

BROADBAND PUBLIC-PRIVATE PARTNERSHIPS: THE KEY LEGAL ISSUES



Jim Baller

Ashley Stelfox

Coalition for Local
Internet Choice

DISCLAIMER

This presentation is intended for informational purposes only. It is not intended as legal advice and should not be interpreted as such. For legal advice, please contact us or other knowledgeable legal counsel individually.

THREE PHASES OF A PROJECT

- 1) Addressing Authority Issues
 - 2) Pre-Negotiation Project Planning and Finding Potential Partners
 - 3) Negotiating an Agreement
- 
- The bottom of the slide features a decorative graphic consisting of several overlapping geometric shapes. On the left, there is a dark olive green triangle pointing right. To its right is a larger, dark blue triangle pointing left. The rest of the bottom area is filled with a solid, medium-blue color.

CONFIRMATION OF AUTHORITY

Before any type of planning begins, it is critical to understand the nature of your authority. Are there any outright restrictions? Are there any limitations? What if authority is unclear? What procedures apply? *Answering these questions at the beginning will help avoid costly mistakes.*

AUTHORITY: STATE CONSTITUTIONS & STATE STATUTES

State Constitutions

- Establish political subdivisions
- May discuss authority of political subdivisions, although rarely in great detail

State Statutes

- P3 Statutes
 - 30 states have P3 statutes
 - Only Arkansas addresses broadband P3 projects
 - Statutes can grant broad authority (Maryland) or narrow authority (Florida)
- Municipal Broadband Statutes (continued on the next slide)

AUTHORITY: MUNICIPAL BROADBAND STATUTES

Permissive Broadband Statutes

- Several states authorize local governments to provide broadband

Restrictive Broadband Statutes

- At least 20 states have laws that limit the authority of local governments to provide broadband
- This year, new barriers to community broadband and public-private partnerships introduced in Missouri and Colorado, and bills to remove existing barriers pending in Tennessee and North Carolina

AUTHORITY: STATE AUTHORITY UNCLEAR?

Why it matters?

- Local governments are “political subdivisions” of their States
- States determine how much authority to cede to its localities
 - FCC Wilson/Chattanooga EPB Preemption Order: Once a state has authorized municipalities to provide services, it cannot impose barriers that interfere with interstate commerce

Where law is silent or ambiguous, local powers determined by which rule governs:

- Home Rule – localities may undertake any activity *not* prohibited by the state legislature
- Dillon’s Rule – localities only have those powers that the state legislature has *expressly* provided or *necessarily implied* from existing power

AUTHORITY: LOCAL RESTRICTIONS

Check for Potential Self-Imposed Limitations

- Local charters
 - Local ordinances
 - Non-compete clauses in franchises, pole or conduit attachment agreements
 - Most favored nations restrictions
 - Other agreements
- 

PERFECTION OF AUTHORITY: PROCEDURES

What Procedural Steps are Necessary to Implement Authority?

- Publication requirements?
- Public hearings?
- Majority or supermajority vote of the governing body?
- Referendum?
- Other requirements?

PRE-NEGOTIATION PROJECT PLANNING

Now it is time determine what type of project makes sense given your communications needs, financial position, desired level of involvement, technical expertise, legal constraints, attitude toward taking risks, etc.

PROJECT PLANNING: SKILL SETS AND GOALS

What Kinds of Expertise Does the Public Entity Have?

- Building and managing infrastructure?
- Raising funds through bonds or otherwise?
- Providing services for internal use? To large institutions? To the public?

What Skills Can Private Partners Bring to the Project?

- Designing, building, managing, operating, and maintaining the networks?
- Marketing, providing/supporting, updating customer services?
- Raising capital and operating funds?

Any Limitations of What the Public Entity is Willing to Do?

PROJECT PLANNING: FINANCING

Public-Sector Financing

- Surplus Revenues
 - Tax Incremental Financing
 - New Markets Tax Credit Program
 - General Obligation Bonds
 - Revenue Bonds
 - Certificates of Participation
 - Economic Development Districts
 - Certified Development Corporations
 - Many more options and opportunities
- 

PROJECT PLANNING: FINANCING

Federal Subsidy Programs

- FCC
 - E-Rate – Schools and Libraries Program, Connect America Fund (CAF), Healthcare Connect Fund, Lifeline
- USDA, Rural Utilities Service (RUS)
 - Telecommunications Infrastructure Loan Program, Farm Bill Broadband Loan Program, Community Connect Grant Program, etc.
- DOC, Economic Development Administration (EDA)
 - Public Works and Economic Adjustment Assistance, Planning and Local Technical Assistance Grants
- HUD
 - Community Development Block Grants, ConnectHome Initiative, Section 108 Loan Guarantee Program, many other programs

PROJECT PLANNING: PUBLIC RIGHTS-OF-WAY

Access to Public Rights-of-Way (PROW)

- Local Governments have police powers over the PROW, but cannot impose barriers to entry [47 USC 253(a)]
- Non-discriminatory, competitively neutral restrictions may be permissible [47 USC 253(b), (c)]
- Efficient PROW access essential to private partners:
 - Accelerated timetables for permitting
 - Pre-approval of specific techniques (i.e. microtrenching)
 - Reduced fees
 - Dedicated inspectors
 - “Dig Once” or “One Touch” Policies (Louisville Litigation)
- Key issue: What is a “level playing field”?

