

**Before the Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Implementing the Infrastructure Investment)
and Jobs Act: Prevention and Elimination)
of Digital Discrimination)

RM Docket No. 22-69

**Written Comments of the Connecticut Office of State Broadband
within the Connecticut Office of Consumer Counsel**

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The Connecticut Office of State Broadband (“CT OSB”) is established by statute within the Connecticut Office of Consumer Counsel,¹ which is an independent agency that serves as the advocate for consumer interests in all matters involving traditional utilities, electric suppliers, cable television companies and telecommunications providers and by statute is authorized to appear and participate in any federal or state regulatory or judicial proceedings in which the interests of Connecticut consumers may be involved or in matters involving the services rendered by these entities may be involved. Conn. Gen. Stat. § 16-2a(a). The CT OSB is statutorily charged with “work[ing] to facilitate the availability of broadband access to every state citizen and to increase access to and the adoption of ultra-high-speed gigabit capable broadband networks.” CT OSB hereby respectfully submits these Comments in response to the Commission’s Notice of Inquiry. *See* FCC, GN Docket No. 22-69, *supra*, Notice of Inquiry (Mar. 17, 2022). CT OSB supports fully the FCC’s mandate:

“...to ensure that all people of the United States benefit from equal access to broadband internet access service,” with the intention of preventing and identifying steps the Commission should take to eliminate “digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin,” consistent with Congress’s directive in section 60506 of the Infrastructure Investment and Jobs Act (Infrastructure Act).²

To that end, CT OSB provides general comments and suggestions regarding a legal approach under which the Commission may address digital discrimination and a model policy for the Commission to consider. CT OSB further advocates for local enforcement of digital discrimination claims to provide the requisite resources to meaningfully combat discrimination on all fronts.

¹ Conn. Gen. Stat. § 16-2a(c).

² Notice of Inquiry, GN Docket No. 22-69, Para. 2.

1. Introduction

Digital “redlining,” as defined by the National Digital Inclusion Alliance, is: “. . . discrimination by internet service providers in the deployment, maintenance, or upgrade of infrastructure or delivery of services. The denial of services has disparate impacts on people in certain areas of cities or regions, most frequently on the basis of income, race, and ethnicity.³” Although the challenges posed by providing equal, or equitable services are often framed in terms of business decisions based on economics and technological issues,⁴ at the end of the day the effects result in disparate and unequal services and tiers of access and adoption correlating to systematically ingrained racial and socioeconomic boundaries that have been historically prevalent.

2. CT OSB Suggests Borrowing From Existing Law On Discrimination

Although case law across various contexts in which discrimination is litigated has evolved (and continues to evolve) through time reflecting new considerations, CT OSB submits that there is benefit to relying on previously established paradigms related to discrimination from the contexts of employment and housing. Being able to use existing paradigms as a baseline to build upon will assist all aspects of enforcement, as practitioners and adjudicators alike will have a basic understanding of what constitutes discriminatory conduct from a body of time-tested law. Key to thinking through this process for the digital equity context is to recognize the inevitable inequities that already exist for a discrimination plaintiff due to the unequal power dynamics

³ <https://www.digitalinclusion.org/definitions/>

⁴ “Lack of high-speed home internet access disproportionately affects children of color, according to a joint study last year from the Alliance for Excellent Education, National Indian Education Association, National Urban League and UnidosUS. It found that 34% of American Indian/Alaska Native families and about 31% each of Black and Latino families lack access to high-speed home internet, versus 21% of white families. That raises the risk these kids will fall behind their peers.” <https://www.cnet.com/home/internet/features/the-broadband-gaps-dirty-secret-redlining-still-exists-in-digital-form/>

between a sole plaintiff and a corporate defendant. Those prevailing and ingrained disparities underlie the recommendations set forth by CT OSB below.

First, CT OSB would expect claims of digital discrimination will quickly overwhelm the Commission's resources and submits that there must be an individual right of action that extends beyond the Commission to permit relief from either state-level commissions or state courts.

