</sup> See, e.g., ACA Comments at 3, 13.

transmission speeds and prices. For example, the 300 Mbps tier quotes a “\$55/mo plus taxes” charge, to which a disclaimer is appended noting “w/ AutoPay and paperless billing disc. Monthly State Cost Recovery Charge in TX, OH, NV applies. See details.” The “see details” (which is of course details of the offering’s “terms and conditions”) opens a pop-up window that contains separate entries for each offered tier. It includes, *e.g.*, for the 300 Mbps tier language such as “[p]rice for Internet 300 for residential customers is after \$5/mo autopay & paperless bill discount,” in addition to a myriad of details explaining the terms and conditions that the customer must meet in order to receive the headline advertised rate.

Second, it defies all logic that Congress would be concerned with potential discrimination frustrating “equal access to broadband internet access service . . . for comparable terms and conditions,” but instruct the Commission to ignore the service price. It is well-established that price is the “main criteria broadband consumers use when choosing an Internet service provider.”<sup>32</sup> This is of course an obvious and fundamental principle of economics – the supply and demand of a good is a function of the price that users are willing to pay for that good, and the price that producers are willing to accept to supply it.

Furthermore, unreasonable discrimination in price is perhaps the most-impactful and measurable way to harm end users. It is a given that if a market is uncompetitive, producers will have the incentive and ability to charge inefficiently high prices. Such conditions alone frustrate achievement of the goals of equal access and “maximum utilization of broadband infrastructure and service by the public.”<sup>33</sup> But if producers price-discriminate based on factors such as the customer’s race or community’s racial/ethnic composition (or utilize policies that produce such

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<sup>32</sup> See Nicole Ferraro, “Price is main driver of broadband provider choice – report,” *LightReading* (Oct. 14, 2022).

<sup>33</sup> 47 U.S.C. § 1305(k)(2)(B).

an outcome), that clearly contravenes the purposes of Section 60506 and other parts of the Communications Act.

In the *Notice*, the Commission asks if it should “undertake new data collection efforts . . . [that] could help us to identify when consumers’ access to broadband internet has been differentially impacted.”<sup>34</sup> In order to actually uncover and understand the subtle and not-so-subtle methods ISPs may utilize that are unlawfully discriminatory, we strongly urge the Commission – as Free Press<sup>35</sup> and others<sup>36</sup> have for many years – to collect granular data not just on advertised prices, but on actual prices offered and charged. For example, it is possible that ISPs may wind up charging higher rates to customers in certain areas, because more people living in that particular area may be unbanked and underbanked, and thus less likely to be able to comply with the conditions necessary to obtain certain discounts, like “Auto Pay.” Or it could be the case that ISPs have methods for determining which customers calling at the end of a promotional period to request a lower rate are extended further discounts. Those methods could be discriminatory in intent or impact if they are based directly or indirectly on a person’s or an entire community’s race or income level, or on other factors closely correlated to the protected characteristics spelled out in Section 60506.

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<sup>34</sup> *Notice* ¶ 51.

<sup>35</sup> For a brief synopsis of some of our advocacy and analysis in this area, see Free Press, Notice of Written *Ex Parte* Presentation, WC Docket No. 11-10 (filed July 11, 2019).

<sup>36</sup> *See, e.g.*, Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 43-44 (2010) (“National Broadband Plan”) (“The FCC should collect data on advertised prices, prices actually paid by subscribers, plans, bundles and promotions of fixed and mobile broadband services that have material penetration among users, as well as their evolution over time, by provider and by geographic area. Collecting information on advertised and promotional prices, rather than only prices current subscribers pay, is very helpful for analyzing competition because advertised prices focus on winning new customers or keeping customers considering switching providers and can offer important insights into how firms compete. In addition, it is important that the FCC collect information about the pricing plans to which customers are actually subscribing. Pricing plans that are available to customers but are not *de facto* marketed by service providers tend to have more limited competitive impact.”) (emphasis added).

We note too that there is informative value in advertised prices. There's high-quality research indicating that incumbents in markets with more robust facilities-based competition will not only be more likely to extend more favorable terms beyond a promotional period, but do sometimes advertise lower prices in these more competitive markets.<sup>37</sup> This obvious consequence of competition economics is certainly not news to the Commission, though the agency has yet to fully investigate its causes and outcomes.<sup>38</sup>

In sum, as we discuss herein, Section 60506 and other sections in the law empower the Commission with broad authority to address outcome disparities, and to do so through a variety of methods that are not solely confined to encouraging or requiring facilities-based competition.<sup>39</sup>

**D. Section 60506's Non-Discriminatory Requirements Apply to ISPs and Other Entities that Impact Broadband Deployment, Marketing and Provisioning.**

In the *Notice*, the Commission asks “what types of entities should be covered by our definition of digital discrimination of access” and “whether we should understand ‘digital discrimination of access’ to include policies or practices by a broader range of entities than

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<sup>37</sup> See Leon Yin & Aaron Sankin, “Poor, Less White US Neighborhoods Get Worst Internet Deals,” *Associated Press* and *The Markup* (2022). This study highlights how incumbent cable ISPs will often extend better-priced promotional offers to people living in areas where incumbent telephone company ISPs have deployed Fiber-to-the-Home service. Because those FTTH services are disproportionately located in more-affluent areas, this means that families living in lower-income neighborhoods are often missing out not only on FTTH deployments but also on what little competitive benefits may come in a duopoly market. This of course is an example of the cable company ISPs exploiting their monopoly market positions in those areas where they are truly the only option for very-high speed internet service.

<sup>38</sup> See National Broadband Plan at 42 (“[I]f typical users require high speeds and only one provider can offer those speeds, and expected returns to telephone companies do not justify fiber upgrades, then users may face higher prices, fewer choices and less innovation. Because of this risk, it is crucial that the FCC track and compare the evolution of pricing in areas where two service providers offer very high peak speeds with pricing in areas where only one provider can offer very high peak speeds. The FCC should benchmark prices and services and include these in future reports on the state of broadband deployment.”).

<sup>39</sup> See *Notice* ¶ 91.

broadband providers.”<sup>40</sup> Free Press suggests that the Commission has the authority to apply its rules to all entities under its jurisdiction, which extends to all interstate and foreign communication by wire or radio.<sup>41</sup> This means the rules adopted pursuant to Section 60506 apply to cable multiple system operators (“MSOs”), competitive and incumbent local exchange carriers (“LECs”), telecommunications resellers, fixed wireless internet service providers (“WISPs”), mobile service providers (whether through their owned facilities or on a virtual basis), and any other current or future classes of carriers that offer broadband internet access service.<sup>42</sup>

The reach of Section 60506 extends beyond carriers too. Section 60506(c) states that the “Commission and the Attorney General shall ensure that Federal policies promote equal access to robust broadband internet access service by prohibiting deployment discrimination based on (1) the income level of an area; (2) the predominant race or ethnicity composition of an area; or (3) other factors the Commission determines to be relevant based on the findings in the record developed from the rulemaking under [Section 60506] subsection (b).”<sup>43</sup> This section’s specification of the Attorney General’s mandate and other Federal policies has separate meaning from subsection (b), or otherwise subsection (c) would be redundant to the broader FCC authority in subsection (b) to address discrimination in the deployment and offering of broadband internet access service.

