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Municipal Broadband and Opportunities for Public Private Partnerships

By

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# The Explosion of Digital Information Needs: Is Your City Prepared?

## BB&K In The News

BB&K Attorney Gail Karish Examines What it Takes to Build a Municipal Broadband Network and Why Cities in California Should Consider the Move

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By **Gail A. Karish**

Broadband communications are important to local communities. Local public officials do not need to be convinced. Broadband has become an essential component of modern community infrastructure, like electricity, water and roads. Yet California is not leading the nation in high speed broadband deployments. Is there anything local governments in California can or should be doing to spur broadband deployment? In a word, yes.

Communities around the country are building their own broadband networks. Unlike a number of other states that place restrictions and sometimes outright bans on municipal networks, the right of local governments to provide communications is constitutionally enshrined in the California constitution, Article XI, Section 9. Surprisingly, few California local governments have taken advantage of this right. Conditions may be right for that to change.

**Is It Time to Think About Establishing a Municipal Network?**

Local governments are major consumers of all forms of communications services – telephone and Internet in government buildings, cell phones for mobile workers, public safety communications for first responders, 911 call centers, traffic management systems, libraries, schools, and the list goes on and on. A major challenge for public officials is how to meet today's myriad communications needs – both within governmental operations and with and by the public – in a

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cost-effective way.

Often communications planning is dispersed among different departments and incremental in approach. Typically, a need is identified by one department– say higher capacity Internet access in a departmental building – and then the department seeks the budget to upgrade the existing service. Over a longer planning horizon, taking an incremental approach may not be the most cost-effective way to meet these needs. Too often, local governments have stovepipes of IT networks and telecommunications services, purchased incrementally and not integrated to take advantage of the power and efficiency of new fiber optic based digital networks and services.

Leading communities are now thinking strategically about their public and private communications infrastructure: What are the government's communications needs as a whole? What is the highest speed, lowest cost option for the community as a whole? Can actions today address both immediate needs and provide growth capacity over the next five years or more? Does the local government have the capacity to plan and operate a network itself, or should it be contracted out?

A community that is not considering self-provisioning its own local broadband network is ignoring a critical analytical and planning step. This is the time to engage in this analysis. Every local government is on the cusp of an explosion in the volume of digital information acquisition, storage and transmission. These needs will continue to grow by leaps and bounds, even as local budgets are being squeezed.

**Institutional Networks Provided by Cable Companies Are Being Phased Out**

When cable television franchising was still a local matter (prior to the enactment of the Digital Infrastructure and Video Competition Act of 2006 or DIVCA), it was commonplace for local cable franchises to include a requirement for the operator of the local cable system to construct and maintain an institutional network or I-Net – connecting government buildings, police and fire stations, perhaps schools and libraries also – for local government communications use. The costs of constructing the I-Net might be borne by the local government or shared by the cable operator who typically agreed to maintain the I-Net at no charge, treating it like part of its own cable system. The I-Net might be expanded to new sites from time to time, but the basic terms were reviewed every 10-15 years, typically when the cable franchise was up for renewal.

DIVCA changed all that. Now cable franchising authority has been removed to the Public Utilities Commission. There are no I-Net requirements in DIVCA, and the obligation to provide and support existing I-Nets continues only until the later

of January 1, 2009, the date the local franchise expires, or the date the term of the local franchise would have expired if it had not been terminated early due to the local market entry of a competitive provider. The result is that cable operators have taken the first opportunity that comes to them to shed these I-Net obligations or to monetize them by charging the local government for continuing the services.

If your community's local cable franchises have expired or been abrogated under DIVCA, then your community may already be dealing with this loss. Sometimes provider requests for compensation are reasonable, and sometimes they are not. But the significance of the change is the introduction of major uncertainty – as to future costs and availability of existing communications networks on which your community may depend to deliver services to residents.

**T-Band Communications Systems Are Being Phased Out**

Another example of the pending changes in local communications networks comes courtesy of Congress. The Middle Class Tax Relief and Job Creation Act of 2012 (H.R. 3630) did not simply extend the federal payroll tax reduction. Title VI of the statute deals with public safety communications. It created a framework for a new nationwide 700 MHz public safety broadband radio system that should be built out over the coming decade. However, a little known provision of H.R. 3630 (Section 6103) contains a federal mandate to local governments to abandon use of the so-called "T-Band" (470-512 MHz) of public safety radio spectrum.

