

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

**IMPLEMENTING THE INFRASTRUCTURE)
INVESTMENT AND JOBS ACT)
PREVENTION AND ELIMINATION OF)
DIGITAL DISCRIMINATION)**

Docket No. 22-69

**Comments of
NTCA–THE RURAL BROADBAND ASSOCIATION**

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SUMMARY

NTCA welcomes the focus in the Infrastructure Investment and Jobs Act (IIJA) on ensuring access to broadband throughout the Nation and the imperative to eliminate barriers to access and to ensure, to the greatest extent feasible, the ability of users to access and adopt broadband and advanced communications services. At the same time, NTCA notes that certain of the outcomes envisioned by the IIJA align with sections of the Communications Act of 1934, as amended (the Communications Act), with which NTCA members and many other services providers currently comply. Accordingly, in lieu of creating and superimposing additional duties and obligations that may duplicate or could even conflict in ways with existing requirements, NTCA recommends the Commission to implement the IIJA in a manner that aligns with existing mandates of the Communications Act that may already apply to certain providers. This should ensure a comprehensive and effective path forward toward promoting the provision of broadband to the broadest range of users.

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To the Commission:

I. INTRODUCTION

NTCA–The Rural Broadband Association (NTCA) hereby submits comments in the above-captioned proceeding.¹ NTCA welcomes the focus in the Infrastructure Investment and Jobs Act (IIJA)² on ensuring access to broadband throughout the Nation. As its Smart Rural CommunitySM initiative demonstrates, NTCA recognizes the critical role its members play in ensuring access and increased adoption and usage in their communities – that building a network is a necessary predicate to universal access, but that it is also only the first step in achieving and sustaining that objective. Both empirical and anecdotal evidence culled from NTCA members and their communities reveal the true return on investment delivered by broadband – specifically, improved outcomes in agriculture, economic development, education, healthcare, and other critical sectors. These support the imperative to eliminate barriers to access and to ensure, to the greatest extent feasible, the ability of users to access and adopt broadband and advanced communications services. At the same time, NTCA notes that certain of the outcomes envisioned

¹ *Implementing the Infrastructure Investment and Jobs Act - Preventing and Elimination of Digital Discrimination: Notice of Inquiry*, Docket No. 22-69, FCC 22-21 (2022) (NOI).

² Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

by the IJA align with sections of the Communications Act of 1934, as amended (the Communications Act), with which NTCA members and many other services providers currently comply. Accordingly, in lieu of creating and superimposing additional duties and obligations that may duplicate or could even conflict in ways with existing requirements, NTCA recommends the Commission to implement the IJA in a manner that recognizes where there could be overlap with, and thus similarly aligns, with existing mandates of the Communications Act. This should ensure a comprehensive and effective path forward toward promoting the provision of broadband to the broadest range of users.

II. DISCUSSION

A. STATUTORY BASES FOR THE PROMOTION OF DIGITAL INCLUSION ARE PREVELANT IN THE COMMUNICATIONS ACT.

NTCA has documented gains in broadband-enabled agriculture, economic development, education, and healthcare.³ Moreover, in a recent report focusing on digital inclusion, NTCA explored adoption and usage trend data across several demographics and explained potential gains as gaps in adoption narrow.⁴ NTCA and its members support continued efforts to ensure the widest levels of participation in the emerging digital society. NTCA submits that independent of its members' deep and demonstrated commitment to their local communities, these goals are recognized formally in several sections of the Communications Act as well as Commission rules promulgated in accordance thereof. Accordingly, rather than standing up a raft of new obligations that cover much of the same ground, NTCA recommends the Commission to

³ See, generally, www.smartcommunity.org for links to papers on these and other topics.

⁴ Joshua Seidemann and Roxanna Barboza, "Rural Imperatives in Broadband Adoption and Digital Inclusion," Smart Rural Community (<https://www.ntca.org/sites/default/files/documents/2022-03/src-whitepaper-broadband-adoption-and-digital-inclusion.pdf>) (visited May 16, 2022) (2021).

examine first how provisions in the Communications Act may already promote the goals identified by the IJJA and then to implement the IJJA in alignment with existing standards as set forth in the Communications Act and the rules that implement it.