The language in subsection (c) indicates that Congress understood that deployment discrimination is an outcome that may arise because of actions on the part of persons or entities other than retail ISPs. For example, while the Commission has repeatedly taken steps to address

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<sup>40</sup> *Id.* ¶¶ 29-30.

<sup>41</sup> 47 U.S.C. § 151.

<sup>42</sup> Future classes may include traditional broadcast television licensees, who may offer two-way broadband services or their functional equivalents via the ATSC 3.0 transmission standard.

<sup>43</sup> 47 U.S.C. § 1754(c) (emphases added).

the problem of restrictions on broadband deployment in multiple tenant environments, the agency's authority does not allow it to regulate the decisions solely made by building owners to restrict deployment. Other parties could impact deployment in a discriminatory manner, including construction firms; railroad companies; power, gas or electric companies; and municipalities and state governments.

**E. Section 60506's Non-Discrimination Protections Apply to Individuals and Communities, A Class that Includes all Current and Potential Subscribers.**

In the *Notice*, the Commission asks how it “should identify those who might experience digital discrimination of access,” and asks if digital discrimination of access is “a problem experienced by individuals or communities, or both?”<sup>44</sup> We suggest a plain reading of Section 60506 indicates that Congress understood that digital discrimination is a problem that could impact individuals or entire communities of people. Section 60506 speaks of “people,”<sup>45</sup> “subscribers,”<sup>46</sup> potential subscribers (*i.e.*, those that desire the “opportunity to subscribe to an offered service”<sup>47</sup>), and persons residing in “an area”<sup>48</sup> that may as a collective unit experience discrimination.

The extension of the anti-discrimination protections of Section 60506 to persons on an individual or collective basis is necessary, because the law addresses potential discrimination in both the deployment of broadband and the offering of deployed services. For example, ISPs generally make decisions about broadband deployments on an area-wide basis, but not always.

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<sup>44</sup> *Notice* ¶¶ 37-38.

<sup>45</sup> 47 U.S.C. § 1754(a)(3).

<sup>46</sup> *Id.* § 1754(a)(1).

<sup>47</sup> *Id.* § 1754(a)(2).

<sup>48</sup> *Id.* § 1754(c)(1), (2).

For example, fixed wireless services are mass-market services, but location-specific factors may preclude an individual customer from subscribing.

Discrimination in completing the offering of a service could be subscriber-specific (*e.g.*, rejecting a potential customer based on their credit score), or could be based on factors such as the median income at the ZIP code level (*e.g.*, offering retention deals in some areas but not others, based solely on characteristics of the area generally).

Furthermore, the language in Section 60506's definition of equal access that speaks of a person's "equal opportunity to subscribe to an offered service" clearly indicates that Congress desired the law's protections to apply to an ISP's potential customers as well as their existing subscribers. Any suggestion to limit the covered class to current subscribers is unworkable.<sup>49</sup> The law is constructed to identify and address unlawful discrimination in both the deployment and offering of broadband services. If deployment discrimination exists, that by definition is a circumstance where a person or group of people do not have the "opportunity to subscribe" to a service that was deployed and is offered elsewhere. If there's discrimination in the terms and conditions of a deployed service that is being marketed to potential users in a given area, that discrimination could result in a person or group of people not being able to become subscribers to a service they would have accessed but for the discrimination. In other words, the disparate impacts of discrimination could manifest as low adoption rates, as well as higher monopoly offered or taken prices, in areas both where the carrier in question has or has not deployed.

In sum, a logical reading of Section 60506(a)(1) in concert with subsection (a)(2) plainly suggests that subsection (a)(1) is not intended to afford the law's protections to only persons or

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<sup>49</sup> See ACA Comments at 10. The Commission's question itself illustrates the infeasibility of ACA's suggestion: "If we adopt such a definition, how would we account for consumers who don't subscribe to broadband because the service is not available in their community, possibly because of digital discrimination?" See Notice ¶ 39.

entire communities who have already subscribed. Such a reading would be nonsensical. Subsection (a)(1) suggests Congress’s desired policy outcome for people and communities: that people (as both individuals and as members of a community) have the equal ability to subscribe to non-discriminatory broadband services; and that once they do subscribe, the service is offered on an equitable basis.

**III. Broadband Networks Exhibit Strong Natural Monopoly Economic Characteristics that Impact Deployment. Congress Empowered the Commission to Address the Harmful and Discriminatory Impacts Resulting from Natural Monopoly Economics, Regardless of Provider Intent.**

**A. Deployment Economics Vary Greatly Depending Upon Local Market Conditions, Particularly in the Case of Fiber Overbuilding. However, Congress Clearly Intended for the Commission to Protect People Living in Broadband Monopoly Markets from Discriminatory Harms.**

Section 60506 bars deployment discrimination and “digital discrimination of access” based on a variety of factors, including a person’s income or the income of an area.<sup>50</sup> This prohibition is subject to the Commission “taking into account the issues of technical and economic feasibility.”<sup>51</sup> As we discussed above in Part II.A, this law grew in part out of the identification of, and concerns about, the impacts of ILECs deploying fiber upgrades in some

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<sup>50</sup> 47 U.S.C. § 1754(b)(1), (c)(1).

<sup>51</sup> *Id.* § 1754(b).

areas of their service footprint, but not others – upgrades that were found to be disproportionately unavailable in higher poverty areas.<sup>52</sup>

This raises several questions about what factors would make it “economically feasible” for an ILEC to prioritize where it deploys DSL-to-FTTH upgrades, and to avoid deploying in others. For instance, is it ever lawful for an ILEC to avoid upgrades in an area, not in theory because of the average income of the households in that area but because of the economic consequences of low incomes generally?

