Key Legal Issues Affecting Public Broadband Initiatives and Partnerships

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May 5, 2022

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Introduction/Overview

This program will address the critical legal and regulatory issues that public broadband initiatives and partnerships are likely to encounter at each stage.

1. Preliminary Assessment Stage
   Champions emerge, build community support, “red flag” legal review

2. Planning Stage
   Barriers to Entry
   Funding Opportunities
   Infrastructure Issues (rights-of-way; easements; pole attachments, etc.)
   Wireline/Wireless Issues
   Other Legal Issues

3. Organizational Issues and Partnerships
   Why/When/How to Develop and Negotiate Them

4. Implementation Stage
   Business and Financial Matters
   Federal and State Regulatory Obligations
Part 1: PROJECT INCEPTION: PRELIMINARY ASSESSMENT STAGE
Champions Emerge

- Can be government officials, business leaders, residents, etc.
- Lots of reading, attend conferences, learn from other projects
- Often form local task force or study group
- Common characteristics:
  - Community-oriented
  - Visionary
  - Energetic and hard-working
  - Charismatic
  - Persuasive
Preliminary Assessment: Needs/Assets/Challenges

- Recognize importance of robust broadband to community
- Obtain high level overview of assets, gaps, and opportunities
- Assess intent of incumbents and potential new entrants
- Identify potential partners – broadly defined
- Identify potential funding sources
  - Glean nature and intensity of public support
- Perform “red flag” legal review
- Get commitment to proceed to Planning Stage
Part 2: PLANNING THE PROJECT
Getting Focused

♦ What do you want to accomplish?
  ◇ Many government entities want to obtain or provide high-performance *infrastructure* that can affordably support everything that matters
  ◇ For both public-only and partnership projects, it’s important to understand how particular services are regulated

♦ Implications (among others):
  ◇ Authority
  ◇ Funding Availability
  ◇ Right-of-Way/Infrastructure Access
  ◇ Regulatory burdens
Planning: Initial Legal Issues - Authority

◊ Federal Law (Encourages but does not Authorize)
  – Federal Law does not preempt state restrictions on their own political subdivisions
    • Section 253 - *Nixon v. Missouri Municipal League, 541 U.S. 125 (2004)*
    • Section 706 - *State of Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016)*
  – What about EMCs and IOUs? – They are private entities
  – Federal funding?
    • Under IIJA State subgrant programs cannot exclude “cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments.”

◊ State/Local Law
  – Some States Explicitly Authorize
  – 20 States Restrict (CLIC List: [https://tinyurl.com/yckuzfhd](https://tinyurl.com/yckuzfhd))
    • Substantive and/or Procedural Restrictions
      ◊ Wide range
      ◊ Some loosening of restrictions (e.g., AR and WA)
  – Restrictions on EMCs/IOUs
    • Recent state actions to ease restrictions on EMCs and IOUs (E.g., Georgia explicit authority for EMCs to lease fiber or provide broadband through an affiliate).
Planning: Initial Legal Issues – Authority (cont.)

Must Look To State and Local Law for Authority

♦ State constitutions, statutes, local charters, and ordinances

♦ Dillon’s Rule vs. Home Rule for Publicly-Owned Entities

♦ Service-by-Service Authority Required


♦ Look at state definitions
Planning: Initial Legal Issues – Authority (cont.)

♦ State Restrictions Come in a Wide Variety
   ◆ Some states restrict particular services (e.g., AR – basic local exchange service; GA – cable TV; TX – services for which certain certificates required)
   ◆ Some states restrict manner in which services can be provided e.g., wholesale vs. retail
   ◆ Some states limit the provision of services either directly or indirectly (e.g., NC, SC, TX)
   ◆ Some states require referendums; Feasibility Study; RFPs; etc.
   ◆ EMCs and IOUs may be required to utilize affiliates to provide services
   ◆ Public-Private Partnership Laws

♦ City Charters or Ordinances Impose Restrictions or Requirements

♦ Contracts May Impose Limitations on Commercial Services
   ◆ E.g., Dark fiber obtained through cable franchises often limited to non-competitive uses
Access to Physical Infrastructure

♦ Municipalities Need to Understand and Keep Track of What Hat They Are Wearing

♦ Rights of Way/Franchises/Easements

◊ Access to Public Rights of Way
  – Telecom Sec. 253 (47 U.S.C. 253)
  – Cable Sec. 621 (47 U.S.C. 621)
  – Standalone Broadband?

