IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

SEPT OCT 2021
VOL.62
NO.05

BROADBAND PARTNERSHIPS: FOR MANY COMMUNITIES, A GOOD OPTION AT A GOOD TIME

Broadband Partnerships: For Many Communities, a Good Option at a Good Time

JAMES BALLER, DOUGLAS JARRETT, WESLEY WRIGHT, SEAN STOKES, *and* CASEY LIDE, *Partners, Keller and Heckman LLP, Washington D.C.*[1]

I. INTRODUCTION

The unfortunate reality in the United States is that the availability of high-speed wireline broadband services varies widely, even within major metropolitan areas. In many second-tier and third-tier communities, the established service providers have opted not to upgrade their networks to provide 21st century broadband services, and for millions of residents of rural communities or low-income urban and suburban areas, high-speed Internet access is either unavailable or unaffordable.

If the United States is to remain a great nation and compete successfully for world leadership in the decades ahead, it must act aggressively to meet two core broadband challenges. One is to ensure that all Americans have affordable access to the Internet at levels sufficient to enable them to participate fully in modern life. The other is to ensure that all of America's communities obtain the advanced communications capabilities they will need to survive and thrive in the increasingly competitive global economy. Broadband partnerships can play a vital role in meeting both of these challenges, especially by taking advantage of the substantial federal and state funds that are becoming available for these purposes.

At the individual level, the COVID-19 pandemic has made unmistakably clear that broadband connectivity is essential, particularly in the face of severe disruptions of the kind that we experienced in 2020. Individuals in households with fast connections to the Internet were able to continue to work, educate themselves, obtain medical care, and maintain social contacts from their homes. Unserved or underserved individuals could not do these things and were increasingly isolated and frustrated. The pandemic also made clear to Congress, the States, and local governments across America that upgrading and expanding America's broadband infrastructure will be difficult, complicated, and expensive, but it must be done.

At the community level, advanced communications capabilities have become platforms, drivers, and enablers of progress in just about everything that matters to communities. This includes economic and workforce development, education, health care, public safety, transportation, energy, environmental protection, government service, and much more. Communities without access to affordable advanced communications capabilities will inevitably fall behind in all of these areas.

Recognizing the benefits of advanced communications capabilities, hundreds of communities—perhaps thousands—are exploring their options, including working with willing incumbents or new entrants, developing their own networks, creating regional consortia, or pursuing other creative alternatives. As many are realizing, a partnership of some kind may be their best choice, and perhaps even their only feasible one. With sizable federal and state funding now available and significantly more in the pipeline, partnerships are likely to become an even more attractive option.

In this article, we examine the pros and cons of broadband partnerships, the key legal and regulatory considerations involved, the steps that local governments should take—and the questions they should ask—in analyzing, planning, and negotiating partnerships.

II. WHY PARTNERSHIPS?

Broadband networks—be they wireline or wireless; public, private, or mixed; rural, urban, or suburban; single-location, regional, or national; for-profit or

non-profit—must each address several critical functions:

- **Designing, financing, constructing, operating, maintaining, and refreshing the network;**
- **Obtaining and maintaining all required authorizations, including federal, state, and local registrations, right-of-way approvals, permits, easements, pole attachments, etc.;**
- **Providing services to customers and performing related marketing, installation, billing, customer service, and technical support; and**
- **Complying with all legal and regulatory requirements that apply to the particular services provided over the network.**

Local governments typically have substantial experience with designing, financing, constructing, and maintaining major capital projects, but unless they have substantial experience with providing commercial communications services, they may be hesitant to enter that field themselves. At the same time, communications service providers may not have the resources or desire to build and own a network themselves, but would be glad to market, provision, deliver, bill for, and provide customer support for communications services provided over someone else's network. A partnership can readily be designed to allocate the responsibilities, risks, and rewards among the parties so as to take advantage of each partner's goals and strengths.[2]