When addressing these observed disparities in FTTH upgrades, ILECs’ and industry financial analysts’ explanations generally convey that ILECs prioritize upgrades in areas where they expect to achieve adoption levels (“take rates”) that are above the minimum take rate needed to generate a positive economic rate of return. This for most urban area FTTH deployments is an adoption level of 35 to 40 percent after competitive equilibrium is reached over a multi-year period.<sup>53</sup> Achieving that level of adoption is a function of demand and

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<sup>52</sup> The aforementioned NDIA and CWA studies present direct analysis of AT&T’s fiber deployments, cross-tabulating with the income or poverty levels in those areas. In our 2016 study “Digital Denied,” we used various econometric methods to examine differences in broadband deployment and adoption across racial/ethnic groups, incomes, and a variety of other determinants of broadband adoption or deployment, in order to isolate the marginal impact of each independent determinant. For deployment, we used simple regression models that examined the number of available wired ISPs as of year-end 2014 in a Census tract as a function of the tract’s income, population, and proportion of population made up of persons self-identifying as non-white and/or Hispanic or Latino ethnicity. This analysis found that “[a]fter controlling for income, the impact that a census[ block’s] proportion of non-White population has on the variables for average number of ISPs (at 3, 10 and 25 Mbps) remains statistically significant but small.” And that “[t]he 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.” After discussing the limitations in interpreting this analysis, which were partly due to the lack of block-level income data, we noted that “[w]e expect the bulk of the observed difference in deployment and competition in urban areas, between communities of color and white communities, is driven by income differences; while rural areas may see differing levels of deployment due to structural impacts beyond income inequity.” See S. Derek Turner, Free Press, “Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption,” at 117-18 (2016) (“Digital Denied”).

<sup>53</sup> See, e.g., Mike Dano, “Analysts fret over Lumen’s fiber plans,” *LightReading* (Feb. 10, 2022).

competition. And demand in turn is a function of willingness to pay (which of course is a function of ability to pay).

Generally speaking, when comparing potential investment projects, a firm will likely calculate the projects' internal rate of return ("IRR"). In order to do so, the provider must estimate each project's likely total cash flow in addition to its total cost. In the case of telecommunications network deployments and upgrades, cash flow is directly dependent on the take-up of the services offered over the deployed or upgraded networks. Cash flow is also a function of the service's operating costs; and both the cash flow and take rate are a function of the actual price charged and received for the service. In other words, the "break even" take rate itself may vary based on the actual prices charged (lower prices attract more demand, while higher prices yield more revenue), but cash flows still have to meet a certain threshold for the project to generate a positive rate of return.

The need for a capital project to generate a positive internal rate of return over a typical investment cycle (5 to 10 years) means that the expected take rate for a potential FTTH upgrade matters greatly for whether or not, and how long until, that upgrade generates a positive return. And expectations about take rates are heavily impacted by the observed take rates of services already deployed in a potential upgrade area. In other words, if an ILEC observes that an MSO is charging market rates for comparable, very high-speed internet access services in a given area, and the MSO's take rates are below average, that is a likely indicator of low demand (which is of course impacted by ability to pay, not just general desire to use the service).

Because ILECs need to achieve take rates between 35 and 40 percent within a 5 to 10 year time period to generate a positive IRR, they are likely to favor FTTH deployments in areas

where they expect take rates to be highest, relative to deployment costs.<sup>54</sup> This means that subsidized deployments in areas where they will have a monopoly are highly favored, while unsubsidized deployments in areas with multiple existing competitors are less favored.<sup>55</sup> In typical urban area markets, areas with high adoption rates and only one existing competitor will be favored over areas with lower adoption rates.

We focus here on ILECs and their upgrade decisions, and not on cable MSOs, primarily because the economics are vastly different for these types of broadband providers. As we've noted to the Commission in other proceedings many times before, Cable MSOs enjoy far more favorable upgrade economics than ILECs do. The total costs for MSOs upgrading the entire US cable footprint from DOCSIS 2 technology to DOCSIS 3.0 technology was characterized by one MSO as the kind of money one might find "in Bill Gates' sofa cushions," or about \$16 per

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<sup>54</sup> We constructed a simple IRR model to determine the approximate length of time it would take a typical ILEC to generate a positive return from a DSL to FTTH upgrade. Our model assumed an average one-time passing cost of \$1,200 per location (based on the most recent data from Lumen); installation cost of \$300 per location (based on a variety of published sources, adjusted for inflation at a rate of 3 percent annually), operating expenses that are 60 percent of operating revenues (based on a variety of public data from publicly traded ILECs, as well as precise operating expense data from the municipal fiber provider EPB); average per customer monthly revenues of \$80 (adjusted for inflation at a rate of 3 percent annually); and take rates that start at 20 percent of passings after the first year of availability, growing to 40 percent in year 7, and peaking at 45 percent in year 10. The result of this analysis indicates this hypothetical ILEC would generate a positive rate of return in year 9, which would grow slowly to 11.8 percent in year 20. These results are not meaningfully impacted by lowering operating expenses in the model or accelerating take rate time to reach peak levels. We note that AT&T has indicated it expects its current FTTH upgrade plan to generate a peak IRR of 15 percent annually, a value that is impacted positively by the company's ability to leverage the fiber network in its enterprise and wireless businesses. See Mike Dano, "Is AT&T's fiber investment a good idea?", *LightReading* (June 25, 2021); see also, e.g., "EPB Financial Report 2021-2022," Electric Power Board of Chattanooga (2022); Comments of Christopher David Stansbury, Executive VP & CFO, Lumen Technologies, Inc., Lumen Technologies, Inc. 4Q 2022 Investor Call (Feb. 7, 2022).

<sup>55</sup> ILECs, like Incumbent MSOs, have almost completely avoided fixed deployments outside of their incumbent markets. There are some exceptions to this. Notable is AT&T in Mesa, Arizona (a large suburb of Phoenix that has lower poverty rates than Phoenix). AT&T is deploying FTTH in Mesa, overbuilding the local MSO (Cox) and the incumbent LEC (Lumen). See Comments of John Stankey, CEO, President & Director, AT&T Inc., at the Goldman Sachs Communacopia + Technology Conference (Sept. 12, 2022) ("And so when I step back and I think about that opportunity right now, are there other markets maybe outside of our operating footprint, given our success and what we're seeing in rate of penetration, receptivity of the product, our ability to cross-sell both fixed and wireless, we should understand whether or not there's something there. We announced Phoenix a couple of weeks ago. We did that for a reason. That's a test case for us to understand. Are there attractive markets for us to build as the first fiber provider into a particular area that might make sense for our business. And we'll look at the data and we'll look at the results, and we're going to look at our performance.").

passing.<sup>56</sup> According to Charter’s CEO, the cost of DOCSIS 3.0 to DOCSIS 3.1 upgrades were about \$9 per passing.<sup>57</sup>

These two technology upgrades enabled cable ISPs to move from offering single-digit Mbps downstream speeds to offering downstream speeds in the hundreds of megabits per second range. The costs MSOs face to upgrade to DOCSIS 4.0 will be higher than in previous cycles, but still substantially lower than those ILECs face to deploy FTTH, and DOCSIS 4.0 will enable MSOs to offer residential customers multi-gigabit per second downstream and upstream capacities. For example, Comcast estimated its DOCSIS 4 upgrade cost to be “under \$200” per passing.<sup>58</sup> Charter recently indicated its DOCSIS 4 costs would be about \$100 per passing.<sup>59</sup> These are in line with per passing cost estimates for the cable industry generally.<sup>60</sup> This means that while an ILEC FTTH upgrade could take nearly a decade to generate a positive rate of

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<sup>56</sup> In 2007, Comcast SVP Steve Craddock stated that “[c]able can go deploy DOCSIS 3.0 for a couple billion dollars . . . . We could blanket the entire U.S. footprint in a matter of years, because it’s an incremental upgrade.” At the time there were about 123 million cable passings, which equates to a per passing cost of \$16. See Todd Spangler, “Advantage: DOCSIS 3.0,” *Multichannel News* (May 11, 2007).

