

CLOSING THE “DIGITAL DIVIDE” IN NEW MEXICO

A Legal “White Paper” Exploring How New Mexico Public
Entities Can Participate in Expanding Broadband Access
November 2022

*By Marcus McCarty, Senior Consultant University of Missouri System
& Adjunct Professor of Law University of Missouri-Kansas City School
of Law*

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Supported in part through a grant provided by Finley Engineering Company, Inc*

Table of Contents

Introduction	1
Why Was This White Paper Written?	1
States Will Administer Most of the New Federal Funding	1
Federal Funding Programs Require a State or a Local Government Match.....	1
Federal Government Bias for Public-Private Partnerships	2
Each State’s Approach to Economic Development Is Unique	2
Who Should Use this White Paper?.....	2
How to Use this White Paper & Understanding Its Limitations.....	3
<i>What Is a Public-Private Partnership (P3) & Why Is it Needed to Bridge the Digital Divide?.....</i>	5
P3’s Defined.....	5
Why Are P3s Used for Broadband?	6
New Mexico Broadband Policy & P3’s	7
<i>Traditional Public Economic Development Tools.....</i>	8
Introduction.....	8
Tax-Exempt Financing.....	8
How Does Tax-Exempt Financing Help Close a Financing Gap?	8
Categories of Tax-Exempt Bonds.....	9
Tax Assessments and Tax Assessment Financing	10
Property Tax Exemption and Sales Tax Exemption.....	11
Tax Increment for Development District Financing	12
Special Taxing Districts	13
State Tax Credits	13
<i>The Private Partner’s Federal Tax Requirements and “State Law” Ownership of Broadband Assets</i>	15
Federal Income Tax Ownership vs. State Law “Title”	15
Depreciation, Investment Tax Credit & Other Federal Tax Benefits – Accommodating a Public Entity or NGO.....	16
<i>Federal Preemption Limits on State and Local Regulation of Broadband.....</i>	17
The Telecommunications Act of 1996 and Broadband	17
The New Mexico PRC and Telecommunications Services.....	17
<i>The Connect New Mexico Council; Department of Information Technology (DoIT) and Office of Broadband Access and Expansion (OBAE)</i>	20
DoIT and ARRA & the 2020 Broadband Plan	20
The Connect New Mexico Council & Office of Broadband Access and Expansion (OBAE).....	20

Connect New Mexico Pilot Program.....	21
<i>Organization of New Mexico Government</i>	22
State Government.....	22
The New Mexico Constitution	22
The State Legislature	22
Relevant Executive Branch and Departments	22
Local Government Public Entities.....	23
Counties	23
Cities, Towns and Villages -- Municipalities.....	23
Other Public Entities	23
<i>Relevant Limitations on Public Entity’s Power -- Dillon’s Rule, Home Rule Jurisdictions, the Antidonation Clause & Other Restrictions</i>	24
Dillon’s Rule and Broadband.....	24
An Exception: Home Rule Municipalities	24
The Antidonation Clause	25
Introduction	25
Exceptions to the Antidonation Clause	27
Limits on Legislative Appropriations to Nonprofits	28
Public Use Doctrine & Eminent Domain	28
<i>Legislative Authorization for Public Entities to Construct, Own, Operate and Finance Broadband Infrastructure</i>	29
Introduction.....	29
Discretionary Power of the Governing Body of Public Entities.....	29
The Infrastructure Development Zone Act	30
Cooperation Among Public Entities – the Joint Powers Agreement Act	31
<i>Statutory Authority for Local Government to Participate in Public-Private Partnerships for Broadband Infrastructure</i>	31
The Local Economic Development Act (LEDA).....	32
Qualifying Entity and Eligible Projects	32
LEDA General Provisions.....	33
Accessing Public Funds	33
Tax Increment for Development Act (TIDA)	33
Industrial Revenue Bond Financing	34
County Industrial Revenue Bonds	34
Municipality Industrial Revenue Bonds	35
Using the Industrial Revenue Bond Act for Broadband Infrastructure	35

