

Navigating State Restrictions On Public Broadband

Some state laws are more onerous than they appear to be. Others aren't nearly as restrictive as they seem. Welcome to the confusing world of municipal broadband.

By Craig Settles / *Gigabit Nation*

Though much can still happen in the remainder of 2015, many consumers and businesses are already cheering the FCC's recent actions to advance the cause of broadband. What caused the most champagne corks to pop was the FCC's preempting Tennessee and North Carolina laws that prevented successful municipal broadband systems from expanding to serve nearby towns.

This is the first time since incumbents began campaigning against municipal networks that the federal government has taken forceful regulatory action on behalf of those networks. Though quite a few industry watchers see this as a net-positive development, there are numerous hurdles ahead. "On one hand, the ruling just applies to Chattanooga and Wilson," observes Harold Feld, senior vice president of Public Knowledge. "Each of the other cities in the various states with restrictions will have to file separate sets of documents and get additional rulings.

"On the other hand, there are a number of actions that communities can take, bolstered by the success of those two cities. Some communities may feel that they can mount winning efforts in their state legislatures to get their restrictions curtailed or eliminated. At the very least, in some states, we should see a fair amount of political momentum building that encourages new policies favoring community networks."

For now, legislative restrictions on publicly owned broadband in 21 states are barriers to the goal of faster, better broadband – and there is always the danger of barriers being introduced into other states. These laws, in many cases, negatively affect the ability of communities to pick the best solutions to meet their broadband needs, shortchanging local economic development opportunities. They present three types of barriers: mandated procedures that require varying levels of effort to navigate, litigation minefields and total bans. Dissecting these obstacles with a critical eye, however, can uncover avenues to mitigating or removing some of them. Even some total bans leave public entities with options for moving forward.

The reverse is also true: In some states, removing these laws may not open the gates to community networks to the extent people expect.

Almost all cities that own broadband networks started by making numerous, mostly fruitless, appeals to incumbent telecom and cable companies to improve their broadband infrastructure. Frustrated by repeated rejections, community leaders did – and continue to do – what their predecessors did when private electric companies in the 1930s refused to bring electricity to areas beyond the biggest cities: They built what they needed themselves. Local governments or public utilities now provide broadband services to some 400 U.S. communities. These networks are owned solely

by public entities or by public-private partnerships.

In response, 20 state legislatures passed laws that restricted publicly owned networks to varying degrees, and Iowa legislators expanded an existing law for public utilities to require municipalities to pass referenda to provide broadband.

As the battle lines over these laws are drawn nationally and in the states, the big questions are whether the laws should be rolled back and what the impacts of repealing them would be. Would floodgates open and broadband projects spring up everywhere in those states?

Part of the answer to the second question depends on how well communities plan and build their networks. Large-scale network deployments are costly and complex, and some municipalities lack in-house resources to successfully design, build and operate their own fiber networks. For these communities to join any wave of new projects, they will need to hire or retain experts in funding sources, infrastructure and multivendor network integration.

Restrictive network laws are not the only barriers to community networks. Local governments have tight budgets and challenges in obtaining funding. According to Curtis Dean, broadband services coordinator for the Iowa Association of Municipal Utilities, “Bond markets are improving, but there’s still a hesitation among city officials to pursue this option. In another year, we should see a noticeable increase in bond measures to fund broadband, and, subsequently, more projects.”

Progress can also be impeded by local opposition, driven by the free-market philosophy that only the private sector should undertake broadband projects – the same philosophy that spurred state legislators to pass these laws in the first place.

In the poorest and most sparsely populated areas, the buildout challenges and operating costs are so high, and revenue prospects are so low, that marshaling support for public

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networks could be difficult. Similarly populated states without restrictive laws, such as Wyoming, Montana and Arizona, have made little progress in building municipal networks.

IF-THEN LAWS

State laws that restrict publicly owned networks fall into three categories – if-then laws, minefield laws and total-ban laws.

If-then laws pose requirements rather than restrictions: If a community meets requirement X, then it can build a network. Several states, such as Iowa and Colorado, require communities to hold referenda: If a ballot measure passes, then the community can build a network. In Pennsylvania and some other states, a community needs to present its broadband wishes to the incumbent provider. If the incumbent won’t build the network it requires, then the community can move forward to build its own.

A major barrier in these if-then states appears to be one of perception. Beth McConnell, policy director of the Philadelphia Association of Community Development

Corporations, says, “Unfortunately, many communities honestly believe that the state has a complete prohibition of any kind of public-owned networks.” Cambria County navigated the waters and built a network, but despite that county’s success, no other Pennsylvania community followed its lead. (Kutztown built a municipal network before the law was enacted.)

In states that require referenda, many communities fear a referendum is a near-impossible mountain to climb because incumbents will crush them in an electoral battle. However, Longmont, Colo., and other towns in Colorado and Iowa have created a roadmap for winning referenda. Longmont, backed with \$5,000 in contributions, passed its second referendum by a 2–1 margin despite Comcast’s spending \$350,000 to oppose the measure. In November 2014, eight Colorado communities faced almost no opposition to passing referenda to take back their authority to pursue public broadband, and Estes Park, Colo., overwhelmingly passed a referendum in February 2015.