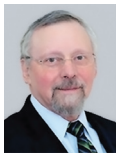
For example, some local governments may decide that their best option is to develop the network infrastructure, retain ownership of it, and lease "dark fibers" or other facilities to one or more partners, who will "light" the fibers to provide communications services to the public. Other local governments may prefer to light some of the fibers themselves and sell transmission capacity to service providers on a wholesale basis or to large enterprise partners. Dozens of local governments have gone still further and found success in also providing retail services to their communities. For example, the municipal fiber network operated by the Electric Power Board of Chattanooga, Tennessee, which has consistently ranked as one of the best broadband service providers in the world and in its first decade generated approximately $2.69 billion in economic and social benefits, on an investment of about $200 million.[3]

Partnerships may also enable public entities to comply with restrictions in some states that might otherwise prevent them from providing communications services themselves. Such restrictions are discussed in greater detail in Section III.A.1 below.

Another key benefit of broadband partnerships is that they can harness the asymmetric goals of the parties. For example, public entities often want to exercise a measure of control to ensure that a network will remain responsive to community needs, and they may place a higher value on advancing community goals—such as economic development, educational opportunity, workforce development, and digital equity—than on maximizing profits. Private parties will probably need to meet revenue and return on investment targets for the project to work for them. Flexible, well-designed partnerships can enable each entity to meet its goals.

Continued on page 8

C. Douglas (Doug) Jarrett represents associations, major corporations, and entrepreneurs before the FCC on policymaking, licensing, and enforcement matters. His clients include dark fiber network operators, wireless site operators, specialized services providers, emerging broadband services providers, MDU developers and owners, and critical infrastructure companies. He is a frequent speaker on telecommunications issues and regularly contributes to the Beyond Telecom Law blog. He holds a J.D. from the George Washington University Law School.



James (Jim) Baller represents clients in matters including high-capacity broadband networks, public-private broadband partnerships, wireless facility siting, right-of-way management, pole and conduit attachments, and impediments to community broadband. He is a past president of the U.S. Broadband Coalition, and the co-founder and president of the Coalition for Local Internet Choice, an alliance working to remove barriers to local governments' ability to make critical broadband infrastructure decisions. He received his J.D. from Cornell University Law School.

Casey Lide counsels on issues including cable television, broadband Internet, wireless services, right-of-way management, pole and conduit attachments, and barriers to local broadband. His advice covers fiber optic IRUs and leases, easements, franchises, attachment agreements, ISP service agreements, interconnection and collocation agreements, strategic MOUs and others. He collaborates with multi-disciplinary teams to assist government and utility clients in producing comprehensive telecommunications plans. Casey holds a J.D. from the Ohio State University.

Wesley (Wes) Wright advises on matters including telecommunications compliance and enforcement, state tariff requirements, private wireless licensing, 911 reliability and outage reporting requirements, customer proprietary network information (CPNI), and the 21st Century Communications and Video Accessibility Act (CVAA). He is the Executive Director of the Next Generation 911 Institute and frequently speaks on such matters as the FCC's 911 Reliability Rules and the FCC's New Citizens Broadband Radio Service. He is a graduate of the University of Akron School of Law.

Sean Stokes represents clients on matters including broadband, cable television, wireless communications, right-of-way management, pole attachments, barriers to community broadband, and public-private partnerships. He counsels on such issues as developing and negotiating agreements involving access to poles, ducts, conduits, dark fiber, and towers. His clients include national and state utility associations, municipal leagues, and numerous public and private entities throughout the U.S. Sean is a graduate of the George Washington University Law School.

Even before the current wave of federal and state broadband funding,[4] the ability of public and private entities to combine funding available to each was an attractive feature of broadband partnerships. That is even more important now, as the size and scope of federal and state funding for broadband partnerships have grown exponentially.

