

CLOSING THE “DIGITAL DIVIDE” IN MISSOURI

A Legal “White Paper” Exploring How Missouri Public Entities
Can Participate in Expanding Broadband Access
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Introduction

Why Was This White Paper Written?

Over the next decade, the federal government will make tens of billions of dollars available for the development of high-speed internet infrastructure (broadband infrastructure) throughout the United States. That being the case, it may not be clear why there is a need for a “White Paper” specific to Missouri dealing with other “traditional” economic development tools used to provide public capital for economic development and infrastructure projects. However, as impressive as the federal government’s investment will be, there are many reasons why a “state-specific” analysis of the topic is necessary.

States will administer most of the new federal funding

First and foremost, state and local government agencies and institutions will play a substantial role in determining how federal funds for broadband will be used. Even though the federal government is supplying the funding, these institutions will be primarily responsible for administering and distributing the money. Congress has set general guidelines for the use of money distributed for broadband as part of the American Rescue Plan Act¹ (ARPA) and the Infrastructure Investment and Jobs Act² (IIJA), and assigned responsibility for implementing its mandates to the Treasury Department,³ the Federal Communications Commission (FCC), and the National Telecommunications and Information Administration (NTIA).⁴ However, the development of the actual *plan* to build out broadband infrastructure, to increase the adoption of broadband, and to make broadband affordable has purposefully been left to the individual states, much like the other federally-funded infrastructure programs.⁵

¹ Public Law 117-2, March 11, 2021, <https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf>.

² Public Law 117-58, November 15, 2021, <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>.

³ The Treasury Department is responsible for developing regulations governing the expenditure of funds provided to states and local government as part of the Coronavirus State and Local Fiscal Recovery Funds (SLFRF). See Final Rule at 87 Federal Register No. 18 (January 27, 2022) (<https://www.govinfo.gov/content/pkg/FR-2022-01-27/pdf/2022-00292.pdf>)

⁴ Although primary responsibility for distributing funds provided under the IIJA has been assigned to the NTIA, the FCC has a limited -- but very important -- role under the IIJA to fulfill Congress’ mandates under the [Broadband Deployment Accuracy and Technological Availability Act](#) (DATA Act) to create a workable set of maps showing the number of potential locations where broadband service is needed and whether those locations are served, unserved or underserved. This data will be used to allocate grant funding to the states.

⁵ For example, the Federal Highway Trust Fund grant program. See PETER G. PETERSON FOUND., *The Highway Trust Fund Explained* (Aug. 14, 2020), <https://www.pgpf.org/budget-basics/budget-explainer-highway-trust-fund>.

Federal funding programs require a state or a local government match

This White Paper is also relevant because the federally funded broadband infrastructure programs require or strongly encourage matching state or local funds to be provided along with the federal grant. For example, the IJA's Broadband Equity, Access and Deployment (BEAD) Program requires that states match at least 25% of the overall cost of program funding. While ARPA grants such as State and Local Fiscal Recovery Funds (SLFRF) can count toward that match requirement, in many states and localities that money has already been used for other needs, and more local funding resources must be identified.

Federal government bias for public-private partnerships

In recent years, reliance solely on the private sector (for-profit internet service providers and telecoms) or on local government (municipal broadband) acting alone to "close the digital divide" has given way to a recognition that private (for profit) and other nongovernment entities (NGOs) must work with public entities (such as state and local governments) to address the problem. In most cases, neither the private sector nor the public sector acting alone has the combination of access to capital, expertise, and public policy objectives necessary to deliver affordable, reliable broadband service to all individuals and businesses in unserved and underserved areas of the country. Public-private partnerships (P3s) are favored because they create the opportunity to combine the strengths of each and forge long-term relationships that minimize risk by capitalizing on the available resources and expertise of each.

Each State's Approach to Economic Development Is Unique

Issues faced when closing the digital divide are really not appreciably different than those encountered with other economic development projects: the potential private source revenues are inadequate for private for-profit entities to profitably construct, maintain and operate the broadband infrastructure. This may be true either because potential customers are spaced too far apart in rural settings, or because not enough customers can afford service in an urban setting; in either case, some level of public investment along with private capital must be supplied to close the financing gap.

Missouri has a long tradition of finding ways to make this public investment. It has programs, entities, and institutions that have a proven track record of success, and many of these can readily be adapted to broadband infrastructure P3s. Missouri also has addressed issues related to when and how local government entities can make this investment, including specific provisions related to public support and operation of broadband and telecommunications projects.

For all involved in bringing broadband to their community, an understanding of these tools and how and when they can be deployed effectively is a critical ingredient for success. What works in Missouri may not work in other states, and some solutions used in other states cannot be used in Missouri because of state and local law restrictions.

Who Should Use this White Paper?

This White Paper is intended for use by project engineers and consultants, internet service providers (ISPs), community planners, legal and financial advisors, and local government administrators and officials. It assumes some level of understanding of broadband infrastructure and the internet service industry and a

significant interest in the peculiar aspects of Missouri law that will affect the development of a workable public-private partnership solution to the digital divide in their community.

How to Use this White Paper and Understanding Its Limitations

This White Paper addresses issues relating to the legal power and authority of political subdivisions, agencies, and public corporations (**Public Entities**) to enter into and take part in a P3 arrangement with for-profit and nonprofit entities (Private Entities), as well as restrictions that may affect a Public Entity's ability to finance a project undertaken by the public-private partnership.

Because of its scope, this White Paper cannot comprehensively discuss every nuance of Missouri state and local law that might be relevant. For example, the White Paper does not discuss general government procedures, public notice, and restrictions on the governing body of a Public Entity. However, the White Paper does identify procedures unique to financing a broadband network or a Public Entity's participation in a P3 created for that purpose.

In addition, legal matters common to any public infrastructure project financed with federal or state funds generally are not addressed in this paper. For example, an environmental site assessment (ESA) is typically part of the due diligence associated with any commercial project.⁶ The purpose of this assessment is to decide whether the location or type of structures impacted by the project create compliance issues under various federal environmental and historical preservations statutes. This review may be mandatory when using federal funds for a project.⁷ While such an assessment may present time-consuming challenges for participants in a broadband P3, the concerns are not unique to a broadband project. Therefore, it is not specifically covered in this White Paper.

This White Paper makes liberal use of footnotes and hyperlinked resources where possible. It is generally organized to include the following topics:

- An Explanation of P3s
- Common "Traditional" Economic Development Tools to Close a Financing Gap
- Project Ownership and Its Importance in Structuring a P3
- The Role of Missouri's Office of Broadband Development
- Missouri State and Local Government Organization
- Debt Financing for Broadband
- Regulation of Broadband as a Public Utility through the Missouri Public Service Commission
- Broadband-Specific Real Estate, Zoning and Land Use
- Recent Proposed Legislation

A major theme of this White Paper is that to truly close the digital divide Public Entities and Private Entities will need to "partner" to draw on the strengths of each and access funding opportunities traditionally used

⁶ An environmental site assessment (ESA) is used to determine whether the location or type of structures involved create compliance issues under various federal environmental and historical preservation statutes

⁷ For example, this review may be mandatory when seeking a federal grant such as under the [USDA Reconnect Grant Program](#).

in P3s for economic development as well as traditional government financing tools. To help Public Entities and their advisors solicit Private Entities willing to engage in this process, a memorandum entitled “Soliciting Broadband P3 Partners -- Drafting an Effective Public Entity Request for Information/Qualifications (RFI/RFQ) or Request for Proposal (RFP)” is included as an Appendix.

This White Paper was prepared and last updated in November 2022. As new administrative and legislative developments occur often, the information supplied must be updated using one or more of the resources described throughout the document.

The views expressed are those of the author writing in his individual capacity only – not those of the University of Missouri System or the UMKC School of Law. The information provided is not intended to constitute legal advice, and all information, content, and materials referenced are for general informational purposes only.

No reader should act or refrain from acting solely on the basis of information in this White Paper without first seeking legal advice from counsel in the relevant jurisdiction.

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What Is a Public-Private Partnership (P3) & Why Is it Needed to Bridge the Digital Divide?

P3s Defined

In this White Paper, the term public-private partnership (“P3”) means an agreement or series of agreements between one or more state or local government entities (Public Entities) and one or more for-profit businesses or nonprofits (Private Entities) for the purpose of joining to share risks and potential rewards related to the design, construction, maintenance and operation, and/or ownership of a capital asset – a broadband network in this case.

This definition potentially includes an almost limitless range of possible relationships. For example, a P3 includes a municipal broadband utility operated by a city, where the only involvement of a Private Entity is a design-build contract for the network. It also includes a broadband network that is owned and operated by a Private Entity (a for-profit ISP), where a Public Entity has entered into a long-term indefeasible right-to-use (IRU) agreement⁸ covering a portion of the network that is needed for governmental services.

While the risks and potential rewards are allocated quite differently, each is a P3. In the first case, the Public Entity through its municipal utility will pay for the network and will be responsible for maintaining and operating it. The Private Entity is responsible for determining network design requirements that meet the city’s needs and assumes the risk of constructing and delivering that network to the city on a turn-key basis in accordance with the mutually agreed specifications.

In the second alternative, the roles are largely reversed, with the Private Entity assuming many of the risks associated with the design, construction, maintenance, and operation of the network. However, even here the Public Entity’s obligations pursuant to the IRU agreement make it liable for a percentage of the capital cost incurred to build the network and a fixed percentage of the cost of maintaining and operating the network.

A P3 is almost never documented as a “partnership.” There are likely many reasons for this; not the least of which is that Missouri and many other states prohibit direct investment in a business entity (a for-profit corporation, limited liability company, or partnership). Instead, P3s usually are documented through a series of interrelated legal agreements that will include the overall arrangement. This often will cover the design, financing, construction, maintenance, operation, and ownership of the project, but P3s can have a more limited scope or duration. However structured, ideally the parties will approach these issues thoughtfully,

⁸ An IDU Agreement [can be defined as](#) a right to use a portion of an asset, in this case an internet network, typically in exchange for an upfront portion of the cost of constructing the network and annual installments representing a percentage of the cost of maintaining and operating the asset. While not exclusive to the telecommunications industry, these agreements are common for fixed fiberoptic internet networks.

with the goal of emphasizing and enforcing areas of agreement and compromising on areas where interests diverge.⁹

Of course, that ideal, even if sought in good faith by all parties, can be difficult to achieve. It's important to keep in mind that calling something a P3 does not guarantee a successful project; in fact, depending on the locality's past experience, calling an arrangement a P3 when describing it to the public or government decisionmakers may be a bad idea. The term "cooperative agreement" might be a more descriptive and less "politically charged" term.

Why Are P3s Used for Broadband?

Even though they are not documented as such, all P3s *are* "partnerships" in the sense that they should contemplate a sharing of risks and rewards to achieve a common purpose. Private and Public Entities may define those risks differently – and almost certainly will have a different view of the potential "rewards" of the venture.

For the private for-profit partner, the desired reward may be achieving a certain level of economic return on the equity it has invested, while the public partner may be focused instead on growing the community's population, expanding business opportunities, or reducing poverty rates. While these goals may at first appear wildly dissimilar, often they are not, because the same level of utilization of the broadband network may help achieve the Public Entity's societal goals while at the same time providing the Private Entity with a reasonable economic return. The key to this, of course, lies in the ability of each to find common ground and to respect the needs and desires of the other.

Another characteristic of P3s is that they usually are created out of economic necessity. If either "partner" felt able to "go at it alone," it would. In the case of most broadband P3s, the challenges that lead to the use of the P3 are three-fold.

First, of course, there must be a perceived "public need" for broadband. In large part, the COVID pandemic created this sense of "public need." Probably more than any other event, it contributed to the shift in the public's mindset from "broadband is nice to have" to "broadband is a necessity – just as water, sewer, and electric power." Once that "public need" is created, Public Entities are willing to take part in a P3. Until that happens, only the private sector will be involved.

Second, both the Public Entity and the Private Entity must possess resources that the other is missing. For Private Entities, this often is the technical expertise and specialized resources that can be deployed to facilitate efficient construction and operation of a broadband network. For Public Entities, resources could include the ability to access federal and state funding more effectively, economic and tax incentives, the

⁹ Typically neither the Public nor the Private Entity will want their arrangement to be classified as a "partnership" either for state law or for federal income tax purposes. Typically this can be easily accomplished because the public entity "benefits" from the arrangement in ways other than an economic profit (for example, better health, education and overall economic opportunity for the community at large). If more direct economic benefit for the Public Entity is contemplated – particularly if both parties intend to earn an economic "profit" from the arrangement – specific advice related to the potential tax or other legal consequences of the arrangement should be obtained.

potential to provide a stable long-term revenue source through an IRU agreement, or access to public right-of-way and necessary easements over private property.

Finally, as discussed in the introduction, in every P3 there's a "financing gap" – the difference between the cost of the broadband network the community wants and needs, and the amount of subscriber revenues that can be expected to support the cost of building, maintaining and operating it. In these cases, there simply is no way for the private sector to economically supply services to these locations. Some level of Public Entity financial support is needed.

Traditional Public Economic Development Tools

Introduction

Most broadband P3 projects share a problem that plagues nearly all economic development projects – a lack of money. Yet without these projects – factories, warehouses, retail stores, major businesses, public arenas and convention centers – economic growth in the community and region declines along with local tax revenues, and eventually the overall quality of life in the community is adversely impacted. This is why Missouri law recognizes that economic development is a “public purpose” justifying direct and indirect investment to promote economic development in a community.

Broadband infrastructure projects (whether owned and operated by a private company or as a municipal utility) are no different. The cost of construction and operation are too high to justify private investment by a Private Entity ISP and likely will not support a revenue-based municipal utility model. Like other economic development projects, broadband P3s must consider one or more common economic development financing “tools” discussed in this section to close the financing gap.

What follows is not an exhaustive discussion of these tools, but instead is an overview to help in understanding the role they have played in P3 projects over the past 30-40 years. Later sections will emphasize how these tools can be useful in “bridging the financial divide” to create an economically viable broadband P3 project.

Tax-Exempt Financing

How Does Tax-Exempt Financing Help Close a Financing Gap?

Any time a Public Entity is involved in a broadband P3 project, one should immediately consider ways the financing component of the plan could involve debt, the interest on which is exempt from federal and/or state income tax (“tax-exempt”) when received by the debtholder. All broadband P3 projects will rely on a limited stream of subscriber revenues to fund operating costs, maintenance, and the repayment of the capital (equity and debt) that was invested to finance the network. For Public Entities, the “investment” is typically sourced primarily from interest-bearing debt (“bonds”¹⁰). Debt is also an important component of any Private Entity’s investment.

¹⁰ Throughout this White Paper, Public Entity debt will be referred to as a “bond” or “bonds” and tax-exempt debt will be referred to as a “tax-exempt bond.” However, the label is not intended to apply exclusively to debt that is documented as a “bond.” Any type of borrowing for federal income tax purposes – a promissory note, interest-bearing installment sale, capital financing lease, or certificate of participation in a financing lease, will be treated as “debt” for income tax purposes and potentially can be structured as “tax-exempt” debt (a tax-exempt bond). However, there may be very different state law consequences associated with different types of arrangements even if they are all classified as debt instruments for federal income tax purposes. For example, while a Public Entity may not be authorized by statute to issue a bond or a note and borrow funds to finance a project, it may have the statutory authority to sign a capital lease (a financing lease) and to make “rent payments” that are treated for federal income tax purposes as interest and principal payments on a borrowing.

