

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Implementing the Infrastructure Investment and) GN Docket No. 22-69
Jobs Act: Prevention and Elimination of Digital)
Discrimination)

To: The Commission

**JOINT COMMENTS OF
ACA CONNECTS – AMERICA’S COMMUNICATIONS ASSOCIATION,
NTCA – THE RURAL BROADBAND ASSOCIATION AND
WISPA – THE ASSOCIATION FOR BROADBAND WITHOUT BOUNDARIES**

ACA Connects – America’s Communications Association (“ACA Connects”), NTCA – The Rural Broadband Association (“NTCA”) and WISPA – The Association for Broadband Without Boundaries (“WISPA”) (collectively, “Joint Commenters”) hereby comment jointly on the proposals in the Further Notice of Proposed Rulemaking (“*FNPRM*”) in the above-captioned proceeding.¹ The Joint Commenters submit that the proposed rules are unnecessary to further the Commission’s goals in this proceeding. If the Commission nevertheless proceeds, any rules it adopts should provide appropriate relief for smaller and rural broadband providers that would incur regulatory costs and burdens without any evidence that they are engaged in practices resulting in discriminatory impacts. Additionally, the *FNPRM* does not contemplate a period in which the Commission can evaluate the effectiveness of rules that were adopted fewer than three months ago and which are not yet effective. Accordingly, the Joint Commenters urge the Commission to defer any action on the proposals in the *FNPRM* until there has been an

¹ *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69, FCC 23-100 (rel. Nov. 20, 2023) (“*Report and Order*” or “*FNPRM*”).

opportunity to assess the effectiveness of the initial rules adopted in the *Report and Order*. The Joint Commenters note that such deferral would at the same time coincide with adjudication of the various appeals of the initial *Report and Order*.

Introduction

Together, ACA Connects, NTCA and WISPA represent more than 2,000 smaller broadband providers that serve consumers in suburban, exurban, rural, and remote areas of the country. Although the Joint Commenters do not always take the same positions in rulemaking proceedings, they do so here, given the substantial costs, burdens, and enforcement uncertainty that their members will incur if the rules proposed in the *FNPRM* are adopted.

Discussion

The *FNPRM* proposes to impose two new “affirmative obligations” on every broadband provider, regardless of size or evidence of discriminatory practices.² First, providers would be required to “submit an annual, publicly-available supplement to the [Broadband Data Collection (“BDC”)] describing, on a state-by-state or territory-by-territory basis, any large-scale broadband deployment, upgrade, and maintenance projects that were completed or substantially completed during the preceding calendar year and the communities served by such projects.”³ Second, providers would be required to “establish a mandatory internal compliance program requiring regular internal assessment of (a) what communities are served by recent, pending, and planned large-scale projects and (b) whether the provider’s broadband-related policies and practices might differentially impact consumers’ access to broadband based on a listed characteristic and

² *FNPRM* at 90 (¶ 180).

³ *Id.*

without adequate technical or economic justification.”⁴ For the reasons described below, the Commission should defer consideration of these rules. However, if the Commission indeed proceeds, then the Commission should exempt smaller and rural providers from any new requirements it may adopt.

I. THE COMMISSION SHOULD DEFER CONSIDERATION OF THE PROPOSED RULES

There are at least two reasons why the Commission should defer action on the *FNPRM*. First, it will be some time before the rules governing differential impacts are tested because the Commission has indicated that it “will not initiate any enforcement investigation solely concerning conduct that produces differential impacts under these rules until at least six months after the effective date of the rules.”⁵ To the extent the proposals of the *FNPRM* are intended to enhance or further the goals of the *Report and Order*, the need and extent of such additional measures will be better known after the Commission and industry have had a sufficient “test period” to evaluate the effectiveness of the initial rules. As noted by the Joint Commenters in their respective initial comments, there is no evidence that smaller and rural providers have reason or motive, or have indeed engaged in, digital discrimination of access. And if after an evaluation period when the new rules are effective *still no evidence of digital discrimination emerges*, the Commission will have good and sufficient reason to not impose on smaller and rural providers additional burdensome requirements. At this point in time, however, there can be no evidence of deficiency because the newly adopted digital discrimination requirements have not yet taken effect.

⁴ *Id.*

⁵ *Report and Order* at 66 (¶ 132). Moreover, amendments to Section 1.717 authorizing informal complaints will not be effective until the Office of Management and Budget completes its review under the Paperwork Reduction Act. *Id.* at 102 (¶ 227). That could take several months.

