

Ten Key Issues for Broadband Network Operating Agreements

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While there is no one solution to deploying affordable broadband, broadband partnerships have emerged as an attractive option in many areas of the country; indeed, in some instances, partnerships may be the only feasible option.^[1] Recognizing the attractiveness of broadband partnerships, Congress and many states have sought to encourage such partnerships to help accelerate broadband deployment, adoption, and use. This includes the \$42.5 billion of broadband funding soon to be allocated under the Broadband Equity, Access and Deployment (“BEAD”) program provisions of the Infrastructure Investment and Jobs Act (“IIJA”), which exhibits a preference for broadband partnerships.

A fundamental component of many broadband partnerships is the development of a network operating agreement (“NOA”) between the entity funding and/or owning the network and the broadband provider that will construct, maintain, and operate the network (on either a wholesale or retail basis). In this blog, we provide an overview of ten key issues that should be addressed in an NOA.

BACKGROUND

Broadband partnerships allow participating parties to draw upon their unique capabilities to meet the overall goals of a broadband initiative. For example, local governments, municipal utilities, and electric cooperatives often have access to broadband funding or key infrastructure, but for a variety of reasons, may not be inclined (or, in some instances, allowed) to directly provide commercial broadband services. At the same time, commercial service providers generally possess the expertise to manage, maintain, and operate a broadband network but may prefer not to invest the capital necessary to construct the network. A partnership between these entities can take advantage of each partner’s strengths and preferences.

Optimally, these partnerships will also 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, in turn, seek to meet revenue and return-on-investment targets for the project to work for them. Flexible, well-designed partnerships can and should enable each entity to meet its goals, and a well-crafted NOA, allocating the respective responsibilities, risks, and rewards, is an important part of it.

The specifics of any NOA will be dictated by the goals of the project, the relationship between the parties, applicable grant or funding compliance requirements, and applicable State and local law. The development of the NOA will involve countless trade-offs, as the risks and responsibilities each party is willing to assume will depend on the nature and extent of the rewards it will want to receive. Based on our experience, the development of these agreements will almost always be more complicated and time-consuming than the parties anticipated. Ultimately, in order to be successful in developing a mutually beneficial NOA, the parties should keep the big-picture goals of the project in mind throughout the negotiations.

TEN KEY ISSUES FOR BROADBAND NETWORK OPERATING AGREEMENTS

A successful Network Operating Agreement will typically address the following ten core issues:

1. Will the Network Operator Construct the Network and/or New Facilities?

When a broadband network is being constructed or substantially expanded, the network owner may select a network operator that will also take responsibility for managing the construction of the network. This arrangement can be set up as part of the NOA, but it may be a separate design and build construction agreement that the parties enter into at the same time as they enter into the NOA. (Alternately, responsibility for the construction may be undertaken as part of a wholly separate process involving a different party than the network operator.)

Construction terms will need to address the network design and capabilities; the construction plan, schedule, and budget; a process for testing and accepting the network facilities by the owner; applicable federal and/or State grant compliance requirements; performance obligations; responsibility for obtaining permits and other authorizations; and myriad other issues.

2. What is the Relationship Between the Parties?

The NOA will need to clearly establish the relationship between the parties. Will the network operator be granted access to the network infrastructure in order to provide services on its own behalf? Or will the network operator be acting as the agent for the network owner, who will, in fact, be the service “provider”? Will it be some of each, depending on the kind of service or customer involved? Alternately, if it is an open access network or a middle mile network, will the network operator be responsible for providing wholesale services and coordinating with ISPs and others that obtain services from the network on a wholesale basis? Each approach has pros and cons and will involve distinct issues under federal, State, and local law, including applicable regulatory compliance obligations.

One important issue that gets to the heart of the matter is determining who “owns” the customer relationship in terms of services, marketing, rates, and billing. Similarly, the network owner, even if not acting as the service provider, may wish to play a role in shaping and reviewing service rates, terms, or conditions, particularly with respect to efforts to ensure that the network has affordable

offerings for low-income consumers and advances digital equity initiatives.

3. Will the Network Operator Obtain a Dark Fiber IRU or Lease?

When the network operator acts as the service provider, the NOA will need to address the mechanism by which the network operator obtains the right to provide services over the network.^[2] This is often established through the grant of an indefeasible right of use (“IRU”) or lease to all, or a portion, of the network for the term of the NOA. The IRU is typically incorporated within or accompanies the NOA as an exhibit.