As many are aware from the personal experience of home loans, the higher the interest rate on borrowed funds, the less principal can be borrowed and repaid from a given amount of revenue. At the same time, for investors who buy bonds, their true rate of return is the amount – after payment of tax on interest earned – that they retain.¹¹ For those reasons, all other things being equal, interest rates on tax-exempt bonds are typically lower than taxable bonds.¹² While the amount of that difference has varied considerably over time depending on the borrower’s credit rating, the overall level of interest rates in the marketplace, and the actual and expected future federal and state tax rates, tax-exempt bonds have been an important tool for economic development projects for many years.

Categories of Tax-Exempt Bonds

There are different types of “tax-exempt bonds,” and each has traditionally had a different level of interest savings, or “discount,” when compared to fully taxable debt. The least valuable, in terms of closing a project’s “financing gap,” are bonds the interest on which is fully taxable for federal income tax purposes but exempt from Missouri income tax. For an investor, the value of a state income tax exemption is quite limited, because state income tax rates are relatively low when compared to federal income tax rates¹³ So, the fact that a bond is exempt from Missouri income tax does not significantly increase the investment’s after-tax return, when compared to a fully taxable bond. In Missouri, interest on all debt that is exempt from federal income tax is also exempt from Missouri income tax. In addition, the taxable debt of many Public Entities, other than Missouri counties and cities, is exempt from Missouri income tax as well.¹⁴

Qualified Broadband Project Private Activity Bonds

The second type of tax-exempt bond is exempt both from Missouri income tax and from “normal” federal income taxes. However, this debt is subject to a special type of federal income tax called the alternative

¹¹ Federal tax rates range from 10% - 37% percent for individuals and 21% for corporations. This means that for investors paying tax at the highest rate, for every dollar of taxable interest earned – after taxes__ they will “net” 63 cents (for individuals) or 79 cents (for a corporate bondholder).

¹² Continuing with the example in the prior footnote, an individual taxed at the maximum federal income tax rate of 37% would receive the same after-tax return (after paying the federal income tax liability) from a federally tax-exempt bond paying 3% as they would from a taxable investment paying 4.76%. Yet from the perspective of the Public Entity, its interest expense is 59% higher on a taxable bond when compared to a tax-exempt bond.

¹³ Currently 5.4% for individuals and 4% for corporations. See TAX FOUND., Taxes In Missouri: Missouri Tax Rates, Collections, and Burdens (last visited Aug. 15, 2022), <https://taxfoundation.org/state/missouri/#:~:text=Missouri%20has%20a%204.0%20percent,State%20Business%20Tax%20Climate%20Index>.

¹⁴ See [MO. REV. STAT. § 143.121.2\(3\)](#) (interest on debt that is exempt for federal income tax retains that status when Missouri income taxes are calculated; however, the tax-exempt interest on obligations issued by other states is added in the calculation of Missouri adjusted gross income). Federally taxable debt of Missouri counties and municipalities is not specifically exempted from Missouri income tax; however, the debt of many other Missouri Public Entities is. See, e.g., [MO. REV. STAT. § 100.275.6](#) (Missouri Development Finance Board) and [MO. REV. STAT. § 349.090](#) (Industrial Development Corporations – IDA’s) for examples of special statutes exempting certain Public Entities’ debt from Missouri income taxation.

minimum tax or AMT. While not all investors are subject to the AMT, enough are to cause these bonds (sometimes called “AMT bonds”) to pay interest at a slightly higher rate than non-AMT bonds.

The IIJA added a new specific category of tax-exempt AMT bonds to the Internal Revenue Code (IRC)¹⁵ for qualified broadband projects.¹⁶ If the broadband infrastructure project meets all requirements for tax-exempt financing,¹⁷ broadband project tax-exempt bonds can be used by a Public Entity to finance a broadband project that will be wholly owned and operated by a for-profit Private Entity and secured and paid solely by that Private Entity. This opens up the possibility for a Public Entity to supply a significant contribution toward supplying access to broadband without any direct financial investment in the project.

Governmental Bonds and Qualified 501(c)(3) Bonds¹⁸

The last categories of tax-exempt financing that can be useful in funding a broadband P3 are referred to as governmental bonds or qualified 501(c)(3) bonds. These bonds are tax-exempt both for federal and state income tax purposes, and the interest paid is not subject to alternative minimum tax. Therefore, these bonds can offer the greatest potential to reduce borrowing costs and help close a financing gap for a project.

However, these tax-exempt bonds typically require the greatest level of involvement or financial commitment to repay the debt, either by a Public Entity directly or by a non-governmental organization (NGO) that is closely aligned with a Public Entity. For example, a city municipal electric utility might issue tax-exempt revenue bonds to finance a broadband network in the city, but unlike the Qualified Broadband Project Private Activity Bonds described above, the city could not require a private ISP to be responsible for repaying the bonds and still qualify the bonds as Governmental Bonds. A qualified 501(c)(3) bond has similar

¹⁵ [26 U.S.C. § 142](#). Throughout the balance of this White Paper, sections of the Internal Revenue Code will be referred to as “IRC”.

¹⁶ See [I.R.C. §§ 142\(a\)\(16\), \(n\)\(1\)](#). A “qualified broadband project” must “provide broadband service solely to 1 or more census block groups in which more than 50 percent of residential households do not have access to fixed, terrestrial broadband service which delivers at least 25 megabits per second downstream and at least 3 megabits service upstream” and the project must “result in internet access to residential locations, commercial locations, or a combination of residential and commercial locations at speeds not less than 100 megabits per second for downloads and 20 megabits for second for uploads,” but only if at least 90% of the locations provided service by the bond-funded project previously lacked that service at the 25/3 megabits per second threshold.

¹⁷ There are many other limitations that apply to these bonds. Among them is a requirement that the state, through the Missouri Department of Economic Development, designate the project to receive a portion of the state’s overall private activity bond allocation limit. [I.R.C. § 146](#) and <https://ded.mo.gov/programs/business/private-activity-bond-allocation>.

¹⁸ [I.R.C. § 145](#). While a detailed discussion of all of the federal income tax requirements for issuing tax-exempt bonds is beyond the scope of this White Paper, qualified 501(c)(3) bonds are so named because non-governmental organizations that are exempt from tax under § 501(c)(3) can own, lease or otherwise use the financed project and pay debt service on the bonds. Governmental Bonds ([I.R.C. § 141](#)) are tax-exempt only if Public Entities are the only owners, and use of the financed project is limited to Public Entities (and the general public) or, alternatively, if substantially all of the debt service on the tax-exempt bonds is secured and paid from taxes.

restrictions, except that in addition to a Public Entity, an NGO that has been recognized by the IRS to be exempt from tax under IRC §501(c)(3) is treated as a Public Entity.¹⁹

To summarize, tax-exempt bonds can offer a significant source of funding and financial advantage for a Broadband P3, but at the same time, they can involve complexities in structure and potentially greater financial risk for the Public Entity. For this reason, while it is important for decisionmakers and their advisors to be aware of the possibility of using tax-exempt bonds, it is extremely important to obtain legal and financial advice before committing to that course to fund a broadband P3.

Tax Assessments and Tax Assessment Financing

Tax assessments and tax assessment financing have been incentive tools used to fund public infrastructure for many years. When used in connection with an economic development project, it is usually undertaken by a Public Entity to provide a type of “off balance sheet” financing for infrastructure costs related to the private commercial or residential project that otherwise would have been paid by the Private Entity from equity or conventional financing. While the Private Entity ultimately is responsible for paying these costs either directly or through an annual tax assessment, tax assessment financing often can be accomplished with tax-exempt bonds, and sometimes those bonds will have a lower interest rate (compared to the debt of the Private Entity) simply because the Public Entity’s name is on the bond.

The mechanics of tax assessment financing are fairly straightforward. In connection with the desired new development (e.g., a new housing project or a commercial development), substantial improvements to public infrastructure also are required. This could include roads, water, sewer, and electric service – and perhaps broadband service as well. Unless these improvements are made, the new private development cannot proceed. Thus, from a practical standpoint, the infrastructure is an essential indirect cost of the overall development, even though the improvements ultimately will not belong to or be the responsibility of the commercial developer or homebuilder.

To fund these improvements, a Public Entity imposes a special real estate property tax assessment equal to the aggregate cost of the improvements. This assessment covers all property that is benefited by the new development (the benefited district). The aggregate total tax assessment (equal to the value of the improvements) is then allocated among the parcels of land in the benefited district using a formula (such as cost per square foot of land in the benefited district).

While the total tax assessment for each parcel of land could be assessed (collected) at the time the improvements are completed, more commonly the Public Entity agrees to allow each property owner to spread the obligation over a number of years, and to pay the total tax due over those years as part of the annual property tax bill. To obtain the funds necessary to construct the improvements, the Public Entity issues debt obligations that are payable solely from the special assessment property taxes. In many cases, this debt can be structured as tax-exempt governmental bonds.

The payment of a special assessment tax typically is not a personal liability of the property owner, but payment of the tax assessment can be enforced through a tax lien that is “senior” to all mortgages/deeds of

¹⁹ For more discussion of the issuance of revenue bonds, see *infra* [Counties and Cities -- Limited Obligation Revenue Bonds](#) and [Other Public Entities – Limited Obligation Revenue Bonds](#)

trust held by secured creditors. For this reason, and because interest on the obligations usually is tax-exempt, special assessment debt normally has an interest rate that is significantly below the rate at which a private entity could borrow.

As described later, Missouri law specifically authorizes cities and counties using a [Neighborhood Improvement District](#) or a [Community Improvement District](#) to impose special assessments to finance broadband projects.

Property Tax Exemption and Sales Tax Exemption

Property tax-exemption is one of the oldest economic incentives used to help bridge a financing gap for a P3 project. In most states, the property tax-exemption was originally limited to situations where the property was located in a blighted or economically depressed area. More recently, Public Entities' ability to offer property tax-exemption has been expanded to include most new commercial enterprises, no matter where they are located, as part of an economic development project.

As discussed [later](#) in this White Paper, the Missouri Statutes permit counties and municipalities to finance many types of commercial facilities and equipment (including telecommunication operations and computer operations)²⁰, using a special conduit financing revenue bond structure where the project user leases the project and rent paid fully covers the cost of financing the project. While these revenue bonds could be purchased by an independent investor, they are most often purchased by the project user. In that case, the bonds would be owned by the project user leasing the project, and rent paid on the lease would be used to pay the debt service on the bonds – owned by that same project user.

Why would this structure be used?

In Missouri, property titled in a political subdivision is exempt from all real and personal property taxes.²¹ From an economic perspective, the exemption from property taxes can be thought of as an ongoing “capital contribution” to the project’s cost of operation made by the taxing districts that otherwise would be entitled to the tax revenue. Absent the exemption, the private owners of the project would need to earn enough revenue to pay the property tax bill as well as servicing debt used to construct the project. The property tax exemption permits those dollars instead to be applied to fund operating costs of the enterprise, including but not limited to, the cost of paying debt service – or providing a reasonable return to equity investors. In a sense, the Public Entity, by working with the Private Entity to keep the cost of the broadband network property off the tax rolls, is making an ongoing contribution to the P3, represented by the amount of taxes avoided annually during the period the project remains off the tax rolls.

Frequently, in addition to the property tax exemption, the Public Entity may elect to cooperate with the Private Entity to structure the purchase of materials and equipment used in the construction of the project

²⁰ See [MO. REV. STAT § 100.010\(5\), \(6\)](#).

²¹ See [Mo. Rev. Stat. §137.100](#).

from retail sales tax.²² Like the property tax exemption, this may involve transferring legal title to the project or the items purchased to construct the project to a Public Entity (to take advantage of the Public Entity's right to claim an exemption of its purchases from retail sales tax). By virtue of *avoiding* taxes that otherwise would be due on the purchase of materials and supplies for the project, the Public Entity has effectively made those amounts available to fund project assets. The effect of the exemption is the economic equivalent of a direct capital investment by the Public Entity in the project. Since state and local sales taxes in some jurisdictions can exceed 10%, the economic impact of this incentive can be substantial.

Tax Increment Financing

Tax increment financing or "TIF" is sometimes a controversial tool for economic development, but that controversy is due primarily to a failure to appreciate the inherent cost to other taxing districts associated with its use, rather than any fundamental deficiency in the underlying mechanism. For well over 30 years, TIF has been a proven method of raising significant "public capital" to assist in the construction of public and private projects.

In its simplest form, TIF involves "freezing" the assessed value of land and related improvements in a specific area of a city or county (a TIF district) at their pre-development values. Real property taxes continue to be collected based on this value and continue to be distributed to the various taxing authorities (school districts, the county, etc.). Substantial improvements are then made to the property within the TIF district. The resulting increase in the property's value creates an "increment" equal to the amount of additional real property taxes that would otherwise have been collected and distributed to the taxing districts because of the appreciation in value. The increment is collected in the same manner as real estate property taxes, but instead of being distributed to the local taxing districts, it is reallocated to fund a portion of the cost of project improvements in the designated TIF district directly or to fund debt service on TIF bonds that are issued for that purpose.

For example, assume that prior to development a parcel of property has an assessed value of \$100,000 and produces annual real estate taxes of \$6,000. After TIF is in place, a new building is constructed on the site, and the assessed value of the property increases to \$10,000,000. If no TIF were in place, the property taxes would rise to \$600,000 (6% of \$10,000,000). Because of the TIF, only \$6,000 is distributed to the various local taxing districts and the remaining \$594,000 "increment" is diverted to pay costs identified in a written project plan approved by the public entity (the TIF Plan).

Missouri allows an "increment" on two more types of taxes – locally imposed retail sales taxes and earnings taxes (within the cities of St. Louis and Kansas City) to be added to the property tax increment along with the property tax. In Missouri, 50% of the increment (the increase in these local taxes collected) can be used to fund costs authorized by the TIF plan.

²² See [MO. REV. STAT. § 144.054.3](#). Much of the cost of internet equipment and material also may be exempt from tax under [Mo. Rev. Stat. 144.030.2 \(4\) and \(5\)](#). This exemption could be claimed directly by a for-profit telecommunications provider.

As discussed, [later](#) in this White Paper, it is likely that broadband infrastructure projects would be undertaken as a part of an overall economic development project within a TIF district, rather than as a single use of funds within the TIF district.

Special Taxing Districts

Special taxing districts are geographic areas of a city or a county. These districts differ from traditional political subdivisions because they have a limited mission and powers (e.g., transportation, parking, community improvement, storm water, flood control, utilities, etc.), and they may exist only for the limited time period necessary to construct and complete the financing of a particular capital project. However, some special taxing districts continue in existence indefinitely, particularly if the district assumes responsibility for the ongoing operation and maintenance of an infrastructure project. In Missouri, special taxing districts can be used alone or in conjunction with a TIF. The two special taxing districts likely to be most useful for broadband infrastructure development in Missouri are CIDs and NIDs, both of which are discussed in more detail [later](#) in this White Paper

State Tax Credits

State tax credits, particularly transferrable or refundable tax credits, can be an important tool that a Public Entity can use to help raise Private Entity equity capital to support a Project. In Missouri, the most relevant state credit program is administered by the Missouri Development Finance Board (MDFB) and is called the “[Tax Credit for Contribution Program](#).” The financing structure used to include State Tax Credits is complex, but essentially it involves a cash contribution to MDFB which in turn is dedicated to fund costs of an eligible project. As part of the same transaction, MDFB provides the donor a transferrable tax credit voucher that can be used to offset state income or financial institutions tax liability. Those credits in turn are [assigned or sold](#) to an investor at a discounted amount in order to raise more capital for the project. The feasibility of contribution tax credits for broadband infrastructure projects is discussed in more detail [later](#) in this White Paper.

