COVID-19 Illustrates Need to Close the Digital Divide

Betsy Lawton, JD, Network for Public Health Law—Northern Region

SUMMARY. As the COVID-19 pandemic continues to influence nearly every facet of daily life across the nation, individuals remain heavily reliant on internet services to access employment, job opportunities, telehealth, education, social supports, and emergency response information vital to staying safe during the COVID-19 pandemic and other natural disasters. Many educational institutions remain closed to in-person learning or require students and parents to pivot from in-person learning to distance learning as infection rates in schools and communities ebb and soar. Individuals who lack broadband access are being left behind, unable to access many of the essential services and conditions that support health and health equity. This Chapter will update information contained in Chapter 30 in ***Assessing Legal Responses to COVID-19: Volume I***; assess new data on the digital divides impacting households and communities during the COVID-19 pandemic; and discuss key legal and policy recommendations to bridge the digital divide for the long term.

Introduction

Broadband service can connect you to a wide-range of services that support healthy outcomes and health equity; however the "digital divide" keeps millions of individuals from accessing broadband at home. Access to home broadband internet service, has long been inequitable for two primary reasons: 1) affordability: households cannot afford the relatively high cost service and 2) availability: broadband infrastructure is not available in some areas of the country. FCC estimates that about 30% of urban residents, 40% of rural residents, and 55% of residents on Tribal lands do not subscribe to a home broadband service (FCC, 2020). These individuals are unable to access their classrooms, jobs and job opportunities, telehealth services, social supports, civic opportunities, and even disaster relief information from home, and no longer have reliable access to broadband at schools and libraries that have been shuttered in response to the COVID-19 pandemic (Benda, 2020).

While federal laws provide monetary incentives for private companies to build broadband infrastructure in unserved rural communities, there is no significant federal oversight over infrastructure deployment, quality of service, or prices private companies charge. Digital deserts exist in rural and urban areas where broadband service providers will not build infrastructure due to the limited number of potential residential subscribers in sparsely populated areas or low-income neighborhoods. Digital redlining can also result in substandard service or exorbitant broadband service fees in some urban areas, and federal law does not require broadband providers to offer the same level of service, or any service at all, to every household within a service area (CWA, 2020). Even where broadband infrastructure does exist, it may not be affordable for many households — at an average cost of $60/month, broadband subscriptions are increasingly out of reach for lower-income households. In fact, affordability is a significant hurdle facing many households that have access to broadband infrastructure; FCC estimates that while 94% of the U.S. population has access to fixed broadband infrastructure, only 65% subscribe to an available service (FCC, 2020). Some Tribal, state, and local governments are filling the void left by private broadband companies via programs that make broadband service more affordable, increase competition, and provide public broadband service to communities that lack reliable service from private broadband providers (Tostle, 2021).

Federal Coronavirus Aid, Relief, and Economic Security Act (CARES), Pub. L. No. 116-136, funding, and other private and public investment have helped supply broadband connections for many students and patients during the COVID-19 pandemic. Yet, the digital divide continues to restrict educational, employment, health, and civic opportunities for many individuals, primarily in low-income communities and communities of color. According to data collected via the U.S. Census Bureau's weekly Household Pulse surveys, the digital divide has not improved significantly during the pandemic and many children are still unable to access online educational resources (Ong, 2020). During the fall 2020 semester, 27% of Black households and 29% of Hispanic households with K-12 students lacked consistent access to broadband services needed to support online learning (Ong, 2020). However higher-income and white households fared better, with only 20% of white households unable to consistently access broadband services for remote learning, and only 12% of students in households with income over $100,000/year lacking reliable access to broadband (Ong, 2020).

An Update: The Digital Divide, COVID-19, and the U.S. Legal and Regulatory Response

In recent months, the federal government has provided significant funding to build broadband infrastructure in unserved rural areas, established a program to expand broadband adoption on tribal lands, and created temporary programs to reduce broadband service costs and broadband inequities that result from digital redlining and disinvestment in low-income neighborhoods and communities of color. State and local governments and school districts have also made serious efforts to address the digital divide via local laws and policies and public-private partnerships. These efforts can help bridge the digital divide during the COVID-19 pandemic and beyond.