New Mexico’s Nonprofit Corporation Statute	36
Purposes, Powers, and Restrictions	36
Federal Tax Exemption for an NGO that Lessens the Burdens of Government.....	36
Using “Publicly Aligned” NGOs organized under the General Nonprofit Corporation Act -NGO Financing on Behalf of a Public Entity	37
Potential Issue With New Mexico’s Participation in IJA Grant Programs	37
<i>New Mexico Specific Broadband & Right-of-Way and Easement Issues.....</i>	38
Legislation Permitting Use of Public Right-of-Way	38
Restrictive View of Existing Easements	38
<i>Recent Proposed Legislation</i>	41
Introduction.....	41
Legislation to Implement HJR 1 (the 2022 Amendment to the Antidonation Clause) and to Expand the Role of Commercial ISPs and Utilities in Broadband Deployment.	41
Easements and Land Use.....	41
2021 Proposed Legislation	41
2022 Proposed Legislation	42

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 New Mexico 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

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 IIJA’s Broadband Equity, Access and Deployment (BEAD) Program requires that states match supply 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.

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>. The primary broadband infrastructure funding under the IIJA is the Broadband Equity, Access and Deployment or (BEAD) grant program.

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 assigned to the NTIA, the FCC’s 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. As discussed [later](#), federal funding under the BEAD program is contingent on allowing private and public entities to apply for funding.

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 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 public entities (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 government) to address the problem. In most cases, neither the private sector (*Private Entities*) nor the public sector (*Public Entities*)⁶ 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.

New Mexico 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. New Mexico 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 New Mexico, may not work in other states, and some solutions used in other states, cannot be used in New Mexico 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 New Mexico law that will affect the development of a workable public-private partnership solution to the digital divide in their community.

⁶ It is not always easy to distinguish between “Public Entities” and “Private Entities.” “Public Entities, certainly includes the United States, federal agencies, the State of New Mexico and its departments, counties, cities, towns and villages, but it also includes any number of additional “public corporations” that are “clothed with the power of levying or providing for the levy of general or special assessments.” [N.M. Stat. Ann. § 73-14-3](#) (definition of “public corporations for purposes of Artesian Conservancy District statute). Using this definition, a Public Entity would not include corporations formed under New Mexico’s business corporation statute [N.M. Stat. Ann. § 53-12-1](#) (and following) or non-profit corporations [N.M. Stat. Ann. § 53-8-1](#) (and following).

How to Use this White Paper & 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 New Mexico 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.⁷ 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.⁸ 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 P3's
- Common "Traditional" Economic Development Tools to Close a Financing Gap
- Project Ownership and Its Importance in Structuring a P3
- The Role of the Connect New Mexico Council and the Office of Broadband Access and Expansion
- Regulation of Broadband as a Public Utility through the New Mexico Public Regulation Commission
- New Mexico State and Local Government Organization
- Financing for Broadband – Public and Privately Owned
- Broadband-Specific Real Estate and Land Use Issues
- 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 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.

⁷ 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

⁸ For example, this review may be mandatory when seeking a federal grant such as under the [USDA Reconnect Grant Program](#).

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.

I want to thank my research assistant Henry Voysey, UMKC Law of School Class of 2023, for his diligent research and assistance in completing this project. Special thanks as well to Bradley Patterson, Shareholder, Gilmore & Bell, P.C., Salt Lake City Utah for his legal review and editorial suggestions. This White Paper was funded in part by a grant provided by Finley Engineering Company, Inc.

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

P3's 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 Public Entity, 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) agreement⁹ 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 contractor plays an important role, in partnership with the Public Entity, and is responsible for determining network design requirements that meet the Public Entity’s needs, and the contractor assumes the risk of constructing and delivering that network to the Public Entity 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 IDU 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 New Mexico 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, with the goal of emphasizing and enforcing areas of agreement and compromising on areas where interests diverge.¹⁰

⁹ 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.

¹⁰ 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.

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 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 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, there always is a "financing gap" for the broadband infrastructure project – a 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.

