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Dear Chairman Pai and Commissioners Clyburn, O'Rielly, Carr, and Rosenworcel:

As the leaders of the Coalition for Local Internet Choice (CLIC), we write to share with you our deep concerns about both the process and outcomes of the Commission's Broadband Deployment Advisory Council (BDAC) with regard to issues of local government autonomy and authority. In particular, we are alarmed by the Commission's startling failure to include adequate local government representation in the BDAC process, which has unsurprisingly resulted in BDAC recommendations that would undercut the important potential of local governments to help improve and accelerate broadband access and availability throughout the nation.

About CLIC

The Coalition for Local Internet Choice represents a wide range of public and private interests that support the authority of local communities to make the broadband internet choices that are essential for economic competitiveness, democratic discourse, and quality of life in the 21st century. CLIC's more than 500 members believe that local choice enables local self-reliance and accountability as well as local innovation, investment, and competition.

CLIC's members believe that local communities, through their elected officials, must have the right and opportunity to choose for themselves the best broadband internet infrastructure for their businesses, institutions, and residents. Federal broadband policies should prioritize local choice and provide local communities full, unhindered authority to choose their own broadband futures.

CLIC's membership—which include corporations, associations, communications providers, localities, and individuals—is united in our strong belief that the nation's interests are remarkably ill-served if the hands of local governments are tied with respect to expanding broadband availability and improving broadband coverage throughout the country.

Leadership:

Jim Baller, President | Jim@LocalNetChoice.org

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Attached to this letter is the recent testimony of our CEO, Joanne Hovis, regarding the importance of local participation in broadband; she appeared before the U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Communications and Technology.

Our concerns with the BDAC process

Few rational observers could interpret the composition of the BDAC or the process it has undertaken in a way that suggests that the Commission has been fair to the perspective of America's tens of thousands of cities, towns, counties, parishes, townships, and villages. To the contrary, the remarkable under-representation of local governments from the Commission's selected composition of the BDAC—despite countless nominations of knowledgeable and experienced local government officials—signaled from the outset both a lack of willingness to consider local government perspectives and, also, a likely outcome that would be hostile to local government and community interests. This has, in fact, occurred—leading two frustrated local officials to resign from the BDAC in protest. The Commission has now appointed another local official to replace the one who most recently resigned, but that does not come close to addressing the stark imbalance in the composition of the BDAC.

The audacity and impropriety of the process is clear from the fact that this entity, comprised primarily of corporate and carrier interests, is empowered by the Commission to develop model codes that could potentially impact every locality and state in the United States without any serious input from the communities it will most affect.

Our concerns with the BDAC's draft model state code

Considering the process involved, BDAC's draft of "model" state legislation is predictably problematic in numerous ways from the perspective of local governments. The elements of the model are not based on any empirical data, economic analysis, or rigorously examined experience of what will actually lead to more widespread deployment. Rather, the elements appear to be based on philosophical, ideological, and especially self-interested considerations on the part of the drafters. Many of the elements and requirements included in the documents are entirely untested and amount to an almost random collection of restrictive requirements based on unproven theories of what will lead to deployment. Such an ad hoc and ideologically based experiment is deeply inappropriate, and the draft legislation cannot be fixed by a few tweaks here and there.

That said, we'll focus here on Article 12 of BDAC's most recently published draft of its *State Model Code for Accelerating Broadband Infrastructure Deployment and Investment*, which was posted to BDAC's website in January 2018. That Article addresses municipal broadband networks, which represent one of the means by which localities seek to meet the needs of their citizens and businesses for broadband internet.

Far from fostering new deployment, public–private collaboration, and creativity at the local level, the proposed Article 12 would pose significant barriers to community-led broadband initiatives. The following are among our primary concerns with Article 12:

First, Article 12 must be read against the backdrop of Article 1, Section (2)(b)(iii), which states (in part) that broadband is critical infrastructure that states should address in two phases:

1. The first phase of the statewide broadband effort must be to make broadband accessible to every individual and organization in the state; and
2. The second phase of the statewide broadband effort must be to establish the state as a leader in the leveraging of broadband in support of the activities essential to an advanced society.