U.S. Congress

In December 2020, as part of its Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, Congress created several shorter-term programs to expand broadband infrastructure deployment, address affordability barriers underlying the digital divide, and reduce inequities in Black and Tribal communities, including:

The Emergency Broadband Benefit Program. This program provides $3.2 billion in temporary funds to reduce monthly broadband service fees by up to $50/month ($75/month for eligible households on Tribal Lands) for low-income households and households experiencing a substantial loss of income due to the COVID-19 pandemic. The program also reimburses broadband service providers $100 for internet-enabled devices sold to participating households for $10-$50. This benefit is drawn from a newly created, Emergency Broadband Connectivity Fund, and is set to expire six months after the Department of Health and Human Services public health emergency ends. The program, while not an expansion of the current Lifeline benefit program, is likely to provide additional benefits for lower-income families that are eligible for the Lifeline benefit and other families that cannot afford monthly home broadband service.

Office of Minority Broadband Initiatives. The newly formed Office of Minority Broadband Initiatives will identify opportunities to expand access to broadband service, and promote digital opportunities, connectivity, digital literacy, and broadband adoption at historically Black colleges and universities, Tribal colleges and universities, minority serving higher education institutions, and nearby income-limited anchor communities.

The Connecting Minority Communities Pilot program. This program will provide $285 million in grants to historically Black colleges and universities, Tribal colleges and universities, minority serving institutions, and consortiums between these educational institutions and minority business enterprise or tax exempt organizations in nearby income-limited anchor communities. These grants can be used to facilitate education or operate minority business enterprises or organizations. The program directs 40% of funds to historically Black colleges and universities, and 20% to educational institutions for broadband internet service or equipment for students.

The Tribal Broadband Connectivity Program. This program will distribute $1 billion in grants to Tribal governments for broadband infrastructure deployment, affordability programs to reduce costs and prevent disconnections, and programs that support remote learning, telehealth, and digital inclusion efforts.

The Consolidated Appropriations Act of 2021 also appropriates $250 million for the COVID-19 Telehealth Program created as part of the CARES Act, and $300 million for rural broadband infrastructure deployment grants.

The Federal Communications Commission

FCC recently took steps to reach its $20.4 billion pre-pandemic commitment to deploy broadband infrastructure to unserved rural communities. In December 2020, FCC announced the winners of Phase I Rural Digital Opportunity Fund program, allocating $9.23 billion to extend broadband infrastructure to 5.2 million unserved rural households and businesses over the next six years (FCC, 2020). In Phase II, FCC plans to distribute an additional $11.2 billion to rural areas that are unserved or partially served via existing broadband infrastructure.

Throughout 2020, FCC encouraged broadband providers to voluntarily expand broadband service for students, patients, and low-income households, by:

- extending, until June 21, 2021, regulatory waivers that allow schools and health care institutions that participate in the FCC's E-rate and Rural Health Care programs to receive free or discounted products and services from broadband providers, including devices, services, hot spots, and home broadband services for students and patients (In re Rural Health Care Universal Service Support Mechanism, 2020).
- extending both its prohibition on de-enrollment from the Lifeline program and its waiver of some requirements that hamper newly unemployed subscribers efforts to quickly access Lifeline benefit.

While the FCC chose not to utilize its regulatory authority to expand its Lifeline or E-rate programs to make home broadband service more affordable for students or low-income households in 2020, some developments in early 2021 indicate there may be renewed focus on utilizing FCC programs to address the digital divide affecting students. In late January 2021, President Biden issued an Executive Order on Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers, encouraging the FCC to "to increase connectivity options for students lacking reliable home broadband, so that they can continue to learn if their schools are operating remotely." Less than a month later, FCC sought public comment on several petitions seeking emergency relief to allow the use of E-rate funds to support off-campus access to broadband services for students who lack home internet access during the COVID-19 pandemic (FCC, 2021).