The Private Partner's Federal Tax Requirements and "State Law" Ownership of Broadband Assets

Federal Income Tax Ownership vs. State Law "Title"

Who will own the broadband network that has been financed and operated using a P3? And what exactly do we mean by that? As [previously discussed](#), a P3 almost never is structured as a business corporation, limited liability company, or partnership between a Public Entity and a Private Entity, in part because the Public Entity is not interested in making an economic profit, and in part because it's [expressly prohibited](#) by law. This means that from a legal perspective the network will not be "owned" by the P3. However, that doesn't mean that "ownership" of the financed network is not a significant concern, both for state law and federal income tax purposes. Later sections of this White Paper will emphasize that certain methods for a Public Entity to help fund a P3 absolutely require that the financed property be "owned" by a Public Entity. On the other hand, other methods such as some types of tax-exempt financing allow the Public Entity to provide financial support for the broadband network only if the property is *not* owned by a Private Entity.

In each case however, when one speaks of "ownership" of property for purposes of state law, the term is taken to mean "legal title" – without regard to who has control or enjoyment of the property. Legal title in turn is evidenced by a legal deed or certificate of title or some other similar document.

For federal income tax purposes, Private Entities participating in the P3 view legal title as only one factor, and often not the most important factor, in determining who is treated as the owner of property for federal income tax purposes, and often for purposes of financial accounting as well. This question is important for purposes of claiming depreciation and other tax benefits, and it also may be relevant for purposes of using [tax-exempt financing](#) and certain federal income tax credits.²³

The Internal Revenue Service has long recognized that the tax benefits provided to a property owner depend on more than legal title, and instead focuses on whether the title holder also has retained significant benefits and burdens of ownership attributable to the asset, such as the ability to realize an economic profit from the sale or operation of the asset and the risk of loss in event of a casualty or financial failure of a business that uses the asset.²⁴ This distinction opens up the possibility that a Public Entity in a P3 could be treated as the "owner" of property for purposes of using one or more state law economic benefit tools discussed in the last section, even though the Private Entity was treated as the owner of the same assets for federal income tax purposes.

²³ For example, the federal [New Markets Tax Credit program](#) (I.R.C. § 45D) provides investors in certain enterprises a federal tax credit equal to 39% of their equity investment. However, to qualify for the program, the business enterprise must not be owned by a state or local government for federal income tax purposes.

²⁴ For example, in Rev. Rul. 68-590, 1968-2 C.B. 66, the IRS determined that a company should be considered the "owner" of property for federal income tax purposes, when the company leased it from a political subdivision. The terms of the lease required the company to pay substantially all of its cost as "rent" over the term of the lease and entitled the company to purchase the property and acquire title at the end of the lease term for a nominal additional payment. The Ruling concluded that taken together, the arrangement gave the company the rights and responsibilities characterized as property owner that was financing the acquisition price of the asset over time.

The point here is the requirements for broadband network ownership for state law purposes often can be accommodated under legal structures where a Private Entity keeps the economic rights of ownership of the asset for federal income tax purposes. On the other hand, because ownership of an asset for federal income tax purposes does not necessarily depend on which entity has “legal title,” it may be possible to provide a Public Entity with rights equivalent to ownership of an asset through a capital lease or a long-term contract (such as an Indefeasible Right of Use Agreement). This flexibility also means that in most cases “legal title” issues can be resolved, with the help of legal and financial consultants, by creatively structuring the rights and obligations associated with the property, as long as these requirements are explored early in the process of negotiating the P3.

Depreciation, Investment Tax Credit & Other Federal Tax Benefits – Accommodating a Public Entity or NGO.

Other potential areas of concern can arise when structuring and negotiating P3s between Public Entities and Private Entities or their “controlled” NGO. Here are three somewhat common issues that arise:

First, Private Entities sometimes fail to recognize that having a Public Entity rent a portion of the privately-owned asset²⁵ or using tax-exempt bonds to finance the asset²⁶ require the use of tax depreciation schedules that are significantly less favorable than those available if the property were financed with taxable debt or if the tenant was a Private Entity subject to federal income tax. Second, P3s are sometimes structured so that an NGO that is controlled by a Public Entity is actually a partner in a limited liability partnership or a member in a limited liability company. In these cases, allocating items of income, gain, loss, and deduction for tax purposes can be problematic because the NGO typically does not care about taxable income or loss. Third, since 2018, all grants provided to a Private Entity must be reported as taxable income unless otherwise subject to a special exception in the Internal Revenue Code.²⁷ For this reason, when structuring the P3, the parties may find it advantageous to divert grants for broadband infrastructure construction to the Public Entity partner. The Private Entity partner still may be able to realize an economic benefit (and taxable income) from the arrangement over time through some other ongoing revenue stream (such as an operating agreement). While an extensive discussion of any of these issues is beyond the scope of this White Paper, it is important that they be identified by tax and legal advisors early in the process of negotiating the P3, so that the proposed state law economic incentives used do not create unanticipated federal income tax consequences for the Private Entity.

²⁵ [I.R.C. § 168\(g\)\(1\), \(5\).](#)

²⁶ [I.R.C. § 168\(g\)\(1\), \(h\)\(1\).](#)

²⁷ In late 2019, Congress enacted an exception to preserve their tax-exempt status of rural electric cooperatives operating as exempt organizations pursuant to [I.R.C. § 501\(c\)\(12\)](#). That exempt status was threatened because of the large amount of grants for broadband infrastructure many cooperatives had received. See [I.R.C. § 501\(c\)\(12\)\(K\)\(ii\)](#). This special rule generally does not apply for other Private Entities. In September 2022 Senators Jerry Moran and Mark Warner proposed legislation that would create a more general exception for any ISP that received federal grants for broadband pursuant to IIJA or ARPA. See Sens. Moran, Warner Introduce Legislation to Prevent Taxation of Broadband Grants September 30, 2022 (last accessed November 11, 2022). Hopefully, this or similar legislation will be adopted by Congress, as it seems foolish and wasteful to provide grants to private ISPs for broadband development on the one hand and then to require a sizable percentage of that grant to be paid back in income tax.

Federal Preemption Limits on State and Local Regulation of Broadband

The Telecommunications Act of 1996 and Broadband

Section 253(a) of the Telecommunications Act (47 U.S.C.S. § 253(a)) (the Telecommunications Act) significantly restricts and preempts states and local governments from regulating telecommunication services including but not limited to internet access.

That section provides:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

However, there are some exceptions to this prohibition. States can impose competitively neutral requirements necessary to preserve and advance universal service in all communities. Regulations that protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers also are permitted – as long as those policies don’t conflict with those developed by the FCC. In addition, states and local governments are entitled to manage the public rights-of-way or to provide competitively neutral charges for the use of that right-of-way. Again, those rules and regulations cannot have the effect of prohibiting any entity from providing internet service.²⁸ Finally, under certain circumstances, §254(f) of the Telecommunications Act permits a state to require that a proposed wireline telecommunications provider in an area then served by a rural telephone company offering universal wireline access, also offer universal access to customers in that area.

The Missouri PSC and Telecommunications Services.

The Missouri Public Service Commission (PSC) generally regulates investor-owned utilities in Missouri. The PSC has retained some limited authority over telecommunication providers as outlined in Mo. Rev. Stat § [392.410](#). This authority is consistent with § 253 of the Telecommunications Act. However, the PSC does not regulate internet service or internet service providers directly except to the extent they are directly offering voice over internet protocol service.²⁹

Section [392.410.7](#), Mo. Rev. Stat. does limit the ability of political subdivisions to offer *telecommunication services*. This statute historically has been of some concern to Missouri political subdivisions considering whether to offer internet service, whether through a P3 or as part of a municipal utility. This is somewhat curious because Mo. Rev. Stat. § 392.410.7 contains a number of exceptions to the general prohibition –

²⁸ [47 U.S.C.S. § 253\(b\), \(c\)](#). The power of the FCC to impose significant limits on a local government’s zoning and permitting process was recently unsuccessfully tested by a group of municipalities in *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). Missouri’s exercise of this power is described [later](#) in this White Paper in the section dealing with real estate and land use issues.

²⁹ See [MO. REV. STAT. § 392.611](#) (describing the PSC authority over telecommunications companies and specifically §392.611.2 which addresses internet service providers); see also MO. PUB. SERV. COMM’N, *A Snapshot of What we Do*, <https://psc.mo.gov/CMSInternetData/ConsumerInformation/A%20Snapshot%20of%20What%20We%20Do.pdf>.

including one for “internet-type service.” In fact, when the prohibition is read together with its exceptions, it seems more likely that the Missouri General Assembly sought only to bar political subdivisions from offering commercial telephone service.

In large part, the concern about Mo. Rev. Stat. § 392.410.7 and municipal broadband is a historical hold-over, attributable to past technologies that relied on telephone service to deliver internet service, as well as the United State Supreme Court’s holding in [Nixon v. Missouri Municipal League, 541 U.S. 125 \(2004\)](#). The question posed in Nixon was whether § 253(a) of the Telecommunications Act preempted enforceability of Mo. Rev. Stat. § 392.410.7. In other words, did § 253(a) not only prohibit states from barring private companies from offering telecommunication service, did it also apply to *political subdivisions* of Missouri? Did Congress intend to prohibit state legislatures from barring entities that were created as political subdivisions of the state government from providing telecommunication services? The Court held that this reading of the Telecommunications Act went too far because political subdivisions were created by the state as extensions of state government itself – and states of course retained the right to determine whether they would or would not offer telecommunication service to the public. Thus, while the holding in Nixon did not by its terms *prohibit* a Missouri political subdivision from being an internet service provider, it does leave open the possibility that the General Assembly could bar political subdivisions from doing so in the future, if it decided that was appropriate.

As for whether the decision in Nixon had the practical effect of prohibiting political subdivisions from providing internet service, the answer is more nuanced, and it has changed over time. Certainly, when the case was decided in the early 2000s, the delivery of internet service relied heavily on access to traditional telephony infrastructure. Dial-up modems were the norm and digital subscriber line service (DSL) was just becoming more prevalent in commercial and residential applications. Both technologies worked in conjunction with traditional telephone service, so practically the only way a municipality could offer internet service was as part of a suite of telecommunication services offered by commercial telephone companies.³⁰ So, at that time, as a practical matter if a municipality wanted to offer internet service it needed to operate a traditional telephone company serving retail customers, and admittedly there was no exception for that in the Missouri statute.

However, in 2022, delivery of traditional wireline telephone service has virtually disappeared in favor of mobile phones or an online web-based service that allows the subscriber to place the call (audio or video) from their computer. A provider of internet service no longer needs to also offer voice or video communications, television video streaming, email, or other services originally bundled with internet access. So, even though Mo. Rev. Stat. §392.410.7 has not changed, it is no longer a practical impediment to a municipality that is considering offering broadband service as a municipal utility.³¹

³⁰ See Samantha Cossik, *Throwback Thursday: Dial-up and our Fondness for the First Internet Connection*, ALLCONNECT (June 29, 2019), <https://www.allconnect.com/blog/enduring-interest-dial-up-internet> for an interesting discussion of the rise and decline of dial-up connections in favor of DSL during the early 2000s.

³¹ Of course, Public Entities, particularly those subject to Dillon’s Rule, must have legislative authority to offer internet service, as discussed in [later sections](#) of this White Paper.

The PSC and Electric Utility Providers

Electric utilities could be critical partners in bridging the digital divide in Missouri but face some unique state law regulatory challenges described here and as discussed in more detail in a [later](#) section dealing with easement issues for their existing electric transmission lines. However, even taking these restrictions into account, the fact remains that many utilities have installed fiber optic cable on poles or underground throughout their transmission network to regulate power distribution and monitor power consumption. From the standpoint of engineering and construction costs, a significant number of these providers have found that this same fiber optic cable could be deployed to provide internet service in the homes and businesses of its customers or provide middle mile access to ISPs serving those end users.

Regulated Investor-owned Electric Utilities

The operation and rates set by for-profit electric utilities (electrical corporations) are regulated by the PSC. However, the PSC has much more limited authority over the operation of municipal and rural electric cooperatives.³² Electrical corporations' efforts to provide high speed internet service have been frustrated by the lack of statutory authority to provide that service and the lack of guidance addressing how rate paying electric customers should be shielded from and/or participate in a separate "unregulated" commercial internet service business. However, in 2021 the PSC did approve an electric utility's lease of dark fiber to provide middle mile internet service to a commercial telecom.³³ As discussed [later](#), several bills have been introduced in the Missouri General Assembly to resolve this issue, but none has been enacted up to this point.

Rural Electric Cooperatives

Rural Electric Cooperatives operate pursuant to Chapter 394 of the Missouri Revised Statutes. The PSC regulates the operational safety of Rural Electric Cooperatives, but they, like municipal electric utilities, are not defined as "electrical corporations" – whose rates are subject to approval by the PSC. Thus, rural electric cooperatives have not faced the same issues that have frustrated electrical corporations when seeking to offer internet service. Several rural electric cooperatives have operated as ISPs for many years, and to encourage this activity, the 2018 Missouri General Assembly enacted Mo. Rev. Stat. § 394.085 that confirms and approves of the continued development of retail internet service by rural electric cooperatives.³⁴

³² See MO. PUB. SERV. COMM'N, *About the PSC*, https://psc.mo.gov/General/About_The_PSC; MO. REV. STAT. § 386.020 (definition of electrical corporation to exclude rural electric cooperatives and municipally owned electric utilities).

³³ See Cameron Green, *PSC Approves Lease of Ameren Fiber for Broadband Service*, MO. TIMES (Oct. 7, 2021), <https://themissouritimes.com/psc-approves-lease-of-ameren-fiber-for-broadband-services/>.

³⁴ "It is the intent of the general assembly to facilitate and to encourage rural electric cooperatives and their affiliates, either collectively, or individually, to continue to enter into and establish voluntary contracts or other forms of joint or cooperative agreements for the use of rural electric cooperative infrastructure in providing access to broadband services." MO. REV. STAT. § 394.085.2.

Missouri's Department of Economic Development & Broadband Development Office

A primary purpose of this White Paper is to describe state and local economic development tools that can be used to facilitate the expansion of broadband access, and unique legal issues that can arise in connection with a broadband infrastructure project. However, a general description of the state's efforts to promote broadband development is offered to provide the historical context, along with a summary of the state's current plans to participate in federal broadband grant programs.

Missouri's efforts to expand and support broadband access and infrastructure development originated with the passage of the American Recovery and Reinvestment Act (ARRA) and the availability of federal funding from that legislation. This Missouri program was called MoBroadbandNow, and while it sought to expand [broadband service to 95% of Missouri households](#) by encouraging public and private participation in federal funding programs, it failed to meet this lofty objective. A significant criticism of the program was its failure to anticipate the need for broadband infrastructure that was "future proof" – capable of expanding to higher bandwidth speeds necessary for interactive video and cloud computing -- as well as a lack of oversight to make sure that the promised service levels were actually delivered. MoBroadbandNow issued its final report in 2015, and organized state government efforts to tackle the digital connectivity problem were suspended for several years thereafter.³⁵ It is fair to say that the results of this effort have contributed to disillusionment in some communities and created some degree of skepticism about the prospects for current efforts to bridge the digital divide. It certainly is the case that NTIA, which administered many of the ARRA programs, and the Missouri General Assembly appear determined to avoid those mistakes with grant funding to states under ARPA and the IIJA.