IF-THEN LAWS	MINEFIELD LAWS	TOTAL BANS
Alabama	Florida	Arkansas
California	Louisiana	Missouri
Colorado	North Carolina	Montana
Iowa	South Carolina	Nebraska
Michigan	Utah	Tennessee
Minnesota		Virginia
Nevada		
Pennsylvania		
Washington		
Wisconsin		

Even in states without restrictive laws, only a small percentage of communities pursues public networks. State laws are not the only obstacles to financing and running a network.

MINEFIELD LAWS

These laws were written with the intent of prohibiting publicly owned networks, though they don't come right out and say so. Some of these laws create multiple layers of rules that are so onerous as to make compliance a significant financial burden. Others are worded so vaguely that they become minefields in which one wrong step could trigger incumbents to take legal action. North Carolina and Louisiana are two states with laws of this type.

Small, rural communities in these states are particularly disadvantaged because they don't have the legal resources and experience to battle incumbents' legal teams. Midsize cities, such as Lafayette, La., and Chattanooga, Tenn., have greater resources and were able to overcome major legal challenges, but they would have preferred to avoid the costs and delays of legal battles. In general, these laws have so many levels of restrictions and requirements that often the best way – though not the only way – for cities to move forward is for legislators to reverse all or parts of the laws or for the FCC to preempt the laws.

TOTAL BAN LAWS

These laws typically are short and unambiguous: Public entities are prohibited from providing services, or they can provide services only to a limited audience and only on a wholesale basis. However, some of these laws have loopholes that can be exploited.

Though Texas law prohibits public entities from owning or operating telecommunications services and is often believed not to allow municipal broadband, I have not included it on

the list. As Clarence West, a Texas telecom attorney, pointed out in a filing with the FCC, "Texas cities are not prohibited from providing Internet connectivity, as it is ... federally classified as an 'information service' and not a 'telecommunications service.'" Texas cities have provided Internet connectivity on a citywide basis, and Greenville, Texas, currently provides both cable and Internet access service.

The FCC's recent move to reclassify ISPs under Title II as a telecommunications service might throw a shadow of doubt over Texas. "This does raise an interesting question, depending on how the state of Texas defines 'telecommunications service' in their state code for this purpose," says Feld. "All these definitions are state-dependent. If a state explicitly ties its definition to the federal definition, then broadband would now become a telecommunications service once the FCC order on net neutrality becomes effective." More legal work for the cities' attorneys.

OVERCOMING OBSTACLES

I was surprised, while researching these laws, that community leaders in many states believe there are total bans on municipal broadband when, in fact, barriers are relatively small or at least manageable for cities willing to put in some hard work.

In the if-then states, digging into the details of the laws can give communities a clear understanding of what they need to do. The minefield states include some that have so many barriers they may as well have total bans and others, such as Florida and Tennessee, in which stouthearted communities with

good lawyers have reasonable shots at overcoming the barriers.

That said, in many of the 21 states, the threat, however vague, of an incumbent lawsuit is always there. Communities whose constituents have a strong need for faster, better broadband have to decide whether the fear of legal action outweighs meeting that need. I expect in another two years that the pressure to save struggling economies will drive communities to take the risks.

RECOGNIZING OTHER OBSTACLES

If these laws disappear tomorrow, then what happens?

Advocates trying to counter the effects of anti-muni-network laws need to have realistic expectations about what they hope to achieve. According to many of those interviewed for this report, removing the laws would be a net positive in terms of increasing the number of community networks. However, other barriers would remain.

The age and political disposition of elected officials won't be affected by changing laws. Anecdotal evidence abounds that elected officials in quite a few small towns and rural counties are nearing retirement age, lack technology experience, and are conservative and not open to publicly owned networks, even in politically blue states.

Even in states without restrictive laws, only a small percentage of communities is pursuing public networks. This indicates what might happen were restrictive laws to disappear. "I don't think floodgates would open," states Bill Clark, the county administrator of Orangeburg County, in South Carolina. "Some municipal entities that have the personnel who can handle this will consider building their own, and a few public-private partnerships might form."

Mark Feest, general manager of CC Communications in Churchill County, in Nevada, adds, "It's possible that CC Communications could help others fund networks, but our offer wasn't embraced a couple years ago."

On the other hand, in 2008, 35 North Carolina communities were ready to pursue public networks but backed away after their state law passed, and Chattanooga's EPB cites various requests from neighboring communities to come to their towns.

Thus, if laws are rolled back in Tennessee and North Carolina, the first wave of communities to get municipal broadband likely would be those that convince existing municipal networks to expand into unserved areas. Communities in these states that want to build networks from scratch will need well-thought-out strategies for funding them.

In Iowa, "the main barrier also is financing," says Curtis Dean. "Those cities that voted to become broadband utilities but haven't built a network yet don't have a lot of money sitting around." Ken Fellman, vice president at the Denver-based law firm of

Kissinger & Fellman and adviser to many public broadband projects, believes most Colorado cities would explore public network strategies, particularly if an organization such as Google offered to step in to help fund them. Even communities in the conservative state of Louisiana would consider government-owned networks if someone else financed them.