◊ Non-Discrimination ≠ Identical Treatment

◊ Competitive Neutrality

◊ Accelerate Access to Public Rights of Way
  – FCC Small Cell, Moratorium, and Other Orders
  – Section 253 Wireline proceedings (Columbia and West Des Moines)
  – FCC Section 261 Cable Order
    • Cable systems do not need additional authorizations to provide other services over their networks (largely upheld by 6th Circuit)
Access to Physical Infrastructure (cont.)

♦ Poles/Conduits/Towers
  ◊ Federal Pole Attachment Regulation Section 224 (47 U.S.C 224)
    – Regulates rates, terms, and conditions
    – Applies to poles, ducts, and conduits but not transmission towers
    – Only applies to investor-owned utilities
      • Government-owned utilities and EMCs exempt
    – Applies to Telecommunications Service and Cable Service attachments
      • Applies to wireline and wireless attachments
      • Does not apply to dark fiber or standalone broadband

◊ FCC Regulation of Municipal Utility Poles
  – Historically Section 253 only applying to regulatory activities and not proprietary activities, such as the leasing of access to facilities
  – FCC Small Cell Order 2018 (upheld by 9th Circuit)
    • Section 253 requires municipal entities to provide wireless attachment access to government-owned facilities within the ROW including poles and streetlight poles
    • Not clear whether ruling will be extended to wireline facilities
Access to Physical Infrastructure (cont.)

♦ Poles/Conduits/Towers

◊ State/Local Pole Attachment Regulations
  – 22 states reverse preempt the FCC and regulate IOUs
  – Many states regulate municipal utilities and EMCs
    • Often incorporate FCC rules

◊ Make Ready
  – Cardinal principle is “cost causer” pays
  – OTMR
  – On-Going Pole Replacement Debate
    • FCC has adopted Notice of Proposed Rulemaking
    • Several states are addressing in context of broadband funding
Access to Physical Infrastructure (cont.)

♦ Fiber Leases/Swaps

♦ Dark Fiber vs. Lit Fiber

- Dark fiber does not contain any of the electronics necessary for the transmission of information and is a facility, not a service
  - Typically, less restrictions on leasing of dark fiber since thought of as infrastructure
    - Still may be restrictions or process
    - TX AG example -- marketing of dark fiber and sharing of revenue the indirect provision of service
- Lit fiber is the provision of “active” transmission of information – telecommunications – and is a service
- An indefeasible right of use (IRU) lease of dark fiber conveys a long-term leasehold interest (often 20 yrs)
  - Can be treated as a capital cost rather than operating cost for accounting purposes
  - Typically pay majority of costs upfront with possible ongoing maintenance costs
  - Often swapped with other network owners
  - Treated as equitable interest for bankruptcy purposes
Service-Specific Regulatory Requirements

♦ Regulatory Silos:

◊ Broadband Internet Access Service (“BIAS”)
  – Generally, “unregulated” (but: Communications Assistance to Law Enforcement Act, Form 477, Broadband Data Collection Program, Transparency, etc.)
  – How obtain ROW/pole access rights?
  – Net Neutrality
    • California and other States
    • Will FCC re-re-classify
“Telecommunication Service” -- not just “telephony”
- Most extensive federal regulation: Title II
  - Universal Service Fund (~25% of end-user revenues (!))
  - Eligible Telecommunications Carrier status, for FCC funding programs
  - Interconnection obligations
  - Consumer Proprietary Network Information, CALEA, 477, etc.
- What about Voice over Internet Protocol?
- State Regulation:
  - PUC certification requirement (CPCN)
  - ROW/pole access benefits
Service-Specific Regulatory Requirements (cont.)