While this may be a reasonable strategy viewed from a statewide perspective, states should not apply it to restrict local initiatives that seek to exceed the states' statewide goals. To the contrary, while pushing to make “broadband” (defined in the draft as 25/3 Mbps) ubiquitously available statewide, states should encourage localities to act more rapidly and aggressively to achieve competitive leadership, by developing fiber networks that have much higher capacity than the current definition of broadband.

Fiber networks, like electric power utilities in the last century, are platforms, drivers, and infrastructure for simultaneous progress in just about everything that is important to communities—including economic development, education, workforce development, public safety, health care, transportation, urban and rural revitalization, environmental protection, democratic discourse, and much more. The stronger such networks make their communities, the more vibrant and globally competitive these communities make their states and our nation as a whole. If communities want to step forward to take advantage of these opportunities as rapidly as possible, it would not only be irrational, but unconscionable, for any state to hold them back, particularly by tethering them to the second-rate offerings of providers that are unwilling or unable to give communities the capabilities they want.

Second, Article 12, Section 1 opens with the statement that “The preference of the State is that municipal Broadband networks be built, owned, and operated by private industry.” At the outset, this statement is awkward from a definitional standpoint—while there are numerous models, a municipal broadband network must, by definition, include some level of municipal construction, ownership, or operation and is therefore not built, owned, and operated by private industry. In any event, if a state were truly serious about becoming a leader in the field and achieving the many worthy goals discussed in the draft, the state should prefer a locality's provision of gigabit connectivity over a private entity's provision of 25/3 Mbps.

Third, the preamble's exclusive focus on rural areas is also problematic. "Rural" is defined in Article 2, Section 56 as "a county with an average population density of less than 100 persons per square mile, excluding the county seat." While rural broadband is a significant challenge, localities everywhere should have the right to do everything that they and their community leaders deem necessary to acquire affordable access to fiber-based advanced communications networks.

Fourth, Article 12, Section 3 starts with the statement: "These time and risk factors in Rural areas of the State demonstrate that exceptions to the normal State preferences for Broadband development are both necessary and justified. In such cases, municipal leaders have an obligation to identify a strategy by which their constituents will have access to Broadband services and the opportunities that therefor result." Article 12, Section 4 then continues with the statement: "Public-Private Models. Municipal officials shall evaluate at least five options for providing Broadband services for feasibility and sustainability. These are, in order of preference" It goes on to describe these options.

Taken together, these two statements suggest that localities have a duty to consider the five broadband options. If that is in fact what the draft is saying, then it is simply unrealistic. There is no reasonable way for a state to force local leaders to prioritize broadband over other perceived local needs and to acquire advanced communications capabilities, particularly in an order of preference that may not be in the best interest of their communities. The most that a state can realistically do is to make it as attractive and as easy as possible for local leaders to take on this responsibility, in ways that are consistent with their own sense of what their communities need and want. At the very least, the state must remove, rather than add to, existing barriers to public broadband initiatives.

Fifth, Article 12, Section 4 lists five business models that localities must consider: Private-led Investment with Public Assistance; Balanced Public-Private Partnerships; Public Assets – Open Access; Public-Led Contracting; Fully Public Funded and Operated Networks. The list, itself, is not problematic, as localities seeking to acquire advanced communications capabilities typically explore a wide range of options and select the one that works best for them, based on highly project-specific considerations. There are, however, significant problems with this section's instructions on what localities must do with these mandated evaluations.

In particular, Article 12, Section 5.3 states: "If, and only if, the Rural municipality receives no reasonable and credible proposal from a private Communications Provider to build a Broadband network and otherwise determines that none of the first three options in Article 12(b) are viable and if, and only if, the Rural municipality makes a positive determination of costs, feasibility, sustainability, and that the action is in the interest of the general public may the Rural

municipality invest in a Fully Public Funded and Operated Network and/or engage in Public-Led Contracting.”

