

Bond Case Briefs

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Infrastructure Investment and Jobs Act Supports Broadband Partnerships.

Background

Broadband networks, like electric power systems a century ago,[1] have increasingly become drivers and enablers of simultaneous progress in just about everything that matters to communities. This includes robust economic development, lifelong educational opportunity, homeland security, public safety, affordable modern healthcare, workforce training and retraining, energy efficiency and security, smart transportation, environmental protection, efficient government service, and much more. As a result, a growing number of initiatives across America have sought to facilitate affordable access to broadband by working with willing incumbents, partnering with new entrants, establishing their own communications networks, or by developing creative new alternatives. For many, broadband partnerships have emerged as their most attractive option; for some, partnerships may be their only feasible option.[2]

Depending on the circumstances, partnerships can significantly improve a broadband project's prospects for success. Among other things, they can facilitate pooling of resources available to the partners, enable each partner to perform the tasks for which it is best suited, and allow for asymmetric allocation of benefits. For example, a well-crafted partnership can take advantage of a public or cooperative entity's ability to invest "patient capital" in projects that provide long-term benefits for the community and, at the same time, accommodate a private entity's need to earn more immediate profits. In some cases, partnerships can also enable the parties to comply with State restrictions on purely public broadband initiatives.

Recognizing the attractiveness of broadband partnerships, Congress and several States have sought to encourage them to help accelerate broadband deployment, adoption, and use. To cite some examples at the federal level, Congress appropriated \$300 million in the Consolidated Appropriations Act to be distributed by the National Telecommunications and Information Administration exclusively to P3s.[3] Under the US Department of Agriculture's ReConnect Program, P3s are not only eligible to receive funding, but the USDA Rural Utilities Service's scoring criteria awards 15 points to P3s for doing so.[4] In the same vein, the bill that would become the Build Back Better Act, which the House of Representatives passed last Friday, contains a \$280 million pilot program for urban P3s.[5]

Broadband partnerships are also increasingly popular at the State level. For example, responding with admirable vision to the COVID-19 pandemic, the Arkansas legislature voted unanimously this year to expand the authority of municipalities to engage in broadband initiatives. Among other things, Arkansas authorized municipalities to fund broadband projects through municipal bonds or special taxes, as long as they "partner, contract, or otherwise affiliate with an entity that is experienced in the operation of the facilities to be acquired or constructed."[6] A number of other states have funding programs that encourage or limit eligibility to broadband partnerships.[7]

Broadband Partnerships Under the Infrastructure Investment and Jobs Act

The IIJA does not just favor partnerships in broadband matters. It also does so for transportation[8] and cybersecurity.[9] (See, e.g., Section 40121). With respect to broadband, the Act establishes the \$42.45 BEAD Program to support qualified broadband projects. The Act defines the term “eligible entity” as “a State,”[10] and it contemplates that States will funnel these funds to eligible “Subgrantees.” That term is broadly defined as “an entity that receives grant funds from an eligible entity to carry out activities under subsection (f).”[11] Elsewhere, however, the Act makes clear that Congress intended partnerships to be among the favored recipients of IIJA funds (with our emphasis added in italics):

Section 60102(h) BROADBAND NETWORK DEPLOYMENT.—

(1) ORDER OF AWARDS; PRIORITY.—

(A) IN GENERAL.—An eligible entity, in awarding subgrants for the deployment of a broadband network using grant funds received under this section, as authorized under subsection (f)(1)—

...

(iii) may not exclude cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility for such grant funds ...

Furthermore, Section 60102(e)(1)(D) requires States to submit 5-year Action Plans in accordance with specifications that the Assistant Secretary (the head of NTIA) is required to develop:

(ii) REQUIREMENTS OF ACTION PLANS. The Assistant Secretary shall establish requirements for the 5-year action plan submitted by an eligible entity under clause (i), which may include requirements to—

...

(VI) ascertain how best to serve unserved locations in the eligible entity, whether through the establishment of cooperatives or public-private partnerships;

As Kathryn de Wit, director of the Pew Charitable Trusts’ Broadband Access Initiative, aptly put it in her recent article on the fundamental shifts that the IIJA may spawn,

One thing is certain: The shifts — whether training clinicians on new technology, wiring households to fiber or retraining workers — won’t happen without partnerships. That’s why the timing of the state five-year action plans is so critical. Research from The Pew Charitable Trusts has found that states have already used planning processes to evaluate need, drive stakeholder engagement and map out a plan for achieving broadband expansion goals.

Now is the time for businesses, research organizations, community partners and others to participate in the continuing state planning efforts, helping to shape state strategies for using federal dollars and developing plans that meet the needs of the state and its communities in ways such as sharing information on skills gaps in the labor force, identifying evidence-based solutions for increasing telehealth usage, or elevating how living on a fixed income may influence aging Americans’ ability to access digital resources.[12]

Five or ten years into the future, we may look back on this as “the Age of Partnerships” - viewing that term in its broadest sense. Let’s act now to make that happen.

- [1] J. Baller, “The Essential Role of Consumer-Owned Electric Utilities in Developing the National Information Infrastructure (Nov. 1994), <https://tinyurl.com/3arcez52>.
- [2] Keller and Heckman Partners, “Broadband Partnerships: For Many Communities, A Good Option at a Good Time,” IMLA Magazine (Sep-Oct 2021), <https://tinyurl.com/4umyt5a3>; J. Hovis, et al., “The World of Broadband Public-Private Partnerships: A Business Strategy and Legal Guide,” Benton Foundation (May 2017), <https://tinyurl.com/5psjsw3e>; J. Hovis, et al, “Public Investment/Private Service: A Shared Risk Partnership Model for the 21st Century, Benton Institute (Oct 2020), <https://tinyurl.com/cejddhyp>.
- [3] NTIA, “Commerce Department’s NTIA Announces \$288 Million in Funding Available to States to Build Broadband Infrastructure,” May 19, 2021, <https://tinyurl.com/aejt5k7z>.
- [4] USDA Rural Utility Service, Funding Opportunity Announcement, Oct. 25, 2021, <https://tinyurl.com/c8ra38pa> (“Local governments, non-profits and cooperatives (15 points). Applications submitted by local governments, non-profits or cooperatives (including for projects involving public-private partnerships where the local government, non-profit, or cooperative is the applicant) will be awarded 15 points.”)
- [5] House Committee on Energy and Commerce, “Fact Sheet,” (November 2021), <https://tinyurl.com/crrp8epf>.
- [6] J. Baller, “Arkansas State Legislature Significantly Expands Local Broadband Options, February 9, 2021, <https://tinyurl.com/4arhtztt>.
- [7] 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>.
- [8] See, e.g., Section 11508 of the IJA.
- [9] See, e.g., id., at Section 40121.
- [10] Section 60102(a)(1)(F).
- [11] Section 60102(a)(1)(F). The “subsection (f)” in the definition of “subgrantee” refers to Section 60102(f), the provision specifying the permissible uses of the funds appropriated under the Act.

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