Second, since the Commission adopted the *Report and Order* and *FNPRM*, approximately 20 petitions for review have been filed in various federal circuit courts, including by ACA Connects and WISPA.⁶ The vast majority of these appeals question whether the Commission has the legal authority to adopt rules under a disparate impact standard.⁷ If the Commission lacks that authority, it follows that it may lack authority to adopt the rules proposed in the *FNPRM*. In light of the numerous appeals arguing that the disparate impact standard is arbitrary and capricious and contrary to law, a pause on the consideration of additional regulatory obligations predicated on the very rules that are subject to appeal will enable a complete assessment of a future path.

II. THE COMMISSION’S PROPOSED RULES WOULD DO LITTLE TO FURTHER THE COMMISSION’S GOAL OF REDUCING DISCRIMINATORILY IMPACTFUL BROADBAND DEPLOYMENTS

The additional requirements proposed in the *FNPRM* are not only untimely, but are unnecessary and would impose undue burdens on providers. First, the Commission fails to establish a need for the proposed annual reports documenting each large broadband “deployment, upgrade, maintenance, or a combination thereof” and providing “a narrative description of the [broadband deployment] project and of the areas served by the project.”⁸ Broadband providers are already required to submit location-specific broadband availability data every six months. As demonstrated by filings in the record,⁹ this BDC data, and other data the

⁶ The cases are being consolidated in the Eighth Circuit. *See Consolidation Order*, MCP No. 177, United States Judicial Panel on Multidistrict Litigation (Feb. 9, 2024).

⁷ *See Consolidation Order*, MCP No. 177, United States Judicial Panel on Multidistrict Litigation (Feb. 9, 2024).

⁸ *FNPRM* at 91 (¶ 184).

⁹ *See, e.g.*, ACA Connects Reply Comments, GN Docket No. 22-69, at 13 (Apr. 20, 2023); ACA Connects Reply Comments, WC No. 23-320, at 9-10 n. 22 (Jan. 17, 2023).

Commission collects and analyzes pursuant to its Section 706 inquiries, can be used to assess whether providers are differentiating their broadband service offerings in a way that may implicate digital discrimination. The Commission also could leverage U.S. Census Bureau data and other data sources to undertake this analysis. In addition, as WISPA proposed in its Comments in response to the 2022 Notice of Inquiry, the Commission could “add layers to the [Broadband Serviceable Location] Fabric representing the listed characteristics to help identify for broadband service providers the specific areas where broadband service is lacking and overlaps with areas with high concentration of low-income households.”¹⁰ Specifically, WISPA suggested overlaying on the Fabric Persistent Poverty Data¹¹ and Qualified Opportunity Zones (“QOZs”) data.¹² Both of those already existing government datasets and U.S. Census Bureau data could be used to readily identify low-income households to help broadband providers target their future deployments areas that are also lacking broadband access. Moreover, the Commission can conduct these analyses over time to examine industry and individual provider trends. The Joint Commenters therefore urge the Commission to first perform this work before imposing any new requirements. This is especially the case because the proposed additional

¹⁰ See Comments of WISPA, GN Docket No. 22-69 (filed May 16, 2022), at 22.

¹¹ *Id.* at 22 (“For example, the USDA collects data by income and tracks counties with poverty rates of 20 percent or more of residents as measured by each of the censuses between 1980 and 2000. This Persistent Poverty Data can be very helpful for service providers and governmental entities to identify geographic areas that have the most need for broadband access, specifically where public money will serve the highest use.”).

¹² *Id.* (“QOZs are certain population census tracts within a State that the Governor designates as significantly below the median family household income levels across other parts of the State, and are designed ‘to spur economic development and job creation in distressed communities throughout the country and U.S. possessions by providing tax benefits to investors who invest eligible capital into these communities.’ Adding QOZs as part of the Fabric will readily identify geographic areas with low household income populations that are eligible for tax benefits for private sector investment without increasing reporting burdens on broadband providers.” (footnotes omitted)).

reporting would increase costs and administrative burdens on covered entities, including small businesses, without delivering offsetting benefits.¹³ Further, unlike the BDC, the proposed annual reports would contain subjective information, which would be at best challenging to interpret and compare. As such, the production of reports may lead to confusion and a need to create additional *post hoc* documentation demonstrating where or how initial expectations or market predictions fell short.

Moreover, the proposal introduces substantial questions regarding the ordinarily proprietary nature of internal business dealings, particularly if providers are required to report information about ongoing or planned expenditures. The proposed reporting would then expose internal decision-making while offering *no more transparency* than the on-the-ground facts that emerge from those plans and revisions to them that can also be anticipated in the normal and ordinary course of business. Even the well-intentioned Advisory Opinion route adopted in the *Report and Order* does not mitigate these concerns, but rather risks imposing yet another anchor on nimble industry response to market conditions.

