Legal Planning For Public-Private Partnerships

The laws governing public-private partnerships for telecom networks are complex and variable. Before entering into a partnership, the parties should develop a legal plan as well as a business plan.

By Craig Settles ■ *Industry Analyst, Speaker, Author*

Public-private partnerships (PPPs) are becoming popular vehicles for moving broadband projects forward in this economically difficult period. However, the business and political hurdles that PPPs face necessitate a thorough grasp of legal issues and effective planning to address these issues.

Some legal hurdles are obvious and have clear paths to resolution, and others are obscure offspring of decades-old laws long since forgotten. "Right from the get-go, you have to step back and think about the full scope of your project," says Jim Baller, president of the Baller Herbst Law Group, a national law firm based in Washington, D.C., and Minneapolis, Minn.

Forming PPPs was relatively easy when a single entity was dealing with a community to implement a reasonably well-defined project. "You'd have 60 to to 80 deal points, make a spreadsheet of issues and going-in positions of the parties, negotiate them, resolve the difficult points, add boilerplate and the deal was done," continues Baller.

Now many communities are looking at more complex partnerships. Google's gigabit network project, for example, brings together two cities in two states (Kansas City, Kan., and Kansas City, Mo.), a network builder, possibly one or more ISPs, a public and a private utility, numerous community anchor institutions and various other major system users. The WiredWest consortium in western Massachusetts will have at least one ISP and more than 44 separate government entities as the collective public partner.

A legal strategy is like a football play – the plan developed in the huddle must be adjusted in response to what happens on the field.

CREATING A LEGAL PLAN

Even projects less complex than Google's may encounter a multilayered, multijurisdictional patchwork of overlapping and conflicting laws, rules, regulations and procedures. Project teams must develop mechanisms early on for ensuring that their plans address that patchwork. Bad decisions or improper procedures in early project stages can create expensive legal knots down the road.

Baller advises, "Do extensive due diligence to create a legal plan that integrates with your business and technology plans. Remain flexible. It's something like a football play – you come out of the huddle with a vision and a plan for how the play will unfold, who goes where and how others contribute to success of the play. But once you come out of the huddle, as you look over the defense, you may need to make adjustments and communicate them. Then, as the play unfolds, you have to adapt and perform according to what actually happens. Finally, you see where you are, huddle again and plan the next play. If your overall game plan was a good one, each individual play will advance it, and you won't have to make wholesale changes as the game proceeds."

An effective legal plan reflects a clear understanding of state and local requirements for both public and private partners. If the public entity will provision broadband services only, what are the federal, state and local ramifications? If the partnership provides voice services, what are the legal consequences in terms of reporting? Communities that only make dark fiber available to businesses have minimal requirements, but those that provide a full package of

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services are subject to more regulations and to financial obligations such as USF contributions.

A clear timeline of action is a must in any legal plan. In a state that has laws governing community involvement in telecommunications, some action items need to be completed before anything else can be done. For example, a town may have to hold a referendum before entering into a partnership. Other items, such as certain regulatory compliance reports, may need to be filed throughout the life of the project, in some cases by all the main partners. Many of these tasks may be interdependent.

Even if each partner is responsible for its own legal work, someone within the partnership should take responsibility to collect and include all this information in the project's legal plan. In addition, all project partners need to know the legal options open to them if the project's progress goes off track.

Although a city's attorney may have the necessary expertise to address many issues, local governments usually need to retain specialized counsel with extensive experience in certain tasks. "If bond financing is part of the plan, communities need to have a reputable bond attorney render an opinion that this is a sound project," says Milda Hedblom, a consultant, lawyer and policy expert who worked extensively with the PPP of Monticello, Minn., and Hiawatha Broadband Communications. "Without this opinion, it's hard to sell bonds."

THREE PHASES OF PLANNING

David Shaw, who heads the government and utilities practice at the law firm of Kirton & McConkie, has advised Powell, Wyo.; WiredWest in Massachusetts; UTOPIA in Utah and several other municipal entities on broadband projects. He likens PPPs to traditional relationships: Flirting is followed by dating and then marriage. Each phase presents specific legal issues.

When a local government begins flirting with the idea of partnering with a potential company, the first question to ask is whether any procurement obligations apply to the PPP – in other words, whether there are rules to follow before having an initial conversation. "States might not have regulations governing meetings, but it's possible local governments could require a formal request for information (RFI)," cautions Shaw. "Even if an RFI isn't required, issuing one is advisable because it minimizes the likelihood of future challenges, particularly from incumbents, on the basis that you did not go through the proper processes."

The second question is whether potential partners want discussions to be confidential. Some open-records laws expressly prohibit government staff from signing nondisclosure agreements. However, they may be able to keep information confidential in other ways. In Utah, for example, government officials can classify a document or a conversation as a "protected record" to avoid revealing its contents.

Failure to follow the classification process to the letter may end up exposing the contents. Furthermore, what's considered acceptable procedure may change with every project.