State and Local Policies and Partnerships

States and local efforts have helped connect households in underserved communities and school districts during the COVID-19 pandemic and resulted in policies to address the ongoing digital divide. For example:

- the Chicago Connected program provides free home broadband service to students in the Chicago Public School District (Chandra, 2020);
- Denver residents passed Ballot Measure 2H, a referendum to opt the city out of a state law that prevents municipalities from building broadband networks;
- many states have utilized CARES funds to purchase internet-enabled devices, wireless hotspots and expand access to public Wi-Fi, telehealth, and residential broadband infrastructure (Chandra, 2020);
- and a recently adopted Arizona law, 2020 Ariz. Legis. Serv. Ch. 84 (S.B. 1460), allows local electric cooperatives to provide broadband service.

These state and local efforts to expand competition in the broadband market, make broadband more affordable, and increase broadband access via community anchor institutions and schools, will help ensure greater access to affordable broadband services now and in the future.

Lessons Learned and Legal and Policy Opportunities to Limit Public Health Inequities Stemming from the Digital Divide

The U.S. COVID-19 pandemic response has been largely premised on "staying home to stay safe." However, across the nation, individuals without home broadband service simply cannot stay home because they cannot connect to online services necessary to promote public health and health equity — including online classrooms, remote job opportunities, telehealth, government services, and emergency services. Efforts to leverage the FCC's Universal Service Fund programs to address affordability limitations underlying the digital divide; increase FCC regulatory oversight; and focus resources on state and local programs to increase competition and create local networks, can help reduce the digital divide for the long-term.

Leveraging Federal Universal Service Affordability Programs to Reduce the Digital Divide

The FCC's Universal Service Fund (USF) programs, 47 U.S.C. § 254, are meant to ensure that all households in the United States have access to, and can afford, telephone and broadband services. As the COVID-19 pandemic has eliminated opportunities to access the internet services outside the home, the FCC should leverage its USF programs to help eliminate the digital divide by making home broadband more affordable. See Assessing Legal Responses to COVID-19: Volume I for additional information on the Universal Services Fund Program, see Chapter 30. However, in 2020, FCC spent only 10% of USF funds to make broadband affordable for disconnected low-income consumers (Federal-State Joint Board, 2020). The Lifeline program is vastly underused, with only 25% of 33 million eligible households actually receiving the Lifeline benefit, and FCC disbursing only $831 million of its $2.385 billion statutorily authorized budget for Lifeline in 2020 (Federal-State Joint Board, 2020). For many low-income households, which can, on average, only afford to pay around $10/month for broadband, the $9.25 monthly Lifeline discount simply is not enough to make broadband affordable. A substantial increase in the Lifeline broadband discount — similar to the $50/month Emergency Broadband Benefit included in the 2021 Consolidated Appropriations bill, could help address racial inequities underlying the digital divide and increase participation in the program in both urban and rural communities.

FCC could likewise tackle the digital divide and educational inequity by authorizing schools and libraries to utilize USF E-rate funds to provide home broadband connections to disconnected students that are unable to access their online classrooms. Despite its reluctance to do so in 2020, FCC has previously allowed USF funds to be used to provide broadband services directly to students' and patients' homes, and FCC is currently considering 11 petitions asking for E-Rate-funds to be used for off campus broadband connections that can enable remote learning for the duration of the pandemic (FCC, 2021). If FCC does not move to authorize use of E-rate funds for this purpose, federal legislation or directed funding could be used to clarify that E-rate funds can be used to provide broadband to students' home classrooms. Such action could greatly limit digital inequities that hamper educational opportunities for millions of children in the United States and contribute to lasting educational inequities and learning loss, particularly in low-income communities and communities of color.

Home broadband service has become indispensable during the COVID-19 pandemic and FCC should leverage its USF programs to ensure all households can access classrooms, jobs and job opportunities, and telehealth services from home.

Increasing FCC's Regulatory Oversight

The COVID-19 pandemic shed new light on the ongoing debate over the level of regulatory control needed to ensure equitable access to affordable broadband service. As the pandemic aggravated public health disparities stemming from the digital divide, FCC relied on voluntary measures to limit the inequities stemming from the digital divide by:

- securing voluntary commitments from broadband service providers to waive late fees, not terminate service, and open Wi-Fi hotspots; and
- encouraging broadband service providers to provide home broadband access to schoolchildren via partnerships with schools districts.