History of the State Broadband Development Office

In 2018, Governor Parson created an Office of Broadband Development within the Department of Economic Development and named Tim Arbeiter as its first Director. That same year, the Missouri legislature created a new state broadband grant program.³⁶ Five million dollars was appropriated for grants in the [fiscal year 2020](#). In 2022, following passage of ARPA and the IIJA, the Missouri General Assembly [substantially expanded the role of the Office of Broadband Development](#) and appropriated several hundred million dollars of ARPA funding for broadband infrastructure.³⁷

³⁵ See Kathryn Hardison, *Little Legislative Progress on Improving Missouri Broadband*, COLUMBIA MISSOURIAN: DISCONNECTED (Jan. 7, 2018), https://www.columbiamissourian.com/news/state_news/little-legislative-progress-on-improving-missouri-broadband/article_e6b766a8-da37-11e7-8cb0-2bbf35fb3a91.html.

³⁶ See [MO. REV. STAT. §§ 620.2400 – 620.2459](#).

³⁷ See Marc McCarty, *A Wrap-up - Broadband and the 2022 Missouri Legislative Session*, UNIV. MO. SYS. (June 7, 2022), <https://mobroadband.org/a-wrap-up-broadband-and-the-2022-missouri-legislative-session/>

ARPA Funding and IIJA Planning and Implementation

Missouri's Broadband Development Office now is, and likely will remain, the single most important state agency involved in broadband infrastructure development programs. It is administering the distribution of CARES Act and ARPA Funding appropriated for broadband infrastructure grants, it is directing the creation of detailed maps needed to assess where better broadband access is needed, and it is responsible for the development of the statewide broadband plans contemplated by the federal BEAD and Broadband Equity Act programs. As discussed in later sections, it also has a role to play in [implementing local funding](#) for broadband under several state statutes.

The State Grant Programs

The Broadband office is currently implementing several broadband grant programs following the General Assembly's passage of the fiscal year 2023 budget appropriations bill.

Infrastructure Grant - \$265 Million

This program³⁸ funds last and middle-mile infrastructure build-out, including make ready and pole replacement costs. Middle-mile infrastructure can only be funded if the project also will provide "last mile" service to end user customers. These programs generally require bringing minimum speeds of at least 100 Mbps download / 20 Mbps upload (100/100 preferred if possible) to unserved and underserved areas (as defined below). A local government match (investment) is not strictly required, but funding preference is given to projects that have local community involvement and investment.

Unserved and Underserved Areas

Under the original broadband grant program, an unserved area was defined as locations where access to fixed wireless or wired service was less than 10 Mbps download/1 Mbps upload (25/3 Mbps for an underserved area). However, a new "amended" definition (enacted by the General Assembly as part of [SB 820](#) on May 13, 2022), modifies these definitions of "unserved or underserved" to include locations lacking access to fixed wireless or wireline service at speeds of 25/3 Mbps (unserved) or 100/20 Mbps (underserved). Satellite internet is excluded from this definition.

Cell Towers Grant - \$20M

This program provides grants to expand the capacity for all cellular carriers by funding the construction, retrofit, and refurbishment of towers, especially on public lands owned by state agencies, counties, and local governments.

³⁸ See MO. DEP'T ECON. DEV., *MISSOURI BROADBAND INFRASTRUCTURE GRANT PROGRAM GUIDELINES APPLICATION PERIOD: July 15, 2022–August 29, 2022*, <https://ded2.mo.gov/media/pdf/missouri-arpa-funded-broadband-infrastructure-grant-guidelines-final> -- Initial grant applications will be accepted during the period July 15, 2022 to August 29, 2022. Several rounds of funding applications are expected during FY 2023 and 2024.

Information regarding these programs can be accessed at <https://ded2.mo.gov/one-stop-arpa-resources-broadband>

Peculiarities of a Missouri “Public Partner” – The Organization of Missouri Government & General Rules Governing Missouri Public Entities’ Ability to Participate in a Broadband P3

Unlike private businesses and nonprofit institutions (Private Entities), the authority and power of state and local government to act (e.g., to contract, issue debt, spend money, and operate enterprises) is more limited. While it sometimes is possible to work around or structure a P3 agreement in a manner that adapts to, these constraints, these differences must be understood and carefully navigated. Ignoring them can scuttle even the most well-constructed P3. At a minimum, this will be embarrassing and damage the reputation of the advisor that promoted the plan, and at the worst, it could potentially expose public officials to legal and political jeopardy.

This section starts with a general overview of how the Missouri government (and its many potential Public Entity “partners”) are organized. It then describes general rules governing the ability of Missouri Public Entities to participate in P3s – specifically those dedicated to bringing better broadband service to the community. Later sections will focus on the role local government and specially-created districts can play in providing financial resources to a broadband P3.

General Organization of Missouri State & Local Government

The Missouri Constitution

Missouri’s government is organized and ultimately governed by its constitution.³⁹ The current Missouri Constitution was adopted in 1945 and has been amended many times by Missouri voters. The Missouri Constitution creates legislative, executive, and judicial branches and establishes a general framework for the organization and operation of counties and municipalities (cities, towns, and villages).

The General Assembly

The Missouri General Assembly consists of a House of Representatives (163 members) and a Senate (34 members) elected to 2- and 4-year terms, respectively.⁴⁰ It exercises legislative power in Missouri. The General Assembly has broad powers to enact legislation, create and empower various state and local government agencies and authorities, impose taxes, and issue debt, subject only to the restrictions imposed by the Federal and Missouri Constitutions.

³⁹ MO. CONST. of 1945 <https://revisor.mo.gov/main/Home.aspx?constit=y#III>

⁴⁰ MO. CONST. art. III §§ [1](#); [3](#); [5](#).

Relevant Executive Branch and Departments

The Governor, other elected officials,⁴¹ and 16 departments are established or authorized by the Missouri Constitution.⁴² Consistent with the federal government's system, bills enacted by the General Assembly must be approved by the Governor to become law, except in cases where the Governor's veto is overridden by a 2/3's vote of both houses of the General Assembly.⁴³

The most relevant Department for the purposes of this White Paper is the Department of Economic Development (DED). Furthermore, the most important division within the DED is the Office of Broadband, which was created in 2018. The role of the Office of Broadband relevant to Broadband infrastructure projects was described in greater detail in [a separate section](#) of this White Paper.

Local Government Public Entities (Political Subdivisions, Authorities & Bodies Corporate and Politic)

Article VI of the Missouri Constitution establishes counties and municipalities (the core institutions of local government in Missouri).⁴⁴ There are 114 counties along with the City of St. Louis (established as a city not within any county). Municipalities (cities, towns or villages) are also authorized and generally classified. As discussed in greater detail in a [separate section](#), the powers granted to county and municipal government are contained in the Missouri Constitution and supplemented by legislation enacted by the General Assembly, although certain counties and cities can elect home rule status and are governed by a separate local charter/constitution approved by the voters.

The General Assembly also has created scores of separate agencies, political subdivisions, bodies corporate and politic, and administrative boards through legislation. In addition, the General Assembly has authorized counties and/or municipalities to create their own local and regional political subdivisions, boards, districts, authorities, and bodies corporate and politic. The result is a highly-balkanized state and local government structure with hundreds of separate Public Entities operating in the state. The potential role of these local government "Public Entities" in a broadband P3 is discussed in separate sections of this White Paper.⁴⁵

⁴¹ MO. CONST. art. IV. In addition to the Governor, Missouri voters separately elect the Lieutenant Governor, Attorney General, State Auditor, Secretary of State and State Treasurer. See MO.GOV, GUIDE TO MISSOURI'S GOVERNMENT, <https://www.mo.gov/government/guide-to-missouris-government/> (last visited Aug. 15, 2022).

⁴² MO.GOV, GUIDE TO MISSOURI'S GOVERNMENT, <https://www.mo.gov/government/guide-to-missouris-government/> (last visited Aug. 15, 2022). The number of Departments is limited to 16. MO. CONST. art. IV, § 12.

⁴³ MO. S., HOW A BILL BECOMES LAW, <https://www.senate.mo.gov/bill-law.htm>.

⁴⁴ MO. CONST. art. VI §§ [1](#), [15](#), [19](#).

⁴⁵ See e.g., *infra* [Express Legislative Authority for Local Government Broadband Infrastructure](#).

Counties and Cities, Towns & Villages

Article VI of the Missouri Constitution addresses the establishment and powers of local government. It provides that [counties](#) and [cities and towns](#) in Missouri are to be classified by statute and to have those powers as the Missouri General Assembly provides in state statutes in addition to those expressly provided in the Missouri Constitution. Missouri Counties are classified as one of [four classes](#) depending on the [assessed value of property within the county](#). Third- and fourth-class counties may further adopt a governing structure consisting of [townships](#), with each township exercising certain powers (primarily related to zoning and land use) that apply only in that township.

Cities, towns, and villages (municipalities) are classified by population. [Most municipalities are classified](#) as cities of the third-class (Mo Rev. Stat. Chapters 77 and 78) or fourth-class (Mo. Rev. Stat. Chapter 78) or as a “town or village” (Mo. Rev. Stat. Chapter 79). Rounding things out, the City of St. Louis has a special status akin to a constitutional charter city and a county. Additionally, seven cities in the state are governed by special charters adopted by the state legislature prior to 1875.

Other Political Subdivisions and Bodies Politic and Corporate, Special Districts, Boards and Authorities

In addition to counties, cities, towns, and villages, Missouri has many other political subdivisions and legal entities – usually called “public corporations” or “bodies politic and corporate.” These entities address more specific public needs and interests. They include [school, road, drainage, sewer and levee districts](#), [agricultural commodity research districts](#), [broadband infrastructure improvement districts](#), county and city [industrial development corporations](#), local [community improvement districts](#), entities created under the [General Cooperation Statute](#), and various state boards and authorities such as the [Missouri Development Finance Board](#) (MDFB), [Health and Education Facilities Authority of the State of Missouri](#) (MoHEFA), and the [Missouri Environmental Improvement and Energy Resources Authority](#) (MoEIERA).

The above-listed entities are all “Public Entities” created or authorized by state statutes. In some cases, they have been granted the power to impose taxes; in others, they are supported through appropriations and/or fees. In many cases, state statutes authorize counties and municipalities to create them. In most cases, the governing body of these entities is either appointed by the governing body of the political subdivision(s) that created the Public Entity, or the governing board is separately elected. Many of these entities have broad powers to finance and, in some cases, may own and operate specific types of “projects” as a separate enterprise.

The General Assembly, counties, and municipalities often make use of these other Public Entities to avoid constitutional or statutory restrictions or other political issues that make it difficult for the state, county, or municipality to act directly. While some of these Public Entities don’t have express authorization in the statute to finance and operate telecommunication or broadband service for individual or business subscribers, they can finance broadband infrastructure if it facilitates the delivery of services contemplated as part of a project that is permitted in the enabling statute. For example, a healthcare provider might finance broadband infrastructure needed for its telehealth delivery services through MoHEFA⁴⁶ in

⁴⁶ MoHEFA and MoEIERA are discussed in more detail [later](#) in this White Paper.

conjunction with a private ISP's expansion of its commercial internet network. In this case, the capital and operating costs of the overall network would be shared through the P3, and the economic prospects for the private ISP's network and the health care provider's achievement of its health care delivery mission are each improved and strengthened

Inherent Limitations on Public Entity's Power to Participate in P3s –Dillon's Rule & Home Rule Jurisdictions

Dillon's Rule and Broadband P3s

The state statutes governing most business entities (for-profit corporations, limited liability companies, and partnerships) and nonprofit corporations (NGOs) enable them to operate, enter into contracts, and conduct business to the same extent as a natural person. While this power can be specifically limited in the entity's organizational documents, most instead elect to include a general "catch-all" purpose/authorization, such as "to conduct and transact all lawful business activities allowed under the laws of the State of Missouri."⁴⁷ These "general powers/purposes" clauses are quite common, and typically there are few if any restrictions imposed on a Private Entity's powers. So long as the proper officers, directors, managers, or members approve an action taken (entering into a contract or authorizing a borrowing, for example), a court will recognize and enforce the contract or action.

Things are much different for most Public Entities. The powers of most Public Entities are strictly limited by statute, and it is very important for anyone working on a broadband P3 to understand this difference and appreciate how these differences may limit and restrict the role a Public Entity can play in a P3.

The powers of most (but not all) Public Entities in Missouri are limited by a doctrine called "Dillon's Rule." Dillon's Rule states that Public Entities have only those powers: "(1) granted in express words; (2) necessarily or fairly implied in or incident to the powers expressly granted; [or] (3) ... essential to the declared objects and purposes of the [local government] —not simply convenient, but indispensable." Furthermore, "[a]ny fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."⁴⁸

Therefore, for Public Entities subject to Dillon's Rule, it will be very important to carefully analyze the Missouri Constitution and statutes under which the Public Entity was created to see what it is authorized to do. For example, if a P3 contemplates that a Public Entity will borrow money to finance a portion of the cost of broadband infrastructure, the statute under which the Public Entity was created must expressly permit it to incur the debt *and* provide express or implied authority to use the money raised to finance the broadband infrastructure. If this authority does not exist, there is a real risk that a court might refuse to enforce the agreement.

⁴⁷ See Missouri Secretary of State Website FAQ. <https://www.sos.mo.gov/business/faqs#Corporations>

⁴⁸ [Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam County, 946 S.W.2d 234 \(Mo. En Banc 1997\)](#)

An Exception: Home Rule / Charter Counties & Municipalities

There's an "exception to every rule," and Dillon's Rule is no exception to that old adage.

Art. VI, §§ [18](#) and [19](#) of the Missouri Constitution grant certain Missouri "home rule" counties and cities more flexibility to work with private partners to develop broadband. As described earlier, most Missouri counties and cities are guided by Dillon's Rule, and therefore they must look to the Missouri Constitution or state statutes for express or implied statutory authority to participate in a broadband P3. However, home rule counties and cities derive their power and authority to act from a local "charter" or "constitution" that has been approved by the voters.

As a result, in addition to those powers granted in the Missouri Constitution or state statute, these counties and cities have the power to do anything that is authorized by the local charter or constitution, so long as the power is one that the General Assembly *could confer* on the city or county under the Missouri Constitution (even if it has not done so), *and* so long as neither the Missouri Constitution nor state law *has prohibited* the city or county from exercising this power. As a practical matter, many local charters or constitutions are written with a broad delegation of powers to the governing body. This means the home rule county or city can take any action and participate in a Broadband P3 in any capacity, so long as it is not prohibited by the Missouri Constitution, state statutes, or the local charter or constitution itself.⁴⁹

Specific Limits on Public Entities Imposed by the Missouri Constitution

The Public Use Doctrine & Eminent Domain

As is generally the case for all state and local governments, participation by a Public Entity in a Broadband P3 must be for a *public purpose*. Art. VI §§ [26](#) and [28](#) prohibit the taking of private property by eminent domain except for a "public use;" the legitimacy of the claimed public use is made by a court, without regard for the local governing body's claim that it is acting for a public purpose.

Grant of Funds and Lending of Credit to Private Persons

Art. III, [§38\(a\)](#) generally prohibits the General Assembly from granting public money or property, or lending public credit, to any private person, association, or corporation. Art. VI, [§25](#) contains a similar restriction for cities and counties and other political corporations or subdivisions.⁵⁰

Both of these sections can prove difficult to interpret and apply in practice. As a general rule, if the legal structure, the parties involved, or the project itself is unique, individualized legal advice will be required to confirm that these prohibitions do not in any way limit the Public Entity's participation in a broadband P3.