Second, as with discrimination cases across contexts, plaintiff bears a heavy burden when intent, as opposed to disparate impact, must be proven. Taking that into account, we nonetheless must concede that unlike the Fair Housing Act, the disparate impact theory has not been codified in the IIJA. Additionally, a successful plaintiff's ability to recover attorneys' fees, which is a necessary component in attempting to level of playing field in the litigation of housing and employment discrimination matters, has also not been codified in the IIJA. To that end, CT OSB strongly advocates for: A. legislative action to revise the existing statute, and B. state level enforcement.⁵ Local enforcement would provide additional resources to both assist complainants in the pursuit of relief, and to educate⁶ complainants and evaluate claims that may not rise to the level of discrimination, which in turn would conserve judicial or agency resources, especially with *pro se* complainants.

Third, CT OSB respectfully suggests a burden-shifting paradigm for evaluating claims of digital discrimination, similar to the long relied upon paradigm from *McDonnell Douglas*.⁷ See

⁵ Discussed further in section 3 below.

⁶ The role of localized education cannot be underestimated not only for potential plaintiffs, but as a settlement term – ordering corporate training on discrimination is an oft-used resource in a plaintiff's settlement toolkit. CT OSB would respectfully submit that local education efforts may be quite beyond the capacity of the Commission, as well as an appropriate role for state enforcement partners to maintain.

⁷ CT OSB makes this suggestion with the caveat that the right to pursue a disparate impact claim is not codified the existing statutory language in the IIJA, so a successful claim of digital discrimination would potentially require a finding of intent.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In this paradigm, if a plaintiff establishes a *prima facie* case of discrimination, the burden would then shift to the defendant to show that its actions were based on a “legitimate non-discriminatory reason”⁸ (in this context), due to lack of economic⁹ and technical feasibility. Should defendant meet that burden, plaintiff would get another chance to prevail by proving that defendant’s claims of lack of feasibility were mere pretext.¹⁰

CT OSB has an additional recommendation for claims of digital discrimination: any rules that the Commission proliferates that are not constrained by statute, (i.e., who can be liable for digital discrimination, what data and sources of information can be used as evidence to support claims, within what contexts can digital discrimination occur, among others) should be cast broadly. Congress tasked the Commission with the *elimination* of digital discrimination. Only when relying on all resources and considering multiple potential circumstances of discrimination that may not have been originally contemplated, can progress be made toward this laudable but daunting goal.

Finally, CT OSB also requests that FCC or its Working Group produce a listing of the more frequently observed situations that would constitute digital discrimination. For example, a cable company upgrading a portion of its network that serves an affluent community but not

⁸ See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000).

⁹ Another opportunity for legislative advocacy that CT OSB supports would be the elimination of “economic” as an option for feasibility, and to limit corporate claims to those of technological infeasibility. See e.g., CA Digital Equity Bill of Rights in which “economic” lack of feasibility was stricken from the early draft of the bill. AR 2753, 2021-2022 Reg. Sess. (CA. 2022) available [here](#). In addition, CT OSB advocates for the Commission to set strict parameters around “economic” lack of feasibility to make this provision less of an escape hatch for providers and a high standard to meet. Only through such measures can we expect meaningful claims of digital discrimination to survive.

¹⁰ Alternatively, as explored in other cases, that defendant’s “legitimate” reasons for its actions were not the primary reason, or that a plaintiff’s protected trait in fact played a role in the alleged discriminatory act. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

performing the comparable upgrade in an area of its franchise area in which less affluent or minority populations are more concentrated.

3. Model Policy & Local Enforcement

The Commission should consider the California Digital Equity Bill of Rights as a model policy concerning digital discrimination. *See* AR 2753, 2021-2022 Reg. Sess. (CA. 2022) available [here](#). In California’s policy, the legislature has codified access and service parameters as a right: “[R]esidents shall have the right to broadband that meets specific requirements, and that broadband internet subscribers benefit from equal access to broadband internet service.” *Id.* Further, California’s Digital Equity Bill of Rights would declare additional rights for all citizens, which are listed as follows:

(1) Broadband that is sufficient and reliable, with internet speeds that are sufficient to meet the growing demand and reliance on access to education, government, public safety, economic prosperity, and healthcare health care through high-speed internet access.

