October 18, 2023

VIA ECFS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: ***Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*; GN Docket No. 22-69**

Dear Ms. Dortch:

The undersigned associations represent broadband providers of all technologies and sizes investing in America's broadband networks. We write to respond to the recent filing by the National Telecommunications and Information Administration ("NTIA") that supports proposals such as price regulation and a broad disparate impact framework that would second-guess legitimate business decision-making.[1] Such proposals would be unlawful and counterproductive to the Commission's broadband goals. Our members are striving to advance universal connectivity and have been actively engaged in the implementation of the broadband access, affordability, and adoption programs in the Infrastructure Investment and Jobs Act ("Infrastructure Act") and are committed to the success of these and other programs. At the same time, our members face the challenging realities of network buildout. These challenges include technical and economic feasibility barriers to deployment such as low population density, workforce and supply limitations, inability to access buildings, limited spectrum, long line drops, topographical challenges, and permitting issues.[2] While these challenges are

[1] *See generally* Ex Parte Comments of NTIA, GN Docket No. 22-69 (Oct. 6, 2023) ("NTIA Ex Parte").

[2] *See* Comments of NCTA–The Internet & Television Association, GN Docket No. 22-69, at 4-8, 30-32 (Feb. 21, 2023) ("NCTA Comments"); Comments of NTCA–The Rural Broadband Association, GN Docket No. 22-69, at 6-8, 15-16 (Feb. 21, 2023) ("NTCA Comments"); Letter from Diana Eisner, Vice President, Policy & Advocacy, USTelecom, to Marlene Dortch, Secretary, FCC, GN Docket No. 22-69,

common to all, they vary from place to place and often result in different deployment levels that are unrelated to discrimination.[3]

In light of our members' experiences in deploying broadband networks and their commitment to universal connectivity, we agree with NTIA that the Commission's rules should facilitate equal access to broadband, prevent digital discrimination of access, and "work in concert with federal programs aimed at achieving universal broadband deployment, adoption, and usage."[4] Commission action to amplify investment and enhance its impact on closing the digital divide would be consistent with both Section 60506 and the broader goals of the Infrastructure Act. But some of NTIA's proposals in this proceeding—such as regulating broadband prices and adopting a disparate impact standard[5]—would undermine, rather than advance, connectivity efforts and the success of its programs, and would be inconsistent with the Infrastructure Act.

The Commission Should Not Regulate the Price of Broadband. NTIA's suggestion that the Commission should scrutinize broadband prices via the digital discrimination rules would be harmful and unlawful. To begin with, the Commission should not pursue novel price regulation at a time when broadband is more affordable than ever: despite rising prices in other segments of the economy, broadband prices continue to drop.[6] Evaluating price via Section 60506 is unnecessary in a competitive marketplace like broadband, would negatively impact continued

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at 1-2 (Sept. 12, 2023) ("USTelecom Sept. 12, 2023 Ex Parte"); Letter from Thomas Cohen, Counsel to ACA Connects – America's Communications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69, at 3-4 (Sept. 29, 2023); Reply Comments of CTIA, GN Docket No. 22-69, at 1-2, 11-13 (Apr. 20, 2023).

[3] For instance, both the Commission and Congress have recognized that technical and economic conditions make it difficult for providers to deploy broadband to hard-to-serve locations and, as a result, have provided billions of dollars in broadband deployment funding needed to overcome these challenges.

[4] NTIA Ex Parte at 1. While NTIA's suggestions generally are inconsistent with the congressional objectives, we agree with NTIA on two points. First, we agree that "Section 60506 is not retroactively applicable." NTIA Ex Parte at 6 (citing Reply Comments of Public Knowledge et al., GN Docket No. 22-69, at 13-17 (Apr. 20, 2023) ("Public Knowledge Reply Comments")). Second, we agree that the Commission should "clarify that actions in compliance with a particular program's requirements (including but not limited to the [Broadband Equity, Access, and Deployment ("BEAD")] Program) are presumptively lawful under the digital discrimination rules." NTIA Ex Parte at 3; *see also* Reply Comments of Verizon, GN Docket No. 22-69, at 20 (Apr. 20, 2023) ("Verizon Reply Comments") ("Providers should not be subject to discrimination claims under Section 60506 if a state's decision making about which projects to fund results in a lack of deployment to the groups protected by the statute.").

[5] *See* NTIA Ex Parte at 4, 8-9.