These concerns also extend to proposals that providers be required to create a “formal internal compliance program” with certain mandatory components.¹⁴ Although adopting best practices may be good business and serve as evidence in defending a digital discrimination complaint, the annual certifications envisioned by the *FNPRM* would require providers to craft practices to meet government-dictated standards that are, at best, highly situation-specific and, at worst, ambiguous. To be sure, creating, updating and maintaining written policies (and,

¹³ By way of example, most of WISPA’s operator members have 10 or fewer full-time employees and the average NTCA member has 35 full-time employees.

¹⁴ *FNPRM* at 95-96 (¶ 201).

presumably, training employees and other “covered entities” with which they do business) is not without cost that smaller providers would be forced to bear, on top of the new broadband label and data breach reporting obligations the Commission has recently imposed. The goal of encouraging greater digital access is disserved when broadband providers are compelled to devote resources to processes that offer no clear link to compliance, but rather require firms to document for regulatory review their internal business practices which may in many events shift from time-to-time to respond to market needs.

III. IF IT DOES NOT DEFER CONSIDERATION OF THE PROPOSED RULES, THE COMMISSION SHOULD EXEMPT SMALLER AND RURAL PROVIDERS

The proposed rules would impose additional burdens on smaller providers that the record in this proceeding would not justify. The record lacks any evidence that smaller providers or rural providers have engaged in the discriminatory practices which the proposed rules seek to prohibit. To the contrary, the Joint Commenters have submitted proof showing that smaller providers and rural providers deploy broadband in a non-discriminatory manner. For example, in its Comments on the NPRM, ACA Connects “submitted data drawn from the Commission’s National Broadband Maps and the U.S. Census Bureau showing that ACA Connects Members are not discriminating among the subscribers they serve based on income, race, or ethnicity.”¹⁵ NTCA additionally provided evidence that its members operate in a non-discriminatory manner.¹⁶ The Joint Commenters have also undertaken individual efforts to promote digital

¹⁵ Comments of ACA Connects on the Notice of Proposed Rulemaking, GN Docket No. 22-69, at 8-16 and Appendix (Feb. 21, 2023). ACA Connects also provided examples, based on this same data, indicating that Members operating in various markets are not engaging in digital discrimination. *See id.*

¹⁶ Comments of NTCA— The Rural Broadband Association, GN Docket No. 22-69, at 7 (Feb. 21, 2023) (“[D]eployments and adoption continue to increase throughout NTCA member service areas. This progress arises against a backdrop in which nearly one-quarter of rural residents are members of a racial minority...and racial diversity in rural spaces is generally increasing. With an average of fewer than 384016v8

inclusion, reflecting their members' interests in broadening broadband deployment and adoption. By way of example, NTCA has published a comprehensive report on rural broadband inclusion and adoption;¹⁷ hosted webinar programming to explore adoption and inclusion in Tribal and low-income communities;¹⁸ and created a multi-part Digital Inclusion toolkit to promote strategies and resources for rural broadband providers, including a digital inclusion toolkit for ISPs and community partners.¹⁹

In the absence of evidence that smaller and rural providers are engaged in discriminatory practices, the Commission should not saddle these providers with additional, burdensome requirements. Compared to their larger counterparts, smaller providers are resource-constrained and risk-averse by nature. For example, many of the members of the Joint Commenters have fewer than ten employees. They already invest considerable resources completing their BDC filings, which the proposed reporting would make more labor-intensive and time-consuming. The proposed rules to (1) meticulously document decisions relating to a broadband deployment, (2) create policies pursuant to the *FNPRM*, and (3) appoint officers pursuant to the *FNPRM* will also create disproportionate burdens on smaller and rural providers, particularly those who are already subject to build-out and reporting requirements in USF, BEAD, or other Federal

5,000 fixed broadband accounts per service territory, it would be against their own interest in sustaining a business model for NTCA members to engage in discriminatory practices that would demur to serve a protected class or members of protected class of users.”).

¹⁷ See Joshua Seidemann and Roxanna Barboza, *Rural Imperatives in Broadband Adoption and Digital Inclusion*, Smart Rural Community, NTCA–The Rural Broadband Association (2021).

¹⁸ 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).

¹⁹ See “Digital Inclusion,” NTCA, available at <https://www.ntca.org/member-services/digital-inclusion>; see, also, “SMART Tools for Digital Inclusion,” NTCA, available at <https://www.ntca.org/sites/default/files/documents/SMARTDigitalInclusionToolkit.pdf>.

programs. Given the disproportionate burdens these rules will create – coupled with the uncontested evidence showing that smaller providers and rural providers deploy broadband in a nondiscriminatory manner – the Commission should exempt smaller and rural providers from the proposed rules.

Conclusion

ACA Connects, NTCA, and WISPA appreciate the opportunity to participate in this proceeding and urge the Commission to adopt its recommendations.

Respectfully submitted,

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