♦ “Cable Service”
  - With OTT, the economics of video service have changed.
  - Federal regulation: Title VI, “Cable Act”
    • Retransmission consent, customer privacy, PEG obligations, franchise fees, etc.
  - State/Local regulation:
    • Cable franchising
    • Access to ROW and non-exempt poles, conduits, utility ROW
  - How to get out of cable business?
Access to Customers

♦ Multi-Tenant Environments:

◇ FCC rules generally prohibit exclusive access agreements to MTEs for telecommunications or MVPD (i.e., cable TV) services
  – FCC allows some forms of exclusive wiring arrangements (subject to cable inside wiring rules)
  – FCC allows exclusive marketing arrangements
  – FCC allows “bulk” billing arrangements

◇ Feb. 2022 FCC Report and Order and Declaratory Ruling:
  – Exclusive and graduated revenue-sharing arrangements prohibited
  – Exclusive marketing arrangements must be disclosed to tenants
  – Inside wiring “sale-and-leaseback” prohibited

◇ Rules do not cover broadband-only providers.
Access to Customers

♦ Anchor Institutions

♦ Schools, Libraries, Public Safety

♦ Discrete funding programs such as E-Rate, etc. have procurement process requirements
Access to Content and Services

♦ Provide Cable TV or just Internet access for “Over the Top” service?

♦ Negotiating with content providers (networks, etc.)
  − Retransmission consent
  − Good faith negotiation requirements
  − A challenging (broken?) model, esp. for smaller operators.

♦ *Locast* decision (2021)
Voice Issues

♦ 911 Requirements
   ♦ Focus on Location
   ♦ RAY BAUM’S Act (HR 4986 – 115th Congress)
   – Passed in 2018
   – Required FCC to adopt rules to ensure that a dispatchable location is conveyed with a 9-1-1 call, regardless of the technology platform
   – Deadline Depends on Technology
     • Jan. 6, 2021 – Fixed Telephone, Fixed MLTS, Fixed Interconnected VoIP
     • Jan. 6, 2022 – Non-Fixed MLTS, Non-Fixed VoIP, Outbound-Only VoIP
Voice Issues (Continued)

♦ Kari’s Law
  ◦ Applicability:
    – Manufacturers, Sellers, Operators of MLTS (ex. hotels, offices, campuses, etc.)
  ◦ Key Provisions
    – Direct Dialing
    – On-Site Notification
  ◦ ~Half of States Have Similar Requirements

♦ Other State/Federal Regulatory Obligations (thinking ahead...)
  ◦ State PUC certification?
  ◦ Universal service
Wireless Issues

♦ Wireless poses complex issues for wireline network providers
  ◦ Small Cell/DAS opportunities and challenges
  ◦ Competition from 5G and/or Satellites (GEO/LEO)

♦ Wireless Spectrum Licensing
  ◦ Site-Based vs. Geographic Licenses
  ◦ Bandwidth Limitations and Propagation Challenges

♦ Other Spectrum Considerations
  ◦ Last Mile
    – CBRS, Unlicensed, Other Auctioned Allocations
  ◦ Middle Mile
    – Point-to-Point Microwave Backhaul
Funding Opportunities

- A sample of existing broadband funding opportunities (pre-COVID):
  - E-Rate (FCC/USAC)
  - ReConnect (USDA)
  - Community Connect Grant Program (USDA)
  - Distance Learning and Telemedicine Grant Program (USDA)
  - Econ. Devp. Grants (Commerce)
  - Appalachian Regional Commission
  - NSF (Smart and Connected Communities)
  - FCC High-Cost Program
    - Rural Digital Opportunity Fund (RDOF)
    - Connect America Fund
  - Rural Health Care Program (FCC)
  - Connected Care Pilot Program (FCC)
Funding Opportunities

шение American Rescue Plan Act:

◊ State and Local Fiscal Recovery Fund (SLFRF):
  – “Necessary broadband infrastructure,” e.g., “identified need for additional broadband investment” (not just unserved/underserved)
  – Projects underway, funding available now
  – Issues to watch:
    • Competitive procurement issues: local and federal regs
    • Mandatory terms in subaward agreements
    • Program income
    • State limitations on “overbuilding” (RDOF overlap?)