Broadband partnerships may also diminish political opposition to public broadband initiatives. Today, at the federal level, a sharp divide exists between the Biden Administration, which seeks to prioritize local broadband decision-making,[5] and some House Republicans, who want to ban community broadband initiatives altogether.[6] Partnerships may help bridge this divide, especially at the state and local levels. It is noteworthy that opposition to public broadband initiatives and public private partnerships has diminished in some states. For example, the conservative legislature of Arkansas voted unanimously this year to give public entities substantial new options, including entering into public-private partnerships.[7] Effective July 2021, the Washington State legislature removed its restrictions on public utility districts, ports, and small cities and towns.[8] Similarly, the legislature of Ohio rejected amendments to a budget bill that would have banned all existing and future municipal broadband projects and public-private partnerships in the state.[9]

III. KEY LEGAL ISSUES

Broadband partnerships often involve community-specific allocations of risks, rewards, and responsibilities among participating entities. How does a local government get started and proceed with such a project? Typically, this occurs in four stages—(A) Analysis and Planning; (B) Identifying Potential Partners; (C) Negotiating a Deal; and (D) Implementing the Partnership. In this section, we address the key legal issues in each stage.

In contrast, twenty states impose either explicit or practical restrictions on local broadband initiatives. Barriers to entry sometimes take the form of onerous procedural requirements that are misrepresented as being necessary to achieve "fair competition" or a "level playing field" for established service providers.

A. Analysis and Planning Stage

Projects resulting in broadband partnerships often begin when local champions commit themselves to doing everything necessary to get an advanced communications network for their community. The champions often include local government officials, business leaders, educators, health care professionals, or young people, all with the energy and ability to inspire and encourage others to follow their lead.

The champions usually start by learning what the incumbent service providers and potential entrants are and are not willing to do; what challenges comparable communities faced and how they addressed them; what federal, state, and other resources may be available; what their community's strengths, weaknesses, needs, gaps, options, politics, and level of support may be; whether combining efforts with neighboring communities may be worthwhile; and whom to engage for assessing the community's technological choices, estimating costs and revenues, addressing federal, state, and local legal issues, and dealing with other critical issues.[10] The following are the key legal issues that typically arise in this stage.

1. Confirmation of Authority.

Until recently, federal law could be characterized as neither for nor against local broadband initiatives. As noted below, federal support of public-private partnerships is becoming more robust and meaningful. However, one must look to state and local law for a local government's authority to participate in a public-private partnership or to deploy and operate a broadband network by itself. Some states explicitly authorize local governments to engage in such activities. For example, Article XI, Section 9 of the California Constitution empowers both charter cities and non-charter cities to establish public utilities, including those that provide for "means of communication," and California courts have a long history of ruling in favor of local authority to provide communications services.[11] Similarly, Article X of the Connecticut Constitution and Conn. Gen. Stat. Ann. § 7-188 give all of Connecticut's municipalities broad Home Rule authority, and Conn. Gen. Stat. Ann. §§ 7213, 7-233ii, and 7536 expressly authorize them to provide telecommunications services, cable television services, and broadband services, subject to some limitations. And in Illinois, 20 ILCS 661/35 states that:

> Any municipality or county may undertake local broadband projects and the provision of services in connection therewith; may lease infrastructure that it owns or controls; may aggregate customers or demand for broadband services; may apply for and receive funds or technical assistance to undertake such projects to address the level of broadband access available to its businesses and residents. To the extent that it seeks to serve as a retail provider of telecommuni-

cations services, the municipality or county shall be required to obtain appropriate certification from the Illinois Commerce Commission as a telecommunications carrier.