This requirement is troublesome for multiple reasons. Here are just a few:

- Again, only rural communities are considered and other communities that may have equal or greater needs are ignored.
- A locality that wants to build a state-of-the-art gigabit-plus fiber network would not be allowed to do so if it were “reasonable,” “credible,” and “viable” for a private provider to provide the community 25/3 Mbps. While not all municipalities will be willing and able to invest in a state-of-the-art fiber network, those that can should not be held back.
- The terms “reasonable,” “credible,” and “viable” are so vague that they would invite time-consuming, burdensome, and costly disputes and potential litigation, which, in turn, would drive away potential investment capital. For example, suppose that a locality could build out fiber to the whole community within four years and the incumbent private service provider could not do so in less than seven years at the earliest. Could the locality develop its own network in this scenario? The answer is not clear.

Suppose that a locality operates its own electric, water, sewer, and/or other utilities. An advanced communications network could benefit all of those other utilities as well as meet the community’s needs for advanced connectivity to the internet. A publicly owned multi-purpose fiber network might well be a better choice for the locality than any “reasonable,” “credible,” and “viable” solution that a private provider may offer, but under the evaluation scheme set forth in Article 12, Section 5.3, the locality would apparently be forced to accept the less attractive option.

In addition, under Article 12, Section 5.2, before “investing in a fully Publicly-Funded and Operated Broadband Network and/or investing in Public-Led Contracting,” a locality must consider whether “the benefits associated with purchasing or constructing the facilities outweigh the costs.” While calculating costs may be a manageable task, it is impossible to measure all of the many benefits, including the “positive externalities,” that advanced communications networks can provide.

Sixth, Article 12, Section 6 states that “Any facilities constructed or purchased pursuant to this Article 12(b)(iv) and Article 12(b)(v) must be made available to private entities on a non-discriminatory basis under the same terms and conditions as for the facilities listed in Article 9.” Article 9 requires public entities to make publicly owned dark fiber, towers, buildings, and other vertical assets available to private entities on a non-discriminatory basis. These requirements are

one-sided, inconsistent with other requirements in the draft model legislation, and counterproductive.

Indeed, for many years, private broadband service providers have vigorously resisted requirements that would have given competitors wholesale access to their fiber and other infrastructure, arguing that such access would significantly discourage broadband investment and harm their business prospects. The draft model legislation would do precisely that, but only for public broadband service providers. If states seriously want municipal broadband networks to succeed, the draft model should either drop these requirements for public broadband service providers or apply them in a non-discriminatory manner to all service providers.

Seventh, Article 12, Section 4.2 requires municipalities to consider this option: “Balanced Public-Private Partnerships. In which a municipality provides all or some of the necessary capital funds to construct the network, and one selected service provider is granted an exclusive franchise agreement for a finite period of time sufficient for the Broadband provider to recover its capital investment. At the end of that timeline, the system is open access with the incumbent Broadband provider retaining responsibility for system maintenance and operations.” As this provision recognizes, temporary exclusivity can be an important feature of some public-private partnerships. States should not deprive localities of their ability to employ their dark fiber or other assets as they consider most effective in achieving their broadband goals, even if that requires temporary exclusivity in some cases.

Finally, in the Wilson/Chattanooga preemption proceeding, the FCC took a hard and detailed look at how state laws, such as the North Carolina and Tennessee barriers at issue, actually work in practice. The FCC found that these laws pose severe and asymmetric barriers to public broadband investment. While the Sixth Circuit found that the FCC lacked authority to preempt these state laws, it did not question the merits of the FCC’s findings about the counterproductive effects of these laws.

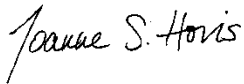
The proposed model state legislation says nothing on its face about removing existing state laws that impose barriers to public broadband initiatives; to the contrary, it can be read to impose new burdens on top of those that already exist in the more than 20 states that currently have such barriers. At the same time, the model state legislation could result in new barriers in states that do not already have them, creating significant new impediments to broadband deployment—in the guise of fostering deployment.