New Mexico Broadband Policy & P3's

In the past, New Mexico has tended to focus efforts to expand broadband access to favor Public Entity ownership and operation of Broadband.¹¹ This likely is due in large part to New Mexico's Antidonation Clause, which has at times created concerns that working jointly with private entities may involve an illegal public donation or "gift" to a private business. Whether those concerns are justified in a particular broadband P3, of course, is a matter that likely will require individualized legal advice,¹² but the fact remains that a – properly negotiated – P3 should be a contract and that implies both parties are negotiating to reach a reasonable mutual exchange of value, rather than a donation.

¹¹ See, *Gov. Lujan Grisham signs measures advancing broadband connection and development*, April 7, 2021, <https://www.governor.state.nm.us/2021/04/07/gov-lujan-grisham-signs-measures-advancing-broadband-connection-and-development/> (outlining initial funding to support broadband expansion by Public Entities). Compare with the Connect New Mexico Pilot Program, described later, that opens funding to Private Entities, and requires a 25% match from other funding partners.

¹² See the [section of this White Paper](#) discussing the Antidonation Clause and its exceptions.

Traditional Public Economic Development Tools

Introduction

Most broadband 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 decline along with local tax revenues, and eventually the overall quality of life in the community is adversely impacted. This is why New Mexico law recognizes that economic development is a “public purpose” justifying direct and indirect investment to promote economic development in a community.¹³

Broadband infrastructure projects (whether they eventually will be owned and operated by a private company or as a municipal utility) are no different. The costs 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. Many 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”¹⁴). Debt is also an important component of any Private Entity’s investment.

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

¹³ See, e.g., N.M. CONST. [Art. IX, § 14D](#) (exception to the Antidonation Clause); The Industrial Revenue Bond Act, N.M. REV. STAT. §§ [3-32-1](#) to [-16](#).

¹⁴ 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 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.

– that they retain.¹⁵ For those reasons, all other things being equal, interest rates on tax-exempt bonds are typically lower than taxable bonds.¹⁶ 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

Federally Taxable/State Tax Exempt

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 New Mexico 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.¹⁷ So, the fact that a bond is exempt from New Mexico income tax does not significantly increase the investment’s after-tax return, when compared to a fully taxable bond. In New Mexico, interest on all debt that is exempt from federal income tax is also exempt from New Mexico income tax. In addition, the taxable debt of many Public Entities, other than New Mexico counties and cities, is exempt from New Mexico income tax as well.¹⁸

Qualified Broadband Project Private Activity Bonds

The second type of tax-exempt bond is exempt both from New Mexico income tax and from “normal” federal income taxes. However, this debt is subject to a special type of federal income tax called the alternative 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 IJA added a new specific category of tax-exempt AMT bonds to the Internal Revenue Code (IRC)¹⁹ for qualified broadband projects.²⁰ If the broadband infrastructure project meets all requirements for tax-exempt financing,²¹ broadband project tax-exempt bonds can be used by a Public Entity to finance a

¹⁵ 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).

¹⁶ 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 taxable bond when compared to a tax-exempt bond.

¹⁷ Currently 5.9% for individuals and 5.9% for corporations. See N.M. STAT. ANN. §§ [7-2-7](#), [2A-5](#).

¹⁸ See N.M. STAT. ANN. § [7-2A-2\(C\)](#); see also N.M. STAT. ANN. § [4-59-12](#) (County Industrial Revenue Bonds).

¹⁹ 26 U.S.C. §142, as amended. Throughout the balance of this White Paper, sections of the Internal Revenue Code will be referred to as “IRC”.

²⁰ 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.

²¹ There are many other limitations that apply to these bonds. Among them is a requirement that the state, through the New Mexico, designate the project to receive a portion of the state’s overall private activity bond allocation limit. [I.R.C. § 146](#); N.M. REV. STAT. ANN. §§ [6-20-1](#) to [-11](#).

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) Bonds 22

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 Public Entity, but unlike the Qualified Broadband Project Private Activity Bonds described above, the Public Entity 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 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.