In contrast, twenty states impose either explicit or practical restrictions on local broadband initiatives.[12] Barriers to entry sometimes take the form of onerous procedural requirements that are misrepresented as being necessary to achieve "fair competition" or a "level playing field" for established service providers. One such example involved Wilson, North Carolina, which desired to expand its highly successful municipal internet service to neighboring jurisdictions but was prohibited from doing so by state law. While the Federal Communications Commission (FCC) preempted the North Carolina statute,[13] the Sixth Circuit reversed, finding that the FCC lacked authority to do so.[14] A number of states have also recently enacted laws encouraging public-private partnerships, but some of these laws do not apply to telecommunications matters, and others do not clearly address existing restrictions.[15]

If a state's constitution or statutes do not deal explicitly with the relevant authority issues, the outcome will often turn on whether the state is a Dillon's Rule state or a Home Rule state.[16] In Dillon's Rule states, municipalities are deemed to have only such powers as the state has granted to them, either explicitly or by necessary implication from other grants of municipal authority, and any doubts must be resolved against the existence of the local power. In Home Rule states, the presumptions run in the opposite direction—i.e., municipalities are deemed to have all powers that the state has not expressly or by clear implication denied them, and any doubts must be resolved in favor of the existence of the local power. Unfortunately, Dillon's Rule and Home Rule standards vary from state to state, and even within states. The outcome of a particular matter may depend on the nature of the local power at issue, the size of the local government, whether the local government is providing competitive commercial services, and so on.

In each case, it is important to dive deeply into authority issues, as mistakes can be time-consuming and costly, and workable alternatives are often available.

2. Funding Opportunities

Even before the recent wave of new federal and state funding programs, broadband partnerships often enabled public and private parties to come up with sufficient funding to meet project needs by drawing upon resources available to each. For example, local governments could use municipal bonds, Tax Incremental Financing, New Market Tax Credits, Qualified Opportunity Zones, several federal and a few state programs, and many other vehicles to contribute to project financing.[17] For their part, private partners could take advantage of a wide range of options, including equity, debt, contribution of equipment or facilities, in-kind services, buyer discounts, fiber swaps, and many other devices.

According to the National Telecommunications and Information Administration (NTIA), there are now "more than 80 federal programs across 14 federal agencies whose funding can be used for broadband-related purposes."[18] These programs are described in NTIA's "BroadbandUSA Federal Funding Guide for Fiscal Year 2021."[19] In addition, as of the date of this writing, Congress was considering a $1 trillion bipartisan infrastructure bill that includes an additional $65 billion for improvement of Internet access, of which $42.5 billion would be distributed by states to eligible broadband projects.[20]

Broadband partnerships have fared well under recent federal and state funding programs. For example, the Consolidated Appropriations Act that became law in late December 2020 provided NTIA with $300 million to distribute to public-private partnerships.[21] In addition, the 2021 American Rescue Plan Act has allocated $350 billion to state and local government infrastructure projects that could be utilized for public-private broadband partnerships. Similarly, several states have adopted funding programs that prioritize public-private partnerships.[22]

With so much federal and state funding potentially available to broadband partnerships, it behooves the participants to explore the possibilities and take advantage of them.

3. Access to Public Rights of Way and Infrastructure

Every broadband project must have access to the public rights-of-way (PROW) for the installation of fiber and facilities on poles or in underground conduits. Local governments typically regulate access to PROW, subject to federal and state laws, including non-discrimination and competitive neutrality requirements.[23]

Given the importance of speed to market, service providers want local governments to accelerate their processes for reviewing applications for access to the PROW. Providers also often seek to lower their deployment costs by seeking lower PROW access fees. Partnerships may offer the participants multiple ways to accelerate and lower the cost of access to the PROW, but one must be very careful about this.

For example, a broadband partnership will often provide the community benefits that other occupants of the PROW do not provide. While some degree of discrimination is appropriate when dealing with entities that are not similarly situated, drawing distinctions may often be difficult and controversial. Incumbent providers have frequently complained that anything that favors a public project or partnership violates federal and state nondiscrimination and competitive neutrality requirements unless the local government offers similar concessions to the incumbents. So,

Continued on page 10

local governments must be deliberate in framing the PROW benefits that they can offer as part of a public–private partnerships.

Existing infrastructure and facilities are among the most important assets that local governments may be able to bring to a broadband public–private partnership. Facilities may include fiber, poles, ducts, conduits, sewers, streetlights, towers, rooftops, and collocation space. Local government-owned land can also be an important and valuable asset to make available.