Indeed, this incongruity between the stated goals of the BDAC and its output is at the root of our deep concerns with the BDAC process and recommendations: It is truly Orwellian that the entity purporting to advise on “broadband deployment” should be proposing significant barriers to new

deployment. And given the dearth of local government participation in the process, this comes as no surprise.

On behalf of CLIC, we register our deep concern regarding the Commission's creation, constitution, and oversight of the BDAC, as well as our deep concern regarding the draft model state code and its deleterious impact on true broadband deployment.

Respectfully,



Joanne Hovis
Chief Executive Officer
Coalition for Local Internet Choice



James Baller
President
Coalition for Local Internet Choice

Testimony of Joanne S. Hovis
President, CTC Technology & Energy

before the

U.S. House of Representatives Committee on Energy and Commerce
Subcommittee on Communications and Technology

“Closing the Digital Divide: Broadband Infrastructure Solutions”
January 30, 2018

Chairman Blackburn, Ranking Member Doyle, Members of the Subcommittee—thank you for having me here. And thank you for your commitment to bridging the digital divide. My name is Joanne Hovis. I am president of CTC Technology & Energy, a communications engineering and planning consultancy serving the public sector.

I am also CEO of the Coalition for Local Internet Choice, a non-profit entity that brings together public and private entities that believe solving our nation's broadband challenges requires a full range of options. And this includes locally-driven efforts to deploy networks and create public-private collaboration.

As we look forward to Super Bowl Sunday, I suggest today that our country's drive to bridge the digital divide is a critical test of our ability to develop a winning strategy on one of the most important playing fields of the 21st century.

My comments focus on two critical questions about this essential effort. My first question is, do we actually have a winning strategy? Much of the current discussion here in Washington seems premised on the idea that a winning broadband strategy will smash so-called barriers, such as environmental permitting, local process, and costs of access to public facilities.

The premise is wrong. In reality, the fundamental reason we do not see comprehensive broadband deployment throughout the United States is that areas with high infrastructure costs per user, particularly rural areas, fail to attract private capital. This is not surprising. Nor is it a value judgment. It is simply how private investment works. If return on investment is low or nonexistent, the investment will not be made.

To solve this, state, local, and federal governments can take steps to improve the economics of broadband deployment in areas where investment has been insufficient. These areas include not only rural communities, but also underserved urban areas such as small business locations in cities and suburbs, as well as low-income areas where adoption is low and incumbents see no return that justifies network upgrades. Particular attention and support must be directed to those areas; without such efforts, private dollars will continue to flow primarily to the most profitable areas.

A better game-plan would involve these plays:

- First, support public-private partnerships that ease the economic challenges of constructing rural and urban infrastructure
- Second, incent local efforts to build infrastructure—ones that private service providers can use—by making bonding and other financing strategies more feasible, potentially through reduced interest payments or expanded use of tax-exempt bonds
- Third, target meaningful infrastructure capital support to rural and urban broadband deserts, not only to attract private capital but also to stimulate private efforts to gain or retain competitive advantage
- Fourth, empower local governments to pursue broadband solutions of all types, including use of public assets to attract and shape private investment patterns, so as to leverage taxpayer-funded property and create competitive dynamics that attract incumbent investment
- Fifth, require all entities that benefit from public subsidy, including access to public assets, to make enforceable commitments to build in areas that are historically unserved or underserved

- And, maximize the benefits of competition by requiring that all federal subsidy programs are offered on a competitive and neutral basis for bid by any qualified entity

Such strategies directly address the core reason the digital divide persists: lack of return on investment in many areas of the country.

Let me be very clear why the current strategy doesn't squarely face the challenge. Current efforts are focused on reducing the private sector's costs of doing business, such as by removing local processes, waiving environmental protections, and forcing local communities to subsidize carrier access to public property. All of this simply makes more profitable the already profitable areas of the country. Reducing those requirements does not fundamentally change the economics of broadband deployment in areas where return-on-investment is challenging—because the local processes and environmental and historic protections are such a small part of the economics of reaching and serving a rural area.¹ Rather, at best, these efforts tinker at the margins of broadband economics; at worst, they distract from the key issues and misdirect resources.