Any IRU or lease, as well as the NOA, should make clear that it does not transfer legal title to the network, that the network owner will at all times continue to own the network facilities, and that it shall not be sold, transferred, or encumbered by the network operator.

Similarly, if the network operator will be constructing its own network facilities that will be utilized in conjunction with the overall network, the NOA will need to specify practices relating to the demarcation between such facilities, as well as the rights and obligations concerning the use of such facilities in operating the overall network.

4. Securing Right-of-Way and Pole Attachment Authorizations

The NOA will need to clearly identify the obligations and responsibilities of the parties in securing and maintaining all requisite authorizations from State and local authorities, local utilities, and private property owners to construct, maintain, and operate the network facilities within the public-right-of-way, on or in utility poles or conduit, and with private easements. This will need to specify in whose name such authorizations are being obtained, as well as the allocation of financial responsibility for both one-time permitting and construction authorizations and ongoing rental payments.

5. Network Performance and Maintenance Requirements

The NOA will need to define network performance metrics and requirements and agree on mechanisms to ensure the network operator meets these requirements. This will include requirements to ensure that the network is capable of offering and supporting agreed-upon broadband service performance throughout the network service area and ensuring network security. The NOA may establish requirements to periodically “benchmark” the network’s services in order to provide a comparison with other similar networks.

The NOA will need to establish maintenance and repair requirements for both routine maintenance and emergency service restoration work. These requirements should address response, dispatch, and service restoration times.

In some instances, particularly where the network owner is an electric utility, the network owner may elect to take on the obligations of managing the outside physical plant of the network, with the network operator being responsible for maintaining the electronics and customer premise equipment.

The NOA should also address and allocate responsibility for network upgrades and periodic electronic refreshes over the term of the agreement.

6. Compensation and Revenue Sharing

The NOA will need to establish the compensation to be paid between the parties. There is a wide range of compensation models, including flat lease payments, revenue-sharing formulae, or a combination. The specific model will depend on the needs and expectations of the parties, consistent with the overall goal of developing and sustaining a financially viable network that provides affordable services.

7. Regulatory Compliance

The NOA must clearly allocate responsibilities for federal, State, and local regulatory compliance. This would include any and all applicable licensing, franchises, and registration, as well as ongoing regulatory compliance and reporting. As with authorizations, the NOA should address financial responsibility for such regulatory compliance, including the collection and remittance of fees imposed by government agencies on customers.

Importantly, if federal or State grant funding is involved, the parties may need to determine whether the network operator will be treated as a “subrecipient” or a “contractor” under applicable federal or State guidelines and establish grant compliance responsibilities accordingly. For example, in addition to the specific requirements of the federal agency providing the funding, nearly all federal broadband funding is subject to an extensive body of rules located at [2 CFR Part 200](#), known as the “Uniform Guidance” or “Part 200.”

8. Term; Dispute Resolution; Default; Termination

The NOA will need to address the term of the agreement and conditions of any renewal; a dispute resolution process for addressing disputes; a default process that sets out the rights of the parties in the event that either party fails to meet its obligations under the agreement; and provisions establishing the process to be followed upon termination the agreement. The termination provisions might also establish a transition process to ensure the continued seamless operation of the network upon the termination of the NOA.

9. Insurance; Liability; Performance Bonds

The NOA will need to have adequate insurance and liability provisions to protect against damages to the network as well as claims against either of the parties related to the construction and operation of the network. In addition, some NOAs contain performance bonds or other mechanisms, such as parental guarantees, to protect against costs resulting from a network operator’s failure to perform its obligations under the agreement.

10. Force Majeure

Force majeure clauses that excuse a party’s lack of performance resulting from an event or circumstance beyond the reasonable control of the party are relatively routine contractual clauses. But COVID-19 and its aftereffects have caused parties to rethink the specifics of their *force*

majeure clauses. For example, the term “pandemics” now tends to be specifically listed as a *force majeure* event. At the same time, parties may now be less likely to treat a supply chain delay or increased inflation pressures as being *force majeure* events, but rather as circumstances that could reasonably be anticipated and accounted for in the development of business plans.

CONCLUSION

Broadband partnerships offer significant opportunities to materially advance national goals of facilitating the widespread availability of affordable broadband services and capabilities. The development of a thorough, fair, and balanced network operating agreement is often a critical element in ensuring that the partnership is a long-term, sustainable relationship.

FOOTNOTES

[1] 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>.

[2] To the extent the network operator is acting as the agent for the network owner then the NOA will need to establish the authority and rights of the network operator to provide services over the network on behalf of the network owner.

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