Until recently, local governments were widely understood to have the proprietary power to control access to the physical infrastructure or facilities they own. With this power, they could deny access to their facilities or grant access on terms and conditions of their own choosing.[24] When acting as property owners, they were not subject to federal nondiscrimination or competitive neutrality rules.

Now, however, the Federal Communications Commission (FCC) has partially eroded this power by requiring local governments to make their physical infrastructure and facilities located within their own PROW available, at cost, to entities that seek to mount small cell wireless antennas and related equipment.[25] Whether and how far this precedent will evolve remains to be seen. In the meanwhile, local governments still retain substantial flexibility in managing their physical infrastructure and facilities and bringing them into broadband partnerships.

Aside from PROW and infrastructure access issues, there are multiple access-related issues that can arise in the context of broadband partnerships. These include access to municipally-installed fiber and privately-owned towers, sides and rooftops of buildings, private easements, distributed antenna system (DAS)/small cell sites, wetlands, historical or other protected properties, environmental issues, and more. Each

Incumbent providers have frequently complained that anything that favors a public project or partnership violates federal and state nondiscrimination and competitive neutrality requirements unless the local government offers similar concessions to the incumbents.

is governed by its own history, rules, administrative precedent, case law, and politics. It is therefore important for the public and private partners to have access to expertise in all of these areas. A detailed discussion of these issues is beyond the scope of this article.

4. Organizational and Governance Issues

In addition to considering how the broadband partnership itself will be structured, it is important for a local government to consider how it will organize and run its side of the partnership—including whether to use an existing branch of government to oversee the project; whether to create a new division, commission, authority, non-profit, or cooperative; and how to involve the key stakeholders, including the school system and the municipal utility (if one exists).

How a public entity chooses to organize itself is typically based on political, legal, and practical considerations. For example, a local government may simply not have the authority to create a new agency and will thus have to operate within its existing structure. A public entity may also choose its organizational structure based on governance issues, particularly if the project will involve multiple public entities. All parties benefit when there is a clear chain of command and decision-making process in place, regardless of the organizational structure.

B. Finding Potential Partners

Once a local government has acquired a reasonably good understanding of what it needs, what it wants, what it has to offer, and what it may be willing to bargain away, it must then find the right partner(s). This can happen in many different ways.

Many local governments have found it useful to take the initiative and reach out to potential partners through a "Request for Information," a "Request for Qualifications," or a similar informal process. These documents set forth the community's visions of the future, its assets and strengths, and its reasons for believing that a partnership would be good for all concerned. RFIs and RFQs also identify the community's goals and what it needs from private partners to achieve them.

The RFI or RFQ process can be particularly valuable because it allows for extensive informal one-on-one communications between local governments and potential partners, which often compete with each other to win the local government's support. From these communications, local governments may discover even better ways to achieve their goals than they had originally conceived.

RFI or RFQ processes give local governments a better understanding of what it will take to get their projects off the ground in their particular circumstances. They will have a much better understanding of the approximate costs, revenues, and other benefits and burdens of their initiative. They will also have a good sense of who would be a good partner.

With this knowledge, a local government can issue a formal Request for Proposals or engage in whatever other procurement process applicable state and local law requires.

C. Negotiation Stage

Sooner or later, local governments will identify the entity or entities with which they want to partner. Negotiations will typically address a series of distinct issues, largely driven by the unique relationship between the parties, the goals of the project, and state and local law. Allocation of responsibilities, risks, and rewards will involve trade-offs, as the greater the risks and responsibilities each party is willing to assume will depend on the nature and extent of the rewards that it will want to receive. Based on our experience, the process of finalizing the respective responsibilities is often more nuanced and time-consuming than anticipated.

In order to be successful, the parties must keep the big picture goals of the project in mind throughout the negotiations.