A NONPARTISAN ISSUE

Conventional wisdom says that legislatures with conservative majorities usually oppose public networks and strongly progressive legislatures support them. However, in 2014, you couldn't always tell a book by its partisan cover. A conservative member of the North Carolina legislature encouraged a group of local government IT officials to elect representatives who favor community networks and indicated that legislators are having doubts about their law.

In Tennessee, eight bills to modify state restrictions worked their way toward passage in the Tennessee assembly and senate until – according to state Sen. Janice Bowling, the Republican sponsor of one such bill – an AT&T executive made a veiled threat of litigation. On the other side of the aisle, several Democratic legislators organized to reverse Colorado's public broadband restrictions until their leaders told them the bill couldn't be touched. Democrats at that time controlled the state house of representatives and had a slim majority in the senate.

Conversely, in deep-blue California, only one of several recent broadband-related measures introduced in the state legislature or the Public Utility Commission was designed to help municipal networks specifically.

Communities often find the path to better broadband is a nonpartisan call



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Some laws may actually foster best practices. Passing a referendum, for example, requires a city to do a thorough needs assessment.

to arms driven by strong economic and quality of life issues. The nonpartisan nature of public broadband was on full display in November 2014 when eight Colorado communities, some distinctly left-leaning and others distinctly right-leaning, passed referenda by margins greater than 75 percent to take back broadband authority. The success of these initiatives, together with constant media coverage of successful deployments, is driving constituents to pressure state legislators to support rather than hinder public broadband. The rise of public-private partnerships in which public entities own the network infrastructures and private companies deliver services to customers further reduces legislative support for restrictive laws.

As the FCC brings government pressure from the top down, localities need to bring alternative forces up to the state level. Bipartisan pressure at the ballot box is one force to bring to bear. Another is revving up electric co-ops and other nonprofits to become broadband providers, as Missouri has done to keep local control while avoiding the restrictive tenets of its laws. Finally, riding the public-private partnership wave can be a strong counter to the effects of if-then laws in particular and some of the milder minefield laws.

Broadband advocates must be vigilant in regard to state legislatures, both in the 21 states with restrictions and in those without. There is always the danger that some legislators will introduce new restrictions to existing laws or create new laws in states that have no barriers. Conversely, some conservative legislators are shifting their positions and becoming allies to communities.

Cities and counties that have networks need to be frequently present

in the halls of legislatures while they are in session and in lawmakers' home offices at other times. The more success stories legislators hear, the better.

LAWS MAY FOSTER BEST PRACTICES

Some laws actually provide an impetus to build better networks. If a state law requires a referendum or a right of first refusal, consider this an invitation to create a better infrastructure with greater consensus among stakeholders and a much higher likelihood of financial sustainability. By meeting the letter and the spirit of these laws, communities should end up following best practices for effective broadband strategy planning – as did Cambria County, Longmont and Lafayette.

One concern that drives the crafting and passage of many of these laws is the belief that there's no need for public networks and that all municipal networks are failures. If needs do exist, a thorough, six- to 12-month needs assessment will uncover them and document them. In addition, enthusiasm created during the assessment translates into referendum votes in the short term and into paying subscribers in the long term.

Still, setting up and running special elections can be a significant time and money sink that communities can do without. For this reason, and the fact that just having the law on the books can prevent certain private investments in broadband, some communities still may try to have these restrictions removed.

RECOMMENDATIONS

- **Know the law.** Many communities have been misled into believing statutes place total prohibitions on the creation and operation of muni

networks when some do not.

- **Be ready to fight in the state legislature on a moment's notice.** New attempts to make current laws worse or to introduce restrictive laws are always likely.
- **Deal with easy-to-address restrictions head on.** Sometimes jumping hurdles is easier than trying to rewrite or remove laws.
- **Commit to executing a thorough needs assessment process and developing a broadband plan.** In states that require referenda or right-of-first-refusal procedures, use the results of the needs assessment to develop a referendum strategy or a strategy for approaching incumbents.
- **Take a page from the electric co-ops' playbook:** Hold open houses for legislators to show them the success of your network. Legislators love to hang their hats – and photo ops – on high-profile, successful community projects. Pay special attention to the Kit Carson Electric Cooperative playbook. (For more about Kit Carson, see p. 20.) At one time, the state of New Mexico had a statute that forbade co-ops from providing broadband services. Luis Reyes Jr., CEO of Kit Carson, began a systematic campaign to build local political support, to champion economic development projects and to educate communities on how broadband would bring jobs to the area. The co-op generated 1,000 letters of support for its broadband plans, and state legislators removed the restrictive law. ❖

Craig Settles is a community broadband industry analyst, a strategy consultant and host of the Gigabit Nation radio talk show. This article was adapted from a longer report, "How to Navigate, Mitigate or Eliminate the Impacts of State Restrictions on Public Broadband," that contains details on all the state laws referenced. To obtain the full report, write to Craig at craig@cjspeaks.com.