The IJJA, signed into law on November 15, 2021, includes clear provisions to promote greater broadband adoption and usage, including *inter alia* directives to implement the Affordable Connectivity Program (ACP);⁵ broadband consumer labels;⁶ and steps to “prevent and eliminate digital discrimination.”⁷ The IJJA states that, subject to technical and economic feasibility, “subscribers should benefit from equal access to broadband internet access service within the service area of a provider,” and that the “Commission should take steps to ensure that all people of the United States benefit from equal access to broadband internet access service.”⁸ This subsection defines equal access 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.”⁹ The IJJA explains that “equal access to broadband” is achieved *inter alia* by “prohibiting deployment discrimination” on the basis of income, race, ethnicity, and other factors that may be present in a proposed service area. NTCA has commented extensively on the ACP, and in fact a preponderance of its members are volunteering to participate in this important program. Similarly, NTCA has expressed its support

⁵ 47 U.S.C. § 1752; *see also* *Affordable Connectivity Program, Emergency Broadband Benefit Program*, WC Docket Nos. 21-450, 20-445, Report and Order and Further Notice of Proposed Rulemaking, FCC 22-2 (Jan. 21, 2022). NTCA has participated actively in this proceeding.

⁶ 47 U.S.C. § 1753; *see also* *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Notice of Proposed Rulemaking, FCC 22-7 (2022). NTCA has participated actively in this proceeding.

⁷ 47 U.S.C. § 1754.

⁸ 47 U.S.C. §§ 1754(a)(1), (a)(3).

⁹ 47 U.S.C. § 1754(a)(2).

for broadband labels that impart clear and useful information to consumers.¹⁰ These IJJA-based initiatives carry forward important public policy goals in ways intended to meet not only growing *demand* for broadband services but a growing *need* for broadband. In similar vein, NTCA supports outcomes that increase and expand participating in the digital society, including broadband-enabled applications to promote improvements in education, economic opportunities, healthcare and other vital sectors.

NTCA submits that the articulated goals of the IJJA are already reflected to a significant degree in various provisions of the Communications Act, and that the Commission would be well-served to consider the questions presented by the IJJA against this backdrop – especially where providers may already be subject to these pre-existing requirements in certain cases, harmonizing the path for achievement of the IJJA’s goals with them could be most effective and minimize the prospect of duplicative or even inconsistent obligations. For example, Section 202 prohibits “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service,” as well as giving “any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”¹¹ Even if it may be the case presently that Section 202 does not apply to broadband internet access services, it would make sense to align any IJJA implementation with this construct in lieu of creating a new framework from scratch that incorporates and applies duplicative or even contradictory or confusing principles. And,

¹⁰ See, *i.e.*, *Empowering Broadband Consumers Through Transparency: Joint Comments of NTCA–The Rural Broadband Association and the Wireless Internet Service Providers Association*, Docket No. 22-2 (filed Mar. 9, 2022).

¹¹ 47 U.S.C. § 202.

Section 254 reinforces these long-standing principles, (i) encapsulating economic access by providing that “quality services should be available at just, reasonable, and affordable rates;”¹² (ii) geographic access by directing “advanced telecommunications and information services should be provided in all regions of the Nation;”¹³ and (iii) comparable services by specifying “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”¹⁴ Finally, Section 706 of the Telecommunications Act of 1996¹⁵ admonishes the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹⁶ Together, these collective provisions and the rules promulgated to implement them constitute a fabric that contemplate the deployment of networks and the delivery of services to all geographic and demographic communities throughout the Nation.

Nevertheless, NTCA recognizes gaps in broadband adoption, and it is in these places where the Commission should focus in lieu of adopting sweeping new principles that differ from the fundamental constructs arising out of the provisions described above. These gaps were

¹² 47 U.S.C. § 254(b)(1).

¹³ 47 U.S.C. § 254(b)(2).

¹⁴ 47 U.S.C. § 254(b)(3).

¹⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act of 1934 and is codified at 47 U.S.C. § 151 *et seq.*

¹⁶ 47 U.S.C. § 1302(b).

highlighted by NTCA in its afore-mentioned report on digital inclusion, wherein NTCA examined fixed and mobile broadband adoption data on the basis of age, race, educational attainment, and household income.¹⁷ On the positive side, data that indicate gaps in broadband adoption are closing at various rates among different demographic groups. Age-related gaps are narrowing and can be expected to effectively close over time. But gaps between different tiers of household income and educational attainment persist, presenting the widest discrepancies in broadband adoption rates. Issues of affordability are of critical interest to rural providers since 86% of counties exhibiting persistent poverty are rural.¹⁸ Finally, while adoption rate gaps between different racial demographics are narrowing, home broadband adoption rates reveal room for growth.