◊ Coronavirus Capital Projects Fund
Funding Opportunities

- Infrastructure Investment and Jobs Act (IIJA)
  - BEAD program: $42.45 billion to States for “unserved and underserved service projects” and service to CAIs
  - Middle mile program: $1 billion
  - Digital Equity Act: $2.75 billion

- NTIA NOFO expected *May 13*:
  - BEAD program details; kickoff State processes
  - Initial Digital Equity Act information (State planning grants)

- Many steps to follow; funding may not flow until 2023
- Broadband mapping is crucial.
  - Challenge process could be messy.
Smart Coordination of Infrastructure Funding

IIJA will fund many traditional infrastructure projects beyond broadband:

◊ Electric utilities / smart grid:
  – Sec. 40101. Preventing Outages and Enhancing the Resilience of the Electric Grid; Sec. 40107. Deployment of Technologies to Enhance Grid Flexibility; Sec. 40124. Rural and Municipal Utility Advanced Cybersecurity Grant and Technical Assistance Program

◊ Water, sewer:
  – Sec. 50107. Midsize and Large Drinking Water System Infrastructure Resilience and Sustainability Program; Sec. 50205. Clean Water Infrastructure Resiliency and Sustainability; Sec. 50112. Advanced Drinking Water Technologies

◊ Intelligent transportation:
  – Sec. 25005. Strengthening Mobility and Revolutionizing Transportation Grant Program; Sec. 11109. Surface Transportation Block Grant Program; Sec. 11405. Promoting Resilient Operations for Transformative, Efficient and Cost-Saving Transportation (PROTECT) Program; Sec. 21202. Local and Regional Project Assistance; Sec. 11401. Grants for Charging and Fueling Infrastructure.
Smart Coordination of Infrastructure Funding

- Traditional utilities can bring significant value to a broadband deployment (esp. fiber):
  - Access to ROW / easements
  - “Dig once”
  - Direct access to facilities:
    - Water and sewer pipes
    - Electric utility poles

- Examples:
  - Many electric utilities (SCADA -> retail FTTP)
  - City of London (UK)
  - Anacortes, WA
  - Aurora, IL

- Coordination = efficient use of IIJA funds. Will NTIA encourage it?
Taxation of Broadband Grants

- In general, broadband grants are taxable income according to the IRS.

- Non-tax-exempt corporations may be assessed 21% tax on grant funds received, including ARPA subawards and IIJA grants (subject to basis adjustment, r).

- Biden Admin. considering executive action, but Congressional action may be needed due to 2017 TCJA.

- If not addressed, the tax issue may encourage grant funds to be received by local governments, tax-exempt cooperative entities, and other non-profit entities.

  - A for-profit corporation may still be a project participant or partner. How structure the initiative to minimize tax hit?
PART 3: ORGANIZATIONS AND PARTNERSHIPS
Organizational and Governance Issues

♦ Structure of Organization
  ◇ Single Entity
    – City Department, Independent Commission, Non-Profit
  ◇ Multiple Entities
    – Regional Consortia or other Partnerships

♦ Roles
  – Network Owner, Lessor, Operator, etc.
  – Allocating Financial, Operational, Regulatory Compliance Responsibilities
  – Affiliate Transactions
  – Nondiscrimination and Competitive Neutrality
  – High-Level Checklist of Ongoing Obligations
Partnerships

♦ Many Shapes and Forms

♦ Common Advantages
  ◇ Increased Financial Resources
  ◇ Targeted Skills, Experience, and Expertise
  ◇ Asymmetric Goals
  ◇ Greater Flexibility to Address Legal and Political Barriers

♦ Typical Disadvantages
  ◇ Greater Complexity
  ◇ Diminished Control
  ◇ Potential Changes of Ownership or Control
Partnerships (continued)