If we want to solve deployment issues in rural and low-income areas, we must target our solutions to those areas, and the solutions we choose must be adequate to the task. One-size-fits-all approaches will not bridge the digital divide because they effectively provide most of their benefit to providers in better-served areas that don't need incentives,

¹ Please see the declaration and report written by my colleague, Dr. Andrew Afflerbach, for the Smart Communities Siting Coalition. <http://www.ctcnet.us/wp-content/uploads/2017/05/Streamlining-Deployment-of-Small-Cell-Infrastructure-by-Improving-Wireless-Facilities-Siting-Policies.pdf>. This report, which has been filed in multiple FCC proceedings and never countered or disputed by industry participants, discusses how reducing local processes and fees will have marginal impact on rural broadband deployment. It suggests, rather, that local coordination, public-private planning, and partnership are tested means of enabling deployment.

without requiring the providers to invest some of their windfalls in more challenging areas. In other words, legislation or regulatory activity that purports to remove so-called barriers like local processes and fees may make for more profitable carriers in well-served areas. But they won't be sufficient to incent deployment in rural and urban broadband deserts.

Furthermore, if these strategies are premised on the idea that removing so-called barriers will lead to rural deployment of the emerging wireless technologies known as "5G," it's critical to know that no credible engineer, market analyst, or carrier is claiming that 5G deployment is planned or technically appropriate for rural areas. This is because 5G, which is still in developmental stages, is a wireless technology for very fast communications over very short distances. No wireless carrier would use 5G to serve low-density rural areas, any more than a team would focus on short-yard plays when far from the end zone, behind at the end of the fourth-quarter. If the goal is to attract private capital to rural communities, making wireless deployment more profitable in high-return metropolitan markets is exactly the wrong way to do it.

In summary: Doubling down on existing broadband investment patterns by making them even more profitable will not close this nation's digital divide. Rather, this approach is like moving the ball a few inches and calling it a touchdown.

My second question about our digital divide strategy is: Do we have the right players on the field? Let me suggest that local governments have proven themselves most valuable players in creating and incenting broadband deployment for many years—and that it's counter-productive to vilify localities based on the evidence-free assertion that local efforts and local processes restrict or disincent private deployment.

The assumption that the federal government is more **motivated** to enable deployment of this critical economic development infrastructure ignores the immediacy of the broadband need and the digital divide for local officials. And the assumption that the federal government is more **competent** to develop strategies to incent broadband deployment ignores the experience of the past decade, which demonstrates that local governments, given the opportunity, will apply creativity, local resources, physical assets, and diligence to try to solve broadband problems. For example, when Google Fiber first got started, more than 1,100 communities offered access to infrastructure, data, and other help to try and attract the company.

And they are not alone. Hundreds of localities have reached out to companies like AT&T and other incumbents, C-Spire, Ting Internet, Metronet, ALLO Communications, and many others to offer what amount to economic development packages and other incentives in return for commitments to deploy broadband infrastructure. Local collaborations are in formation between public and private sectors in hundreds of communities, to the benefit of both. The federal and state governments should not disrupt them.

Make no mistake: It is in areas where localities have been free to use their creativity, public assets, and legal authority to incent opportunity where we have seen some of the most robust broadband deployment. Observe the small towns in the Tennessee Valley that are connected with ubiquitous community-owned fiber optics; the Google Fiber cities where incumbents, led by AT&T, have greatly increased their upgrade investments to react to the threat of competition; the communities in Mississippi that competed to attract C-Spire investment; the Indiana towns that developed economic development packages to attract Metronet; and so many others. The data are clear: The areas of the country with the

best infrastructure and the liveliest competition are areas where localities have been able to engage in addressing their broadband needs based on local strategies and local needs.