[6] *See* Comments of CTIA, GN Docket No. 22-69, at 6-7 (Feb. 21, 2023) ("CTIA Comments"); Letter from Brian Hurley, Chief Regulatory Counsel, ACA Connects – America's Communications Association, to Marlene Dortch, Secretary, FCC, GN Docket No. 22-69, at 2 (Mar. 6, 2023); Reply Comments of NCTA–The Internet & Television Association, GN Docket No. 22-69, at 29-30 (Apr. 20, 2023) ("NCTA Reply Comments"); Reply Comments of USTelecom, GN Docket No. 22-69, at 12 (Apr. 20, 2023) ("USTelecom Reply Comments").

investment, and would be extremely administratively burdensome and time-consuming for the Commission to apply.[7]

Nor does Section 60506 give the Commission any authority to evaluate or consider price.[8] NTIA cites a single case in support of its interpretation, *AT&T v. Iowa Utilities Board*, but that decision does not hold that the statutory phrase "terms and conditions" may include price.[9] NTIA asserts that "the Supreme Court upheld an FCC decision that interpreted a statutory reference [in Section 252(i) of the Communications Act] to 'terms and conditions' to encompass 'rates' as well."[10] However, the petitioners in that case did not challenge the Commission's interpretation of "terms and conditions" in Section 252(i). Instead, the petitioners challenged the Commission's interpretation of "any interconnection, service, or network element," which the Commission originally interpreted, as a policymaking choice, to allow new entrants to pick and choose among provisions in previously approved interconnection agreements.[11] It was the Commission's interpretation of that latter phrase—not its interpretation

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[7] *See* NCTA Reply Comments at 24; USTelecom Reply Comments at 17; *see also*, *e.g.*, *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, 32 FCC Rcd 3459, 3463-64, ¶ 7 (2017) (recounting the history of Commission attempts to regulate business data services rates); *Special Access for Price Cap Local Exchange Carriers et al.*, Report and Order, 27 FCC Rcd 10557, 10558, ¶ 1 (2012) (suspending pricing flexibility rules because they were "not working as predicted, and . . . fail[ed] to accurately reflect competition" in the marketplace); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 561 (D.C. Cir. 2004) (stating, on the Commission's third attempt to adopt valid unbundling rules, "[a]gain, regrettably, much of the resulting work is unlawful"); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340-41 (D.C. Cir. 1980) (criticizing years-long tariff review).

[8] *Contra* NTIA Ex Parte at 8-9. Indeed, the record amply supports that "terms and conditions" as used in Section 60506 does not include price. *See* Comments of Verizon, GN Docket No. 22-69, at 21-22 (Feb. 21, 2023) ("Verizon Comments"); CTIA Comments at 11; NCTA Reply Comments at 25-28; USTelecom Reply Comments at 31. Congress routinely uses the phrase "rates, terms, and conditions" when it intends for the Commission to reach price, *see* Verizon Comments at 21-23, and it used "rates, terms, and conditions" in other provisions of the Infrastructure Act. *See, e.g.*, Infrastructure Act, Pub. L. No. 117-58, § 40304(a), 135 Stat. 1245, 988 (2021); *see also* Infrastructure Act § 11523. Congress' exclusion of the term "rates" from "terms and conditions" in Section 60506 therefore shows that it did *not* mean to reach price. And well-established principles of statutory interpretation hold that if a statute includes a word in one section but omits it in another section of the same act, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

[9] NTIA Ex Parte at 9 (citing *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999)).

[10] *Id.*; *see also* 47 U.S.C. § 252(i) ("A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.").

[11] *Iowa Utils. Bd.*, 525 U.S. at 377, 396 (upholding the Commission's "pick and choose" rule, under which "a carrier may demand that the [local exchange carrier] make available to it 'any individual interconnection, service, or network element arrangement' on the same terms and conditions the [local exchange carrier] has given anyone else in an agreement approved under § 252"). The Commission subsequently interpreted those statutory words to require new entrants to choose whether to adopt entire agreements. *See also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*

of "terms and conditions"—that the Supreme Court described as "reasonable" and "most readily apparent."[12]

Moreover, unlike in Section 60506, there is ample textual guidance showing that the right Section 252(i) created for new entrants included the ability to obtain the prices contained in the previously approved interconnection agreements. Section 252 contains the provisions that govern the creation of interconnection agreements, which must include "a detailed schedule of itemized charges."[13] In addition, state commissions may reject agreements that "do[] not meet . . . the standards set forth in [Section 252](d)," which governs the charges included in those agreements.[14] Further context is found in Section 252(f), which allows a state commission to approve a Statement of Generally Available Terms, rather than an interconnection agreement, so long as its "terms and conditions" "compl[y] with [Section 252](d)."[15] All of this provided context from which the Commission could conclude that "terms and conditions," when used in Section 252(i) to refer to previously approved interconnection agreements, included the prices in those agreements. NTIA's citation to the Commission's rule implementing Section 252(i), therefore, shows that only in an instance where there is clear textual evidence may the Commission interpret "terms and conditions" to include price. There is no comparable textual evidence, however, that Congress intended Section 60506 to authorize regulatory review of broadband prices.[16]