With few regulatory options to ensure high quality, affordable service for all U.S. households during the pandemic, the FCC Chairman called on Congress to take action to ensure "doctors and patients, students and teachers, low-income families and veterans, those who have lost their jobs and livelihoods due to the pandemic and the accompanying lockdowns" remain connected (FCC News).

FCC's lack of regulatory opportunities to limit the worsening impacts of the inequitable digital divide during the COVID-19 pandemic stems from FCC's 2017 decision to release broadband providers from common carrier regulations found in Title II of the Communications Act (Holmes 2020). Common carrier regulations, which still apply to telephone service providers, provide increased regulatory oversight, require common carriers to furnish service upon reasonable request where in the public interest, and prohibit unjust or unreasonable discrimination in charging, practices, facilities and services (Gilroy, 2020). Individuals can file complaints with FCC under 47 U.S.C. § 208, alleging discrimination by common carriers (see for example *Taylor v. AT&T Corp.*, 2017).

The lack of common carrier status for broadband providers also limits the number and type of providers that can offer Lifeline discounts to broadband subscribers, and may place the program on questionable legal ground because only common carriers are eligible to receive the Lifeline reimbursement for providing discounted services (FCC Order on Remand, 2020). Digital inclusion proponents have sought reconsideration of FCC's position, and argue that eliminating the common carrier designation for broadband service providers narrows the program, limits options for Lifeline subscribers who wish to utilize a broadband only service provider, and reduces competition by limiting opportunities for broadband only providers (Common Cause, et. al, 2021).

FCC could restore common carrier status for broadband service providers by redefining broadband service as telecommunications service subject to common carrier regulations. However, courts have broadly deferred to FCC's decisions as to whether broadband is, or is not, a telecommunications services subject to common carrier regulation, finding either interpretation permissible under the federal Telecommunication Act and making it possible for a future FCC to, again, release broadband from common carrier regulations (Gilroy, 2020) To prevent weakening of FCC regulatory oversight options in the future, Congress could also enact a law clearly defining broadband service as a telecommunications service subject to common carrier regulation, or develop other oversight mechanisms that prohibit discriminatory pricing, services, and deployment. With such increased regulatory oversight, FCC could better help address the digital divide, and its disproportionate impacts on low-income households and communities of color, now and in future public health emergencies.

Public Broadband Service

Public broadband services operated by local governments, such as municipalities, Tribes, or rural electric cooperatives, can help bridge the digital divide in underserved and unserved communities by increasing availability and competition, and providing affordable broadband service. Opponents of community broadband service, citing unfair competition, taxpayer risk, and private sector disinvestment, have backed state laws restricting community broadband services via preemptive laws banning or restricting community broadband networks. FCC's efforts to eliminate these state specific restrictions have failed, however, Congressional action barring state restrictions on public broadband services could help encourage state and local action to bridge the digital divide.

Assessment

Many of the voluntary efforts urged by the FCC to keep people connected during the pandemic, while helpful, failed to ensure equal access to online services necessary to promote public health and health equity. Recent digital inclusion and affordability programs are key stepping-stones to bridging the digital divide, and should be complemented by long-term federal, state, and local policies and programs that prioritize affordable, quality broadband service for all students and households, and provide the regulatory oversight needed to ensure the digital divide does not exacerbate health inequities now, and in the future.

Recommendations for Action

Federal government:

- Congress should amend Title 47 of the United States Code, to classify broadband as a telecommunications service, or otherwise provide needed oversight that could help increase competition and eliminate the digital divide.
- Congress should amend Title 47 of the United States Code, to prohibit state preemption of local broadband markets and decision-making.
- The FCC should issue an order authorizing the use of E-rate funding to purchase home broadband connections for students; and waiving the E-rate funding penalty for schools that provide such connections. FCC should revise its regulations, 47 C.F.R. § 54.500 et seq, to codify these changes and expand the E-Rate program. If FCC fails to take should action, Congress should clarify that E-rate funding can be used to purchase home broadband connections for student's home classrooms.
- The FCC should revise its Lifeline regulations, at 47 C.F.R. § 54.400 et seq., to increase the amount of the Lifeline discount so that low-income consumers can obtain broadband service for $10 per month.

