Before the
Federal Communications Commission
Washington, DC 20554

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

To: The Commission

JOINT REPLY 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, NTCA–The Rural Broadband Association, and WISPA – The Association for Broadband Without Boundaries (together, "Joint Commenters") hereby reply to the initial Comments filed in the above-captioned proceeding.[1]

Introduction

The Joint Commenters reiterate 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, regarding whom there is no evidence of practices resulting in unlawful discriminatory impacts. In the absence of such relief, these small businesses that provide crucial services to consumers in rural spaces will incur unwarranted and disproportionate regulatory costs and burdens. Evaluating the initial comments, the record overwhelmingly supports deferral of Commission action on the proposals in the *FNPRM* until there has been an opportunity to assess the effectiveness of the

[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*").

initial rules adopted in the *Report and Order*. Finally, the record raises novel and compelling legal issues about the extent of the Commission's authority that should be addressed before the Commission adopts any rules pursuant to the *FNPRM*.

Discussion

I. THE COMMISSION SHOULD NOT ADOPT THE *FNPRM*'S PROPOSALS AND SHOULD, AT MINIMUM, EXEMPT SMALL PROVIDERS FROM THE SUBSTANTIAL BURDENS THE PROPOSED RULES WOULD IMPOSE.

The *FNPRM*'s proposed rules would not further the Commission's goals in the instant proceeding and would create substantial and unnecessary burdens for small providers. At a minimum, and as discussed below, the Commission should defer consideration of the proposed rules until a reasonable "test period" in which the effectiveness of the new rules can be evaluated. However, if the Commission nevertheless adopts affirmative obligations in this proceeding, small providers should be exempt from those requirements. The Joint Commenters agree that broadband is necessary for full participation in our society,[2] and that ongoing efforts are critical to ensure that access to broadband is provided as widely as economically and technically feasible. However, the Joint Commenters oppose measures that would create unnecessary and burdensome layers of regulation, or the proposition that such far-reaching reporting and other obligations will help close the digital divide.[3]

[2] *See* Comments of the Leadership Conference on Civil and Human Rights, GN Docket No. 22-69 (filed Mar. 4, 2024), at 1.

[3] *Cf.* Comments of Public Knowledge, GN Docket No. 22-69 (filed Mar. 4, 2024) ("Public Knowledge Comments"), at 8, 9.

In the first instance, there is no evidence of discrimination. Numerous commenters agree that "there remains no evidence showing any pattern of digital discrimination meriting regulation."[4] In fact, the Commission itself said,

> Based on the record before us, we do not expect to encounter many instances of intentional discrimination with respect to deployment and network upgrades, *as there is little or no evidence in the legislative history of section 60506 or the record of this proceeding* indicating that intentional discrimination by industry participants based on the listed characteristics substantially contributes to disparities in access to broadband internet service across the Nation.[5]

As the Free State Foundation observed, "[c]onsumers cannot materially benefit from requirements aimed at a problem that has not been shown to exist."[6] But more to the point, the very intent of the proposed rules – to lend transparency to deployment strategies and outcomes – is rife with inefficiencies and hazards. Smaller ISPs such as the members of the Joint Commenters are already subject to numerous reporting requirements, and as noted by one small ISP, "[i]mposing a mandatory compliance program inspired by a framework intended for criminal deterrence is unnecessary and dismissively overlooks these providers' existing commitments to nondiscrimination."[7] All broadband providers are subject to Broadband Data Collection requirements, which demand information on infrastructure and where service can be

[4] Comments of TechFreedom, GN Docket No. 22-69 (filed Mar. 4, 2024) ("TechFreedom Comments"), at 1. *See also* CTIA Comments at 6 ("the Commission has not established in the digital discrimination context a track record of wireless maintenance problems that could even warrant new industrywide reporting"); Comments of Free State Foundation, GN Docket No. 22-69 (filed Mar. 4, 2024) ("Free State Foundation Comments"), at 4-7 ("There is no evidence of digital discrimination, but there is evidence of market competition and continuing improvements in Network Capabilities and access").

[5] *Report and Order* at ¶ 38 (emphasis added).

[6] Free State Foundation Comments at 8.