⁴⁹ See generally, NAT'L LEAGUE OF CITIES, *Cities 101 – Delegation of Power*, <https://www.nlc.org/resource/cities-101-delegation-of-power/>.

⁵⁰ See also, MO. CONST. art. X, [§ 3](#) contains a separate restriction, requiring that *taxes* be "levied and collected for public purposes only...."

On the one hand, the restrictions clearly cannot be interpreted literally; after all, the government regularly grants money or property to private persons and corporations to obtain various goods or services. Missouri Courts recognize this distinction by applying the public purpose doctrine.⁵¹ The existence of a “public purpose” is recognized even if Private Entities enjoy a significant “incidental” benefit (e.g., a grant of money to a private company in aid of the project’s construction). Missouri courts generally defer to the governing body of a municipality or county to determine whether there was a valid public purpose for an act, and what constitutes a valid public purpose can change over time with economic and social conditions. The universe of recognized “public purposes” includes the elimination of blight,⁵² the furthering of education, the fostering of public health, and the promotion of economic development.⁵³ However, in every case grants of public funds must be in support of an overarching “public purpose” determined by the public entity’s governing body.⁵⁴

But the deference afforded to a Public Entity’s determination that a public purpose exists and that it is the dominant motivation is not limitless, and it can be challenged,⁵⁵ and even a valid public purpose may not justify the direct extension of credit in the form of a bondholder guarantee, particularly where this benefit is extended only to a select number of projects for private companies.⁵⁶

⁵¹ See e.g., *Menorah Medical Center v. Health Educ. Facilities Auth.*, [584 S.W.2d 73, 78-79](#) (Mo. banc 1979) (citing *State ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority*, 518 S.W.2d 68 (Mo. banc 1975)).

⁵² See e.g., MO. REV. STAT. [§ 99.810](#) (Tax Increment Financing statute – elimination of blight and similar conditions).

⁵³ For example, the Missouri Constitution was amended in 1972 to create an administrative department *dedicated* to the promotion of economic development ([Mo. CONST. art. IV, § 36\(a\)](#)). The universe of recognized “public purposes” includes the elimination of blight,⁵³ the construction of public buildings and public works, and the promotion of economic development.⁵³

⁵⁴ *Burks v. City of Licking*, [980 S.W.2d 109](#) (Mo. Ct. App. 1998) which held that a city’s purchase and donation of land to the state as a site for a prison served an economic development public purpose for the city contains an extensive summary of relevant case law.

⁵⁵ See e.g., *State ex rel. City of Jefferson v. Smith*, [154 S.W.2d 101](#) (Mo. banc 1941)(holding that a city’s issuance of bonds to fund the cost of construction of an office building for that would be used primarily to house private and state offices lacked a valid public purpose because the ballot authorizing the bonds stated that the building was to be used as a *municipal* office building).

⁵⁶ *Curchin v. Missouri Industrial Development Board*, [722 S.W.2d 930](#) (Mo. 1987) the Missouri Supreme Court invalidated a statute that permitted a state tax credit to be issued to compensate bondholders of defaulted industrial development bonds that would finance a commercial project, even though the project financed might well have led to more jobs and an economic benefit for the community (a good public purpose).

The Court found that the approach taken by the General Assembly in authorizing the tax was too close to the 19th century practice of granting tax revenues to private railroads and other corporations that had led to the adoption of the [Art. III, §38\(a\)](#), even though clearly the state constitution does not prohibit the issuance of bonds backed by tax revenues to pay for plants and equipment of promote industrial development ([Mo. CONST. art. III, § 27](#)). In response,

the General Assembly amended the statute ([Mo. Rev. Stat. § 100.297](#)) to limit the tax credit guaranty provision to public infrastructure projects where there is more clearly no grant of public money to private persons.

Statutory Authority for Local Government to Participate in Public-Private Partnerships

There are several statutory provisions that allow Public Entities, nonprofits, and for-profit companies to enter into contractual agreements to develop, construct, and operate various types of projects and/or to jointly supply services. In some cases, these statutes allow a county or municipality to create a new “separate” local government entity to carry out these goals. Two of the most important are described below.

Missouri’s General Cooperation Statute

Mo. Rev. Stat. §§ [70.210](#)-70.320 is “Missouri’s General Cooperation Statute.” It authorizes any Public Entity to cooperate by contract with the United States, for-profit entities, and non-profit organizations (NGOs) “for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision.” Mo. Rev. Stat. § 70.220. The “contract” created under the General Cooperation Statute can contain separate provisions creating a self-governing board and a new, separate “[body corporate and politic](#)” (a separate Public Entity) – with specified powers that augment those specified by the contract itself. In other words, the General Cooperation Statute functions to authorize Public Entities to participate in the creation and operation of a public-private partnership and, if desired, to create a new separate local government entity to carry out its purposes.

Joint Municipality Utility Commission Act

The [Joint Municipality Utility Commission Act](#) allows municipalities (cities, towns, and villages) and other government-owned and nonprofit water and sewer utilities to create a “commission” by contract that can own and operate revenue-producing utility property (a [project](#)). Once in place, these commissions enable their individual local governments to exercise powers of ownership, contracting, and financing on a joint basis with substantially more flexibility than they could otherwise exercise working alone. There are several joint commissions formed under this statute. Three with statewide jurisdiction include the Missouri Joint Municipal Electric Utility Commission (MJMEUC) and the Municipal Gas Commission of Missouri (MGCM). Acting in conjunction with a separate trade organization, the Missouri Association of Municipal Utilities (MAMU), these entities operate by contract as the Missouri Public Utilities Alliance (MPUA). Several of the municipal electric utilities that are members of MJMEUC also operate as municipal internet service providers in their communities, and some municipal members of MPUA are exploring the use of the Joint Municipal Utility Commission Act to finance, construct, and operate middle mile broadband infrastructure projects.

Legislative Authorization for Public Entities to Construct, Own, and Operate Broadband Infrastructure & Alternatives

As discussed earlier, most Public Entities organized in Missouri must comply with Dillon’s Rule. This means that these Public Entities need express or implied legislative authority to enter into a P3 and to take the action and assume the responsibilities contemplated by a P3 agreement. As discussed earlier, [Missouri’s General Cooperation Statute](#) is broad enough to allow a Public Entity subject to Dillon’s Rule to participate in almost any broadband P3, but only so long as, and only to the extent that, the actions contemplated are within the express or implied powers of the Public Entity.

Home rule Counties and Cities face somewhat the same limits. However, since they are governed primarily by their charter, they typically have more flexibility to act, and the potential to amend their charter (with voter approval) if necessary to accommodate a proposed P3 arrangement.

This section describes express and implied authorization for Public Entities subject to Dillon’s Rule to participate in broadband P3s, possible issues and limitations on that authority, and possible options to work around the limitations imposed by Dillon’s Rule (or restrictions on home rule Public Entities).

Express Legislative Authority for Local Government Broadband Infrastructure

Neighborhood Improvement Districts

A municipality or county may designate an area within its borders as a [Neighborhood Improvement District](#). This designation does not create a new Public Entity, but once the district’s formation has been approved by voters or property owners in the district, and other procedural limitations have been satisfied, the city or county may use general obligation bonds paid primarily from a [property tax assessment](#) to fund a partnership with a telecommunications company or another broadband service provider for the purpose of constructing or improving broadband in an “[unserved or underserved area](#).” Prior to issuing the bonds, the unserved or underserved status must be certified by the [Director of Broadband Development](#). In addition, the statute expressly provides that all property used to supply the broadband service must be owned and operated by the telecommunications company or broadband service provider.⁵⁷

Municipal Broadband Improvement Districts

With voter approval, two or more municipalities (cities, towns, or villages) may form a new political subdivision called a [Broadband Infrastructure Improvement District](#). Broadband infrastructure improvement districts may fund a partnership with a telecommunications company or broadband service provider in order

⁵⁷As discussed later, similar language appears in the CID statute and the Broadband Infrastructure Improvement District statute. The statutes do not otherwise define these terms. A telecommunications company is defined in [Mo. Rev. Stat. § 386.020](#) to include Private Entities offering telecommunication service, including Rural Electric Cooperatives. A broadband service provider presumably could include any other Public Entity (other than the county or city that created the district) so long as it was providing broadband service.

to construct or improve broadband in an “[unserved or underserved area](#).” Again, the area must be certified by the [Director of Broadband Development](#) as unserved or underserved, and the property must be wholly owned and run by the telecommunications company or broadband service provider. The statute authorizes the imposition of up to a 1% sales tax to fund the costs of the broadband project (with voter approval).

[Legislation proposed during the 2022](#) session of the General Assembly would have amended this statute to authorize all political subdivisions (e.g., counties and other Public Entities designated as political subdivisions) to create a broadband infrastructure improvement district but was not enacted. However, presumably, counties and other political subdivisions wishing to take part in a broadband P3 project along with a broadband infrastructure improvement district could do so by using the [general cooperation statute](#). However, this solution is not ideal because any sales tax imposed by the broadband infrastructure improvement district would be limited to sales occurring within the boundaries of the district’s participating municipalities.

Community Improvement Districts

A city or county may designate an area within its borders as a community improvement district (a CID).⁵⁸ A CID is a separate political subdivision and is governed by its own board, the members of which are elected by the district’s residents or property owners, or appointed by the governing body of the city or county. Once approved by residents or property owners in the CID, and after the normal formation procedures are completed, debt obligations backed by a special assessment, an ad valorem property tax, or a sales tax may be used to fund a partnership with a telecommunications company or broadband service provider to construct or improve broadband in an “[unserved or underserved area](#).” As was true with a NID and broadband infrastructure improvement district, the [Director of Broadband Development](#) must certify that the area is unserved or underserved. Again, all property used to supply the service must be owned and run by the telecommunications company or broadband service provider.

[Implied or Incidental Powers for Local Government Broadband Infrastructure](#)

Several Missouri Public Entities – particularly cities that have locally owned municipal utilities, own and operate municipal utilities that offer internet service to residents and businesses in the community, or to select business and/or institutional customers. Two examples are the [City of Marshall, Missouri](#), which has operated internet service for over 20 years through its Board of Public Works, and [Houston, Missouri](#), which began offering service to residents and businesses last year. The [City of West Plains, Missouri](#), is an example of a city that offers internet service to a limited number of business customers. Two separate grounds seem to supply an independent basis (an implied power) for counties or municipalities to undertake municipal broadband service as a “utility” or to take part in a broadband P3.

Incidental to Expressly Granted Powers to Operate Local Government and/or Municipal Utilities.

It goes without saying that broadband access is critical to the efficient conduct of most business transactions in the United States, and that includes the *business* of counties and municipal governments. Municipal

⁵⁸ MO. REV. STAT. § [67.1401](#).

utilities increasingly rely on high-speed internet infrastructure and applications to manage the operation and delivery of utility services, handling issues such as metering, balancing system demand, and identifying potential maintenance and repair needs.⁵⁹ More generally, county and municipal governments, like their business counterparts, are increasingly relying on internet-based applications to handle traditional government functions more efficiently in lieu of in-person, telephone, or mail communications. These functions include paying taxes, applying for permits, and asking for public comment on proposed zoning changes or other government actions. Of course, school districts relied heavily on online remote learning during the pandemic, and although in-person learning has returned, the ability to continue instruction in lieu of snow days offers the potential of supplying students with a better learning experience while saving money by avoiding snow-day makeups.

Most of these government services require reliable broadband service to be available in every location in the jurisdiction. While no Missouri court has directly addressed the question, with each passing month evidence mounts that the existence of this infrastructure is an essential prerequisite to the local government's ability to carry out the powers expressly granted to it, whether it be a municipal utility or simply the general operation of the local government. In recognition of this fact, in 2018 the General Assembly stated, "expanding and accelerating access to high-speed broadband communications services throughout the entire state of Missouri is necessary, desirable, in the best interests of the citizens of this state, and that *it is a public purpose of great importance*."⁶⁰

Incidental and Necessary to the Promotion of Economic Development

Mo. Rev. Stat. § [349.012](#) authorizes the governing body of any county or municipality to "spend its funds to promote commercial and industrial development and, in order to achieve such promotion, to engage in any activities, either on its own or in conjunction and by contract with any not-for-profit organization, which it deems necessary to carry on such promotional work." Mo. Rev. Stat. § [67.303](#) empowers all county commissions to engage in any activity designed for the promotion of economic growth within the county and to contract with any political subdivision, entity, or person to carry out that power. With voter authorization, counties and municipalities may impose a 1% sales tax to [promote economic development and use the proceeds to fund "public infrastructure projects"](#).

Mo. Rev. Stat. §§ [100.010](#)–100.200 (the "Industrial Development Act") authorize any county or municipality to finance the purchase, construction, extension, or improvement of a project for industrial development. Those provisions of the statute specifically authorize the issuance of general obligation bonds (if approved by the voters) or revenue bonds, with the approval of the governing body, to finance the project. A "project" is defined to include a "telecommunications operation."⁶¹ While the term "telecommunications operation"

⁵⁹ Chapter 91, MO. REV. STAT. authorizes municipalities to own and operate municipal utilities including a telephone plant or exchange. [MO. REV. STAT. § 91.450](#).

⁶⁰ [MO. REV. STAT. § 394.085](#) (emphasis supplied, confirming the statutory authority for Rural Electric Cooperatives to offer broadband service to its customers).

⁶¹ [MO. REV. STAT. § 100.010](#) (definition of an "office industry").

is not specifically defined in the Industrial Development Act, Mo. Rev. Stat. § [386.020 \(56\)](#) defines the term “telecommunications service” as:

the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. As used in this definition, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.

As [previously discussed](#), while Missouri political subdivisions are not permitted to operate a traditional telephone company, they are not prohibited from offering “internet type service”.

Taken together, these provisions certainly seem to authorize a county or a municipality to finance internet infrastructure to promote economic development using the Industrial Development Act. In addition, although the statutes do not expressly state that a county or municipality may operate an internet network and provide service to businesses and residents, the power to acquire and construct internet infrastructure (a telecommunications operation), and to finance the cost of acquisition and construction through the issuance of revenue bonds or general obligation bonds, would seem to necessarily imply the power, where deemed appropriate by the local governing body, for the county or municipality to operate the network as well, particularly if that was necessary to promote economic growth and the development of industry in a community. Nevertheless, given the lack of express authority, each community contemplating a broadband P3 structure where it will operate the network, should seek legal advice on this question.

[Using an NGO to Avoid the Limitations of Dillon’s Rule](#)

While counties and municipalities may have the authority to own and directly operate a broadband network as a public utility or to encourage economic development, the Public Entity’s ownership and operation may not be the optimal approach in every community. Some communities may prefer instead to have the network enterprise held in a separate entity, but still desire to retain indirect control over the operation to help ensure that the network truly does serve the public interest rather than private profit. To achieve these goals, counties and municipalities can consider using an aligned nonprofit corporation.