Do not confuse process rules with rules governing legal authority, which can also vary from one project or locality to another. "Process" refers to the way an action must be taken, and "legal authority" determines who is allowed to take or is prevented from taking an action. For example, any entity that intends to operate a telecom service may be required to file a specified set of documents (process). However, a county ordinance may not grant city governments *the right* to run a telecom service (legal authority).

WE LIKE EACH OTHER. NOW WHAT?

After partners decide they want to execute a partnership agreement, "dating" begins in earnest. In this phase, due diligence, planning, and anticipating legal processes, hurdles and challenges by incumbents increase in importance. Everyone involved with the PPP must pay attention to subtle legal distinctions.

In some locations, communities may have the legal authority to form PPPs but not have the legal authority to finance them. In 2006 and 2007, telecom providers aggressively lobbied state

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legislators to limit communities' rights to run municipal networks, but in the past year, they have shifted to attacking municipalities' ability to issue bonds or otherwise raise money for building and operating networks.

North Carolina's recently enacted Level Playing Field/Local Government Competition Act severely restricts all avenues for municipal network financing, adds special taxes, fixes the prices cities can charge for services and prevents PPPs. In Minnesota, Colorado, Idaho and other states, bond measures to fund networks must be passed by referenda, with voting procedures structured to put municipalities at maximum disadvantage and make them unattractive partners. Even in states friendly to PPPs, communities must conduct due diligence to ensure they aren't blindsided by tricky financing laws.

"I don't think the difference between legal authority and legal structure is appreciated enough in many places," adds Shaw. Even communities that have the legal authority to form PPPs may have to create new political structures to operate them.

For example, Massachusetts does not have laws banning municipal networks. However, WiredWest decided to structure itself legally as a "cooperative of municipal light plants," a designation created by a 100-year-old law that enabled towns to distribute their own electricity. Adopting the "light plant" designation allows towns to own telecom services within existing legislative guidelines and use municipal bonds to fund their networks. Besides establishing its legal structure, WiredWest also has to herd towns through a complex procedural hurdle: Each town must pass two separate referenda approving membership in WiredWest.

MAKING IT LEGAL

When partners decide to formalize and consummate the partnership, the local government should issue a public notice alerting other potential suitors that it has settled on a partner. This reduces the PPP's vulnerability to future legal challenges. "You create defensibility in the event of future litigation," says Shaw. "It's equivalent to 'Speak now or forever hold your peace' but before rather than during the wedding."

Service providers Qwest and Bresnan Communications both threatened to sue Powell if it entered into a PPP until the city's legal team reminded them that Powell had served public notice, including in its notice a statement that the agreement was a done deal if no one came in with a better offer.

As the maneuverings between potential partners reach the final stages, the legal dance steps start to resemble those for typical business deals. Putting enough legal oversight in place to prevent a community from being taken for a ride by contractors is critical. If a builder puts in more conduit than called for in the engineering design, for example, does the city have to pay the contractor? There may be court rulings to guide aspects of contract agreements, but addressing procurement processes in the legal plan as well is advisable.

As broadband stimulus projects got underway, some PPPs and private companies ran into problems because they overlooked ramifications of the Davis-Bacon Act, which establishes minimum wage rates for companies that work on federally funded projects. Although the law is intended to set these rates based on local prevailing wages, in practice rates are sometimes set higher, leading to cost overruns and litigation. After PPPs have been legally formed and received federal or state grant money, middle managers retaining a small army of subcontractors can easily but inadvertently make errors because they don't know federal, state and even local labor laws. Due diligence is an ongoing exercise.

CHANGES TO THE PARTNERSHIP

Legal issues don't come to an end after a network is built. New partners may be added to the mix at any time. For example, after a network is up and running, a private ISP may request to lease portions of the network, such as dark fiber, from the public partner. Do standard landlord-tenant laws apply in this case? "As the lessor, I want a standard lease, because if the ISP doesn't pay its bills, I want to be able to kick it off the network," says Shaw.

Conversely, a public partner may decide to switch roles and lease a connection to a middle-mile network. As the lessee, it would want an Indefeasible Right of Use, a stronger form of property rights that could enable it to stay on the network even after falling behind in lease payments.

Finally, although no one enjoys bringing up the topic, PPPs must also address the possibility of divorce. "You have to accept that this deal is not forever," says Hedblom. "Cities that don't understand this are not thinking correctly. You have to talk about severability. Under what conditions and on what terms? What kind of notice must the partners give? Who owns the assets? You want to make sure none of the parties are unduly hurt." Usually contracts allow for a transfer of interest in case the private partner is acquired. Subsequently, the city may be able to avoid having to continue the relationship with the new buyer.

For the security of its investment and the peace of mind of everyone involved, each community should have a legal "dream team" – perhaps including the city or county attorney as team leader – and a well-written legal plan. Broadband deployments face numerous complex legal issues, and every project will need to resolve unanticipated legal bumps on the road to success. Communities should be prepared and remain vigilant. ❖