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.²³ 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

²² [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.

²³ See, e.g., N. M. STAT. ANN § [53-33-1](#) to -43.

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 in the district 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 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.

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 New Mexico Statutes permit counties and municipalities to finance many types of commercial facilities and equipment, 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?

Property titled in a political subdivision is exempt from all real and personal property taxes.²⁴ 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

²⁴ See N.M. STAT. ANN. [§ 7-36-3](#) (tenant’s interest in the property is exempt for no more than 30 years).

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 also elect to cooperate with the Private Entity to structure the purchase of certain materials and equipment used in the construction of the project from retail sales tax. This involves using various structures designed to take advantage of the Public Entity's exemption from gross receipts and compensating tax (sales tax).²⁵

Like the property tax exemption, this will involve transferring legal title to the project or the items purchased to construct the project to a Public Entity. 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 8%, the economic impact of this incentive can be substantial.

New Mexico's Industrial Revenue Bond statute²⁶ authorizes this type of conduit financing for a designated "project," which could include:

"a business in which all or part of the activities of the business involve the supplying of services to the general public or to governmental agencies or to a specific industry or customer...."²⁷

Tax Increment for Development District Financing

Tax increment for Development District Financing or (TIDD Financing)²⁸ and similar provisions in most other states have been a proven method of raising significant "public capital" to assist in economic development projects. New Mexico's statute authorizes cities and counties, with the approval of property owners to use this economic development financing tool.

In its simplest form, TIDD involves "freezing" the assessed value of land and related improvements in a specific area of a city or county (a 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 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. This amount (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 district directly, or more often to fund debt service on TIDD 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 TIDD 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

²⁵ See Regulation [§ 3.2.212.22](#) NMAC (sets out the procedure for obtaining an exemption certificate)

²⁶ N.M. STAT. ANN. § [3-32-1](#) to -16.

²⁷ N.M. STAT. ANN. § [3-32-1](#)(B)(3). The applicability of the statute is discussed in greater detail [later](#) in a separate section.

²⁸ N.M. STAT. ANN. § [5-15-1](#) to [-29](#).

would rise to \$600,000 (6% of \$10,000,000). Because of the TIDD, only \$6,000 is distributed to the various local taxing districts and the remaining \$594,000 “increment” is diverted to pay public improvement costs identified and approved by the public entity and authorized by statute.²⁹

New Mexico allows an “increment” on locally (county and municipality) imposed gross receipts taxes to be added to the property tax increment along with the property tax. In addition, New Mexico authorizes a TIDD to impose a separate ad valorem real estate property tax to help pay for development costs.³⁰ As discussed in a later [section](#), the TIDA can be used to finance public broadband infrastructure.

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. These districts typically rely on enterprise revenues and new taxes imposed on property or transactions within the district to finance specific improvements or services. As discussed in greater detail later, New Mexico’s primary special taxing district statute that potentially could be useful in supporting broadband is the Infrastructure Development District Act.³¹

State Tax Credits³²

State tax credits, particularly transferrable or refundable tax credits can be an important tool a Public Entity can use to help raise Private Entity equity capital to support a Project. The financing structure used to include transferable State Tax Credits is complex, but typically involves a direct equity investment in a project that qualifies for the issuance of a state tax credit. That credit can in turn be sold or specially allocated (at a discount) to investors that otherwise can use them to offset a state tax liability. The proceeds of the sale or allocation in turn can dedicated to fund costs of an eligible project. New Mexico has many tax credit

²⁹ N.M. STAT. ANN. § 5-15-3(S).