Upwards of 100 California communities, including major cities such as Los Angeles, are currently using the T-Band for important public safety communications and will be impacted by this mandate. As a first step, the Federal Communications Commission (FCC) imposed a T-Band channel bandwidth limit of 12.5 KHz effective January 1, 2013. The FCC later waived the deadline for Industrial/Business and Public Safety Radio Pool licensees in the 470-512 MHz band T-Band licensees that also operate on frequencies in the 150-174 MHz and 421-470 MHz bands must meet the narrowbanding deadline with respect to those frequencies. If your community uses the T-Band and has not invested in the new, narrower channel equipment, your community may need a waiver from the FCC to continue use beyond the end of 2012. Some major T-Band users such as the New York City Transit Authority have already applied for waivers.

The FCC may take up to nine years to begin auctioning reclaimed T-Band spectrum to commercial uses, but it need not wait that long. Commercial providers are clamoring for more spectrum now – warning of a spectrum crunch due to the explosive demand for wireless data services. And the FCC is a strong advocate of wireless broadband. Thus, if your community uses T-Band spectrum, there is real urgency to consider both whether a waiver request is needed and to plan for the relocation or replacement of your existing T-Band system.

**Planning for Future Communications Needs**

The above examples are just two of numerous state and federal regulatory mandates changing the local communications landscape. More broadly, the commercial communications industry has largely been deregulated in the last 10 years and is now dominated by a handful of large providers that have the power to engage in monopoly pricing. Your community's actions to replace an institutional network or T-Band system can be responded to as one-off items. Why not use these changes as a catalyst for a fundamental rethinking of the local government's approach to evaluating and addressing the community's communications needs?

If you are willing to engage in a major re-think, the place to start is with thorough planning.

A critical component of the planning process is to inventory existing communications assets and systems. A collaborative effort among departments and agencies will identify and leverage existing communications assets – these may include transit system fiber, utility communications infrastructure, WiFi systems, public safety systems, radio licenses, Educational Broadcast Spectrum licenses and the like. Building on existing infrastructure is an important cost savings strategy.

Another important component is consultation. An aspect of local cable franchising that has been lost or at least deferred in California is the community needs assessment process that accompanies cable franchise renewal. With most 10-year state-level franchises having been issued in the 2007-2009 period, renewal processes that would have been due under local franchises in many communities have been deferred at least another five years, and how renewal processes will work under DIVCA is highly uncertain.

In a cable franchise renewal, the community needs assessment process serves as part evaluation and part projection of future needs. The point is to ascertain how well the community's cable-related needs are being met and what investments in infrastructure are needed to meet current and future needs over the next decade. Using community needs assessment techniques (surveys, focus groups, interviews) may be helpful as part of a broader communications planning process. It will also help build community support for the investment.

Collaboration with other entities should also be strongly considered. Neighboring communities, special districts, educational institutions, healthcare institutions, private entities – everyone needs better communications infrastructure. Pooling resources – both financial and physical – can make a lot of sense. Organizational structure should be carefully considered up front. In our experience, three broad

categories of issues exist, and the answers will vary depending on the legal structure of the entity involved: 1) Is the entity and/or the services being offered subject to regulation? 2) How complicated is it to get access to public rights of way and towers? 3) What contracting processes must be followed?

Funding, obviously, will be a major issue in the current fiscal environment. But this is also an opportune time to explore new broadband funding sources both at the state and federal levels. Some major middle mile fiber projects were funded with federal ARRA grants. These include public-private partnerships such as California Broadband Cooperative, Inc. (awarded over $80 million to build a fiber network more than 500 miles long along Interstate 395) and Central Valley Next Generation Broadband Infrastructure Project (awarded over $45 million to build broadband networking infrastructure in 18 counties within the California Central Valley).

Under SB 1040, the California Legislature extended and added funding to the California Advanced Services Fund (CASF) at the end of 2010. The California Public Utilities Commission (CPUC) has already awarded grants for broadband planning to dozens of consortia throughout the state out of its “Rural and Urban Regional Broadband Consortia Account.” Many of these consortia include local governments. Federal and state telephone service universal service funds are also being restructured and redirected towards broadband deployments.

A careful evaluation of the benefits and risks of building rather than “buying” communications services will be key. Benefits can include controlling your own costs, technology and build out. Building may bring the opportunity to generate revenue by selling excess capacity and/or becoming a wholesale or retail provider. Financial risks, obviously, are different than with a service contract and typically involve longer payouts. Other risks include technology change and maintaining community commitment.

There will be opposition, particularly from the existing commercial communications providers.

In some states where communities have decided to build their own communications networks, there has been litigation and attempts to pass legislation to ban such projects or put hurdles in front of them. Here in California, under current CPUC rules, the broadband infrastructure grants and loans authorized under the CASF will only be available to entities registered with the CPUC (holders of certificates of public convenience and necessity or wireless identification registrations). These are typically commercial entities.

While at first considering self-provisioning a broadband communications network may seem daunting, none of these risks are unique. Local governments routinely

take up complex and challenging construction projects – to build all sorts of essential infrastructure. Broadband is equally important and should be considered in the same light.

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