[7] Comments of Bulloch Solutions, GN Docket No. 22-69 (filed Mar. 4, 2024), at 8.

provided upon customer request,[8] as well as requirements to display broadband labels.[9] Providers are also subject to myriad reporting and compliance obligations arising out of their participation in Universal Service Fund and other programs, many of which have been imposed in the past two years.[10] These existing and accumulating reporting obligations provide ample basis for demonstrating providers' work in serving their communities and for determining the service offerings that are available.[11]

Moreover, the Commission's proposal to adopt annual reporting requirements and to require providers to establish and maintain a comprehensive compliance program contemplate a broad and prescriptive form of record keeping that departs from standard practices relied upon by most providers.[12] For example, the inclusion of contemplated information regarding upgrades would not only impose substantial burdens on providers but also implicate overwhelming costs as fees for legal review to expenses arise out of the numerous report preparations.[13] As noted by several commenters, reports that force providers to disclose strategies, plans, and costs "raise[] serious competitive problems, as providers would be able to infer important and confidential

[8] *See* Comments of USTelecom, GN Docket No. 22-69 (filed Mar. 4, 2024) ("USTelecom Comments"), at 13. *See also* Comments of CTIA, GN Docket No. 22-69 (filed Mar. 4, 2024) ("CTIA Comments"), at 5, n.14; Comments of NCTA, GN Docket No. 22-69 (filed Mar. 4, 2024) ("NCTA Comments"), at 2, 3.

[9] These requirements will become for effective for small providers October 10, 2024.

[10] *See id.* at 3, 4, 6.

[11] These existing requirements make it unnecessary to require providers to submit information about "low-cost broadband offerings available at the sites of large-scale deployment, upgrade, and maintenance projects," as suggested by Public Knowledge. Public Knowledge Comments at 8.

[12] *See FNPRM* at ¶ 201 ("Such models teach us that effective compliance programs should include, at a minimum: (1) development and implementation of written policies and procedures; (2) designation of a compliance officer and/or compliance committee; (3) conducting effective training and education regarding the purposes and operation of the compliance program; (4) developing effective lines of reporting and communication; (5) conducting internal monitoring and auditing; (6) enforcing standards through well-publicized disciplinary guidelines; and (7) responding promptly to detected problems through corrective action.")

[13] *See, e.g.,* NCTA Comments at 4; USTelecom Comments at 18, 22.

information about their competitors' business strategies."[14] Moreover, efforts to *avoid* an enforcement action could perversely lead to substantial privacy and data security issues were providers to inquire about sensitive personal information such as race, religion, income, or other protected classes – criteria that are usually exceedingly private and sensitive and which providers do not collect, and in fact would be diametrically opposite Federal Trade Commission guidance for firms to *reduce* personal data collections.[15] Several commenters observed that the proposed rules, which are conjured in the absence of any evidence of intentional discrimination, exceed the type of requirements that are typically found in a consent decree following an evidentiary finding of actual wrongdoing.[16] These requirements are simply inappropriate when employed as preventative measures against conditions that have not been demonstrated in the underlying record.

The Commission's proposed reporting rules will not, as speculated by the New York State Public Service Commission, "help ensure that affordable and reliable BIAS is available to all consumers."[17] To the contrary, particularly small providers, who are subject to numerous new and cumbersome reporting and compliance requirements, have a proven track record of deploying increasingly advanced broadband services throughout their service areas, as well as legally-mandated participation in Lifeline and extensive participation in the Affordable Connectivity Program.[18] In fact, the NYPSC strays into unchartered territory by recommending

[14] USTelecom Comments at 9; *see also* CTIA Comments at 7, 10; NCTA Comments at 5, 6, 8.

[15] *See* CTIA Comments at 9, 10; NCTA Comments at 5.

[16] CTIA Comments at 8; NCTA Comments at 6, 10.

[17] Comments of the New York Public Service Commission, GN Docket No. 22-69 (filed Mar. 4, 2024) ("NYPSC Comments"), at 2.

[18] *See, e.g.,* "Broadband/Internet Availability Survey Report," NTCA–The Rural Broadband Association (Arlington, VA) (2022) (documenting year-on-year deployment growth and increasing subscriptions to

prophylactic remedies for problems that it acknowledges *do not exist*.[19] Burdening ISPs, especially smaller ones that have no track record of discrimination and are subject to an onslaught of new reporting and compliance obligations, are entirely unnecessary when no problem is shown to exist and where the proposed rules will not eradicate the perceived harm.

