



Public Private Partnerships

The Legal and Regulatory Landscape – Stephen L. Goodman



What is Driving Public Private Partnerships?

- Broadband Economics -- positive externalities that are not accounted for by the marketplace. No need to spend a lot of time on this issue, because I am preaching to the choir.
- Business – deploying, running and marketing a broadband network (with “triple play” or “quadruple play”) is outside the expertise of most cities.
- Legal – there are restrictions in many states on municipalities’ ability to provide broadband service

It is not all a bed of roses – there are “complications” that cities need to consider

- Impact on competition/competitors
 - The municipality controls the competitor’s inputs -- both cable (right of way) and wireless broadband (zoning, access to poles & rights of way, as well as the fiber-to-the cell site input of the wireless carriers’ costs).
 - Municipalities may be able to underprice competitors, due to the structural advantages and the absence of a need to maximize profits .
- May be a need for ongoing costs and subsidies – it is not just the upfront costs. While the “availability” of service is largely upfront costs, the “affordability” and “adoption” are likely to require continuing municipal expenditures. [Opponents of municipal broadband cite the bankruptcies/abandoned municipal broadband systems, but that happens as well on a much larger scale for private telecom companies]
- Providing access to competitors -- how/at what cost? Lessons learned from the 1996 ACT – UNE-P (TELRIC vs. avoidable costs for resale) – what the Court of Appeals called “synthetic competition”.

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- It is far from clear that there is or will be legal and regulatory stability. The different federal Administrations have expressed divergent views on the wisdom of municipal broadband, and it is not clear whether there will be federal legislation (such as the current Bi-Partisan infrastructure efforts) to permanently address this issue. In addition, State laws vary dramatically and are subject to change, and may or may not be preempted by federal legislation.
- Compliance with state requirements can add delays to the process. Recognizing that the plural of anecdote is not data, I can provide an example from my hometown of Alexandria:
 - **March 2010:** City of Alexandria Receives Notice from Verizon of End to New FiOS Deployments
 - **April 2015:** City Staff Presents on Review of Broadband Alternatives
 - **September 2016:** Alexandria City Council Directs Next Steps to Expand Consumer Broadband Choice

It is not all a bed of roses – there are “complications” that cities need to consider

- City of Alexandria timeline continued
 - **March 2018.** The City contracted with consulting and engineering company CTC Technology and Energy to design the City’s municipal fiber network.
 - **November 2019 (Municipal Fiber).** The Invitation to Bid (ITB) for the construction of the City’s Municipal Fiber Network has been issued
 - **March 2020 (Municipal Fiber).** The City has cancelled Invitation to Bid (ITB) NO.857: Municipal Fiber Network Construction without award. Bid(s) received in response to the ITB exceeded available funds.
 - **November 2020 (Municipal Fiber).** The Invitation to Bid (ITB) for the construction of the City’s Municipal Fiber Network has been reissued.
 - **April 2021 (Municipal Fiber).** The City has awarded the contract for the construction of the Municipal Fiber Network to Jones Utilities Construction INC. Construction is anticipated to begin in summer *and will take approximately four years to complete.* (emphasis added)

The Legal and Regulatory Landscape -- Federal Regulatory History

- **In March 2015, the FCC under Chairman Wheeler preempted restrictions that North Carolina and Tennessee placed on municipal broadband.**
- **In August, 2016, the Sixth Circuit Court of Appeals reversed the FCC's preemption decision, finding that the FCC – which relied on Section 706 – lacked authority to preempt the States' decision to restrict municipal broadband, because Congress did not provide a “clear statement” in Section 706 granting the FCC such preemption authority.**
- **The FCC thus currently does not have authority to preempt State municipal broadband restrictions.**

The Legal and Regulatory Landscape – The Current Federal Regulatory Status

- **Current federal subsidy programs are supportive of municipal broadband.**
 - **RUS ReConnect program**
 - **§ 1740.9(a)(4) Eligible and ineligible entities: (a) To be eligible for funding, an Applicant may be either a nonprofit or for-profit organization, and must take one of the following forms ... States or local governments, including any agency, subdivision, instrumentality, or political subdivision thereof.**
 - Department of the Treasury’s Interim Final Rule with regard to Implementing the Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund Established under the American Rescue Plan Act, 86 Fed Reg. 26786, 26806 (May 17, 2021):
 - “Treasury also encourages recipients to prioritize support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and co-operatives— providers with less pressure to turn profits and with a commitment to serving entire communities.”

The Legal and Regulatory Landscape – State Restrictions on Municipal Broadband

Roughly 20 States presently prohibit or severely limit municipal broadband systems.

<https://broadbandnow.com/report/municipal-broadband-roadblocks/>

- The restrictions take many forms – imputed costs; requiring a voter referendum (sometimes with a need for a super-majority); only allowing service in “unserved” areas (and any current service, no matter how slow, renders the area off limits); not allowing service in areas the incumbent carrier intends to serve.

But the situation is fluid. Five States had introduced legislation in 2021 to reduce barriers to municipal broadband, and it passed in two of those states (but was defeated or stalled in the other three states).

The Legal and Regulatory Landscape – Public Private Partnerships are Viewed More Favorably than Municipal Broadband

US Telecom Statement on Competition Executive Order – “A better model to help finish the connectivity job: government can deepen its partnership with private broadband innovators to serve communities while lowering the barriers to deployment that saddle projects with red tape and wasteful delays.” (<https://www.ustelecom.org/context-and-facts-matter-a-response-to-the-white-house-executive-order-fact-sheet/>)

Court of Appeals Decision Overturning the FCC’s Preemption of Restrictions on Municipal Broadband – “Under [North Carolina Statute] § 340.6, municipalities must solicit public private partnership proposals before a municipality can begin construction on a communications network.”

The Legal and Regulatory Landscape – It is not Clear What the Future Will Bring

- White House Fact Sheet on The American Jobs Plan (<https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>):
 - “The President’s plan prioritizes ... support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and co-operatives—providers with less pressure to turn profits and with a commitment to serving entire communities.”
- ***Proposed Bi-Partisan Infrastructure Legislation*** ([FACT SHEET: President Biden Announces Support for the Bipartisan Infrastructure Framework | The White House](#))
 - Proposes \$65 Billion for broadband deployment, and indicates that financing for this subsidy program will come from “Public-private partnerships, private activity bonds, direct pay bonds and asset recycling for infrastructure investment.”

The Legal and Regulatory Landscape – Takeaways

- Public Private Partnerships can address the business issues by providing private sector expertise, and also address the legal issues by providing a work-around of State restrictions on municipal broadband, while also allowing the City to help capture the positive externalities of robust and ubiquitous fiber deployment.
- But they may not address all of the “complications,” including the impact on competition, the need for continuing subsidies to support broadband adoption and bureaucracy/delay.
- Public Private Partnerships, like municipal broadband, are not a binary good in all circumstances or bad in all circumstances – but a potentially very useful tool in the toolbelt, depending on the particular situation. Harry Truman was purported to have said “Send me a one-armed economist, so I won’t have to deal with the on the one hand, but on the other hand advice I get” -- for this subject, we need a two-armed economist (along with lawyers, accountants and lobbyists).

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