Determining minimum speeds for high-speed internet infrastructure should be performance-based to support distance learning, online educational opportunities, telehealth, and remote working by a majority of households online simultaneously with line 16 an increasing need for symmetrical network speeds.

(2) Broadband that is ubiquitous by ensuring that sufficient and reliable broadband access is available throughout the state, from the most rural areas, including tribal lands, to the most populated urban areas, including all low-income neighborhoods. Public broadband investments should be prioritized to connect entire communities and address digital redlining in historically unserved and underserved communities.

(3) Broadband that is affordable by ensuring that internet service plans are affordable for all residents of the state, regardless of their geographic location or household income.

(4) Broadband that provides educational opportunities and supports digital skills proficiency by providing residents of state with access to opportunities to develop the skills needed to thrive in a digital world.

(5) Broadband that ensures public safety and maintains the peace of mind of the residents of the state that comes with knowing they have reliable access to emergency response services and emergency line 34 alert systems in the event of emergencies or catastrophic disasters.

(6) Broadband that improves quality of life by advancing economic status with access to educational opportunities, new job opportunities, and health care.

(7) Broadband that supports economic prosperity by ensuring that all workers, employers, businesses, entrepreneurs, startups, and enterprises, regardless of size, and including agriculture, have high-speed internet access that optimizes the value of their contributions to the economy to ensure global competitiveness.

(8) Broadband that attracts capital investment because ubiquitous high-speed internet infrastructure is essential to ensuring that the state continues to attract its fair share of global capital investment to support and enhance economic prosperity.

(9) Broadband that supports innovation and research by ensuring that high-speed internet infrastructure connects all research institutions to sustain world-class research and innovation that drives economic productivity.

(10) Broadband that empowers and enables participation in the democratic process so that all residents of the state are connected to the internet with sufficient speeds to participate in government, distance learning, online educational opportunities, and telehealth for quality of life and public safety.

Id. The Digital Equity Bill of Rights also tasks the state Public Utility Commission with adopting rules to facilitate equal access to broadband and require that any rules adopted promote equal access to robust broadband internet service by prohibiting deployment discrimination. *Id.* The Bill further directs the PUC to amend its complaint process include complaints of digital discrimination. *Id.* CT OSB believes that the California model is able to serve federal, state, and local contexts to arrive at a common end goal. It establishes unified policy objectives, but allows rules and enforcement mechanisms to be considered locally.

CT OSB advocates for local processes for targeting digital discrimination, such as that in the pending California legislation, which would work in concert with any processes that the Commission will establish. Further, CT OSB respectfully suggests that local enforcement is crucial to the Commission's goal of eliminating digital discrimination. As such, and as the CT OSB has recommended previously in the context of enforcing consumer labelling requirements,¹¹ it again urges the FCC to allow for concurrent jurisdiction between itself and state utility commissions to enforce the Commission's rules, to make clear that the FCC does not have exclusive enforcement jurisdiction and that states are not preempted from enforcement of

¹¹ FCC CG Docket No. 22-2, In the Matter of Empowering Broadband Customers through Transparency, Written Comments of the e Connecticut Office of State Broadband within the Connecticut Office of Consumer Counsel and Office of Telecommunications and Broadband within the Department of Energy and Environmental Protection's Bureau of Energy and Technology Policy (Mar. 9, 2022) available [here](#)

digital discrimination regulations.¹² Only with multi-jurisdictional resources dedicated to this goal, and working together on all fronts toward equitable deployment, access, and adoption from individual neighborhoods to countrywide can the vision of the IIJA move from theory into practice.

4. Conclusion

The Connecticut Office of Consumer Counsel and Office of State Broadband appreciates this opportunity afforded by the Commission to provide input to shape its rules and processes designed to rectify longstanding historical inequities of digital access, adoption, and deployment. The CT OSB also appreciates the Commission's detailed attention to the complex and multifaceted issues and opportunities that it faces in addressing digital discrimination, and looks forward to continued involvement and engagement with the Commission as this process moves forward.

¹² Allowing states to not only enforce federal rules in the digital equity arena, but also making clear that local governments may go beyond what is dictated federally will allow for robust regulatory schemata and enforcement. Secondly, states who choose not to expand upon the federal regulations will continue to enjoy those protections as a baseline.