D. Implementation Stage

Eventually, solid projects will reach the Implementation Stage. By this point, the major issues will have been resolved, and the parties should have a clear path through network construction and years of ongoing operations. The main legal and regulatory issues at this stage will involve compliance with generally applicable FCC and other federal and state requirements, including, as applicable, grant funding construction milestone reporting and record keeping. There will also be a series of transactional agreements associated with infrastructure access and service delivery all of which require thoughtful drafting and a commitment to a long-term, sustainable relationship.

IV. CONCLUSION

Broadband partnerships have long enabled communities and service providers to join forces to produce impressive results that they would not have been able to achieve individually. But even with all of the advantages that partnerships offer, funding challenges are sometimes too steep to achieve a respectable level of affordable broadband service for all too many of America's unserved and underserved areas and communities. Now, with billions of federal and state dollars becoming available to improve and accelerate connectivity to the Internet, broadband partnerships can be all the more effective in helping America achieve its key broadband goals. This is an opportunity that local governments should not and cannot afford to miss. **ML**

NOTES

1. The authors acknowledge and thank summer associate Ian Murray for his contributions to this article.

2. For an extensive discuss of the key business and legal considerations that affect broadband partnerships, including numerous detailed case histories, see Coalition for Local Internet Choice ("CLIC"), "Public Infrastructure/Private Service: A Shared-Risk Model for 21st Century Infrastructure" (Benton Institute for Broadband & Society October 2020), https://www.benton.org/sites/default/files/PPP3_final.pdf

3. *See, e.g.*, S. Subramanian, "The best broadband in the US isn't in New

Continued on page 30

Local Broadband *cont'd from page 11*

York or San Francisco. It's in Chattanooga." Quartz (April 15, 2021), https://qz.com/1996234/the-best-broadband-in-the-us-is-in-chattanooga-tn/; S. Gonsalves, "Study Finds Chattanooga Fiber Network 10-Year ROI: $2.69 Billion," Community Networks (February 1, 2021), https://muninetworks.org/content/study-finds-chattanooga-fiber-network-10-year-roi-269-billion.

4. *See e.g.*, Casey Lide, "*An Overview of Broadband Provisions in the Infrastructure Bill (as of July 30, 2021)"*, August 2, 2021, available at: https://www.beyondtelecomlawblog.com/an-overview-of-broadband-provisions-in-the-infrastructure-bill-as-of-july-30-2021/ (last visited Aug. 9, 2021).

5. Cite White House press release in March 2021 https://www.whitehouse.gov/briefing-room/statements-releases/2021/fact-sheet-the-american-jobs-plan/

6. Cite House Republican bills https://republicans-energycommerce.house.gov/news/press-release/ec-gop-leaders-unveil-the-boosting-broadband-connectivity-agenda/

7. http://www.localnetchoice.org/connections/arkansas-state-legislature-significantly-expands-local-broadband-options/

8. https://app.leg.wa.gov/billsummary?BillNumber=1336&Year=2021&Initiative=false

9. https://tech.slashdot.org/story/21/06/30/0042239/ohio-gop-ends-attempt-to-ban-municipal-broadband-after-protest-from-residents

10. The National Information and Technology Administration (NTIA) has issued a useful tool to guide communities through the process of developing a community-led broadband initiative. NTIA, "Planning a Community Broadband Roadmap: A Toolkit for Local and Tribal Governments," https://broadbandusa.ntia.doc.gov/sites/default/files/publication-pdfs/bbusa_planning_community_broadband_roadmap.pdf

11. *See, e.g.,* Cequel III Communications I LLC v. Local Agency Formation Commission of Nevada County, 149 Cal. App. 4th 310; 57 Cal. Rptr. 3d 32 (Cal. Supp. 2007).