With these factors present, NTCA recommends the Commission to view the instant proceeding as an opportunity to implement the IJA in a way that seeks to fill surgically any specific gaps that have not been already addressed by other constructs; as a predicate to doing so, this means the Commission should gather data and evidence establishing where such gaps exist and the scope of them, rather than adopting rules first and identifying and sizing the precise problems later. By way of example, the Lifeline provisions of the Communications Act have resulted in important benefits for users of the telecommunications and broadband services. Nevertheless, Congress recognized in the Consolidated Appropriations Act that the current Lifeline benefit for broadband was not sufficient in the face of COVID-19 and legislated the Emergency Broadband Benefit (EBB), which increased monthly support for broadband by a

¹⁷ See fn. 4, *supra*.

¹⁸ “Rural Counties With High and Persistent Poverty in 2019 Were Mostly Located Across the South,” Economic Research Service, USDA (Aug. 11, 2021) (<https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=101781#:~:text=More%20than%205%20million%20rural,the%20total%20rural%20poor%20population>) (visited May 10, 2022).

substantial 440%.¹⁹ Demand for the EBB was reflected in subsequent IJA provisions that establish the permanent ACP.²⁰ In this instance, the IJA *builds on* existing USF programming to foster greater broadband adoption and retention.

In encouraging this sequence of identifying gaps, sizing problems, considering how existing efforts might address them, and then targeting principles or additional steps to do so, NTCA does not suggest that the task of connecting all Americans has been completed. While NTCA notes positive trends in broadband deployment and adoption across several demographic categories (age, race, educational attainment, and household income), there is clearly more work to be done and gaps to be closed. Especially given that progress has been made but gaps remain, improvements to digital inclusion can benefit from focused and targeted strategies that study those gaps and design solutions to address them in lieu of the introduction of comprehensive requirements in addition to those to which the companies are already subject, and with which they comply. Indeed, and as evidenced by year-on-year survey results, NTCA member deployments are continuing apace as its members meet regulatory-mandate buildout requirements throughout their respective service areas. A wholesale implementation of far-reaching requirements visiting administrative complexities and burdens on providers that could in fact *delay* deployment by diverting resources from currently successful efforts to redundant processes.

By way of example, Section 254 of the Communications Act requires recipients of high-cost universal service support (USF) to not only *provide* services throughout their designated service area but to also *advertise* the availability of those services in media of general

¹⁹ The maximum Lifeline benefit is \$9.25 per month; the EBB offered up to \$50 per month. The rate of increase for Tribal users, from \$34.25 to \$70, was slightly more than 100%.

²⁰ 47 U.S.C. § 1752; *see also* fn. 5, *supra*.

distribution. The Commission asks whether it should draw a “broader or narrower” obligation for purposes of fulfilling the IIA imperative to promote “equal opportunity to subscribe” among prospective users.²¹ NTCA submits that Eligible Telecommunications Carriers (ETCs) subject to the requirements arising out of Section 254 and the ETCs’ receipt of USF already fulfill requirements articulated by IIA and should therefore not be subject to additional obligations that could conceivably be attached to the IIA in this regard. Specifically, ETCs that adhere to Commission rules governing the advertising of services for purposes of USF are meeting *de facto* the goals of the IIA and should not be subject to broader or additional requirements. Adherence to Section 254 requirements should be counted as concomitant fulfillment of any IIA obligations.

In similar vein, the Commission seeks comment on IIA standard to offer services “that provide[] comparable speeds, capabilities, latency, and other quality of service metrics.”²² Here, too, NTCA submits that USF recipients are *de facto* meeting these obligations by elementary construction of (a) the USF statute, which directs the standard of reasonable comparability, and (b) build-out and performance obligations arising out of their receipt of high-cost support. To the narrower question of the factors that would constitute “speeds, capacities, latency, and other quality of service metrics,” and specifically the matter of “other quality of service metrics,” NTCA urges a narrow reading of this language. Quality of service is measured predominantly by speed, capacity, and latency. In fact, these metrics are the primary metrics that NTCA has supported for inclusion in broadband disclosure labels because they are tied most directly to the broadband experience of the customer and are the overarching factors in the quality of the

²¹ NOI at para. 12.

²² NOI at para. 13.

service. NTCA, taking a lead from the Commission of whether these standards might change over time,²³ suggests that “other qualities of service” be defined in the near term as “aspects affecting overall quality of service that may become apparent or consequential as broadband service technology may develop in the future.” That enables the Commission and industry to focus for the near and mid-term on those factors that are primary determinants of broadband service currently, namely, speed, capacity, and latency, and leave open the possibility that in the future an additional characteristic or characteristics may be recognized by users, the industry, and standard-setting bodies as may be appropriate. To the extent that the Commission is compelled to promulgate a defined service metric at this time, NTCA suggests that network reliability may be considered. However, NTCA urges the Commission specify that USF recipients who comply with performance measurement obligations are *de facto* compliant with IJJA requirements.