<sup>57</sup> See Comments of Thomas M. Rutledge, CEO, Charter Communications Inc., Charter Communications Inc. Q1 2019 Earnings Call (Apr. 30, 2019) (“[I]n only 14 months, we launched DOCSIS 3.1, which took our speeds up to 1 gigabit across our entire footprint at a cost of just \$9 per passing, enabling . . . 51 million passings to receive this service.”).

<sup>58</sup> See Diana Goovaerts, “Comcast cites \$200 cost per passing for mid-split, DOCSIS 4.0 upgrades,” *FierceTelecom* (Nov. 15, 2022).

<sup>59</sup> See Comments of Christopher L. Winfrey, President & CEO, Charter Communications, Inc., Charter Communications Inc. Special Investor Call (Dec. 13, 2022) (“[W]e’re going to start off with 2 gig by 1 gig speeds and [ ] we’re going to have network capabilities of going to 10 gigabit per second through DOCSIS 4.0, and we’re going to be able to get all of that with – at a targeted cost of \$100 per passing. Some of you are doing the math, and you’re saying, Chris, I get it \$100 per passing. That’s so much better. That’s a fraction of the cost of your competitors, and you’re right.”).

<sup>60</sup> See Jeff Baumgartner, “Analysts peg DOCSIS 4.0 network upgrade costs at \$180 per home passed,” *LightReading* (Oct. 11, 2022).

return, a typical MSO expanding to multi-gigabit capacity via a DOCSIS 4 upgrade will generate a positive return on investment after one year, and earn a far higher terminal rate of return.<sup>61</sup>

ILECs' per location FTTH upgrade costs are at least an order of magnitude higher than the MSOs' DOCSIS 4 upgrade costs, and both technologies will enable multigigabit symmetrical services. For example, Lumen Technologies recently disclosed that its FTTH upgrade costs in urban markets are about \$1,200 per passing, not including the cost to install.<sup>62</sup> Frontier estimated a cost of \$900 to \$1000 per passing and an additional \$550 to \$600 installation cost for its build plans during 2022-2025, which are also largely for urban and suburban markets.<sup>63</sup>

There are significant differences between cable MSO and ILEC system architectures that greatly impact the scope of upgrades. ILECs must first pass homes on the street with fiber, then once a customer orders service they have to send a technician to the location to "drop" the line from the nearest terminal (buried or on a utility pole) to the customer's premise, and install an Optical Network Terminal ("ONT") that can then be connected to the customer's inside wiring. In contrast, when MSOs perform DOCSIS upgrades, they do so system-wide, as the changes are not made at the customer's location but at the cable system headend or node. This means that

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<sup>61</sup> Using a similar IRR model as described above in footnote 54, but altering the passing cost to \$200 and the installation cost to \$100, and assuming initial market share of 40 percent of passings, we see that a hypothetical MSO would earn a 26 percent rate of return in year two, doubling to 53 percent in year three, and reaching above 75 percent by year seven.

<sup>62</sup> See Comments of Christopher David Stansbury, Executive VP & CFO, Lumen Technologies, Inc., Lumen Technologies, Inc. 4Q 2022 Investor Call (Feb. 7, 2022) ("[W]e expect to enable an incremental 500,000 Quantum locations in 2023 as we emerge from our project reevaluation. We anticipate a cost per enablement of \$1,200 in 2023. . . . And as we've said, our plans for Quantum are dense urban areas and major metros, and that remains. We're not going to be looking to run fiber to lower density areas because the numbers just don't make sense.").

<sup>63</sup> See Comments of Scott C. Beasley, Executive VP & Chief Network Officer, Frontier Communications Parent, Inc., Frontier 2021 Investor Day (Aug. 5, 2021) ("From 2022 through 2025, we expect our average cost per passing to be in the \$900 to \$1,000 range. This range is an average that factors in the topography and household density within our footprint. It includes a modest degree of cost inflation throughout the build period. It also reflects our emphasis on accelerating our path to expansion and time to revenue. Our projected cost on wave 2 is driven by how we strategically prioritize our deployment plan. To accelerate our overall value creation, our deployment plan balances several different priorities, including IRR, cost, scale economies, market level efficiency and time to build. . . . [O]n the cost to connect, what we typically think is a range in the kind of \$550 to \$600 per customer range.").

when cable MSOs decide to do upgrades, they are usually across their entire local system's footprint, while ILEC upgrades are made at the street-level.

Therefore it should come as no surprise that the cable lobby claimed its analysis of the most recent location-level broadband deployment data showed that cable operators “have deployed and upgraded high-speed networks within their footprints regardless of demographics, in both urban and rural areas” and have done so “regardless of income level or racial composition.”<sup>64</sup> This should be the expected result based on the cable industry's system architecture and incredibly low network upgrade costs. It is also of course in part the result of the Communications Act requiring that franchise authorities, in awarding franchises, assure that “cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area.”<sup>65</sup>

Survey data consistently indicates that adoption of broadband – wired broadband in particular – increases as income increases (see Figures 1 and 2 below). This is an adoption gap that is troubling, but not surprising given the purchasing constraints faced by lower-income households (many of whom may choose to prioritize mobile connectivity over fixed, if their budgets do not allow for purchasing both types of connectivity).

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<sup>64</sup> See John Eggerton, “NCTA: Cable Broadband Buildouts Are Equitable,” *Multichannel News* (Dec. 22, 2022) (hereinafter, “Eggerton NCTA Article”).

<sup>65</sup> 47 U.S.C. § 541(a)(3). *But see* *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (“The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal service. . . . [W]e read the sentence to require exactly what it says: ‘wiring of all areas of the franchise’ to prevent redlining. However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited.”).

**Figure 1:**

Persons (age 3+) with Internet in Home  
by Family Income (2015 vs. 2017 vs. 2019 vs. 2021)

Year	Bottom Income Quintile	2nd Income Quintile	3rd Income Quintile	4th Income Quintile	Top Income Quintile
2015	54%	66%	78%	87%	90%
2017	62%	72%	82%	88%	90%
2019	65%	74%	83%	88%	90%
2021	73%	81%	86%	89%	90%

Gap w/ Lowest-Income Quintile					
2015		11%	24%	32%	36%
2017		11%	20%	26%	29%
2019		9%	18%	23%	25%
2021		9%	14%	17%	18%

Difference w/ Lowest-Income Quintile Statistically Significant (p<0.05)?					
2015		Yes, Higher	Yes, Higher	Yes, Higher	Yes, Higher
2017		Yes, Higher	Yes, Higher	Yes, Higher	Yes, Higher
2019		Yes, Higher	Yes, Higher	Yes, Higher	Yes, Higher
2021		Yes, Higher	Yes, Higher	Yes, Higher	Yes, Higher

Source: Free Press analysis of U.S. Census Bureau Current Population Surveys, Internet and Computer Use Supplements. 95 percent confidence interval at p<0.05 calculated using successive difference replication standard error values. Values represent persons (age 3+) who live in a home with internet, but may not necessarily use the connection themselves. NOTE: Census Bureau urges caution when using answers for family income due to approximately 20 percent allocation rate.