³⁰ N.M. STAT. ANN. §§ 5-15-13 (property tax), -15 (gross receipts tax)

³¹ N.M. STAT. ANN. §§3-33-1 to -43

³² New Mexico (though the New Mexico Finance Authority) actively participates in the Federal New Markets Tax Credit program, through an entity that seeks allocation of Federal New Markets Credits from the Federal Government. See *New Markets Tax Credit Program*, N.M. FIN. AUTH., <https://www.nmfinance.com/business-financing/new-markets-tax-credits/#:~:text=The%20New%20Markets%20Tax%20Credit,job%20creation%20and%20development%20activities> (last visited Aug. 17, 2022). As discussed in a [later section](#), New Markets Tax Credits can be an important financing tool for capital investment in economically distressed communities, and recently have been used in other states to finance privately owned broadband infrastructure. NEW MARKETS TAX CREDITS EXPANDS BROADBAND IN APPALACHIAN OHIO, CDFI FUND, <https://www.cdfifund.gov/sites/cdfi/files/documents/nmtc-greatwave-impact-story-041917.pdf>.

programs,³³ but none appear to currently be directed to broadband internet infrastructure, although some changes have been proposed to existing credit programs to include broadband infrastructure.³⁴

³³ See FYI-106 FOR YOUR INFORMATION: CLAIMING BUSINESS-RELATED TAX CREDITS FOR INDIVIDUALS AND BUSINESSES, N.M., TAX'N & REVENUE DEP'T, (June 2020), <https://www.tax.newmexico.gov/wp-content/uploads/sites/6/2020/10/FYI-106-Claiming-Business-Related-Tax-Credits-for-Individuals-and-Businesses-1.pdf>.

³⁴ See, e.g., H.B. 15 <https://www.nmlegis.gov/Sessions/21%20Regular/bills/house/HB0015.HTML> (proposed to amend the Sustainable Building Tax Credit (N.M. STAT. ANN. § 7-2-18.19 (1978)) to include broadband infrastructure ready commercial buildings).

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 generally prohibited by law.³⁵ 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.

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.³⁶

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.³⁷ 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.

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

³⁵ See N.M. REV. STAT. ANN. [§ 6-1-13](#).

³⁶ 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.

³⁷ 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.

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 asset³⁸ or using tax-exempt bonds to finance the asset³⁹ 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.⁴⁰

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.

³⁸ [I.R.C. § 168\(g\)\(1\), \(5\)](#).

³⁹ [I.R.C. § 168\(g\)\(1\), \(h\)\(1\)](#).

⁴⁰ 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 government 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.⁴¹ 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 New Mexico PRC and Telecommunications Services.

In New Mexico, the Public Regulation Commission (PRC) has the authority to regulate utilities as provided by law.⁴² However, in most respects telecommunications are not currently regulated under the Public Utilities Act.⁴³ and the PRC currently generally does not regulate electric and gas utilities operated by municipalities, counties, and cooperatives.⁴⁴ Currently an elected position, in 2023, members of the PRC will be appointed by the governor, as a result of various constitutional amendments and changes to its statute, the role of the PRC is now in large part confined to the regulation of electric, water, gas, and telecommunication utilities.⁴⁵ In response to Congress’ preemption under the Federal Telecommunications

⁴¹ [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). New Mexico’s exercise of this power is described [later](#) in this White Paper in the section dealing with real estate and land use issues.

⁴² N.M. CONST. [art. XI, § 1](#).

⁴³ In *Re Qwest Communications Intl.*, [42 P.3d 1219](#) (N.M. 2002). But see [N.M. REV. STAT. ANN. § 62-19-18](#) that becomes effective January 1, 2023 and which would create a telecommunications bureau as a division of the PRC with authority to investigate complaints and review disputes between telecommunications providers and matters arising under N.M. Rev. Stat. Ann. Chapter 63.

⁴⁴ N.M. REV. STAT. ANN. [§ 62-6-4](#).

