



November 7, 2023

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

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

Dear Ms. Dortch:

NTCA–The Rural Broadband Association (NTCA) submits this letter to address the draft Order in the above captioned docket (FCC-CIRC2311-01). While aiming to create an environment in which broadband adoption and engagement will be fostered, the draft Order unfortunately includes provisions that at best create substantial uncertainty and risk for internet service providers (ISPs), and at worst threaten to intrude upon independent business decision making in a manner neither foreseen nor supported by the relevant statute. Neither outcome serves the goal of increasing broadband engagement but rather creates an environment in which business decisions that conform to statutory vision will be reviewed through an altogether different agency lens.

In the first instance, the draft Order proposes to depart from the statute’s guidance by imposing a disparate impact, as opposed to a discriminatory intent, standard. As explained in NTCA’s comments in the underlying proceeding, the scope of the statute, which includes clear exemptions for instances of technical and economic infeasibility, evidence the fact that Congress intended the statute to reach limited situations in which disparate conditions are the result of decisions made with discriminatory intent (NTCA Comments at 13-15; NTCA Reply Comments at 4-7). Stated differently, the statute recognizes that disparate outcomes may emerge from technological and economic considerations, and expressly separates those *disparate impact* outcomes from instances of *discriminatory intent*, *i.e.*, decision-making in favor or against a person based on that person’s inclusion in a particular group, class, or category (NTCA Reply Comments at 11). The latter is prohibited; the former is understood by the statute to be a consequence of lawful business practices.

To be sure, the draft Order does not *per se* disregard the carve outs of the statute. But the draft Order articulates considerations and criteria that would substitute agency oversight for private business judgement and minimizes the applicability and practical effectiveness of these statutory carve outs. The draft Order unpacks nearly every aspect of an ISP operation and subjects it to potential scrutiny, supposing that each component plays an ultimate role in adoption and engagement among covered populations. These include, but are not limited to, network maintenance and reliability; language options; marketing; renewals and upgrades; customer premises equipment; installation; and pricing (Draft Order at para. 102). In doing so, the draft Order effectively rejects the proposition that individual businesses faced with specific conditions can make rationally tailored decisions (Draft Order at para. 73). Instead, the draft Order shifts the burden of proof to the provider to demonstrate why the ISP's actions were *not* inconsistent with guardrails of technical and economic feasibility that guide business decisions. Of concern, however, is that this burden must be met not by demonstrating that the ISP acted in accordance with principles deployed in the normal and ordinary course of business, but rather that the ISP acted in accordance with what the *regulator* perceived *post hoc* to have been a more appropriate private business decision (Draft Order at para. 74; *see, also*, NTCA Reply Comments at 6, explaining the impact of projected take rates; loop lengths; terrain; pole attachments; and other factors beyond the control of the ISP). This outcome creates an environment of expansive uncertainty and liability for providers.

The draft Order also creates significant uncertainty regarding the penalties an ISP might face should it be unable to demonstrate to the Commission's satisfaction that its decisions were guided by reasonable determinations of what was technically or economically feasible. The draft Order does not specify penalties or remedial pathways but rather explains that each case will be addressed on a "case-by-case basis," and that the Commission will invoke the "full suite of available remedies, including the possibility of monetary forfeitures" (Draft Order at para. 141). Taken together, the draft Order dispenses with a rational standard of economic and technical guidance (as established by the statute) and replaces it with a paradigm in which each aspect of a private firm's decision-making process is subject to scrutiny, with no defined guidance on the front end and a seemingly limitless overhang of penalty on the back end.

This outcome is particularly troubling when held against commenters' reasonable requests for a safe harbor, which the draft Order expressly denies (Draft Order at para. 142). As NTCA explained in its comments, many ISPs are subject to clearly defined buildout obligations, and moreover participate in programs aimed at increasing user affordability (NTCA Comments at 29). The specter of technical and economic feasibility among providers that rely on high-cost support is clear because the *very provision* of high-cost support evidences the economic infeasibility of deploying broadband in that provider's service area. Accordingly, where a provider complies with buildout and Lifeline obligations of the Universal Service Fund, it can hardly be argued that disparate outcomes evidence discriminatory intent.

For the reasons stated above, NTCA urges the Commission to set aside the disparate outcome standard; to preserve the ability of private firms to make rational business decisions in accord with the statute's explicit recognition of technical and economic infeasibility; and to create a safe harbor for providers subject to buildout and Lifeline obligations pursuant to Universal Service Fund or other programs whose funding is intended to overcome the lack of economic scales that would ordinarily justify broadband deployment.

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Respectfully submitted,

*s/ Joshua Seidemann*

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