**Figure 2:**

Persons (age 3+) with Wired Internet in Home  
by Family Income (2017 vs. 2019 vs. 2021)

Year	Bottom Income Quintile	2nd Income Quintile	3rd Income Quintile	4th Income Quintile	Top Income Quintile
2017	46%	57%	69%	79%	84%
2019	48%	56%	69%	78%	84%
2021	57%	68%	76%	82%	85%

Gap w/ Lowest-Income Quintile					
2017		11%	23%	33%	38%
2019		8%	21%	30%	36%
2021		11%	19%	25%	29%

Difference w/ Lowest-Income Quintile Statistically Significant (p<0.05)?					
2017		Yes, lower	Yes, lower	Yes, lower	Yes, lower
2019		Yes, lower	Yes, lower	Yes, lower	Yes, lower
2021		Yes, lower	Yes, lower	Yes, lower	Yes, lower

Source: Free Press analysis of U.S. Census Bureau Current Population Surveys, Internet and Computer Use Supplements. 95 percent confidence interval at p<0.05 calculated using successive difference replication standard error values. Values represent persons (age 3+) who live in a home with internet, but may not necessarily use the connection themselves. NOTE: Census Bureau urges caution when using answers for family income due to approximately 20 percent allocation rate.

**Figure 3:**

Persons (age 3+) with Internet in Home  
by Race/Ethnicity (2015 vs. 2019 vs. 2021)

Year	Non-Hispanic White	Hispanic	Black	Amer. In/AK	Asian	NH/PI	Multirace
2015	81%	70%	68%	72%	84%	68%	81%
2017	84%	78%	76%	70%	85%	81%	87%
2019	85%	80%	78%	78%	85%	85%	88%
2021	86%	82%	81%	77%	87%	84%	87%
<b>Gap w/ White Non-Hispanic Persons (age 3+)</b>							
2015		-11%	-13%	-9%	3%	-12%	1%
2017		-6%	-8%	-14%	1%	-3%	3%
2019		-5%	-7%	-7%	0%	0%	3%
2021		-4%	-5%	-9%	1%	-2%	1%
<b>Difference w/ White Non Hispanic Persons (age 3+) Statistically Significant (p&lt;0.05)?</b>							
2015		Yes, Lower	Yes, Lower	Yes, Lower	Yes, Higher	Yes, Lower	Not Significant
2017		Yes, Lower	Yes, Lower	Yes, Lower	Not Significant	Not Significant	Yes, Higher
2019		Yes, Lower	Yes, Lower	Yes, Lower	Not Significant	Not Significant	Yes, Higher
2021		Yes, Lower	Yes, Lower	Yes, Lower	Not Significant	Not Significant	Not Significant

Source: Free Press analysis of U.S. Census Bureau Current Population Surveys, Internet and Computer Use Supplements. 95 percent confidence interval at p<0.05 calculated using successive difference replication standard error values. Values represent persons (age 3+) who live in a home with internet, but may not necessarily use the connection themselves.

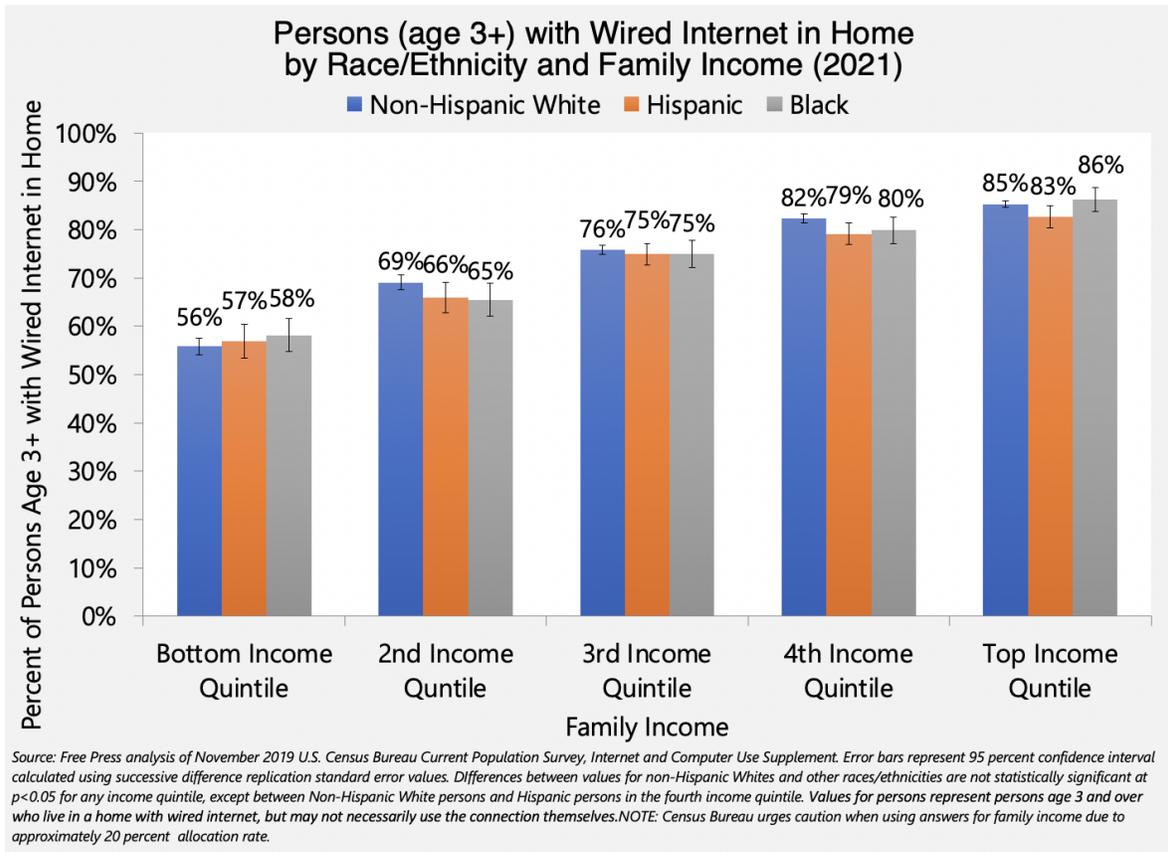
**Figure 4:**

Persons (age 3+) with Wired Internet in Home  
by Race/Ethnicity (2017 vs. 2019 vs. 2021)