PROJECT PLANNING: CONTROL OVER INFRASTRUCTURE

- Local Regulatory Control over PROW vs. Local Proprietary Control over Facilities
- Fewer restrictions / greater latitude for proprietary activities (at least theoretically)
 - Fiber
 - Poles
 - Conduit space
 - Towers
 - Rooftops and buildings
 - Etc.

PROJECT PLANNING: OTHER CONSIDERATIONS

Regulatory Burdens and Benefits

- Classification as a “Common Carrier”
 - Pro: Access to poles, interconnection and collocation, etc.
 - Con: Potentially huge Universal Service liability

Organizational Issues

- Where will the project be housed?
 - Existing branch of government
 - New entity (division, commission, non-profit, etc.)
 - Governance issues (especially if multiple public entities are involved)

Tax Considerations

FINDING POTENTIAL PRIVATE PARTNERS

Request for Information/Request for Qualifications

- Common non-binding opportunity to identify options
- Opportunity for the community and potential partners to court each other
- Feedback from bidders may generate new ideas/approaches
- Process typically not governed by state or local procurement requirements

Request for Proposals

- Once the community has identified one or more potential partners and refined its requirements, it can make a more formal solicitation
- Must follow applicable procurement rules

NEGOTIATING THE AGREEMENT

Striking the right balance with your private sector partner is all about negotiating the risks, responsibilities and rewards of a project.

*Note: You can get creative here.

NEGOTIATING WITH THE PRIVATE SECTOR

After receiving submissions from the private sector, the public entity will normally to narrow the pool to a few qualified applicants. It may choose to begin negotiations with its top choice and reengage with the other qualified applicants if the negotiations fall through, or, if permitted, may negotiation with a few applicants simultaneously.*

NUMBER OF PARTNERS	PRO	CON
One Partner	Simplicity; Reduced Negotiating Costs	Less leverage during negotiations
Two or More Partners	Competition may produce a better deal, forcing both sides to think creatively	Possibility of protracted negotiations (time and cost)

* Must ensure procurement rules allow simultaneous negotiations; Some only allow the public entity to engage a 2nd party if the negotiations with the 1st party fall through.

NEGOTIATING: ALLOCATION OF RISK

Risk will depend on the particular P3 model, although some models may not be clearly in one category or another and each risk must be individually negotiated in the contract. Generally, the risk break down is as follows:

- Model #1 – Private Investment, Public Facilitation (e.g., Google Fiber)
= Relatively low public risk
- Model #2 – Private Execution, Public Funding (e.g., Kentucky Wired)
= Higher public risk
- Model #3 – Shared Investment and Risk (e.g., Westminster)
= Moderate, shared risk

NEGOTIATING: ALLOCATION OF RESPONSIBILITIES

DIFFERENT LEVELS OF PRIVATE SECTOR ENGAGEMENT IN PPP CONTRACTS

	Identify Infrastructure Need	Propose Solution	Project Design	Project Financing	Construction	Operation / Maintenance	Ownership
Bid / Build	Public Sector				Private Sector	Public Sector	
Design / Build	Public Sector		Private Sector	Public Sector	Private Sector	Public Sector	
Design / Build / Finance	Public Sector		Private Sector			Public Sector	
Design / Build / Finance Operate / Maintain	Public Sector		Private Sector				Public Sector

*Source: Brookings Institute Model of Responsibility Sharing

NEGOTIATING: ALLOCATION OF REWARDS AND COSTS

Rewards

- Direct Monetary Benefits
 - Cost Savings // More and better services
 - Potential revenue sharing
- Difficult to Measure Benefits
 - Advanced broadband infrastructure as platform and driver of simultaneous progress in multiple areas that benefit community (e.g., economic development, education, health care, environmental protection, energy, gov't services, etc.)
 - Deployment in unserved or underserved areas

Costs

- Closely linked to allocation of responsibilities
- But payments, backstops can be separated from activities

FOR FURTHER INFORMATION

Jim Baller

(202) 833-1144

Jim@Baller.com

Ashley Stelfox

(202) 833-3301

AStelfox@Baller.com