♦ When to Consider Partnership(s)
  ◦ Some projects do so right after preliminary assessment (e.g., where very limited local role contemplated)
  ◦ Others do so after extensive self-assessment (better)

♦ How to Find Suitable Partner(s)
  ◦ Informal word-of-mouth, consultant recommendations, similar projects, etc.
  ◦ More formal procurement methods
    – RFIs and RFQs facilitate gathering ideas, meeting partners, informing follow-up RFPs
    – RFPs or other procurement more rigid, work best when public entity knows exactly what it wants
Partnerships (continued)

♦ Keys to Negotiating a Successful Partnership Agreement
  ◇ Carefully Specify Each Party’s Goals
  ◇ Ensure Compliance with State/Local Law
    – Authority and Procedural Issues
  ◇ Painstakingly Allocate Responsibilities, Risks, and Rewards
    – Funding
    – Network Construction, Operation, Maintenance, and Upgrades
    – Customer Acquisition and Service
    – Authorizations (pole attachments, easements)
    – Regulatory Compliance
  ◇ Timeline and Key Benchmarks
Partnerships (continued)

Some Key Pitfalls to Avoid

- Who’s responsible for regulatory compliance? If violations, who pays?
- Nail down infrastructure early – poles, conduits, franchises, easements, ...
- Balance desire to control with flexibility to incentivize investment
- Who owns extensions?
- How handle supply chain delays?
- Who owns customers during term? Upon termination?
- Who owns and controls confidential information?
- Who bears risk of below-par performance -- technical? marketing?
- What if private partner wants to assign its interest?
- Transition process as term nears end?
Partnership Resources:


Part 4: IMPLEMENTATION AND ONGOING OPERATIONS
Typical Implementation Activities

♦ Finalize Funding Authorizations and Agreements
  ◊ Bond authorizations
  ◊ Move from letters of commitment to actual funding documents and provision of “match”
  ◊ Federal and state grants and loans often require a grant and security agreements
  ◊ Letters of credit

♦ Lock Down Infrastructure Commitments
  ◊ Rights-of-Way, Poles, Towers, Easements, Other Equipment
    – Don’t assume space availability or make-ready timelines
    – If a partnership, who is obtaining these rights?

♦ Legal and Regulatory Requirements Triggered by Service Launch
  ◊ PSC certification?
  ◊ ETC status for FCC Connect America Funding Programs
  ◊ FCC 499A for telecommunications or VoIP
  ◊ Creation of affiliate needed?
  ◊ ROW franchises
Key Operational Legal Issues

♦ Contractual Matters
  ◇ Construction Agreement(s)
    - Does program or procurement require bidding process for construction?
    - Supply chain and labor availability issues
  ◇ Network Operation Agreements
    - SLAs
    - Who “owns” customer relationship?
    - Wholesale and White Label Providers
  ◇ Fiber Agreement(s)
    - Dark v. Lit Fiber
    - Lease v. IRU
  ◇ Customer Service Agreement(s)
    - Terms of use; privacy; transparency; service tiers; bundling
  ◇ Retransmission consent agreements
ISP Transparency Statement (*Restoring Internet Freedom* Transparency Rule (47 CFR 8.1(a))

- All ISPs must publicly disclose practices in three categories of information:
  - **Network management practices** (blocking, throttling, prioritization, congestion management, device attachment, etc.)
  - **Performance characteristics** (service description, etc.)
  - **Commercial terms** (price, privacy practices disclosure, redress)

- Transparency Statement must be posted on website, or submit to FCC for posting.

- (Template available from KH)
Key Operational Legal Issues (cont.)

- More Regulatory Compliance:
  - Communications Assistance to Law Enforcement Act (CALEA) SSI filing
  - DMCA
  - STIR/SHAKEN
  - Annual disability reporting certification (CVAA)
  - CPNI annual certification
  - Broadband “nutrition label” (when finalized)
  - Form 395 Common Carrier employment reporting (telecom carriers only)
Key Operational Legal Issues (cont.)