Year	Non-Hispanic White	Hispanic	Black	Amer. In/AK	Asian	NH/PI	Multirace
2017	73%	65%	62%	56%	78%	76%	76%
2019	74%	65%	66%	59%	77%	72%	75%
2021	76%	70%	70%	65%	79%	75%	76%
<b>Gap w/ White Non-Hispanic Persons (age 3+)</b>							
2017		-8%	-11%	-17%	5%	3%	3%
2019		-9%	-8%	-15%	3%	-2%	1%
2021		-6%	-6%	-11%	3%	-1%	0%
<b>Difference w/ White Non Hispanic Persons (age 3+) Statistically Significant (p&lt;0.05)?</b>							
2017		Yes, lower	Yes, lower	Yes, lower	Yes, higher	Not significant	Not Significant
2019		Yes, lower	Yes, lower	Yes, Lower	Not significant	Not significant	Not Significant
2021		Yes, lower	Yes, lower	Yes, Lower	Not significant	Not significant	Not Significant

Source: Free Press analysis of U.S. Census Bureau Current Population Surveys, Internet and Computer Use Supplements. 95 percent confidence interval at p<0.05 calculated using successive difference replication standard error values. Values represent persons (age 3+) who live in a home with internet, but may not necessarily use the connection themselves.

Figure 5:



And because income and race/ethnicity are highly correlated, this results in digital divides along racial/ethnic lines both for internet adoption on the whole and wired adoption too (see Figures 3 and 4 above). This wired divide was particularly acute for low-income Black and Hispanic households in prior years.<sup>66</sup> However, this racial/ethnic wired adoption gap in the bottom income tier is no longer seen in the 2021 Census Current Population Survey data (see Figure 5 above). This is strong circumstantial evidence that various low-income subsidy programs (both public and private), particularly the Emergency Broadband Benefit (“EBB”), have helped to finally close the digital divide to a large degree. And in the case of ACP, it will

<sup>66</sup> See Digital Denied at 53-54. Analysis of the 2017 CPS data indicates wired home internet adoption among persons in the bottom family income quintile was statistically significantly higher for non-Hispanic Whites (52 percent) than Hispanic (42 percent) or Black persons (39 percent). Analysis of the 2019 CPS data indicates wired home internet adoption among persons in the bottom family income quintile was statistically significantly higher for non-Hispanic Whites (51 percent) than Hispanic (44 percent) or Black persons (45 percent).

continue to do so, as long as these trends seen in late 2021 (just before the Commission launched the ACP successor to the EBB program) continue in the same direction.

Given the reality that income disparities create broadband adoption disparities, and given the economic factors that determine where ILECs choose to upgrade their networks, it is not surprising that numerous studies indicate that lower-income neighborhoods are less likely to have contemporaneous DOCSIS deployments and FTTH deployments.

But that buildout disparity, whether based on economic feasibility or not, has real world consequences, depriving those in monopoly cable areas the competitive benefits that customers in areas with both DOCSIS and FTTH services may receive. Section 60506 plainly directs the Commission to identify and take steps “to ensure that all people of the United States benefit from equal access to broadband internet access service.”<sup>67</sup> Did Congress adopt Section 60506 as an unfunded FTTH overbuilding universal service obligation? Did Congress intend to make a monumental change to the USF and have ratepayers be regressively taxed to subsidize ILEC, WISP and CMRS buildouts to every premise in the country, even though most are not in high-cost areas? Or did Congress adopt Section 60506 knowing that ILECs would be able to easily claim economic feasibility justifications for their deployment disparities, rendering the deployment aspect of the law largely useless?

We suggest that the answer is none of these extreme interpretations. Given the full context of Section 60506, we believe it is reasonable for the Commission to interpret this and other Congressional directives<sup>68</sup> as instructions to ensure that the benefits of fiber-overbuilding are universally enjoyed. Not necessarily by mandating universal fiber upgrades by all ILECs in

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<sup>67</sup> 47 U.S.C. § 1754(a)(3).

<sup>68</sup> As explained above, Title II is not simply a framework for monopolies offering legacy services. Yet Title II is particularly equipped to address monopoly market harms, because it can directly address and remedy those harms without regard to why any given area is an infrastructure monopoly.

all parts of their service area,<sup>69</sup> but by preventing ISPs in monopoly markets from exercising their market power in a way that harms people living in those areas by depriving them of the benefits that they would enjoy if there was overbuilding.<sup>70</sup>

**B. The Commission Must Apply a Very Stringent Test to BEAD, CAF, RDOF and other ISP Subsidy Recipients Who Engage in Deployment Discrimination and Claim Technical or Economic Feasibility.**

ILECs weighing whether or not to upgrade their systems from ADSL to FTTH in areas where cable MSOs currently control a large share of the addressable locations certainly face a far different market than ISPs deploying broadband in completely unserved areas. Though per-location deployment costs are vastly higher in most unserved areas, there's no evidence to suggest that demand is significantly different there from what it is in already served areas. ISPs large and small have shown strong interest in deploying in high-cost areas if the government subsidizes that deployment. Providers rationally understand that they face little risk and

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<sup>69</sup> See Notice ¶ 48. The Commission sought comment on “the relevant geographic comparators to use in identifying when a consumer’s broadband access is differentially impacted.” Defining a “service area” (as that term is used in 47 U.S.C. § 1754(a)(1)) for most incumbents should be relatively straightforward. For MSOs, they operate under franchises, which are typically at a municipal level, where 47 U.S.C. § 541(a) applies. Adjacent to these areas or in places where the franchise authority did not require buildout there could be potential Section 60506 cases, where the MSO’s economic feasibility claims should be closely scrutinized, but potentially simple to adjudicate. ILECs do not operate in franchise areas, but do have established geographies based on their incumbent central office footprints, where they are (or were) regulated by the states as “carriers of last resort.” Wired MSO overbuilders that entered the market prior to the IPTV era likely secured franchise agreements, but could be potential Section 60506 cases, again subject to likely straightforward determinations of economic feasibility. Where the concept of service area most requires flexibility and case-by-case examination is for wireless services, particularly fixed wireless, since it is point-to-point (*i.e.*, a distribution antenna to a particular end user).