In addition, the context here shows that Congress did not view Commission evaluation of price as a means to achieve the goals of the Infrastructure Act. Congress has rightly chosen programs such as the Affordable Connectivity Program and Lifeline, rather than regulatory scrutiny of pricing, to help address broadband affordability for low-income households—and it created the $2.75 billion Digital Equity Act programs to help address adoption.[17] It was important to Congress that BEAD—the centerpiece of the Infrastructure Act with regard to

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Carriers, Second Report and Order, 19 FCC Rcd 13494, 13499 ¶ 8 (2004) ("The Supreme Court, however, did not hold that the Commission's current interpretation of section 252(i) is compelled by the statute."). The Ninth Circuit upheld that later decision, in a case that did not involve a challenge to whether "terms and conditions" in Section 252(i) included prices. *See New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (9th Cir. 2006).

[12] *Iowa Utils. Bd.*, 525 U.S. at 396.

[13] 47 U.S.C. § 252(a)(1).

[14] *Id*. § 252(e)(2)(B).

[15] *Id*. § 252(f)(1)-(2).

[16] Evaluating broadband prices for the first time, via Section 60506, would be a matter of economic and political significance for which the Commission lacks clear authorization. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (stating that the United States Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes").

[17] *See* Comments of USTelecom, GN Docket No. 22-69, at 8 (Feb. 21, 2023) ("USTelecom Comments"); NCTA Comments at 9-10; Reply Comments of NTCA–The Rural Broadband Association, GN Docket No. 22-69, at 2-3 (Apr. 20, 2023) ("NTCA Reply Comments").

broadband deployment—did not involve rate regulation.[18] Indeed, Congress expressly prohibited rate regulation in the BEAD provisions of the statute,[19] and it would not have made sense for Congress to foreclose price regulation in that context but direct it here despite no mention of prices in Section 60506.[20] Further, NTIA's request for BEAD participants to be deemed presumptively compliant with Section 60506 illustrates that price regulation is not necessary to implement Section 60506.[21]

The Commission Should Not Adopt a Disparate Impact Standard. "Digital discrimination" as set forth in Section 60506 does not include disparate impact, contrary to NTIA's suggestion otherwise.[22] As numerous commenters show, the text of Section 60506 and the Infrastructure Act does not allow a disparate impact standard.[23] In urging the Commission to adopt such a standard, NTIA ignores the Supreme Court's test for applying a disparate impact standard and does not even cite *Inclusive Communities*,[24] the Court's key case regarding when a statute creates such a standard.[25] Nor does NTIA properly evaluate the practical effects of a disparate impact standard. Instead, relying heavily on Public Knowledge's comments, the

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[18] *See* 167 Cong. Rec. S5921-22 (2021) (daily ed. Aug. 5, 2021) (statement of Sen. Roger Wicker) ("It is my understanding that . . . no rate regulation of broadband services would be authorized or permitted by NTIA or the Assistant Secretary who leads the NTIA, as part of the State broadband grants program [in the Infrastructure Act]."); *see also Department of Commerce Fiscal Year 2023 Budget Priorities: Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 117th Cong. (2022) (testimony of Secretary of Commerce Gina Raimondo) (stating, in response to a question concerning the BEAD Program, that "the statute expressly prohibits rate regulation").

[19] *See* Infrastructure Act § 60102(h)(5)(D).

[20] *See* NCTA Reply Comments at 27-28.

[21] *See* NTIA Ex Parte at 11. Furthermore, the Commission should refrain from pursuing NTIA's suggestion that it consider collecting additional data regarding "variations in broadband pricing, terms, and conditions across different communities and demographics." NTIA Ex Parte at 15. Congress spoke in the Infrastructure Act directly to the information disclosures that it viewed as appropriate in the provisions addressing broadband mapping and broadband consumer labels, not NTIA's contemplated expansive, administratively burdensome effort. Infrastructure Act §§ 60103, 60105, 60504; *see also* USTelecom Comments at 14-15; NCTA Comments at 33-35.

[22] NTIA Ex Parte at 4.

[23] *See* CTIA Comments at 19-20; NCTA Comments at 19-23; NTCA Comments at 11-12; Reply Comments of ACA Connects – America's Communications Association, GN Docket No. 22-69, at 11-13 (Apr. 20, 2023); USTelecom Comments at 22-25.

[24] *See generally Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015) ("*Inclusive Communities*"); *see also* CTIA Comments at 19; NCTA Reply Comments at 6; NTCA Comments at 13-14; USTelecom Comments at 22-23.