Nor should the Commission adopt expansive new obligations proposed by some commenters that go well beyond the *FNPRM*'s proposals. For example, it should reject the call of the California Public Utilities Commission ("CPUC") that it adopt new requirements intended to "aid in evaluating technical or economic feasibility."[20] The CPUC's recommendation not only ignores variances of corporate culture and risk tolerance thresholds that define investment strategies, but even suggests that the Commission should "assess whether providers are using reasonable profitability standards in making deployment decisions."[21] The CPUC further contends that the Commission can and should regulate the duration during which private firms may seek to recover investment or overall strategies for earnings.[22] Nowhere does the governing statute envision a hostile takeover of private business management. The road to such excessive reporting requirements is riddled with flaws and concerns. The Commission should therefore decline to impose such requirements on providers, especially small providers who have not been shown to engage in problematic or unlawful behavior.

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higher capacity services as well as ACP participation rates) (https://www.ntca.org/sites/default/files/documents/2022-12/2022%20Broadband%20Survey%20Report%20(FINAL%2011-28-22).pdf) (visited Mar. 21, 2024).

[19] NYPSC Comments at 2, arguing the Commission "can also use the information to craft additional protections to address new forms of digital discrimination *that may materialize over time."* (emphasis added).

[20] Comments of the California Public Utilities Commission, GN Docket No. 22-69 (filed Mar. 4, 2024), at 3, 5, 6.

[21] *Id.* at 5.

[22] *See id.* at 6-9.

II. THE RECORD DEMONSTRATES SUPPORT FOR DEFERRING CONSIDERATION OF THE PROPOSED RULES.

The record offers clear support for Commission deferral of action on the *FNPRM* until (1) the Commission has the opportunity to determine whether and to what extent additional measures may be necessary, and (2) judicial appeals of the *Report and Order* are resolved.[23] In the first instance, the supposed need for additional requirements as proposed in the *FNPRM* cannot be determined until after "a sufficient 'test period' to evaluate the effectiveness of the initial rules."[24] As NCTA observes, "[b]ecause the Commission and broadband providers have not had experience applying these rules, there is no basis for finding that this burdensome additional layer of compliance regulation is necessary."[25] In fact, and as noted by NCTA, the Commission has previously deferred adoption of ancillary reporting obligations until there had been time to analyze the effectiveness of the underlying rules being supported.[26] The Joint Commenters agree that the Commission should follow that precedent and delay any new obligations until the effectiveness of the existing rules can be studied.[27]

Delaying any further burdensome regulatory obligations would also be consistent with the Commission's mandate from Congress that the Commission assess the state of competition

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[23] *See* Comments of Joint Commenters, GN Docket No. 22-69 (filed Mar. 4, 2024) ("Joint Commenters Comments"), at 3-4.

[24] *Id.* at 3.

[25] NCTA Comments at 10; *see also id.* at 11 (proposed rules would be "counterproductive to the Commission's goals to impose prescriptive internal compliance requirements before broadband providers have had any experience complying with or implementing the new rules.").

[26] *Id.* at 11 ("in 2023, the Commission required all providers to submit a robocall mitigation plan with certain components," but "the Commission did not impose the mandate until three years after it first adopted the STIR/SHAKEN framework.")

[27] The Joint Commenters also echo CTIA's sentiment that compliance with the proposed rules would come at an inopportune time: "The Commission and broadband providers are still experiencing technical and data processing issues just based on the current BDC requirements." CTIA Comments at 7.

and identify any law, regulation, or regulatory practice that poses a marketplace barrier to entry or to the competitive expansion of existing providers of communications services, especially for small providers.[28] Moreover, the Initial Regulatory Flexibility Analysis in the *FNPRM* is woefully insufficient because the Commission cannot reasonably determine the substantial economic impact the proposed rules would have on small providers without evaluating the rules adopted in the *Report and Order*, especially when compounded by additional regulatory burdens. The Regulatory Flexibility Act, as amended ("RFA"),[29] was designed to reduce the economic impact of regulations on small business and acts as a statutorily mandated analytical tool to assist federal agencies in rational decision making processes.[30] Adopting the rules proposed in the *FNRPM* without a reasonable evaluation of the impact and effectiveness of the current rules would violate the RFA.