<sup>70</sup> The Commission has previously rejected the notion that 47 U.S.C. § 541(a)(3)’s prohibition on redlining requires competitive entrants to build-out throughout an entire franchise area. See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶¶ 89, 91 (2007) (finding that “Section 621(a)(1) prohibits LFAs from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements” but that “it would seem reasonable for an LFA in establishing build-out requirements to consider the new entrant’s market penetration. It would also seem reasonable for an LFA to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.”).

uncertainty under these conditions, because they will not be required to invest substantial capital yet can expect to capture the near-entirety of the demand in these areas.<sup>71</sup>

Therefore, given that Section 60506 was adopted in conjunction with the \$42.5 billion BEAD unserved areas program,<sup>72</sup> the Commission’s rules should set a very high bar for deployments and offerings for projects funded with these subsidies, and should closely scrutinize discriminatory outcomes in subsidized areas no matter what feasibility claims any ISPs receiving these funds may make. Congress required states to “distribute the funds in an equitable and non-discriminatory manner,”<sup>73</sup> and ensure that grantees “use[ ] the [BEAD] funds in an equitable and nondiscriminatory manner.”<sup>74</sup> However, because this section of the IJA contains no further instructions or definitions on what exactly constitutes an “equitable and nondiscriminatory manner,” it is necessary that states look to the Commission’s non-discrimination rules and any guidances that the Attorney General adopts pursuant to Section 60506. For example, if a state allocated grant money disproportionately to white unserved areas, that discriminatory outcome should be subject to Section 60506 review and potential sanction. Likewise if an ISP submits a bid that favors the predominately white unserved rural areas within its service area, then that would be subject to Section 60506 review and potential enforcement.

Similarly, it is clear that Section 60506’s anti-discrimination provisions apply in other subsidy programs, whether or not they are administered by the FCC. Yet for FCC-administered funds such as the Rural Digital Opportunity Fund (“RDOF”) or Connect America Fund (“CAF”),

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<sup>71</sup> We say nearly the entirety of the customers but not all because some of the demand in unserved areas that will receive BEAD or RDOF funding will be met either via existing ISPs that do not offer service above the 25/3 Mbps threshold, or through mobile or satellite broadband providers.

<sup>72</sup> 47 U.S.C. § 1702.

<sup>73</sup> *Id.* § 1702(g)(2)(C)(1).

<sup>74</sup> *Id.* § 1702(g)(2)(C)(2).

the Commission should revise its rules to ensure that fund recipients are specifically subject to the rules adopted pursuant to Section 60506.<sup>75</sup>

**IV. Because Section 60506 Raises Many Novel Issues, The Commission Should Not Preemptively Narrow its Enforcement Authority.**

**A. The Commission Should Proceed on A Case-by-Case Basis. It Would Be Premature to Create Safe Harbors or Codify Definitions of Technical or Economic Feasibility.**

In the *Notice*, the Commission asks if it should “adopt safe harbors, establish a case-by-case standard for infeasibility, or both.”<sup>76</sup> Various carriers argue that the Commission needs to adopt safe harbor definitions for technical and economic feasibility in order to give ISPs flexibility and to avoid the Commission inserting itself into carriers’ investment decisions, which they say would frustrate congressional and Commission goals.<sup>77</sup> These carrier concerns are overstated and premature.

In these comments, we have discussed the vastly differing deployment and operational economics that various classes of carriers face. The Commission certainly understands these differences, and has ample information to begin to understand what carrier actions may or may not be infeasible. However, the Commission does not yet have a complete understanding of these issues, and does not yet have a robust enough record to support the establishment of safe harbors.

The proposed complaint process will allow separate channels for informal and formal complaints, and for the latter, offer a “complaint pathway for state, local, Tribal, and community-based organizations” that is separate from the pathway for “individual and

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<sup>75</sup> *Notice* ¶ 85 (where the Commission asks if its “existing funding programs [should] be revised in any way to ensure they do not perpetuate existing inequities?”).

<sup>76</sup> *Id.* ¶ 35.

<sup>77</sup> *Id.* ¶ 34.

organizational filers.”<sup>78</sup> We believe that this structure will help to ensure that any allegations of Section 60506 rule violations that reach the formal complaint stage are very serious. The formal complaint process in particular is structured so that complainants and defendants are encouraged to interact prior to the Commission proceeding to adjudication. That process should narrow the scope of complaints that reach the latter stages of Commission adjudication, winnowing them down to those that raise the most-disputed issues. This will in turn help the Commission understand the potential boundaries of technical and economic feasibility, which will give both potential complainants and carriers more certainty about the reach of the Section 60506 rules.

**B. Economic Feasibility Claims Require Different Standards of Evaluation For Monopoly Carriers Versus New Entrants.**

The Commission also asks how it should evaluate claims of technical or economic feasibility, and what the evidentiary burdens should be for carriers and complainants.<sup>79</sup> While we believe it would be premature to formally decide on all of these concepts at this time, we suggest that the Commission should have a far higher bar for any claimed economic feasibility exceptions when evaluating complaints concerning discrimination in the terms and conditions of an existing offering than it would when evaluating a complaint about discriminatory deployment.

Certainly, for-profit carriers must generate a positive return on invested capital, over a reasonable period of time. Congress has created, authorized, and funded many programs that subsidize telecommunications deployment in high-cost areas because of concerns that private industry would not otherwise construct networks in such areas due to low or negative rates of return. Congress created the BEAD program to finish the job and bring very high-quality broadband to the approximately 7 million locations that lack any fixed terrestrial options. The

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<sup>78</sup> *Id.* ¶ 54.

<sup>79</sup> *Id.* ¶¶ 35-36.

states are tasked with awarding these funds, and Congress instructed them to do so in an equitable and non-discriminatory manner, and also to ensure that grantees deploy and offer services on an equitable and non-discriminatory basis. Thus, if the Commission receives a formal complaint concerning an ISP's discriminatory use of BEAD funds, it should be very skeptical if the ISP claims an economic feasibility defense. If the states do their job properly and faithfully to the law, and the NTIA carries out its oversight duties,<sup>80</sup> BEAD funds should be allocated in an equitable and non-discriminatory manner. The Commission will in these potential cases be a last line of oversight, and therefore the burden for an ISP to claim it discriminated based on economic feasibility considerations rather than prohibited reasons should be very high. In such cases, the Commission will have plenty of comparative evidence to consider, as every state in the U.S. is about to go through the process of funding deployment in unserved areas.

Cases that allege deployment discrimination in already-served areas of course require a different approach to adjudicating economic feasibility claims. Network economics are vastly different in urban and suburban areas that are already served. MSOs and ILECs have operated networks in these areas for decades, and each have very different capital and operational economics. We discussed above the substantial network cost advantages that cable MSOs have had compared to ILECs. Where cable TV was deployed, high-quality broadband is now largely available. Many ILECs have held onto their subpar ADSL for far too long, eschewing upgrades to chase vertical mergers or selling off these assets to private equity. And now most are expanding their urban and suburban fiber footprints, realizing a little late that they can't milk

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<sup>80</sup> See generally 47 U.S.C. § 1702.

DSL forever.<sup>81</sup> But overbuilding their copper networks with fiber-to-the-home is a substantial investment, even with their scale and scope benefits as incumbent carriers. And if there is already a cable ISP offering broadband to the same locations as the ILEC, that ILEC investment will take longer to break even and earn a lower return than the MSO's will. That overbuilding economics are challenging, however, does not mean that these incumbents need subsidies.