[25] NTIA's arguments for a disparate impact standard focus significantly on adoption. *See* NTIA Ex Parte at 4-8. However, it concedes that "disparate adoption levels alone are not necessarily evidence of digital discrimination of access, as Internet use is linked with a wide range of factors." NTIA Ex Parte at 8 n.19. Moreover, the Infrastructure Act addresses barriers to adoption thoroughly via other provisions, not Section 60506. *See*, *e.g.*, NCTA Comments at 9-10; USTelecom Comments at 7-9. NTIA's discussion of adoption also illustrates that factors far beyond the control of providers influence customer preferences; it would be irrational and manifestly unjust to hold providers accountable for conditions they do not control.

agency asserts that "real-world examples demonstrat[e] that providers can profitably deploy to all segments of the market."[26] But the fact that Congress established the historic $42.5 billion BEAD Program to ensure deployment to unserved and underserved areas belies this claim.[27] Furthermore, the Public Knowledge comment NTIA identifies suggests that the Commission consider profitability "on a reasonable multi-year basis."[28] However, providers already are motivated to find profitable business opportunities, and NTIA does not and cannot provide any factual basis for the Commission to assume otherwise.[29] Furthermore, the comment calls for providers to cross-subsidize their services, which the Commission has long recognized is not workable absent a government-sanctioned monopoly.[30]

Government action can amplify private investment and enhance its impact on closing the digital divide, or it can make achieving that goal more difficult. The record shows that a disparate impact standard would hinder efforts to close the digital divide.[31] The Commission

[26] NTIA Ex Parte at 5 (citing Public Knowledge Reply Comments at 42).

[27] *See* NCTA Comments at 9-10; NTCA Comments at 16; USTelecom Comments at 7-8. The Infrastructure Act itself recognizes the impact of economic feasibility on deployment strategies. Infrastructure Act § 60506(a)-(b). And the impact of those costs on feasibility is evident in the Communications Act's recognition that costs in rural areas will likely exceed those in urban areas. *See* 47 U.S.C. § 254(b)(3); *see also* NTCA Comments at 19 (discussing substantially higher costs of deployment in rural areas); USTelecom Sept. 12, 2023 Ex Parte at 2-4 (discussing feasibility challenges).

[28] NTIA Ex Parte at 5-6 & n.14 (citing Public Knowledge Reply Comments at 40-45).

[29] *See* Reply Comments of AT&T Services, Inc., GN Docket No. 22-69, at 15-16 (Apr. 20, 2023) ("AT&T Reply Comments"); NCTA Reply Comments at 20-21; NTCA Comments at 15; USTelecom Comments at 17. NTIA's request for the Commission to intrude on providers' business decision-making does not account for the disincentives to financing and deployment that such an inquiry would create, the feasibility challenges providers face, or necessary burden-shifting safeguards. *See, e.g.*, Comments of ACA Connects – America's Communications Association, GN Docket No. 22-69, at 19-20 (Feb. 21, 2023); Letter from Pamela Arluk, Vice President and Associate General Counsel, NCTA – The Internet & Television Association, to Marlene Dortch, Secretary, FCC, GN Docket No. 22-69, at 3-4 (Oct. 13, 2023) ("NCTA Ex Parte"); NTCA Reply Comments at 6-7; Letter from Diana Eisner, Vice President, Policy & Advocacy, USTelecom, to Marlene Dortch, Secretary, FCC, GN Docket No. 22-69, at 5-7 (Sept. 28, 2023); Verizon Reply Comments at 20-22.

[30] *Compare* Public Knowledge Reply Comments at 42, *with* Verizon Reply Comments at 21-22, and AT&T Reply Comments at 15-16. *See also Report on the Future of the Universal Service Fund*, Report, 37 FCC Rcd 10041, ¶¶ 2-3 (2022) (explaining that the Commission abandoned cross-subsidization mechanisms after enactment of the Telecommunications Act of 1996).

[31] *See* Comments of AT&T, GN Docket No. 22-69, at 14 (Feb. 21, 2023); Comments of T-Mobile USA, Inc., GN Docket No. 22-69, at 20 (Feb. 21, 2023); NTCA Comments at 1, 16; USTelecom Comments at 34; Verizon Comments at 16-17. Regardless of the standard the Commission adopts, it may not mandate "buildout requirements." *See, e.g.*, Letter from Amy E. Bender, Vice President, Regulatory Affairs, CTIA, to Marlene Dortch, Secretary, FCC, GN Docket No. 22-69, at 3 (Oct. 13, 2023); NCTA Reply Comments at 15-16; Reply Comments of TechFreedom, GN Docket No. 22-69, at 11 (Apr. 20, 2023); USTelecom Reply Comments at 36; *see also* 47 U.S.C. § 254(b)(5), (e). *But see* NTIA Ex Parte at 6 n.15.

therefore should heed Congress's direction to "facilitate equal access" and take into account technical and economic feasibility by adopting solely a disparate treatment standard.[32]

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Please contact the undersigned if you have any questions.

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[32] *See* CTIA Comments at 18; NCTA Comments at 28-31; NTCA Comments at 11-12; USTelecom Sept. 12, 2023 Ex Parte at 5 n.20.