Missouri’s Nonprofit Corporation Statute

Chapter 355 of the Missouri Statutes contains Missouri’s Nonprofit Corporation Act (NGO Act). The NGO Act allows individuals to form a nonprofit corporation for almost any purpose, so long as it operates on a nonprofit basis (no profit paid to any Private Entity or individual).⁶² The NGO Act specifically allows NGOs to

⁶² [MO. REV. STAT. § 355.025](#) provides: Nonprofit corporations may be organized under this chapter for any one or more of the following or similar purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; cultural; social welfare; health; cemetery; social; literary; athletic; scientific; research; agricultural; horticultural; soil, crop, livestock and poultry improvement; professional, commercial, industrial, or trade association; wildlife conservation; homeowner and community improvement association; recreational club or association; and for the ownership and operation of water supply facilities for drinking and general uses; and for the ownership of sanitary sewer collection systems and waste water treatment facilities; or for the purpose of executing any trust, or administering any community chest, fund or foundation, to further objects which are within the purview of this section....”

be formed for charitable, civic, and commercial purposes. In situations where a local government wishes to act for the public good but prefers to shield the county or municipality from direct participation in the activity, a nonprofit corporation can be formed pursuant to the NGO Act by individuals who are closely aligned with a local government, such as elected or appointed government officials or community volunteers.

Once formed, these NGOs can assist the municipality or county by providing the local government greater flexibility to perform tasks necessary to fully participate in a P3, because the NGO is not constrained by Dillon's Rule or other statutory restrictions and limitations that apply to Public Entities. At the same time, because the NGO rather than the Public Entity owns and/or operates the broadband network, certain statutory restrictions that apply to the municipality or county – such as direct ownership or operation of the project are not violated.⁶³

Federal Tax Exemption for an NGO that Lessens the Burdens of Government

For federal income tax purposes, such an NGO might also achieve favorable status as a federally tax-exempt charity. In this regard, it is important to understand that the standard for achieving tax-exempt status under federal income tax rules (IRC §501(c)(3)) is not the same as the broad authority granted to form an NGO under the NGO Act.

For example, merely operating as a *not-for-profit* ISP (without more), while literally meeting the requirements of the NGO Act, would be considered to be engaging in a trade or business, and is *not*, by itself, a basis for federal income tax-exempt status under Internal Revenue Code §501(c)(3). However, a nonprofit corporation can obtain tax-exempt status under §501(c)(3), qualify for [federal tax-exempt bond financing](#), and qualify for the receipt of tax-deductible charitable contributions if it is organized and operated exclusively for *charitable purposes*.

As defined by the Internal Revenue Code, “charitable purposes” includes “lessening the burdens of government.” This is a term used to describe arrangements where an NGO is organized and operated in a manner closely aligned with a county or municipality so that it can work to help the local government achieve an identified public objective. An IRS training memorandum states that depending on the level of local government involvement, a nonprofit ISP might qualify for tax-exempt status under 501(c)(3).⁶⁴ [As described in the next section](#), NGOs sometimes also are used by Public Entities to borrow funds on behalf of the Public Entity in addition to or in lieu of operating the financed project.

⁶³ For example, an NGO might be the ISP provider that owns and operates a broadband network financed by a [CID, NID or broadband infrastructure development district](#).

⁶⁴ See Donna Moore & Robert Harper, Internet Service Providers Exemption Issues Under IRC 501(c)(3) and 501(c)(12), (1999) (available at <https://www.irs.gov/pub/irs-tege/eotopic99.pdf>).

Public Entity Debt Financing for Broadband: Legal Authorization, Limitations & Workarounds

Introduction

As discussed earlier, there is limited statutory authority for political subdivisions (counties and municipalities) to operate retail broadband networks. However, the advantage of a P3 is that no single “partner” need be responsible for all aspects of a broadband network. This means that Public Entities can play a limited role in the ownership, maintenance, and operation of a broadband network, but still play a very important role in the success of the P3 by working with Private Entities to help fund the construction and ongoing operating costs of the network.

This is by no means destined to be a one-way street, with the Public Entity supplying financial resources and reducing risks for the Private Entity and receiving nothing in return. As described earlier, realizing the ultimate goal of the broadband P3 – making broadband access available to everyone in the community – enables Public Entities to further their public purposes and objectives such as providing for better and more cost-effective delivery of general government services, public utilities, as well as providing for industrial and economic development in the community.

However, to achieve these public purposes – to build the network infrastructure at a cost that enables service to be priced at a reasonable level – requires a public financial commitment along with federal grants and private ISP investment. This section describes some options available to Public Entities to provide those funds.

Discretionary Power of the Governing Body of Public Entities

One point that needs to be stressed at the outset of this discussion is that merely because a Public Entity may have the *power* to issue debt or to provide other financial assistance to a broadband infrastructure project, does not mean it can be compelled to do so. In many cases, local government can achieve that result only with the approval of a state agency or a state-sponsored Public Entity. In some cases, such as the [state contribution tax credit program](#), there may be an overall limitation on the benefit that can be granted each year imposed by state law, and competition for the benefit may be highly competitive. In other cases, such as the issuance of [private activity bonds](#), federal law may require action of a state agency. In every case, public officials likely will be very concerned about the financial viability of the P3 and its ability to repay bondholders. Finally, worthy projects may be rejected by the governing body of the Public Entity solely for political or philosophical reasons.

For all of these reasons, when structuring a P3 it is extremely important to make certain that support exists in the governing body for each Public Entity partner that is expected to make a financial contribution and each government agency that must approve the means of funding that contribution. Fortunately, as the discussion below indicates, often there are multiple options available involving different Public Entities, so if one approach does not work, another may be available.

Counties and Cities -- Limited Obligation Revenue Bonds

The authority to issue debt backed by the credit of a Public Entity and payable from property taxes is restricted by the Missouri Constitution to certain percentages of the assessed value of the property and requires a public vote. However, limited obligation “revenue bond” debt may be issued without any restriction on amount, and in some cases without the requirement for a public vote. To qualify as a “revenue bond” the debt can only be payable from revenues generated from the operation (including the lease) of the financed property. (Missouri Constitution Art. VI, §§ 27 and 27(c)).

Utility and Industrial Development Projects

Revenue bonds also must be used for a purpose permitted by the constitution and state statutes. If approved by a majority of the voters, Art. VI, § 27 of the Missouri Constitution authorizes any municipality and any joint board or commission, established by contract between municipalities or political subdivisions, to issue revenue bonds for the purpose of paying the cost of constructing, extending, or improving a revenue-producing water, sewer, gas, or electric light works, heating or power plants. A project could also include property that is leased or otherwise transferred to private persons or corporations for manufacturing and industrial development purposes.

These projects must be owned by the municipality or by the cooperating municipalities or political subdivisions or the joint board or commission, either exclusively or jointly or by participation with cooperatives or municipally owned or public utilities.⁶⁵

Finally, Art. VI, § 27(b) authorizes any county, city, incorporated town or village, with a majority vote of its governing body (the county commission, city council, or board of aldermen), to use revenue bonds to finance the cost of property used for manufacturing, commercial, warehousing, and industrial development purposes, provided the property is leased or otherwise disposed of pursuant to law to private persons or corporations and the debt is repaid solely from those revenues.

One question that has arisen is whether property can be utility-type property (water, gas, electric light works, heating or power plants (§§27 and 27(a)), and also be considered manufacturing, commercial, or industrial development property (§ 27(b)). In other words, if a city issues revenue bonds to improve utility property that will be leased to and used by a public utility to generate power, is that property a utility (section 27 and 27(a)) or a commercial, industrial, or manufacturing property – or could it be either one? The Missouri Supreme Court found that §§ 27, 27(a), or 27(b) were available, and permitted a city to issue bonds pursuant

⁶⁵ Art. VI [§ 27\(a\)](#) of the Missouri Constitution also authorizes a county, municipality if approved by a majority vote to issue revenue bond debt to pay all or part of the cost of purchasing, constructing, extending or revenue producing water, gas or electric light works, heating or power plants. While similar to § 27, [§ 27\(a\)](#) was part of a single Constitutional Amendment that contained [§ 27\(b\)](#) and [\(c\)](#). All were adopted by voters at the same time.).

to § 27(b) to finance an electric power plant without a public election – even though the project also met the definition of a utility.⁶⁶

For municipal utilities, this power is exercised pursuant to the statutory authority granted in [Mo. Rev. Stat. Chap. 91](#).

Chapter 100, the Industrial Development Act

As previously described, Sections 100.010 to 100.200 of the Missouri Revised Statutes (the Industrial Development Act) establish a framework for counties and municipalities to use revenue bond financing for broadband infrastructure, since Mo. Rev. Stat. §100.010 specifically states that “industrial development projects” include [“telecommunication operations”](#).

The Industrial Development Act also permits a city or county to use a financing structure in which the project assets (the broadband infrastructure in this case) are nominally owned by the municipality or the county, but leased to another entity – such as a Private Entity ISP using a conduit financing structure that transfers the economic benefits and burdens of ownership to the Private Entity ISP. Because legal title to telecommunication project property is held by the city or county, it should remain exempt from property taxes during the term of the financing and possibly entitled to a sales tax exemption on material and equipment purchased through the financing.⁶⁷

Neighborhood Improvement Districts (NID)

As [previously discussed](#), a municipality or county may finance certain broadband projects using bonds that are repaid from a special assessment⁶⁸ against property benefited by the improvement. This debt is a limited general obligation of the city or county and may qualify as a tax-exempt bond, which will lower its interest rate. However, the property that is part of the broadband project must be owned (for state law purposes) and operated by an ISP other than the municipality or county that formed the NID. In addition, the DED (Office of Broadband) must certify that the project area is underserved or unserved. Because of these requirements, use of NID financing can only be accomplished using a broadband P3 with either an independent for-profit ISP or a Public Entity sponsored NGO.⁶⁹

⁶⁶ StopAquilaNow.org v. City of Peculiar, 208 S.W.3d 895 (Mo. 2006). While other Public Entities likely could issue debt without a public election, by structuring the financing so that a county or city is the “owner” the project will be exempt from property tax.

⁶⁷ See the early discussion regarding [Property Tax Exemption and Sales Tax Exemption](#) and how it can have the effect of helping a Public Entity close a project financing gap.

⁶⁸ See the earlier discussion of [Tax Assessments and Tax Assessment Financing](#)

⁶⁹ See the earlier discussion of [Using an NGO to Avoid the Limitations of Dillon’s Rule](#)

Other Public Entities – Limited Obligation Revenue Bonds

Industrial Development Corporations (IDAs)

Chapter 349, Mo. Rev. Stat. authorizes the governing body of a county or municipality to create an industrial development corporation (usually referred to as an Industrial Development Authority or IDA) and for that IDA to issue revenue bonds to finance certain “projects.” The IDA is governed by a board approved by the governing body of the municipality or county.

Conduit Financing

While IDAs have rather broad powers to issue debt that can be used to acquire “projects,” including the power to acquire, sell, lease, or mortgage property, they cannot directly operate any manufacturing, industrial or commercial enterprise.⁷⁰ An IDA financing almost always is structured as a conduit financing to facilitate tax-exempt bonds.⁷¹ In a conduit financing arrangement, debt is incurred by the IDA, and the proceeds are then loaned to the project owner/operator. The IDA debt is then repaid by the project owner/operator loan. In this way, the IDA in effect acts as a “conduit” between the ultimate investor (lender) and the project owner/operator (borrower).

Definition of “Projects” Eligible for Financing

A project for the delivery of internet service is not included in the long list of “projects” permitted to be financed by an IDA.⁷² However, “internet service” would seem to qualify as a type of “commercial” facility (which is listed) if it is privately owned or as a “public facility” if it is owned and operated by a Public Entity. Further complicating the issue is the fact that the statutory definition of a “project” excludes “facilities designed for the sale or distribution to the public of electricity, gas, water or telephone, together with any other facilities for cable television and those commonly classified as public utilities.” Because the availability of internet service has increasingly been referred to as the equivalent of a “utility,”⁷³ whether a particular broadband P3 qualifies a “project” for financing by an IDA should be specifically addressed by legal counsel.

⁷⁰ Mo. Rev. Stat. §§ [349.050](#) and [349.020](#).

⁷¹ [IIJA § 80401](#) amended [§ 142\(a\)](#) of the Internal Revenue to create a new category of federally tax-exempt bonds for broadband infrastructure.

⁷² [Mo. Rev. Stat. § 349.010](#) defines a project to include a “factory, assembly plant, manufacturing plant, processing plant, fabricating plant, distribution center, warehouse building, public facility, waterborne vessels excepting commercial passenger vessels for hire in a city not within a county built prior to 1950, office building, for-profit or not-for-profit hospital, not-for-profit nursing or retirement facility or combination thereof, physical fitness, recreational, indoor and resident outdoor facilities operated by not-for-profit organizations, commercial or agricultural facility, or facilities for the prevention, reduction or control of pollution.”

⁷³ See for example [Mo. Rev. Stat. § 394.085](#), which authorizes rural electric cooperatives to offer broadband communication services... “The general assembly declares that expanding and accelerating access to high-speed broadband communications services throughout the entire state of Missouri is necessary, desirable, in the best interests of the citizens of this state, and that it is a public purpose of great importance.”

Community Improvement District (CID) and Broadband Infrastructure Improvement District Financing

As [previously discussed](#), a municipality or county with the approval of the affected eligible voters may form a separate political subdivision, a CID, and finance a broadband project with revenues derived from a district-wide special assessment, ad valorem property tax, and/or a 1% sales tax. The bonds will be issued by the CID and will not be an obligation of the municipality or county. Likewise, multiple municipalities may form a [broadband infrastructure improvement district](#) and impose a separate sales tax to finance the project.

However, as with the NID, the property that is part of the broadband project must be owned (for state law purposes) and operated by an ISP other than the CID. In addition, DED must certify that the project area is underserved or unserved. Because of these requirements, use of CID or broadband infrastructure improvement district financing can only be accomplished using a broadband P3 with either an independent for-profit ISP or a Public Entity sponsored NGO.⁷⁴

Missouri Development Finance Board (MDFB)

The Missouri Development Finance Board (MDFB) is a public corporation organized and governed by an appointed board that operates within the Department of Economic Development.⁷⁵ Its primary missions are to finance economic development activities and public sector infrastructure improvements.⁷⁶ The statute permits MDFB to finance a wide variety of projects (including broadband infrastructure)⁷⁷ located anywhere in the state.

Bond Financing

MDFB has a public entity loan program to provide Public Entities loans of at least \$1 million to finance infrastructure projects including “communications and similar facilities.”⁷⁸ These loans in turn are typically financed using a “conduit financing” structure similar to that described earlier in the section discussing [IDAs](#).

⁷⁴ See the earlier discussion of [Using an NGO to Avoid the Limitations of Dillon’s Rule](#)

⁷⁵ [MO. REV. STAT. § 100.265](#).

⁷⁶ <https://www.mdfb.org/Programs.html> Economic development initiatives focus on financing private sector investments that result in the creation or retention of jobs and expansion of capital investment within the State. Public infrastructure initiatives focus on financing improvements that leverage private sector job creation and investment or that fund improvements to rural sewer and potable water services necessary to alleviate public health and safety issues.

⁷⁷ [MO. REV. STAT. § 100.255 \(13\), \(9\), \(14\)](#). A project includes a long list of specific types of commercial, retail, and manufacturing facilities, along with “public facilities” and “infrastructure facilities.” The term “public facility” includes a “facility or improvements available for use by the general public including facilities for which user or other fees are charged on a nondiscriminatory basis.” The term “infrastructure facility is defined to include “telecommunication facilities” and “any other improvements provided by any form of government or development agency.”

⁷⁸ MO. DEV. FIN. BD., MDFPB ENTITY LOAN PROGRAM, <https://www.mdfb.org/Programs/Public%20Entity%20Loan%20Program.html>.