Therefore when faced with a complaint alleging deployment discrimination where the carrier claims a defense of economic feasibility, the Commission can first look to that ISP's and other similarly-situated ISP's prior deployments, and inquire whether or not the ISP undertook deployments in other areas that had similar expected rates of return. The Commission can then probe the reasons why the defendant carrier chose to move forward certain projects but not the ones at the center of the allegation. This investigation can be fact-specific, and also buttressed by statistical tools like matched-pair statistical analysis.

The congressional concern about deployment discrimination in instances where ILECs are selectively deploying FTTH upgrades is of course rooted in market economics: competition benefits consumers. The Commission has not really ever attempted to fully understand how competition functions or doesn't in the U.S. duopoly broadband market, and so has to rely on the scattered data suggesting that consumers in areas with multiple facilities-based providers enjoy

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<sup>81</sup> We've written extensively about the history of ILEC broadband deployment. *See, e.g.* Comments of Free Press *In the Matter of Restoring Internet Freedom*, WC Docket 17-108, at 86-207 (filed July 17, 2017). *See also, e.g.* Comments of Free Press *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket 20-269 (filed Sep. 18, 2020). We've noted the poor Wall Street reaction to Verizon's early fiber investments, AT&T's VDSL U-Verse strategy and years of vertical merger disasters finally giving way to a serious fiber push, Lumen's similar failed pursuit of IPTV and broadband over VDSL now giving way to a partial fiber deployment plan, and Frontier's bankruptcy and recent fiber expansion).

some benefits of competition, which may come even in a duopoly or weak oligopoly market.<sup>82</sup> Section 60506 grew out of the congressional desire to ensure that these competitive benefits are enjoyed by all subscribers.

But while fiber overbuilders face higher upfront capital expenditures and do not see positive returns for several years, incumbent cable ISPs are in a much better position. Cable ISPs have historically earned very high, very immediate economic returns on their broadband investments, and will continue to do so over the next 5 years as they upgrade their systems with multi-gigabit symmetrical DOCSIS 4.0 technology. Cable ISPs note that they've deployed throughout their franchise areas,<sup>83</sup> in which incumbent cable MSOs were subject to the Communications Act's anti-redlining provisions.<sup>84</sup>

If cable 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. Section 60506 clearly authorizes the Commission to act to eliminate that discrimination by taking action against the monopoly ISP. The evidence here should be far more straightforward to collect and analyze

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<sup>82</sup> See, e.g., Leon Yin & Aaron Sankin, "Poor, Less White US Neighborhoods Get Worst Internet Deals," *Associated Press* and *The Markup* (Oct. 19, 2022). However, it is important to note 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. Indeed, there's evidence suggesting that the competitive benefits of fiber overbuilding wane after just a few years, as the market settles into a duopoly equilibrium. See, e.g., Jeff Baumgartner, "Market is undervaluing US cable – analyst," *Light Reading* (Oct. 10, 2022) ("But [analyst Craig Moffett is] not convinced that competition in fiber-overlapped areas will be subject to 'intense' price competition, noting that competition tends to heat up in the first four years after a new fiber player enters the market and then subsides into a 'stable duopoly equilibrium.'").

<sup>83</sup> See Eggerton NCTA Article, *supra* note 64.

<sup>84</sup> 47 U.S.C. § 541(a)(3).

than in cases where the Commission would be asked to determine if an ILEC's buildout plans were economically feasible.

What's more, the remedy is obvious and would not require the Commission to force ratepayers to subsidize the for-profit ILEC's fiber buildouts: if a complainant proves an ISP imposed terms and conditions on a customer or potential customer (or groups of customers or potential customers) in the ISP's monopoly areas, and those terms and conditions were materially worse than those imposed on customers in the ISP's non-monopoly areas, the Commission must find the monopoly terms unlawful.

**C. The Commission's Proposed Revision to Its Informal Complaint Process Will Facilitate a More Impactful Implementation and Enforcement of Section 60506.**

Section 60506(e) 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."<sup>85</sup> To fulfill this requirement, the Commission proposes to create a "dedicated pathway for digital discrimination of access complaints,"<sup>86</sup> one that like its regular Section 208 process<sup>87</sup> will accept both informal and formal complaints. However, the Commission also proposes to create a unique formal complaint pathway for "state, local, Tribal, and community-based organizations" that is separate from the formal complaint pathway for individual and organizational filers.<sup>88</sup>

We agree with commenters who argue that this structure will aid the Commission in identifying and responding to substantive complaints. It will also encourage and facilitate better

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<sup>85</sup> *Id.* § 1754(e).

<sup>86</sup> *Notice* ¶ 52.

<sup>87</sup> 47 U.S.C. § 208; 47 C.F.R. §§ 1.711-1.740.

<sup>88</sup> *Notice* ¶ 54.

interaction between community and consumer advocacy organizations, which will ultimately aid the Commission in better understanding the causes and potential solutions to digital discrimination.

The Commission also proposes to “collect voluntary demographic information from filers who submit digital discrimination of access complaints.”<sup>89</sup> While we agree with commenters supporting this proposal that doing so could help the Commission “better identify underlying patterns of discrimination that complainants themselves may be unaware of,” the value of such information reported via the informal complaint process will ultimately be a function of the overall quality of, and validity of the informal complaints themselves.<sup>90</sup> This is why we strongly agree with the Commission’s proposal to “make anonymized complaint data available to the public through the FCC’s Consumer Complaint Data Center,” so that third-party researchers with the knowledge, time, and resources can help the Commission analyze and contextualize this information.<sup>91</sup>

## **V. Conclusion**

Congress gave the Commission the authority and mandate to combat digital discrimination, as well as the tools needed to ensure every person benefits from equal access to broadband. The Commission should reject industry calls to needlessly give away its authority to protect marginalized communities from discrimination. In particular, the Commission has the responsibility to act to protect people living in monopoly areas from discrimination, and ensure

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<sup>89</sup> *Id.* ¶ 55.

<sup>90</sup> *Id.* The Commission notes “the temptation to make frivolous, malicious or prank complaints, and the ease of machine generation of such complaints.” It is unfortunate that the Commission’s systems for collecting information from the public have been abused by malicious actors, including allegedly agents of carriers themselves. *See, e.g.*, Jon Brodtkin, “Biggest ISPs paid for 8.5 million fake FCC comments opposing net neutrality,” *Ars Technica* (May 6, 2021). We nonetheless encourage the Commission to continue to explore methods that will enable it to solicit and address high-quality information from members of the public.

<sup>91</sup> *Notice* ¶ 52.

that the benefits of broadband competition are enjoyed by all. The best way to address monopoly harms is to identify and sanction the monopoly providers who impose discriminatory terms and conditions.