Key Legal Issues Public Broadband Initiatives

Keller and Heckman Legal Workshop

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Fiber: Paving the Road to Our Connected Future
K&H Session at BBC Summit

May 1, 2023

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Overview

1. Preliminary Assessment Stage
   Getting started, including “red flag” legal review

2. Planning Stage
   Authority Issues
   Broadband Funding
   Access to Infrastructure (rights-of-way; easements; poles, etc.)
   Access to Customers and Content
   Service-Specific Regulations
   Wireline/Wireless Issues
   Cybersecurity and Privacy
   Organizational and Governance Issues
   Partnerships

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

- COVID focused attention on need for robust broadband + resources
- 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 – both substance and process
- Get commitment to proceed to Planning Stage
Part 2: PLANNING THE PROJECT
Part 2A: AUTHORITY ISSUES
Authority Issues

♦ 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 the 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 imputation of phantom costs, majority or super-majority vote in referendum, feasibility study confirming that project will meet virtually impossible performance criteria, etc.
Authority Issues

◊ What about electric cooperatives and investor-owned utilities?
  – They are private entities
  – Recent state actions to ease restrictions on EMCs and IOUs (E.g., Georgia explicitly allows EMCs to lease fiber or provide broadband via affiliate).
  – Some states require service to be provided through a subsidiary/affiliate.

◊ 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.”
  • Collision course with States that restrict public broadband projects.
PART 2B: ACCESS TO INFRASTRUCTURE, CUSTOMERS, AND CONTENT
Access to Physical Infrastructure -- ROW

♦ Rights of Way/Franchises/Easements
  ♦ Federal Law 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
  ♦ FCC efforts to “accelerate” infrastructure deployment
    – FCC Small Cell Orders
    – Section 253 Wireline proceedings (Columbia and West Des Moines)
    – FCC Section 261 Cable Order
      • Cable systems may rely on cable franchise to offer other services
  ♦ Who has authority to use ROW in a partnership?
Access to Physical Infrastructure -- Easements

♦ Access to Private Easements
  ◊ Law is largely state specific
  ◊ In some instances, access for compatible uses allowed
  ◊ Specific language of easement often controls
  ◊ Don’t assume you have access

♦ Several states have recently adopted laws allowing electric cooperatives to utilize utility easements for broadband if no appreciable new burden
  ◊ Allow cooperative or affiliate to use easement for broadband if no new burden on easement
  ◊ Allow third-party leasing cooperative fiber to utilize easement
Access to Physical Infrastructure – Poles

◊ 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
    • Applies to Telecommunications Service and Cable Service System attachments
    • Applies to wireline and wireless attachments
    • Does not apply to dark fiber or standalone broadband
    • Only applies to investor-owned utilities
  ◊ Government-owned utilities and Cooperatives exempt
Access to Physical Infrastructure – Poles

◊ FCC’s Small Cell Order extends scope of Section 253 to apply to access to government owned poles and streetlight and other facilities within ROW for small cell wireless installations

◊ State/Local Pole Attachment Regulations
  – 22 states reverse preempt the FCC and regulate IOUs
  – Many states regulate municipal utilities and Cooperatives
    • Often incorporate FCC rules
    • Often require non-discriminatory treatment of municipal/cooperative broadband initiatives
Cardinal Rules of Access

• Non-Discrimination = similar treatment for similarly-situated facilities but not necessarily equal treatment
  ◊ Master agreement with individual pole specific permits
  ◊ First in time order of preference; Use it or lose it
  ◊ Utility to impute costs to its own commercial communications attachments

• Insufficient capacity, safety, reliability, or generally applicable engineering standards are grounds for denial
  ◊ Utility not required to replace pole if insufficient capacity -- *Southern Co. v. F.C.C.*, 293 F.3d 1338 (11th Cir. 2002).

• Cost causer pays
  ◊ Attaching entity to pay for all costs for which it is the “sole cause,” not to remedy pre-existing conditions (more later)
Access to Physical Infrastructure – Poles

◊ **FCC Pole Replacement Proceeding (Docket 17-84)**
  - 2020 NCTA filed petition with FCC arguing that in “unserved areas,” it is “unjust and unreasonable for pole owners to shift all replacement costs to new attachers”
  - 2021 FCC issued a clarification that if a utility replaces a pole in response to an attachment request, “it cannot require the new attacher to pay the entire cost of the pole replacement if it is not solely caused by the new attacher”
  - 2022 FCC initiates proceeding to explore issues related to pole replacements
  - Proceeding has become a battleground on the “cost causer principle”