Additionally, the proposed reporting rules are intended, in part, to inform the Commission's review of claims that a broadband service provider is engaging in practices that have a disparate impact on protected classes of consumers. Because there are numerous petitions for review of the *Report and Order* challenging whether the Commission had authority to adopt the disparate impact claim rules, prudent rulemaking and efficient administration suggest that the Commission pause consideration of its proposed reporting rules until the Eighth Circuit has issued its judgment on these petitions for review.[31]

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[28] 47 U.S.C. §§ 163(b)(3) and (d)(3).

[29] Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121), the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), and the Small Business Jobs Act of 2010 (P.L. 111-240), 5 U.S.C. §§ 601 et seq.

[30] *See* RFA, Congressional Findings and Declaration of Purpose.

[31] *See, e.g.,* TechFreedom Comments at 18. *See also* Joint Commenters Comments at 3.

III. THE RECORD SHOWS THAT THE PROPOSED RULES WOULD UNLAWFULLY EXTEND THE COMMISSION'S AUTHORITY.

The Commission took extraordinary and unlawful steps in the *Report and Order,* including the adoption of a disparate impact standard. The proposals of the *FNRPM* would continue to extend the rules beyond what is neither necessary nor reasonable, and implicate other substantial questions as to the lawfulness of those actions. The record provides ample evidence that the Commission's proposed affirmative reporting obligations would be unlawful. As CTIA pointed out, "[t]he Commission can act only within the scope of authority granted by Congress—and in this case, the Broadband DATA Act does not authorize the Commission to adopt a 'supplement to the BDC.'"[32] Additionally, Section 60506 does not authorize the Commission to enact the affirmative obligations contemplated in the *FNPRM*.[33] Other commenters noted that the proposed rules would extend beyond the Commission's legal authority:

> Section 60506 does not authorize an annual report that effectively expands the BDC. With regard to the compliance program, the Commission cannot extract a second and distinct layer of burdensome obligations out of the same Section 60506 direction it already purported to implement. The brief, high-level digital discrimination statute, tucked into more than one thousand pages of legislation, simply cannot support such extensive intrusion into providers' internal operations.[34]

[32] CTIA Comments at 13 (citing to the Broadband Deployment Accuracy and Technological Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020) ("Broadband DATA Act") (codified as 47 U.S.C. § 641 et seq.)).

[33] *See* CTIA Comments at 11-14; *see id*. at 13 ("Nor does this statute authorize the Commission to require broadband providers to explain the reasons why they are undertaking these activities. Nor does Section 60506 authorize the Commission to add to the BDC in the manner that the Commission seeks here."); *see also id*. at 14 ("[the proposed rules] turns the language of Section 60506 on its head by proposing a costly mandatory compliance program that detracts from the feasibility of broadband investment.").

[34] USTelecom Comments at 28; *see also* Free State Foundation Comments at 7 ("Section 60506 does not contain clear congressional authorization for the Commission to redraw the regulatory landscape of broadband Internet services").

As commenters explain, the extensive intrusion into private business practices envisioned by the proposed rules (and indeed currently activated by the initial rules that are now the subject of numerous appeals) is simply not contemplated in the IIJA, which included a single section on digital discrimination in more than 1,000 pages of legislation.[35] Significantly, the IIJA addresses digital equity extensively in Broadband Equity, Access, and Deployment sections yet does not approach the type of expansive rulemaking as the Commission seeks to create here. Simply put, the proposed rules would be an unlawful extension of the Commission's authority. Neither Section 60506 nor the Broadband DATA Act authorizes the Commission to adopt the proposed rules' affirmative obligations to supplement the BDC. Accordingly, the Joint Commenters encourage the Commission to forgo adopting these unlawful proposals.

Conclusion

The Joint Commenters appreciate the opportunity to participate in this proceeding and urge the Commission to adopt the recommendations expressed in the Joint Comments and these Joint Reply Comments.

Respectfully submitted,

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[35] USTelecom Comments at 24. *See also id.* n.78.