This approach is appropriate to extend to other aspects of the IJJA, as well. The Commission seeks comment on whether “equal access” should be interpreted to mean not only that rates are comparable but affordable as well.²⁴ NTCA submits that “equal access” should be read in accordance with the “plain meaning” rule, *i.e.*, interpreted according to the ordinary meaning of the language. In this instance, “equal access” within the context of a regulation aimed at service providers would be read to mean that *providers* offer all users the equal ability to obtain broadband service, and that the provider does not undertake any action that changes its offering from one class of users to another on an unjust or unreasonable basis. Rather, all users and prospective users of the service enjoy the same terms and conditions of service. To be sure,

²³ NOI at para. 13.

²⁴ NOI at para. 15.

Congress and the Commission have recognized the role of affordability in broadband adoption. NTCA submits that the aspect of affordability is tied to the condition of the *user* rather than the provider. Stated differently, when a provider offers a service or good at the same rate for all prospective users, all users have equal *access* to that service.²⁵ This is differentiated from equal *ability* to access the service. The *ability* of an individual can be addressed through discrete, targeted programming such as the ACP. By way of analogy, all grocery shoppers should enjoy equal *access* to products on the store shelves. Where an individual shopper lacks the *ability* to purchase an item, a targeted program such as SNAP may be invoked to address ability. Access, in contrast, is not implicated from the perspective of the provider of goods or services. This analytical construct is evident in the ACP, which has enjoyed wide adoption among many providers, including a preponderance of NTCA members.²⁶

B. NTCA AND ITS MEMBERS CHAMPION DIGITAL INCLUSION INDEPENDENT OF STATUORY REQUIREMENTS.

Notwithstanding statutory obligations arising out the Communications Act, the documented achievements of NTCA members; NTCA’s positions in numerous Commission proceedings; and the growing library of research in NTCA’s Smart Rural Community program demonstrate the commitment of NTCA and its members to ensure access to broadband and advanced communications services for all who live and work within their respective service areas. Moreover, NTCA has taken particular action over the past year to promote digital inclusion and broadband adoption in under-represented communities: NTCA published a broad

²⁵ It is also worth noting that, under the Commission’s own high-cost USF programs, the rates charged to many rural consumers by definition and design do *not* equal those in urban areas. Rather, the Commission has consistently established budgets for high-cost USF support aimed at enabling providers to deliver services at rates that are pegged two standard deviations higher than national average rates. Applying a strict “equal access” standard that compels charging identical rates in rural and urban areas alike would be unreasonable under these circumstances.

report in inclusion and adoption issues in 2021;²⁷ hosted webinar programming to explore adoption and inclusion in Tribal and low-income communities;²⁸ and created a Digital Inclusion webpage and toolkits to promote strategies and resources for rural broadband providers.²⁹ This series includes strategies to digital inclusion initiatives, including strategic partnerships and designing specific programming. Forthcoming installments will highlight member efforts with digital inclusion in the areas of access to the internet, digital devices, and digital literacy. Finally, NTCA is participating actively on the Commission’s Communications Equity and Diversity Council, represented by Mona Thompson, General Manager of Cheyenne River Sioux Tribe (CRST) Telephone Authority on the Diversity and Equity Working Group. NTCA and its members actively engage strategies to increase digital inclusion. Both current market and regulatory incentives and requirements support their efforts to increase engagement in the broadband society and to ensure that all in their communities can participate.

III. CONCLUSION

NTCA supports policies that promote greater availability of and engagement with broadband services. NTCA promotes digital inclusion and adoption strategies actively among its membership and participates in Commission proceedings related to these goals. The outcomes envisioned by the IIJA align with sections of the Communications Act of 1934, with which NTCA members and many other services providers currently comply. NTCA recommends the Commission to implement the IIJA in a manner that aligns with existing mandates in order to

²⁷ See fn. 4, *supra*.

²⁸ NTCA Webinar, “Rural Imperatives in Broadband Adoption and Digital Inclusion,” featuring Catherine Nicolaou, Sacred Wind Communications, Inc., and Kris Ward, Focus Broadband (Jan. 25, 2022).

²⁹ See, “Digital Inclusion,” <https://www.ntca.org/member-services/digital-inclusion> (visited May 16, 2022).

ensure a comprehensive and effective path forward toward promoting the provision of broadband to the broadest range of users.

Respectfully submitted,

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