State governments:

- State legislatures should repeal state laws that prevent community broadband service providers.

About the Author

Betsy Lawton, JD, is a senior staff attorney at the Northern Region of the Network for Public Health Law, where she works on a variety of public health law issues, including the health impacts of climate change, mental health and well-being, and rural public health.

References

Benda, N. C., Veinot, T. C., Sieck, C. J., Ancker, J. S. (2020). Broadband Internet Access Is a Social Determinant of Health! *American Journal of Public Health*, 110(8), 1123-1125.

Chandra, S., Fazlullah, A., Hill, H., Lynch, J., McBride, L., Weiss, D., Wu, M. (2020). Connect all students: How states and school districts can close the digital divide. San Francisco, CA: Common Sense Media.

Communications Workers of America and the National Digital Inclusion Alliance (CWA). (2020). AT&T's Digital Redlining Leaving Communities Behind for Profit. Retrieved January 17, 2021, from https://cwa-union.org/sites/default/files/20201005attdigitalredlining.pdf

Common Cause, et. al. (2021). Petition for Reconsideration of Common Cause, the Benton Institute for Broadband & Society, United Church of Christ, OC Inc., National Hispanic Media Coalition, New America's Open Technology Institute, and Free Press, *In the matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers*, Lifeline and Linkup Reform and Modernization, WC Dockets. No. 17-108, 17-287, 11-42. Retrieved February, 15, 2021, from https://ecfsapi.fcc.gov/file/10208276724468/Common%20Cause%20Benton%20UCC%20NHMC%20OTI%20FP%20Petition%20for%20Reconsideration%202-8-21.pdf

FCC News. (2020). FCC Chairman Pai Urges Congress to Help Consumers Stay Connected Following End of Keep Americans Connected Pledge on June 30. Retrieved January 17, 2021, from https://www.fcc.gov/document/fcc-chairman-urges-congress-help-consumers-stay-connected

Federal Communications Commission. (2020). Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion. Retrieved January 17, 2021, from https://www.fcc.gov/document/inquiry-concerning-deployment-advanced-telecommunications-capability-3

Federal Communications Commission. (2020). Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, Winning Bidders Announced. Retrieved Feb. 15, 2021, from https://docs.fcc.gov/public/attachments/DA-20-1422A1.pdf

Federal Communications Commission (2020). Order on Remand IN THE MATTER OF RESTORING INTERNET FREEDOM BRIDGING THE DIGITAL DIVIDE FOR LOW-INCOME CONSUMERS LIFELINE AND LINK UP REFORM AND MODERNIZATIONWC Docket Nos. 17-108, 17-287, 11-42FCC 20-151

Federal Communications Commission. (2021). Wireline Competition Bureau Seeks Comment on Petitions for Emergency Relief to Allow the Use of E-Rate funds to Support Remote Learning During the COVID-19 Pandemic, WC Docket no. 21-31. Retrieved Feb. 15, 2021, from https://www.federalregister.gov/documents/2021/02/12/2021-02997/wireline-competition-bureau-seeks-comment-on-petitions-for-emergency-relief-to-allow-the-use-of

Federal-State Joint Board on Universal Service (2020). 2020 Monitoring Report.

Gilroy, A. (2020). The Net Neutrality Debate, Access to Broadband Networks. Retrieved January 17, 2021, from https://fas.org/sgp/crs/misc/R40616.pdf.

Holmes, E. N. (2020). Regulating Internet Access: Lessons from COVID-19. Retrieved January 17, 2021, from https://crsreports.congress.gov/product/pdf/LSB/LSB10520.

In re Rural Health Care Universal Service Support System, F.C.C. DA 20-1479 (2020).

Ong, P. M. (2020). COVID-19 and the Digital Divide in Virtual Learning. Retrieved January 17, 2021, from https://knowledge.luskin.ucla.edu/wp-content/uploads/2020/12/Digital-Divide-v04_Pre_Final.pdf.

Taylor v. AT&T Corp., 2017 WL 4479998 (F.C.C. 2017).