Keller & Heckman Celebrating 60 Years of Excellence 1962-2022

Developing Public Private Partnerships with States and Local Governments

International Municipal Lawyers Association

October 21, 2022

Casey Lide
Partner, Keller & Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001
(202) 434-4100

Why a Public-Private Partnership?

- Public entities often control assets needed for private sector broadband deployment (ROW, tower sites, customers, etc.).
- Public entities want to encourage economic development, but:
  - may lack technical, marketing, financial expertise to provide broadband service;
  - may face political and legal barriers.
- Private entities may not see sufficient economic incentive to invest; local governments can reduce cost and/or provide revenue source
- Some Federal and state funding programs now explicitly favor partnerships.

© 2022 Keller and Heckman LLP

Why, continued

- Public-private partnerships offer the opportunity to:
  - Allocate responsibilities based on skill sets and experience
  - Allocate risks based on who's best able to mitigate them
  - Allocate rewards based on asymmetric priorities
    - Local govt. may value economic development more than profitability; reverse may be true for private partner

© 2022 Keller and Heckman LLP

Models

City Main Business Model Options for Broadband Expansion

		Own Rights of Way, Utility Infra.	Own Middle Mile	Own Last Mile	Operate Infrastructure	Service Customer	Example City
1	Full Municipal Broadband	Public Entity (City or Utility)	Public Entity (City or Utility)	Public Entity (City or Utility)	Public Entity (City or Utility)	Public Entity (City or Utility)	Chattanooga
2	Publicly-owned, Privately-Serviced	Public Entity (City or Utility)	Public Entity (City or Utility)	Public Entity (City or Utility)	Public Entity / Service Provider	Service Providers (One or Several)	Westminster
3	Hybrid Ownership	Public Entity (City or Utility)	Public Entity (City or Utility)	Service Providers (One or Several)	Service Providers (One or Several)	Service Providers (One or Several)	Lincoln
4	Private Developer Open Access[1]	Public Entity (City or Utility)	Private Developer	Private Developer	Private Developer	Several Service Providers	Fullerton
5	Full Private Broadband	Public Entity (City or Utility)	Service Providers (One or Several)	Service Providers (One or Several)	Service Providers (One or Several)	Service Providers (One or Several)	Boston

Note: 1) Private Developer is defined as private company that builds, owns and operates the network infrastructure and offers open access to it to several retail SPs that provide service on the top

Source: US Ignite

© 2022 Keller and Heckman LLP

Models / variations, cont.

- Layer 0 –Conduit:

  West Des Moines, IA (Google Fiber); Lincoln, NE (Allo)

- Layer 1 –Dark Fiber:

  Westminster, MD (Ting); Springfield, MO (CenturyLink); Huntsville, AL (Google Fiber); Holly Springs, NC (Ting); Urbana/Champaign, IL (I3 Broadband)

- Layer 2 –Lit Fiber:

  Utopia, UT (Multiple service providers); Ammon, ID (Multiple Service Providers); Chelan County PUD, WA

© 2022 Keller and Heckman LLP

20 Important Partnership Issues

- State barriers – substantive and procedural (But BEAD: “may not exclude…”)
- Define and align potential partners’ goals – Can be asymmetric
- Clearly define responsibilities, risks, rewards
- Governance issues, especially with multiple public players
- Local desire for control/oversight vs. flexibility to incentivize investment
- “Open Access” – Meaning? Implementation? Enforcement?
- Non-discrimination and competitive neutrality requirements?
- Who pays for what costs? How?
- Tax issues
- Revenue shares – On what? How much?

© 2022 Keller and Heckman LLP

20 Important Partnership Issues (continued)

- Who pays for and owns the network? Drops? Extensions?
- Refresh and Upgrades – When? What standard? Who pays?
- Performance regime – How define, monitor, enforce technical and revenue performance?
- Regulatory compliance – Who's responsible? What if things go wrong?
- Supervening events – compensation, relief, force majeure, change in costs, changes of law, etc. Where do supply chain delays fit in?
- Who owns customers during term? Upon termination?
- Who owns and controls confidential information?
- Assignment of interests?
- Corporate parent guarantees? Performance bonds?
- What's the transition process as term nears its end?

© 2022 Keller and Heckman LLP

Key Legal Issues

- Confirmation of authority of potential public partner:
  - State law: public barriers to entry in ~19 states
  - City charters or ordinances may impose restrictions
  - Existing contracts may limit use of govt. assets for commercial purposes (e.g., city-controlled dark fiber obtained through cable franchise often subject to limitation on use for competitive services)
- State public-private partnership laws:
  - Some are specific to comms. services; others are more general P3 statutes; heavily focused on financing models
- Procedural requirements:
  - Competitive procurement / RFP needed? Publication / notice / comment?
  - To what extent can govt. processes be streamlined?
- Revenue share limitations, “in aid of” prohibitions, private use exception

© 2022 Keller and Heckman LLP

Key Legal Issues

- Legal structure:
  - New (nonprofit) org needed? (maybe, maybe not)
  - 501(c)(12) Cooperative?

- Contractual components:
  - MOU / term sheet
  - Master Agreement / “Network Development Agreement.” May include or reference:
    - Network operation agreement
    - Fiber IRU
    - Pole attachment agreement
    - ROW access agreement (“franchise” / occupancy permit)
    - Wireless siting agreement
    - Etc etc

© 2022 Keller and Heckman LLP

Resources:

Partnership Resources:

Baller, Jarrett, Stokes, Wright, and Lide, “Broadband Partnerships: For Many Communities, a Good Option at a Good Time,” *International Municipal Lawyers Association Magazine* (Sept. 2021), https://tinyurl.com/pzjxb8mh

Hovis, Baller, Talbot, and Blake, “Public Infrastructure/Private Service: A Shared-Risk Partnership Model for 21st Century Broadband.Infrastructure,” *Benton Institute for Broadband and Society* (Oct. 2020), https://www.benton.org/sites/default/files/PPP3_final.pdf

Hovis, Schulhof, Baller, and Stelfox, “The Emerging World of Broadband Public–Private Partnerships: A Business Strategy and Legal Guide,” *Benton Foundation* (May 2017), https://tinyurl.com/33uy6fhh

© 2022 Keller and Heckman LLP

Keller & Heckman
1962-2022
Celebrating 60 Years of Excellence

Thank You

Any questions?

Casey Lide
Partner
Keller & Heckman, LLP
Washington, D.C.
202/277-6276
lide@khlaw.com

 © 2022 Keller and Heckman LLP