♦ Regulatory Compliance

◊ FCC Customer Proprietary Network Information (CPNI) Rules (47 CFR § 64.2001 et seq.)
  – CPNI includes numbers called, frequency, duration and timing of calls, and services purchased
  – Obtain consent to use, disclose, or permit access to CPNI
  – Notify customers of right to opt-out of use of CPNI
  – Implement reasonable security measures
  – Notify law enforcement and affected customers of a breach
  – File annual reports signed by officer to certify compliance
Key Operational Legal Issues (cont.)

- Overview of U.S. Privacy and Data Security Landscape
  - Patchwork of Federal and State Laws
  - Enforcement by Federal Trade Commission (FTC) and State Attorneys General
  - Industry Data Security Standards
  - National Institute of Standards and Technology (NIST) Cybersecurity Framework
Key Operational Legal Issues (cont.)

♦ Federal Privacy and Data Security Laws
  ◊ Credit Information
    – Fair Credit Reporting Act and FTC Red Flags Rule
  ◊ Financial Information
    – Gramm-Leach-Bliley Act
  ◊ Health Information
    – Health Insurance Portability and Accountability Act
  ◊ Children’s Information
    – Children’s Online Privacy Protection Act
  ◊ Media and Technology Specific
    – Computer Fraud and Abuse Act
    – Electronic Communications Privacy Act
    – Controlling the Assault of Non-Solicited Pornography And Marketing (CAN-SPAM) Act
    – Telephone Consumer Protection Act
  ◊ FTC Enforcement of Unfair and Deceptive Acts or Practices Pursuant to Section 5 of FTC Act
Key Operational Legal Issues (cont.)

- State Privacy and Data Security Laws
  - Monitoring and Surveillance
  - Data Security
  - Data Breach Notification (50+ state laws)
  - Internet of Things (IoT) Device Security
  - Biometric Information
  - Telemarketing
  - Consumer Protection Laws/“Little FTC Acts” Enforced by State Attorneys General
Key Operational Legal Issues (cont.)

♦ New Comprehensive State Privacy Laws
  ◊ California Consumer Privacy Act effective 1/1/2020; California Privacy Rights Act takes effect in 2023
  ◊ Other States Have Followed California
    – Virginia Consumer Data Protection Act, Colorado Privacy Act, Utah Consumer Privacy Act, and Connecticut Data Privacy Act take effect in 2023
Key Operational Legal Issues (cont.)

♦ Cyber Attacks and Data Breaches
  ◦ Mobile devices, Internet of Things, and other digital technologies enhance the risk
  ◦ Ransomware has become biggest threat to public and private sector entities
  ◦ Other Threats:
    – Malware
    – Phishing
    – Exploitation of software or operating system vulnerabilities
    – Exploitation of service providers with access to networks
    – Use of stolen credentials
    – Inadvertent disclosure
    – Malicious insiders
Key Operational Legal Issues (cont.)

♦ Cybersecurity Frameworks and Guidance
  ◇ NIST Cybersecurity Framework
    – https://www.nist.gov/cyberframework
  ◇ Cybersecurity and Infrastructure Security Agency, Federal Bureau of Investigation, and National Security Agency Advisories
    – https://www.cisa.gov/uscert/ncas/current-activity
  ◇ U.S. Department of Justice Computer Crime and Intellectual Property Section
    – https://www.justice.gov/criminal-ccips/cybersecurity-unit
Key Operational Legal Issues (cont.)

♦ Cybersecurity Best Practices
  ◦ Physical and Cybersecurity Risk Assessments
  ◦ Password Management
  ◦ Multi-Factor Authentication
  ◦ Network Segmentation
  ◦ Operating System and Software Updates
  ◦ Offline, Encrypted Data Backups
  ◦ Data Minimization and De-Identification
  ◦ Internal Training
  ◦ Incident Response Planning
  ◦ Vendor Management
Regulatory Trends to Watch

- A New FCC Commissioner
- Network Neutrality Redux
- Universal Service Fund Reform
- Broadband Funding
  - State and Local Use of Funds
  - Bipartisan Infrastructure Bill
- Pole Attachments
- Retransmission Consent Review
- Spectrum Issues
Thank You

Any questions?