12. Coalition for Local Internet Choice, "State Restrictions on Community Broadband Initiatives and Public Private Partnerships (as of July 1, 2021)," http://www.localnetchoice.org/wp-content/uploads/2021/08/CLIC-List-State-Barriers-7-1-21.pdf

13. *In the Matter of City of Wilson, Petition for Preemption of North Carolina General Statute 160A-340 et seq.*, FCC Rcd. 2408 (F.C.C.), 2015 WL 1120113; the FCC found that "[t]aken together, these purported "level playing field" provisions single out communications services for asymmetric regulatory burdens that function as barriers to and have the effect of increasing the expense of and causing delay in broadband deployment and infrastructure investment." *Id*. at ¶ 30.

14. State of Tennessee v. Federal Communications Commission, 832 F.3d 597 (6th Cir. 2016).

15. CLIC, *supra* note 2, at 8.1.21.

16. "Dillon's Rule" is named after Iowa Judge F. Dillon, who espoused its principles in two cases decided in 1868. https://www.nlc.org/resource/cities-101-dele-

gation-of-power/#:~:text=Dillon's%20Rule%20is%20derived%20from,sanctioned%20by%20the%20state%20government

17. CLIC, *supra* note 2.

18. NTIA, "NTIA Launches Updated Federal Broadband Program Guide," https://broadbandusa.ntia.doc.gov/news/latest-news/ntia-launches-updated-federal-broadband-funding-guide

19. The NTIA Guide is available online at https://broadbandusa.ntia.doc.gov/sites/default/files/2021-07/FY21%20Federal%20Funding%20Guide%20Updated%2007-12-21-compressed.pdf

20. *See, e.g.*, C. Lide, *supra* note 4; *see also* J.K. Willcox, "Infrastructure Bill Includes $65 Billion for Improving Internet Access," *Consumer Reports* (August 5, 2021), https://www.consumerreports.org/internet/infrastructure-bill-includes-65-billion-for-internet-access-a6861027212/

21. NTIA, "Broadband Infrastructure Program," https://broadbandusa.ntia.doc.gov/resources/grant-programs/broadband-infrastructure-program

22. *See*, *e.g.*, the Virginia Telecommunications Initiative, https://www.dhcd.virginia.gov/vati; the Maryland Expansion of Existing Broadband Grants Program, https://dhcd.maryland.gov/Broadband/Pages/default.aspx; the Massachusetts Mass Interconnect Program, https://broadband.masstech.org/recovery-plan-programs/mass-internet-connect; and the Georgia Broadband Deployment Initiative, https://www.gacities.com/Resources/Reference-Articles/Resources-to-Serve-Cities-Georgia-Broadband-Deploy.aspx.

23. *See*, *e.g.*, 47 U.S.C.§§ 253 and 332.

24. For example, in October 2014, the FCC clarified portions of the Spectrum Act (Pub. L. No. 112-96 § 6409(a), 126 Stat. 156 (2012)) that were intended to address problems relating to state and local government processing of applications for wireless broadband. The FCC directed local governments to approve applications for modification of "an existing wireless tower or base station" (including addition, removal and replacement of equipment) if the modification will not "substantially change." (*Wireless Siting Order,* ¶ 182 *et seq.*). Notably, however, the FCC made it clear that Section 6409(a) does not apply to a state or local government acting in a proprietary capacity, as opposed to a land use regulator. In other words, Section 6409(a) does not apply to modifications of wireless facilities on municipal light poles and other structural property owned by the local government.

25. *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 9088 (F.C.C.), 33 F.C.C.R. 9088, 2018 WL 4678555, (rel. September 27, 2018), *aff'd*, City of Portland v. United States, 969 F. 3d 1020 (9th Cir. 2020), cert. denied sub nom City of Portland v. Federal Communications Commission, No. 20-1353 (June 28, 2021).

26. Coalition for Local Internet Choice, "State Restrictions on Community Broadband Initiatives and Public Private Partnerships (as of July 1, 2021)," http://www.localnetchoice.org/wp-content/uploads/2021/08/CLIC-List-State-Barriers-7-1-21.pdf

27. *Id.*