MDFB's obligations typically are backed only by the Public Entity's credit, and the loans are often structured so that payment is subject to annual appropriation by the governing body of the Public Entity.

MDFB also has a Revenue Bond Program⁷⁹ that could be used to finance broadband infrastructure owned by a Private Entity ISP with Qualified Broadband Project Private Activity Bonds. These are tax-exempt and privately owned and secured by the Private Entity ISP.⁸⁰ However, as described earlier, this federal tax-exempt financing program is new and will require administrative approval and allocation of a state-wide limit on private activity bond financing by the [DED](#), as well as approval by MDFB's governing board.⁸¹

State Tax Credit Program

As mentioned [earlier](#) in this White Paper, MDFB also administers the program that provides state income tax credits for donations of money to fund certain capital projects, which can include telecommunication infrastructure. In a typical P3 financing structure, money that otherwise would be used directly to fund the project is instead donated to MDFB through the Tax Credit Program. MDFB would then make that money available to finance the project as "telecommunications infrastructure" (the P3 broadband project). MDFB also would issue the donor a voucher for a state tax credit equal to 50% of the donated amount. Finally, these tax credits would be allocated or sold to a "state tax credit investor" in exchange for money that would be used to construct the project. The amount of state tax credits available under the MDFB Tax Credit Program each year is \$10 million,⁸² and since many projects (other than broadband infrastructure) are eligible, there is significant competition for credits in most years.

MoHEFA and MoEIERA

Two other state Public Entities, the [Health and Education Facilities Authority of the State of Missouri](#) (MoHEFA) and the [Missouri Environmental Improvement and Energy Resources Authority](#) (MoEIERA), may play a limited role in assisting in financing a broadband P3. Like MDFB, MoHEFA and MoEIERA provide conduit financing to local Public Entities and NGOs. MoHEFA and MoEIERA provide specific assistance in financing infrastructure projects for water, sewer, energy, or pollution control (MoEIERA) and health and education projects for NGOs and Public Entities (MoHEFA). However, MoHEFA and MoEIERA are not authorized to finance internet or telecommunication infrastructure projects except to the extent they are used in conjunction with an authorized project. Thus, MoEIERA and MoHEFA likely will not be the primary source of financing for a broadband P3, but each could have an important role in facilitating conduit financing

⁷⁹ *Id.*

⁸⁰ [IIJA § 80401](#) amended [§ 142\(a\)](#) of the Internal Revenue Code to create a new category of federally tax-exempt bonds for broadband infrastructure.

⁸¹ See [Qualified Broadband Project Private Activity Bonds](#) discussion in this White Paper.

⁸² MO. REV. STAT. § [100.286.6](#).

for an NGO or Public Entity participant in a broadband P3 that needed specific internet infrastructure to use as part of or in conjunction with the broadband network.⁸³

Tax Increment Financing Districts (TIF)

Missouri's Tax Increment Financing Statute⁸⁴ may be useful in limited situations as part of a comprehensive economic development project. The formation and implementation of a TIF can be particularly complex and the procedures required can vary depending on the location of the project within the state.⁸⁵ Formation usually requires a finding that the area is blighted or at least in economic distress, and typically if it is being used, significant overall development of the area (not specifically focused on broadband) is contemplated. Even taking this into account, however, particularly in an urban or "blighted neighborhood" setting, the opportunity to include broadband infrastructure as part of a "redevelopment project" should not be overlooked.⁸⁶ Whether offered by a Private or a Public Entity ISP, the availability of reliable broadband likely is a critical element in the overall redevelopment of the project area. As [previously discussed](#), the advantage of TIF is that it can employ multiple tax revenue streams (property tax, sales tax, and earnings tax (in St. Louis and Kansas City)) to fund the payment of principal and interest on TIF bonds – and in many cases, all or part of the bonds can be issued as tax-exempt bonds.

Using "Publicly Aligned" NGOs organized under the General Nonprofit Corporation Act -NGO Financing on Behalf of a Public Entity

A final option to facilitate a bond or debt financing for a Broadband P3 that is expected to be repaid by a Public Entity, is the use of a publicly controlled nonprofit corporation organized under the state's general nonprofit corporation statute ([previously discussed](#)). This option can be useful in situations where a Public Entity wants greater overall control over the disposition of broadband infrastructure used by the P3 and when it is able to dedicate some funding annually to cover debt service on the bonds issued by the NGO to fund the broadband project. If this structure were used, a new nonprofit corporation (NGO) would be created with a board of directors closely aligned with the Public Entity's governing body or public officials. The NGO would acquire and or construct the broadband project and then lease it pursuant to a capital lease to the Public Entity. Rent under the lease typically would equal debt service on the tax-exempt bonds that the NGO would issue to finance the project. When the bonds were fully repaid, the Public Entity could purchase the project for a nominal amount. The role played by Private Entities might include design and construction and/or maintenance and operation of the broadband network.

⁸³ For example, MoEIERA might provide conduit financing for a local water company that wanted to acquire and install remote meter reading or monitoring devices that would connect to a broadband network being installed in the community.

⁸⁴ See [Mo. Rev. Stat. §§ 99.800-.866](#).

⁸⁵ See, e.g., GILMOREBELL, *Summary of Economic Development Tools*, 4-9 (June 21, 2021), <https://www.gilmorebell.com/wp-content/uploads/2022/01/Economic-Development-Memo-2021.pdf> (summarizing the general statutory requirements).

⁸⁶ See MO. REV. STAT. [§ 99.805\(16\)](#) which defines redevelopment project costs.

This structure can be used to avoid legal or political issues associated with the issuance of debt by the Public Entity, and it is often part of a strategy to make interest on the bonds tax-exempt. Special administrative guidance issued by the IRS ([Revenue Ruling 63-20](#)), permits the bonds to qualify as tax-exempt bonds even though technically the debt is issued by the NGO rather than the Public Entity (a state or local government).

Missouri Specific Broadband & Right-of-Way and Easement Issues

Missouri law related to the use of real estate to locate broadband infrastructure is a bit “schizophrenic.” On the one hand, the state has very ISP-favorable rules intended to encourage and streamline the process of locating wireless and wireline infrastructure in a public right-of-way. However, this liberal view does not extend to the use of existing private easements to co-locate broadband infrastructure.

Legislation Permitting Use of Public Right-of-Way

Missouri has enacted the Uniform Wireless Communication Infrastructure Deployment Act and the Uniform Small Wireless Facility Deployment Act. These laws are intended to streamline the process of locating wireless towers and equipment on existing public or utility-owned property. Similarly, Mo. Rev. Stat. §§ 67.1830-1846 is designed to streamline access for wired ISPs to deploy fiber over rights-of-way owned by political subdivisions.

As part of Senate Bill 820 (discussed in the next section dealing with proposed legislation) §8.475 was added to the Missouri statutes. This new provision specifically authorizes any political subdivision to erect towers and related equipment to provide wireless internet service and to enter into public-private partnerships for that purpose.

Restrictive View of Existing Easements

The statutes that encourage and streamline the use of public rights-of-way to locate wireless and wired internet infrastructure are a stark contrast to an important Missouri court decision related to the use of existing utility easements on private land. The case, *Barfield v. Sho-Me Power Electric Cooperative*, [10 F. Supp. 3d 997](#) (W.D Mo. 2014), arose when a rural electric cooperative sought to attach fiber optic cable to its existing electric utility poles. This was done in part to permit the electric utility to manage the distribution of power throughout its service area. However, Show-Me Power installed fiber optic cable with far more capacity than was necessary for those purposes so that it could begin providing internet service (through a wholly owned subsidiary) using the excess capacity of fiber optic cable.

Landowners that had previously granted easements to Show-Me Power for electrical power transmission lines sued for trespass claiming that the use of the easement to provide internet communications to customers was neither contemplated nor approved under the terms of the original easements. Show-Me argued that its use was merely an extension of the use already permitted under the easement, to deploy fiber optic cable to manage its electric transmission system, and that the use did not exceed the permitted use in a way that harmed the landowners.

The Court disagreed, holding that under Missouri law, secondary use of the easement was not contemplated by the easement language, and was problematic even if they resulted in no more restrictions on the property owner’s use of land than that permitted under the original easement. In other words, the landowner was entitled to be compensated for Sho-Me Power’s use as it was not contemplated or implied from the language of the easements, regardless of whether it resulted in any greater inconvenience or restriction to the

landowner. For this reason, particularly in Missouri, one should not assume that fiber or wireless assets can be used to support the provision of commercial internet service, even if those assets could be used to support operations of a utility for which the easement was granted in the first place.⁸⁷

⁸⁷ The court held that the specific language used in an easement mattered. Easements that granted rights to use the property for the distribution of electric power and communications were held not too problematic.

Recent Proposed Legislation

Particularly over the last few years, legislators have proposed all types of legislation related to broadband access. That activity can be expected to continue and accelerate over the next few years as Missouri works to create its broadband deployment plan required by the IJA. What follows is a table describing legislation introduced during the 2021 and 2022 sessions of the General Assembly related to broadband and broadband P3s.⁸⁸

The primary items that likely deserve to be monitored going forward are:

1. Legislation that would permit “electrical corporations” (regulated for-profit public electric utilities) to provide internet service to its customers or to other ISPs.⁸⁹
2. Legislation designed to improve the utility of broadband infrastructure improvement districts by allowing any political subdivision and others to participate (in addition to municipalities).⁹⁰
3. Legislation that seeks to impose greater oversight over the DED and public input as it implements the various federal grant programs.⁹¹
4. Legislation that seeks to restrict Public Entities from offering internet service directly if an ISP arguably already has adequate broadband service available.⁹²

2021 Proposed Legislation

Bill	Sponsor Bill Information	Bill String	Date/Last Action
HB321	Travis Fitzwater This bill permits electrical corporations to offer broadband service and utility condemnation proceedings	H321	5/14/2021 - Referred: Utilities
HB735	Riggs Authorizes the creation of broadband infrastructure improvement districts	HB 735	5/14/2021 - Referred: Utilities
HB1160	Riggs Creates the 21st Century Missouri Broadband Deployment Task Force	HB 1160	3/08/2021 - Referred: Utilities
HB1378	Black	HB 1378	4/07/2021 - Public Hearing Completed (H)

⁸⁸ House and Senate Joint Tracking, <https://house.mo.gov/LegislationSP.aspx>

⁸⁹ See, e.g., 2021 – HB321; SB 184; 2022 – SB184; HB2015; HB848; HB2353

⁹⁰ See, e.g., 2021 -- HB 735; SB570 2022 – HB2016.

⁹¹ See, e.g., 2021 – HB1160; 2022 HB 2052

⁹² See, e.g., 2022- HB2695 ; SB1074

Bill	Sponsor	Bill String	Date/Last Action
Bill Information			
Allows two or more partnering entities to form a broadband infrastructure improvement district or partnership for the delivery of broadband internet service to the residents of such municipalities or service areas			
HB1384	Riggs	HB 1384	5/14/2021 - Referred: Utilities
Establishes the broadband enhancement council			
SB184	Bean	SCS SB 184	4/01/2021 - SCS Reported Do Pass (S)
Allows electrical corporations to operate and use broadband infrastructure - Amendments			
SB570	Hough	SB 570	2/25/2021 - Introduced and First Read (S)
Allows certain entities to form a broadband infrastructure improvement district for the delivery of broadband internet service - Amendments			

2022 Proposed Legislation

Bill	Sponsor	Bill String	Date/Last Action
Bill Information			
HB2015	Fitzwater	HB 2015	5/13/2022 - Referred: Utilities
Allows electrical corporations to operate and use broadband infrastructure			
HB2016	Black	HB 2016	3/10/2022 - Public Hearing Completed (H)
Modifies provisions relating to broadband infrastructure improvement districts			
HB2052	Riggs	HCS HB 2052	5/09/2022 - Placed on the Informal Perfection Calendar (H)
Creates the 21st Century Missouri Broadband Deployment Task Force			
HB2298	Davidson	HB 2298	5/13/2022 - Referred: Utilities
Authorizes the Department of Economic Development to purchase fiber optic cables and sell them to broadband developers			
HB2353	Riggs	HB 2353	3/10/2022 - Public Hearing Completed (H)
Authorizes political subdivisions to form broadband infrastructure improvement districts			
HB2563	Riggs	HB 2563	3/23/2022 - Public Hearing Completed (H)
Authorizes the department of economic development to perform site inspections of broadband providers who have received state grants or loans			
HB2609	Riggs	HB 2609	3/23/2022 - Public Hearing Completed (H)
Modifies provisions relating to applicants for grants to expand broadband internet access in unserved and underserved areas			

Bill	Sponsor	Bill String	Date/Last Action
Bill Information			
HB2638	Riggs	HCS HB 2638	5/10/2022 - Second read and referred: Commerce, Consumer Protection, Energy and the Environment
			Modifies and establishes provisions relating to broadband services
HB2645	Hurlbert	HB 2645	3/10/2022 - Public Hearing Completed (H)
			Modifies the application requirements for broadband internet grants submitted to the Department of Economic Development
HB2675	Riggs	HB 2675	3/23/2022 - Public Hearing Completed (H)
			Modifies provisions relating to grants to expand broadband internet access in unserved and underserved areas
HB2695	Houx	HB 2695	5/13/2022 - Referred: Utilities
			Prohibits political subdivisions from using federal funds for the construction of retail broadband internet infrastructure in certain circumstances
HB2726	Rogers	HB 2726	5/13/2022 - Referred: Special Committee on Broadband and Infrastructure
			Establishes certain oversight functions of ISPs within the Office of Broadband Development within the Department of Economic Development in statute
HB2765	Riggs	HB 2765	3/24/2022 - Referred: Special Committee on Broadband and Infrastructure
			Creates provisions relating to pole replacements for certain broadband facilities
SB848	Bean	SB 848	
			Allows electrical corporations to operate and use broadband infrastructure - Amendments
SB981	Hoskins	SB 981	
			Modifies provisions relating to grants to expand broadband internet access in unserved and underserved areas - Amendments
SB990	Cierpiot	SB 990	
			Creates provisions relating to pole replacements for certain broadband facilities - Amendments
SB1074	Hegeman	SB 1074	
			Prohibits political subdivisions from using federal funds for the construction of retail broadband internet infrastructure in certain circumstances - Amendments
SB1081	Hegeman	SB 1081	
			Modifies provisions relating to applicants for grants to expand broadband internet access in unserved and underserved areas - Amendments

White Paper Appendix

Soliciting Broadband P3 Partners

Drafting an Effective Public Entity Request for Information/Qualifications (RFI/RFQ) or Request for Proposal (RFP)

By Marcus McCarty
November 2022

This memorandum provides general information and suggestions for communities that wish to solicit private businesses and NGOs to participate with them in a public private partnership to bring high-speed internet (“broadband”) to their community. It was prepared in conjunction with a State-Specific Legal White Paper that described economic development tools available to state and local governments (Public Entities) to fund a public private partnership (a broadband P3) to accomplish this objective. The memorandum suggests matters that should be included in the Public Entity’s written Request for Information/Qualifications (RFI/RFQ) or a Request for Proposal (RFP). Like the Legal White Paper, this memorandum is not intended to substitute for individualized reviewed by legal advisors and/or the Public Entity’s contract officer.¹

Public Entities use the terms “RFI,” “RFQ” and “RFP” somewhat interchangeably. However, it can be useful to contrast an RFI or RFQ – that suggests the Public Entity is more open to considering a variety of legal and financial proposals to reach a desired objective, with an RFP, that may be more appropriate in cases where the Public Entity has a more definite legal and economic structure in mind and is using the solicitation to identify the best proposal/partner to implement its plan. Since the title used varies, in this memorandum they will be referred to as a “**Proposal Solicitation**” or a “**Solicitation**.” The Private Entities responding to a Solicitation will be referred to as “**Submitters**,” and their written response to the Solicitation will be referred to as a “**Proposal**.”