⁴⁵ N.M. REV. STAT. ANN. [§ 8-8-12](#)

Act, the New Mexico Public exercises limited jurisdiction over traditional intrastate (local) telecommunication services offered, but has no jurisdiction over internet service providers.⁴⁶

The PRC and Electric Utility Providers

Electric utilities could be critical partners in bridging the digital divide – providing internet service to residences and businesses, primarily because over the past twenty years they have installed fiber optic cable to regulate and control their utility assets. These assets, in theory, have the capacity to provide internet service to residences and businesses as well. However, New Mexico faces some unique state law regulatory challenges described here and discussed [later](#) in the section dealing with real estate easement and right of way issues. However, neither investor-owned utilities nor cooperatives are eligible to participate in New Mexico’s broadband grant program, and until or unless enabling legislation is adopted to implement the November 2022 changes to the New Mexico Constitution’s Antidonation, both investor-owned utilities and cooperatives likely will not have access this important source of funding.⁴⁷

Regulated Investor-owned Electric Utilities

The New Mexico Public Regulations Commission (PRC) generally regulates rates (tariffs) charged by investor-owned utilities in New Mexico. There are three investor-owned electric utilities currently operating in New Mexico: Xcel Energy, El Paso Electric, and Public Service Company of New Mexico.⁴⁸ None of which currently are providing internet service.⁴⁹ In other states investor-owned utilities that are subject to 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. As discussed, [later](#), bills have been introduced in the New Mexico State Legislature to resolve this issue, but none has been enacted up to this point.

⁴⁶ See Public Regulatory Website, consumer relations, for an explanation of its role in administering telecommunications <https://www.nm-prc.org/consumer-relations/faqs/jurisdiction-list/> and <https://www.nm-prc.org/consumer-relations/no-jurisdiction-resource-list/> (Last accessed 8-10-2022)

⁴⁷ See the discussion of the [Antidonation Clause](#). Most recently, the N.M. Att. Gen. Opinion [2022-06](#) (July 19, 2022) found that a cooperative could not participate in grants under the Connect New Mexico Grant Program ([N.M. REV. STAT. ANN. § 63-9K-6](#)). That conclusion is warranted under the language of the statute and the grant program documents. However, [discussed elsewhere](#), public support and funding for investor-owned or cooperative owned broadband might be justified for economic development and job creation. See [Statutory Authority for Local Government to Participate in Public Private Partnerships for Broadband Infrastructure](#).

⁴⁸ See *New Mexico Utility Energy Efficiency Programs*, S.W ENERGY EFFICIENCY PROJECT (Dec. 2018), <https://www.swenergy.org/utilities/states/newmexico#:~:text=Updated%3A%20December%202018-.Overview,521%2C000%20customers%20as%20of%202017>.

⁴⁹ See utility websites for Xcel Energy <https://nm.my.xcelenergy.com/s/>; El Paso Electric <https://www.epelectric.com/> and Public Service Company of New Mexico (PNM) <https://www.pnm.com/>. In other states, Xcel Energy has agreed to lease access on its poles to a municipality that intends to provide broadband service. See Kim Riley, *City of Boulder, Colo., Xcel Energy revise franchise, partnership agreements*, DAILY ENERGY INSIDER (Aug. 19, 2020), <https://dailyenergyinsider.com/featured/26789-city-of-boulder-colo-xcel-energy-revise-franchise-partnership-agreements/>; Joan Engebretson, *Local N. Mexico Providers Form Network with Plans to Span the State*, TELECOMPETITOR (Apr. 26, 2022), <https://www.telecompetitor.com/local-n-mexico-providers-form-nm-fiber-network-with-plans-to-span-the-state/> (all last accessed 8/10/2022);

Cooperatives

Generally, the PRC does not regulate rates for cooperatives, and they are free to form subsidiaries to deliver broadband service.⁵⁰ As a result several New Mexico rural electric and telecommunication cooperatives are either offering or planning to offer high-speed internet service.⁵¹

⁵⁰ See N.M. STAT. ANN. §§ [62-15-3](#), -3.1 (broadband), -3.1(D).

⁵¹ Collin Krabbe, *Grants-Based cooperative planning broadband project for the Pueblo of Zuni*, Bus. Js.: NEWMEXICOINNO (Mar. 11, 2022), <https://www.bizjournals.com/albuquerque/inno/stories/news/2022/03/11/cdec-partners-with-zuni-pueblo-on-broadband.html>; CONT'L DIVIDE, <https://www.cdec.coop/broadband> (last accessed Aug. 18, 2022); RED BOLT BROADBAND, <https://redboltbroadband.com/> (last accessed Aug. 18, 2022).

