BROADBAND PUBLIC-PRIVATE PARTNERSHIPS: 
THE KEY LEGAL ISSUES

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THREE PHASES OF A PROJECT

1) Addressing Authority Issues

2) Pre-Negotiation Project Planning and Finding Potential Partners

3) Negotiating an Agreement
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)
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?
Now it is time to 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
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
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 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.*

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

<table>
<thead>
<tr>
<th>DIFFERENT LEVELS OF PRIVATE SECTOR ENGAGEMENT IN PPP CONTRACTS</th>
<th>Identify Infrastructure Need</th>
<th>Propose Solution</th>
<th>Project Design</th>
<th>Project Financing</th>
<th>Construction</th>
<th>Operation / Maintenance</th>
<th>Ownership</th>
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<tr>
<td>Bid / Build</td>
<td>Public Sector</td>
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*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

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