How Does Proposal Solicitation Assist in Creating Effective Broadband P3s?

There are many reasons a Public Entity will use a Solicitation. Often it is required law, and regardless, using one can reduce the possibility of claims of bias or favoritism in the selection process. However, the process of preparing the Proposal Solicitation also can help the Public Entity better identify and articulate its goals and objectives for the broadband infrastructure project.

The Need for Individualized Legal Review

While it is possible to identify matters that often need to be considered and addressed in a Proposal Solicitation, state statutes and regulations may require the specific format or format depending on the dollar amount or specific subject matter. Local government charters and ordinances may impose procedural rules as well. Finally broadband grants and loans funded by the federal government, or an NGO may impose certain requirements related to sourcing materials or funding labor costs. For all these reasons, while a list

¹ The views expressed in this Memorandum are those of the author writing in his individual capacity only – not those of the University of Missouri System or the UMKC School of Law. The information provided is not intended to constitute legal advice, and all information, content, and materials referenced are for general informational purposes only.

of general topics that should be considered in most Proposal Solicitations can be identified, decisions regarding whether to include them in a specific Proposal Solicitation should be made by the Public Entity only after obtaining individualized legal, engineering, and financial advice.

Proposal Solicitation Elements

The balance of this Memorandum describes topics that should be considered for inclusion in sections of a Public Entity's Proposal Solicitation. The organization of the Solicitation's topics is suggested as well, but the guiding principle here is to create a document that is both complete and understandable.

Statement Clarifying the Public Entity's Commitment and Goals of the Solicitation Process

The Proposal Solicitation is a critical step in the process of developing a broadband P3. Even though a Public Entity and the winning submitter (the Private Entity) hope that the process ultimately will lead to a binding legal agreement that embodies the terms of a broadband P3, the *Solicitation* process usually should not attempt to create the separate written legal agreement or agreements that will obligate the parties to participate in a broadband P3.² In this regard, the Proposal Solicitation process may differ somewhat from more traditional public bid contracts for goods and services.

To avoid confusion, the Solicitation should state what the Public Entity is, and what it is not, committing to do through the Solicitation process. In most cases this would include acting in good faith to review all qualifying Proposals, and to evaluate them in accordance with the "Selection Procedure" (discussed later). Solicitations often state that submission of a Proposal or selection of a winning Proposal will not create a contract to implement the broadband P3 and will not entitle the Submitter to recoup costs of preparing the Proposal. Language stating that the Public Entity retains the right to reject all submitted Proposals, and that a decision to proceed with the contemplated project is subject to review and approval of the Public Entity's governing body is appropriate. Additionally, language may be added stating that submission of a Proposal gives the Public Entity the right to use any of the ideas embodied in that Proposal. While these provisions are necessary to provide the Submitter fair notice, as a matter of practice a Public Entity should not move forward with a Solicitation, unless it is reasonably expected that the process will lead to a broadband P3.

Description of the Public Entity

It may not be apparent why a Proposal Solicitation needs to include a section describing the Public Entity that is focused on highlighting its strengths, but there is a good rationale for including it in the Solicitation. A broadband P3 differs from a typical supplier-customer contract to purchase goods or services for a set contract price. Broadband P3s involve a sharing of responsibilities and risks, along with mutual financial commitments that typically will remain in place for an extended time-period. Just preparing a reasoned response to the Solicitation will involve a significant investment of time and talent for the Submitter with no

² The contemplated legal agreement requires an "offer" (that typically would be made by the Private Entity, followed by an "acceptance" by the Public Entity. While it is possible to structure a Proposal Solicitation in a format such that the winning Submitter's Proposal is an "offer" which, when accepted by the Public Entity creates a contract, often this will not give the parties sufficient flexibility to fine-tune contract language to best suit their needs.

guaranty of an economic return. For this reason, a description of the Public Entity that emphasizes the potential economic opportunity a P3 relationship with Public Entity will afford the Submitter, and if possible, a description of examples where the Public Entity has successfully undertaken long term cooperative public private partnerships, can encourage Private Entities to invest the time and effort necessary to complete a competitive Proposal.

Summary of the Public Entity's Goals & Expected Outcome from the Solicitation Process

While subsequent sections of the Proposal Solicitation will go into more detail, Public Entities should consider including a separate section that summarizes what it hopes to achieve through the Solicitation process. This statement can vary depending on the specific circumstances. For example, it might be limited to deciding what internet technology to use in the community (fiber, wireless or both) followed by a separate negotiation or solicitation process to address the construction and deployment of the network, or instead, the Public Entity's goal might be to select the Proposal to deploy a specific type of internet infrastructure in the community that has the best combination of price, deployment time, and performance specifications. In either event the goal of this section is to provide Private Entities an overall understanding of what the Public Entity is expecting.

Scope of Work

In this section of the Solicitation the Public Entity should focus on the contribution it expects the Private Entity to make to the broadband P3. Again, this will vary by situation, but it can be useful to address four elements necessary to effectively bring broadband access to the community.

Network Design, Construction, Maintenance, and Operation

To achieve a desired level of broadband access, ultimately Public Entities will need to focus on four elements: network design, network infrastructure construction, ongoing maintenance, and network operation. The Solicitation should require each Submitter include in the Proposal the following information for each phase that is relevant to the objectives of the contemplated broadband P3:

- The proposed network specifications and required performance levels.
- The identity of the project team that will perform the work.
- Any critical conditions/prerequisites to performance of the work, including those within and outside the control of the Submitter and/or the Public Entity
- A detailed timeline for completion of the work

Admittedly, not every broadband P3 will involve all four elements (design, construction, maintenance or operation of a broadband network). For example, a Public Entity may only want to use the Solicitation to create a broadband P3 that will maintain and operate a broadband network that already exists, or alternatively, it may only be concerned with working with the Submitter to identify the best network technology and network design, based on the community's existing resources and needs. This does not mean that the Public Entity cannot go forward with the Solicitation, but it is suggested that Proposal Solicitation explain the Public Entity's intentions for all four elements, even those outside the scope of the contemplated broadband P3.

Taking this step will help Submitters better understand their role in the broadband P3 and reduces the possibility of a Submitter misunderstandings. Furthermore, the process of considering all elements (design, construction, maintenance and operation) may lead the Public Entity to reconsider the scope of the project objectives that are included in the Solicitation.

Private Entity Financial Commitment

This section of the Solicitation highlights an important difference between a broadband P3 and a solicitation to bid to provide goods or services for a fixed contract price. Most broadband P3's will require the Submitter to use its financial resources to cover some portion of cost of the broadband network. Admittedly, in many cases the Submitter will be looking to fund its contribution from business and individual internet service subscriber revenues, but even here the Solicitation should require Submitters to state their proposed contribution to fund deficits if those revenues are insufficient.

Expected Public Entity Contribution

Within this section the Solicitation should describe any resources the Public Entity is prepared to commit to accomplish the objectives for the broadband P3. At a minimum, this likely will include a financial commitment to the fund part of the cost of network construction, but Public Entities should consider other resources that might be offered as well and describe them in this section.

Public Entity physical assets

For example the Public Entity may have physical assets it can commit to the broadband P3. This might include, existing dark fiber owned by the Public Entity, access to right-of-way or vertical infrastructure and co-location space for network equipment.

Public Entity Human Resources

The Public Entity may be in a position to commit some human resources to achieve the objectives of a broadband P3. Examples might include preparation of letters of support for grant or loan applications for the project, access to right of way or assistance in obtaining access easements for network infrastructure, or even making the municipal utility's workforce available to assist with network deployment and operations.

Public Entity Financial Resources

Finally, what resources can the Public Entity provide to help bridge the "financing gap" for the broadband P3. This presupposes that there will be a financing gap of some magnitude even after federal funding under the IJA BEAD infrastructure grant program, Digital Equity Act grants, and Affordable Connectivity Program subscription assistance is secured. To bridge this remaining gap, Public Entities should consider the tools outlined in the accompanying White Paper to determine what funding programs they might offer. The Solicitation should contain specific references to the White Paper these programs or any others to help the potential Submitters determine how they may fit with expected private capital and funding resources.

Additional Suggestions

Submitters may have creative ideas to better leverage existing Public Entity resources or to use other resources that the Public Entity has not considered. The Solicitation can request specific ideas for additional Public Entity Resources in this section.

Special Requirements & Conditions

This section of the Solicitation is devoted to focusing attention on special requirements and conditions relevant to achievement of the broadband P3 objectives. For each, the Submitter should be asked to address which party will be responsible for satisfying the condition as well as who bears the burden of any unexpected increases in the project's cost (the Public Entity, the Private Entity or both). Further, if a Public Entity is unwilling to assume any responsibility for a particular condition, this needs to be affirmatively stated in this section. The following matters likely will need to be considered:

Easement/Right of Way

Which party is responsible for securing the necessary private easements or access to right of way to locate network equipment.

Environmental

Which party has responsibility for securing environmental clearance necessary to locate network equipment.

Import Restrictions, Prevailing wage, and Other Similar Conditions

The Solicitation should note any special requirements the winning Submitter will be required to meet as a result of federal, state, local laws or policies. For example, these might include restrictions on certain imported equipment, prevailing wage and minority/women-owned business enterprise (MWBE) participation in the project, or policies designed to encourage participation by local subcontractors and suppliers

Public approval conditions

If voter, governing body, or state/federal approval of the project will be critical accessing public funding for the project these should be described in this section.

Public Disclosure/Confidential Information Policies

Most Public Entities are required to make information publicly available. Exceptions typically exist for contract negotiations and confidential proprietary information, but the procedures necessary to shield that information from disclosure vary. At minimum the Solicitation should alert Submitters as to the scope of disclosure that they should expect, and request that they identify what procedures they will need to follow if they wish to shield any information in their Proposal from public disclosure.

No Litigation, Tax and Conflict of Interest Representations

Some Public Entities have policies barring transactions with parties who are parties to a lawsuit against the Public Entity or who are delinquent in payment of Public Entity taxes or fees. These should be noted in this section and Submitters asked to disclose any known noncompliance. In addition, Public Entities often have rules to avoid conflicts of interest by officials that may be in a position to influence selection of the winning Submitter or ultimately approve any contracts related to the broadband P3. These policies should be referenced or described, and the Submitter required to identify any known conflicts their Proposal.

“Ownership” or Related Rights of the Public Entity to the Broadband Infrastructure

For a variety of reasons, Public Entities may need or desire to own or have special rights to use all or a portion of the broadband network. In some instances discussed in the accompanying White Paper, ownership may be a prerequisite to accessing certain Public Entity funding. In others, ownership or rights to the network may not be a concern. To the extent the Public Entity has requirements, these should be described in this section.

“Ownership” of Proposal and Right to Use Information

The Public Entity will want to be able to use information and ideas contained in the Proposals without permission or compensation. However, Submitters may feel that certain information they wish to include in their Proposal is proprietary or should be subject to a confidentiality or nondisclosure agreement. It may be difficult to accommodate these requests, so often it is best to state that unless a special exception is granted as part of the Selection Procedure process (discussed later), submission of the Proposal permits the Public Entity to use or disclose any matters contained in the document as they see fit.

Insurance and Minimum Capitalization Requirements

Often a Public Entity will have a policy requiring certain levels of insurance protection for independent contractors working on government owned or publicly supported projects. In addition, depending on the project and the Scope of Work, it may be appropriate to require the winning Submitter to have some level a minimum capitalization. These requirements should be included in this section.

Proposed Form of Agreement

Some Public Entities have specific boilerplate language that must be incorporated in the any contract agreement. Including this language, or even a form of a proposed agreement can be helpful in addressing concerns early in the process. This section should contain or reference the Public Entity’s required language and put the Submitter on notice that it will be used in any agreements executed to implement the P3 unless an exception or modification is requested in the Proposal and approved as part of the Selection Procedure.

Selection Procedure

All Proposal Solicitations should have a dedicated section outlining the procedure and criteria the Public Entity will use to select the winning Submitter. Items that need to be covered in this section include:

- Communication procedures that will be followed to address questions and requested exceptions prior to submission of a Proposal.
- Information regarding the identity of the selection team designed to help the Submitter target its Proposal to their experience level and expertise.
- Whether oral interviews will be part of the selection process and their format.
- Expected selection date and winning Proposal announcement procedure.
- The selection criteria to be used, including the weighting for each.

While all of these are important, identifying and establishing a relative weight for the criteria that will be used to select the winning Proposal is critical to assuring that the Public Entity's process is fair, and that it results in the selection of the Proposal that best suits the Public Entity's needs. Criteria identified by the Public Entity, and the relative weighting given to them will vary, but here are a few that should be considered:

- Completeness of Proposal – (How well did the Proposal address and met the points outlined in “Mandatory Requirements for All Proposals.”)
- Reputation, experience, and financial resources of the Submitter
- Achievement of P3 objectives – (How well does the Proposal deliver the Public Entity's desired access levels now and, in the future – measured by the requirements outlined in the Solicitation's Scope of Work.)
- Requested level of Public Entity financial and other resource commitment.
- Level of financial and human resources the Submitter will commit to the broadband P3.
- Submitter's ability to satisfy Public Entity conditions without significant variances or exceptions.
- Proposed timeline for project completion.
- Achievement of Public Entity identified supply sourcing and workforce policy conditions (For example MWBE participation or use of local business resources)

In most instances Proposals are graded on a 100-point scale with various maximum points established for each scoring criteria. The list above is not intended to cover all possible criteria, and Public Entities will weigh factors differently. This is to be expected. However, to protect the integrity of the process, most Solicitations should assign significant weight to the degree to which a Proposal meets all requirements laid out in the outlined “Mandatory Requirements for All Proposals.”

Mandatory Requirements for All Proposals

In order to efficiently compare Proposals, another critical item in the Solicitation is a detailed mandatory outline that all Proposals must use. In general, the more detailed the outline the better, and of course the outline should closely correspond to the requirements laid out in the Solicitation itself. Here is one possible example of a mandatory Proposal outline:

- Executive Summary of Proposal (1-2 pages maximum)
- Qualifications & experience of the Submitter and the proposed project team.
- Proposed Plan to address “Scope of Work” (This section of the outline should be expanded and modified to include all elements of the Scope of Work required by the Solicitation)
- Identification of any proposed variance from Scope of Work or Additional Conditions

- Schedule of Required Financial Contributions (this should include those provided by Submitter and Public Entity)
- Project timeline
- Optional: Additional Matters (This section of the Proposal would allow the Submitter to include additional matters that it believes might strengthen the proposal)
- Optional: Proposed Legal Structure & Contemplated Documentation

By closely controlling the content format of the Proposals, the Public Entity demonstrates that it is looking for more from Submitters than a generalized marketing statement and encourages more relevant targeted submissions that can be evaluated more efficiently by the Public Entity.

Without question, the approach outlined in this Memorandum will require careful thought and consideration by Public Entity officials, staff and their advisors and a significant time investment. Admittedly not all of the suggestions will be appropriate for every situation. However, it is important to consider that the decisions reached in selecting a Private Entity partner for a broadband P3 can greatly influence the ultimate success of the Public Entity's objectives for years and even decades to come. In most cases it will be well worth the time and effort invested.