Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Preemption of State Laws Restricting the	)	
Deployment of Certain Broadband Networks	)	WCB Docket Nos. 14-115 and 14-116
	)	
	)	

COMMENTS OF THE
TELECOMMUNICATIONS INDUSTRY ASSOCIATION

I. TIA SUPPORTS MUNICIPAL BROADBAND NETWORKS

The Telecommunications Industry Association (TIA)[1] hereby submits comments to the Commission's Public Notice in the above-referenced proceeding.[2]

[1] TIA is the leading trade association for the information and communications technology (ICT) industry, with 600 member companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of public policy issues affecting the ICT industry and forges consensus on industry standards. For over 80 years, TIA has enhanced the business environment for broadband, mobile wireless, information technology, networks, cable, satellite, and unified communications. TIA is accredited by the American National Standards Institute (ANSI).

[2] Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, WCB Docket Nos. 14-115 and 14-116 (rel. July 28, 2014) ("PN").

TIA has been a strong proponent of ubiquitous broadband deployment. Experience indicates that the overwhelming majority of such deployment will come from private sector investment and TIA has long advocated for policies that remove regulatory barriers to private sector investment in new broadband facilities. Competitive markets using private capital provide the best services for consumers. However, governmental entities, pursuant to their mandate to advance or protect the public interest and public safety, may identify broadband needs that are best met through some form of governmental action or partnership with the private sector.

Nationwide, municipalities are considering ways to promote deployment of broadband networks in their communities. Municipal initiatives can complement existing wireline and cable networks by extending broadband' s reach to areas that these incumbent networks do not, or cannot, reach. A number of promising cooperative efforts between municipalities and multiple private sector partners already are underway. While legitimate concerns have been raised about municipal involvement, municipalities can and should find solutions that are open, transparent, and reasonably competitively neutral. Because circumstances vary across municipalities, there is no one-size-fits-all prescription.

Accordingly, no statewide statutory barriers to municipal participation in the broadband market, whether explicit or de facto, should be erected. Some municipalities may find private sector partners able to provide all of their services. Others may find private partners able to provide some, but not all, of the services they require. Still others – because of their small size, remote location, or other unique characteristics – may not find any private sector partners able to make the business case to provide their required services. Where no private partners are able,

municipalities should be allowed to provide broadband, in a way that is non-discriminatory to private providers.

The key and overarching principle is that municipalities, to the extent practical, should use open, competitively neutral processes to determine the private sector involvement and maintain those principles throughout the network's operational life. This approach gives municipalities the flexibility to address their particular circumstances since competitive circumstances vary greatly and what is practical will also vary across cities. But this approach also encourages municipalities to use open, transparent processes that will give ample opportunity for all stakeholders to be heard and will encourage the maximum practical private sector involvement. Many acceptable implementations of this approach are possible and, in fact, are being demonstrated in the marketplace voluntarily.

As a general guideline, however, municipalities should first assess unmet needs, underserved areas, and future requirements, as well as develop a technology-neutral requirements document. This process might involve working with private-sector consulting firms. A vendor-neutral evaluation process would then determine the best-suited technology, capabilities, and providers. In keeping with competitive neutrality, new private sector entrants, established firms with existing facilities, and out-of-region established firms would be free to bid on the service provision and network operational requirements as they see fit. Municipalities should conduct open procurement processes that ensure transparency and allow private companies the opportunity to compete on the same terms as the municipal alternative. Municipal efforts should not get preferred access to rights-of-way or other favored treatment.

In summary, TIA opposes state laws that erect explicit or de facto barriers to any municipal broadband deployment initiatives. Municipalities must be allowed to pursue broadband network solutions, and private sector firms must not be foreclosed from choosing to invest in and partner with municipalities. A framework of open processes and reasonable competitive neutrality allows all stakeholders to be heard. Reasonable examples are already being demonstrated in the marketplace voluntarily and without statutory mandates. We believe such a framework can encourage public-private partnerships that advance the goal of making affordable and high quality broadband available to all Americans.

II. FCC LEGAL AUTHORITY TO ADVANCE BROADBAND WITH MUNICIPAL DEPLOYMENTS

The DC Circuit in the *Verizon* case recognized that Section 706(b) "directs the Commission to determine periodically if broadband 'is being deployed to all Americans in a reasonable and timely fashion.[3] In the event that the Federal Communications Commission ("Commission") determines regulatory barriers exist, it is mandated to take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[4]

The DC Circuit's opinion quotes the Sec. 706(b)'s legislative history as supporting the Commission's interpretation, noting that the Senate Report for the bill explained that it was

[3] See, Verizon v. FCC, No. 11-1355 (D.C. Cir. Jan. 14, 2014) ("DC Cir. Decision")

[4] In July 2010, the Commission concluded for the first time in the Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9558 ¶¶2-3 (2010), that "broadband deployment to all Americans is not reasonable and timely," thus triggering Section 706(b) "as a consequence of that conclusion."

"intended to ensure that one of the primary objectives of [the 1996 Act] – to accelerate deployment of advanced telecommunications capability – is achieved," and that the FCC was empowered to "provide the proper incentives for infrastructure investment."[5]

The DC Circuit recognizes that there are limits on the actions that the Commission can undertake, stating "[s]ection 706(a) permits the FCC to take only two categories of action:

- "measures that promote competition in the local telecommunications market" and
- "[[o]ther regulating methods that remove barriers to infrastructure investment."[6]

The specificity of the requirements suggests that this language was not intended as an expansive grant of authority, but rather as a tool with which the Commission can reach specific, legislatively prescribed policy objectives.

Beyond Section 706, the 1996 Telecommunication Act more broadly reflects a pro-competition policy in ensuring that "any entity" could enter the market to provide telecommunications services. Section 253 prohibits states or localities from enacting a law or regulation that would have the effect of barring such entry, and it gives the Commission the ability to preempt such actions. To be sure, the U.S. Supreme Court held in *Nixon V. Missouri Municipal League* that Congress had not spoken explicitly enough in Section 253 to overcome the high standard that the Court employs in construing federal statutes that are said to preempt traditional state powers.[7]

Yet, the Court further concluded that it was not deciding the merits of municipal entry and

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5 See, S. Rep. No. 104-23 at 50 (1995)

6 See, DC Cir. Decision at 32.

7 See, 541 U.S.125, 155 S.Ct. 1555.

that the municipalities had: "at the very least a respectable position, that fencing governmental entities out of the telecommunications business flouts the public interest." The opinion also noted that a majority of the FCC's Commissioners had "denounced the policy behind the Missouri statute;" that two of the commissioners had "minced no words in saying that participation of municipal entities in the telecommunications business would `further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small and rural communities in which municipally-owned electric utilities have great competitive potential;'" and that a third commissioner had underscored that "barring municipalities from providing telecommunications substantially disserved the policy behind the Telecommunications Act."[8]

[8] See, 541 U.S. 130-131, 155 S.Ct. 1560-1561.

II. CONCLUSION

U.S. telecommunications policy has a long history of using targeted government initiatives to assure service for high-cost and underserved geographies. As discussed above, under its legislative authority, Commission action to prevent explicit or de facto barriers to any municipal broadband deployment is appropriate.

Respectfully submitted,

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