The Connect New Mexico Council; Department of Information Technology (DoIT) and Office of Broadband Access and Expansion (OBAE)

A primary purpose of this White Paper is to describe traditional 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 historical context, along with a summary of the state's grants and current plans to participate in federal broadband grant programs.

DoIT and ARRA & the 2020 Broadband Plan

The Department of Information Technology (DoIT) was created in 2007⁵² as an executive department to focus on and improve state information technology systems. It obtained planning grants through the American Recovery and Reinvestment Act (ARRA) programs.⁵³ It also commissioned several broadband strategic plans⁵⁴ centered around broadband access and adoption. Like other states, cooperatives in New Mexico took advantage of ARRA funding to expand broadband service, but other programs offered through the FCC auctions have had more mixed results.⁵⁵ In June 2020, DoIT released a 191-page comprehensive broadband strategic plan. The 2020 Broadband Strategic Plan made multiple recommendations, including leveraging federal funding with state grants, emphasizing the development of fiber broadband to “future proof” broadband infrastructure, supporting local company and government efforts to deploy broadband, and elevating the state's broadband office.⁵⁶

The Connect New Mexico Council & Office of Broadband Access and Expansion (OBAE)

In the 2021 legislative session, new laws were passed to begin implementing these recommendations.⁵⁷ This legislation included passage of House Bill 10, the “Connect New Mexico Act”.⁵⁸ The Act created the 15-member Connect New Mexico Council, composed of representatives of various government departments, the governor, legislature, and Indian tribes. The Connect New Mexico Council meets monthly and is tasked with implementing the statewide broadband plan, evaluating and prioritizing grant proposals and making grant awards from the Connect New Mexico Fund, and adopting rules regulating a competitive grant program.

⁵² N. M. STAT. ANN. § 9-27-1 to -27.

⁵³ See, e.g., *New Mexico Department of Information Technology*, NAT'L TELECOMM. & INFO. ADMIN. <https://www2.ntia.doc.gov/grantee/new-mexico-department-of-information-technology-0> (last accessed Aug. 18, 2022).

⁵⁴ <https://www.ctcnet.us/wp-content/uploads/2018/04/New-Mexico-Strategic-Plan.pdf> and https://www.doit.nm.gov/wp-content/uploads/sites/4/2022/03/nmbbp_digital_literacy_strategic_plan.pdf

⁵⁵ *State of New Mexico Broadband Strategic Plan and Rural Broadband Assessment*, N.M. DEP'T INFO. TECH. 1, 4-5 (Dec. 2014) <https://www.ctcnet.us/wp-content/uploads/2020/07/New-Mexico-Broadband-Strategic-Plan-20200616.pdf> (the 2020 Broadband Strategic Plan).

⁵⁶ *Id.* at 9-18.

⁵⁷ See *New Mexico Broadband Program Update*, N.M. DEP'T INFO. TECH. (November 29, 2021), <https://www.nmlegis.gov/handouts/TIRS%20112921%20Item%201%20A%20Sambandam.pdf>.

⁵⁸ 2021 N.M. LAWS Ch. 120; N.M. REV. STAT. §§ 63-9K-1 to -6.

Senate Bill 93⁵⁹ created an office of broadband access and expansion (OBAE or “Broadband Office”) within the DoIT that is to be headed by a director appointed by the Governor. Among other responsibilities, the OBAE is tasked with developing and administering a statewide broadband plan.⁶⁰ [Senate Bill 377](#)⁶¹ appropriates money to the Connect New Mexico Fund for fiscal years ending 2021 to 2026. This money is to be used for the following purposes: (1) \$70,000,000 to plan, design, engineer, construct, purchase, and equip broadband infrastructure; (2) \$25,000,000 to plan, design, engineer, construct, purchase, and equip broadband infrastructure for public schools; (3) \$5,000,000 general fund for grants to local governments, tribes, electric cooperatives and telephone cooperatives for strategic planning and grant writing support for broadband service in unserved areas; (4) \$500,000 to fund the creation of the OBAE.