◊ **State Pole Replacement legislation**
  - Require utilities to pay for or share in the costs of pole replacements when an older pole needs to be replaced to accommodate new broadband attachments
  - Some states are allocating broadband funds for pole replacement costs
Access to Physical Infrastructure – Fiber

Dark Fiber vs. Lit Fiber

- Dark fiber -- the individual fiber strands and not the electronics necessary to transmit signals
- Right to activate or “light” a fiber optic strand distinct from the ownership interest in the fiber
- Dark Fiber
  - Generally, not regulated by the FCC or states as a “telecommunications” service
  - Some states have accounting or other safeguards when leased by utilities or municipalities
  - Typically, does not have pole attachment or ROW access rights
- Lit Fiber
  - Service specific regulation by FCC and states
  - Pole and ROW access rights will depend on service and state
- Choice (or combination) often depends on skill sets, preferences, priorities and politics
- Revenue and business considerations
  - IRUs may provide substantial upfront payments to grantor; tax benefits and bankruptcy protection to grantee
  - Impact of Dark Fiber leasing on Lit Fiber broadband 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

♦ Last-Mile Access: Fixed Wireless v. Fiber to the Premises

♦ Fixed Wireless
  – Deployment Timeline and Costs
  – Temporary v. Permanent reliance on Fixed Wireless solution
    • Speed and reliability concerns
  – Funding
    • Federal and State Grantors view of Fixed Wireless
    • Private Investors view of Fixed Wireless

♦ Fiber to the Premises
  – Deployment Timeline and Costs
  – Transition from Fixed Wireless to Fiber to the Premises
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.
PART 2C: BROADBAND FUNDING
Broadband Infrastructure Funding: Key Legal Issues to Watch

♦ Many evolving substantive and procedural legal issues
♦ Forthcoming Treasury SLFRF/CPF Guidance:
  ◦ Procurement
  ◦ Program income
  ◦ Federal Interest duration
  ◦ Scope of Proposed Guidance limited to “ISPs”: Will Treasury expand?
♦ BEAD:
  ◦ Initial Proposals and state barriers-to-entry
  ◦ State challenge processes
♦ Taxation of Broadband Grants:
  ◦ In general, broadband grants are taxable income.
  ◦ Legislation pending in Congress (“Broadband Grant Tax Treatment Act”)
PART 2D: SERVICE-SPECIFIC REQUIREMENTS
Service-Specific Regulatory Requirements

♦ Regulatory Silos: (BIAS, Telecommunication Service, Cable Service)

◊ 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”/Title II
    • California and other States
    • Will FCC re-re-classify?
“Telecommunication Service”
- Provision of “telecommunications” (not just “telephony”) on a common carriage basis
- Most extensive federal regulation: Title II
  - Universal Service Fund (~30% of end-user revenues (!))
  - Interconnection obligations, access to infrastructure
  - Consumer Proprietary Network Information, CALEA, 477, etc.
- State Regulation:
  - PUC certification requirement (CPCN)
  - ROW/pole access benefits

Voice over Internet Protocol
“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?
PART 2E: VOICE AND WIRELESS ISSUES
Voice Issues

♦ Public Safety Requirements
  ◊ 911 Rules Focus on Location
    – RAY BAUM’S Act (HR 4986 – 115th Congress, 2018)
      • FCC adopted rules to ensure that a dispatchable location is conveyed with a 9-1-1 call, regardless of the technology platform
      • Forward-Looking 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
    – Location-Based Routing Proceeding
    – Network Monitoring and Outage Reporting Requirements
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

♦ 988 Suicide and Crisis Lifeline

♦ 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
PART 2F: CYBERSECURITY AND PRIVACY
U.S. Privacy and Security Landscape

- Patchwork of Federal and State Laws
- Enforcement by Federal Trade Commission (FTC), FCC, State Attorneys General (AGs), District Attorneys, and Other Agencies
- Private Rights of Action
- Industry Data Security Standards
- National Institute of Standards and Technology (NIST) Cybersecurity Framework
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**
State Privacy and Data Security Laws

- Monitoring and Surveillance
- Data Security
- Data Breach Notification
- Internet of Things (IoT) Device Security
- Biometric Information
- Telemarketing
- Consumer Protection Laws /“Little FTC Acts” Enforced by AGs
New Omnibus State Privacy Laws