Is it wise or appropriate for the federal government to interfere with those and many other potential local initiatives? Is the federal government better able to understand how to work with companies to meet both private and community needs? And is it really accurate to assume that industry giants like AT&T and Verizon cannot ably negotiate with localities—and require the intervention of the federal government to protect them?

Broadband is an existential issue for many local governments. No one recognizes better than an elected local official the importance of broadband to the economic vitality of a community, and its attractiveness for residents, workers, and businesses.

In short, it's counter-productive to tie the hands of the public officials—the very people who have the greatest incentive to solve these problems effectively and efficiently.

Let me share a few examples of the local motivation and creativity I see throughout the country:

- In Spring Hill, Kansas and Pikeville, Kentucky, local communities are seeking to deploy fiber optic infrastructure to enable private sector service provision and competition as part of a broader economic development strategy. In Pikeville, the goal is to replace the declining coal economy with a coding economy, which is possible only with robust and plentiful broadband.
- Seattle has sought ideas from the private sector and has developed strategies for enabling wireless broadband service to low-income communities and users; the City is considering strategies to incent companies to serve lower-income parts of the City.

- In Gallup, New Mexico, the city's utility seeks to deploy infrastructure for public safety that will also enable private sector services in an area where private sector infrastructure deployment has not emerged.
- San Francisco is considering establishing an innovative public-private partnership that would ensure deployment and provision of ubiquitous best-in-class services with particularly attractive and affordable pricing for the 150,000 San Francisco residents who are not currently able to purchase existing high bandwidth products.
- In Michigan, a number of rural townships that are unserved with broadband are seeking to build broadband infrastructure in their rights-of-way and partner with private entities for service provision. A local non-profit, the Michigan Broadband Cooperative, formed to work with and coordinate among the townships so that they can learn from each other and build sustainable partnership strategies.
- In Sublette County, Wyoming, and Huntington, West Virginia, the local governments are seeking to deploy infrastructure to business districts to enable private sector services in an area where private sector infrastructure deployment has not emerged. Bowling Green, Kentucky has done exactly that: the city built fiber infrastructure to businesses and has enabled local companies to compete in the global marketplace.
- Boston has developed an innovative partnership with an open access fiber and wireless infrastructure provider in which the City incented new, open fiber deployment by leveraging the needs of schools and public safety facilities for fiber-based services.
- Rural Queen Anne's County, Maryland has been working with local incumbents seeking partnership opportunities to support broadband deployment.

- New York City late last year released a request for information seeking industry ideas for how the city and private entities can collaborate to bridge the considerable digital divide in which low-income New Yorkers have fewer broadband choices and challenges affording high bandwidth options where they exist. In a clear indication of the potential for city-led public-private collaboration, the city received more than three dozen substantive responses.
- In Wilson, North Carolina, the public utility extended gigabit internet to rural areas in its electric footprint. It enabled a large family farm to export its sweet potatoes to the European market by meeting Europe's high food monitoring requirements. At the same time, the utility was the only carrier to help the 600-home rural town of Pinetops with free connectivity to the local church and shelter during the 2016 flood following Hurricane Matthew.
- In Lafayette, Louisiana, Chattanooga, Tennessee, and dozens of other communities, local governments have developed their own advanced communications networks after finding the incumbent providers unwilling or unable to upgrade their networks in a timely manner to meet local needs.

Blaming localities for the digital infrastructure divide ignores these and thousands of other local efforts. At the same time, tying the hands of localities reduces their ability and incentive to work creatively with partners of all sorts to solve these problems. And preempting local authority over infrastructure assets such as light poles removes from the local toolkit incentives that localities can use to attract and shape private broadband deployment.

In short: Preempting local efforts and authority is not a winning strategy; it simply removes from the playing field one of the most important players: local government. Let me suggest that the urgency of this task, bridging the infrastructure digital divide, calls for all players to take the field.

My thanks for your consideration of my comments and for your commitment to this enormously important issue.