USTELECOM | THE BROADBAND ASSOCIATION

August 10, 2022

Marlene Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation
***Implementing the Infrastructure Investments and Jobs Act: Prevention and Elimination of Digital Discrimination*; GN Docket No. 22-69**

Dear Ms. Dortch:

On August 9, 2022, the undersigned of USTelecom – The Broadband Association ("USTelecom") met via teleconference with Benjamin Arden of Commissioner Carr's office. During this meeting, USTelecom expressed its strong support for the Commission's important work to facilitate equal access, which includes preventing digital discrimination and we discussed critical issues that the Commission should keep in mind as it is beginning to draft the Notice of Proposed Rulemaking in this proceeding.

Specifically, and consistent with USTelecom's comments in this proceeding[1] we discussed the importance of the Commission balancing its Congressional mandate with the imperative to continue incentivizing broadband investment. As an initial matter, there are many in the record who take aim at providers for refuting the existence of digital discrimination, however those same groups claim that digital discrimination exists because there is still a digital divide in this country. USTelecom and its members have repeatedly acknowledged there is a digital divide, but USTelecom's members are continuing to work to close that divide. The divide will get smaller with each passing day as more public and private capital is funneled into broadband, including the $86 billion the country's providers invested in 2021.[2] But the existence of a digital divide does not equal digital discrimination and the two should not be conflated. Importantly, although the IIJA includes findings by Congress about the digital divide and its impact on vulnerable populations, it makes no findings that broadband providers have engaged in digital discrimination. Rather, it charges the Commission with facilitating equal access, including by preventing digital discrimination if and where it exists.

We also discussed that digital discrimination must be construed as intentional discrimination. A disparate impact standard would contravene Congressional intent given that Congress used the words "based on" which the Supreme Court has held refers to mindset and does not encompass disparate impact liability. Furthermore, making any rules retroactive, as

[1] *See* Comments of USTelecom, Docket No. 22-69 (May 16, 2022); Reply Comments of USTelecom, Docket No. 22-69 (June 30, 2022).

[2] *See 2021 Broadband Capex Report*, USTelecom (July 19, 2022), https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf.

some in the record have urged, is impermissible as an agency may only promulgate retroactive regulations with express Congressional authority to do so, and there is none here.

We then discussed the crux of the Commission's directive: facilitating equal access. This will best be accomplished by positive changes targeted to incentivize investment and drive deployment, including further streamlining the Section 214 requirements for discontinuing outdated, legacy services and preempting unreasonable permitting processes and non-cost-based rights of way fees. Such positive changes are a far superior means to facilitate equal access than the Commission overseeing ever aspect of a provider's network from speed and jitter to promotional offerings, contrary to the urgings of some in the record. Moreover, deployment mandates, including forcing a provider to deploy in an area where a competitor has a foothold should not be considered. Doing so would essentially create a new regulatory regime, which is not authorized by the Infrastructure Act. And the vast resources the Commission would need to oversee every aspect of every provider's network and mandating deployment are better put towards policy changes to incentivize investment, not disincentivize it.

Finally, we discussed the important role of technological and economic feasibility. The Commission should reject calls for a strict formula on what an appropriate return on investment is for a provider which stretches for the entire useful life of the assert. Such an approach is out of line with business realities. No rational provider would sink billions of dollars in facilities upgrades anywhere if it would expose it to liability for failing to deploy the same upgrades everywhere at the same time and on identical terms, irrespective of differences in cost or demand. Moreover, if providers have money tied up in a certain location for 10, 15, 20 years, they will not be able to recoup their investment in the shorter term to deploy that capital on other areas. The bottom line is that every provider is different and must be able to make reasonable business decisions in line with their business needs.

Please contact the undersigned if you have any questions.

Sincerely,

/s Diana Eisner/

Diana Eisner
Vice President, Policy & Advocacy

cc: Benjamin Arden