♦ California Consumer Privacy Act went into effect 1/1/2020; amended by the California Privacy Rights Act
♦ Virginia Consumer Data Protection Act went into effect 1/1/2023
♦ Colorado Privacy Act takes effect 7/1/2023
♦ Connecticut Data Privacy Act takes effect 7/1/2023
♦ Utah Consumer Privacy Act takes effect 12/31/2023
♦ Iowa Consumer Data Protection Act takes effect 1/1/2025
♦ Indiana Consumer Data Protection Act, Montana Consumer Data Privacy Act, and Tennessee Information Protection Act approved by legislatures
♦ Several other states have pending legislation
Customer Proprietary Network Information

- FCC enforces 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
- Requirements:
  - 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
CPNI Notice of Proposed Rulemaking

♦ FCC released a Notice of Proposed Rulemaking in January 2023

♦ Proposals:
  ◊ Expand definition of “breach” to include inadvertent access, use, or disclosure of CPNI
  ◊ Implement a harm-based notification trigger
  ◊ Notify FCC of a breach (in addition to law enforcement)
  ◊ Require notification based on number of affected customers
  ◊ Specify content for breach notification
  ◊ Specify method for breach notification
Cyber Attacks and Data Breaches

- Mobile devices, connected products, other 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
Cyber Incident Reporting

- Cyber Incident Reporting for Critical Infrastructure Act of 2022
  - Critical infrastructure owners and operators must report certain incidents within 72 hours and report ransomware payments within 24 hours
  - Cybersecurity and Infrastructure Security Agency (CISA) to publish a Notice of Proposed Rulemaking no later than March 2024 and a Final Rule no later than September 2025
  - CISA issued a request for information in September 2022
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

♦ FBI Internet Crime Complaint Center (IC3)

♦ U.S. Department of Justice Computer Crime and Intellectual Property Section
  ◊ https://www.justice.gov/criminal-ccips/cybersecurity-unit
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
PART 2G: ORGANIZATIONAL AND GOVERNANCE ISSUES
Organizational and Governance Issues

♦ Structure of Organization
  ◊ Single Entity
    – City Department, Independent Commission, Non-Profit
    – Coops: Division, Separate Subsidiary, Members vs. Patrons, etc.
  ◊ Consortia of Multiple Entities
    – Participation agreements
  ◊ Roles
    – Network Owner, Lessor, Operator, etc.
    – Allocating Financial, Operational, Regulatory Compliance Responsibilities
    – Affiliate Transactions
    – Cross-subsidization, Nondiscrimination and Competitive Neutrality
    – Tax issues (especially for cooperatives)
PART 2G:
PARTNERSHIPS
Partnerships

♦ Many Shapes and Forms

♦ Common Advantages
  ◊ Increased Financial Resources
  ◊ Draw on Best 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 public 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 pays for/owns extensions? Service drops?
- Who pays what costs?
- Revenue shares – on what? How much?
- How handle supply chain delays?
- Who owns customers during term? On termination?
- Who owns, controls confidential information? Intellectual property?
- Who bears risk of below-par performance — Technical? Marketing?
- What if private partner wants to assign its interest?
- Transition process as term nears end?
Partnerships (continued)

Partnership Resources:


PART 3: 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, Equipment purchases
    – Be conservative in estimating space availability and make-ready timelines
    – If a partnership, specify who is obtaining these rights, who bears risk of delays

♦ 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?
  – Construction plan and schedule
  – Grant compliance requirements and timelines
    • Contractor or subrecipient?
  – Supply chain and labor availability issues

◊ Network Operation Agreements
  – Service and maintenance requirements
    • Who “owns” customer relationship?
  – Compensation/Revenue share
  – Authorizations
  – Regulatory obligations
Key Operational Legal Issues

Dark Fiber IRU vs. Other Forms of Dark Fiber Lease

♦ IRU: “Indefeasible Right of Use”
  ◊ Long term, often for usable life of the fiber (typically 20+ years)
  ◊ Large upfront or front-loaded payments
  ◊ Often transfer legal title at end of term
  ◊ Normally treat as a capital cost, not operating expense
    – Tax implications
  ◊ In many ways akin to a sale, beneficial ownership without legal title
  ◊ May be able to secure pole and ROW access
  ◊ May survive grantor’s bankruptcy

♦ Lease
  ◊ More flexibility on term length
  ◊ Payment can be spread over time
  ◊ Treated as OPEX by lessee
Key Operational Legal Issues

♦ Other Contractual Matters
  ◊ Customer Service Agreement(s) and Notifications
    – Terms of use; privacy; transparency; service tiers; bundling
  ◊ Agreements with Wholesale and White Label Providers
  ◊ Retransmission consent agreements
Thank You

Any questions?