Connect New Mexico Pilot Program

Finally, HB 2, adopted on December 21, 2021,⁶² appropriated approximately \$126,000,000 to DoIT to renovate and equipment broadband statewide. In response, on August 10, 2022, OBAE issued a Notice of Funding Opportunity for a “Connect New Mexico Pilot Program” to make grants for broadband infrastructure statewide. Unlike prior grant programs, and consistent with Federal funding requirements on Broadband infrastructure grant programs paid from ARPA funds, the Program is open to for-profit ISPs, utilities, and cooperatives as well as state, local, and tribal governments.⁶³

⁵⁹ 2021 N.M. LAWS Ch. 123; N.M. REV. STAT. §§ [63-9J-1](#) to -4.

⁶⁰ [N.M. Stat. Ann. § 63-9J-2\(G\)](#) the plan is to include “commended statutory changes and implementation procedures, for the development and expansion of broadband infrastructure and services throughout the state to meet the needs: (1) for the delivery of internet-based educational, medical and emergency services; (2) for local and tribal communities to foster and recruit internet-reliant business and industry and to promote economic development and job creation; and (3) to support internet-reliant state, local and tribal government agency functions and facilitate the delivery of governmental services in a manner that is competitive with similar government agencies in neighboring states.”

⁶¹ 2021 N.M. LAWS Ch. 140, § 17 (April 9, 2021).

⁶² General Appropriation Act of 2021, H.B. 2, 2021 Reg. Sess. (available at <https://www.nmlegis.gov/Sessions/21%20Special2/final/HB0002.pdf>)

⁶³ *Notice of Funding Opportunity (NOFO): Connect New Mexico Pilot Program*, N.M. OFF. BROADBAND ACCESS & EXPANSION (Aug. 10, 2022), <https://api.realfile.rtsclients.com/PublicFiles/16569e3bf98c467e95901b46fd511499/4de96794-cd8c-4811-b3f9-89f864aeb042/pilot-program-nofo-2022-08-10.pdf> (August 10, 2022) (last accessed August 16, 2022).

Organization of New Mexico Government

Unlike private business and nonprofit institutions (Private Entities), the authority and power of state and local government to act (to contract, issue debt, spend money, operate enterprises) is specifically circumscribed and limited. While it is often possible to work around, or to structure a P3 agreement in a manner that adapts to these constraints, these differences must be understood and carefully navigated. Ignoring it 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 New Mexico government (and its many potential Public Entity “partners”) are organized. It then describes general rules governing the ability of New Mexico 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.

State Government

Like most states, New Mexico has three independent branches of state government: an executive branch, a bicameral legislature (consisting of a house of representatives and a senate), and a judiciary.

The New Mexico Constitution

The framework for New Mexico’s government is established by its Constitution that was ratified in 1910 and became effective February 14, 1912, when New Mexico was admitted as a state.⁶⁴ The Constitution governs how New Mexico's state government is organized and establishes the general framework for the organization and operation of counties and municipalities.

The State Legislature

The New Mexico Legislature consists of a House of Representatives (70 members) and a Senate (42 members) elected to 2- and 4-year terms, respectively.⁶⁵ It exercises legislative power in New Mexico. The State Legislature 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 United States and New Mexico Constitutions.

Relevant Executive Branch and Departments

The executive branch is led by the Governor and includes an elected Lieutenant Governor, Attorney General, Secretary of State, State Auditor, State Treasurer, and Commissioner of Public Lands.⁶⁶ The Governor

⁶⁴ David L. Robbins, *New Mexico Constitutional History*, CONSTITUTING AMERICA (2022), <https://constitutingamerica.org/new-mexico-constitutional-history-guest-essayist-the-honorable-david-l-robbins/#:~:text=The%20New%20Mexico%20Constitution%20became,constitution%20on%20November%205%2C%201911.>

⁶⁵ *The New Mexico Legislature*, N.M. MUN. LEAGUE, <https://nmml.org/legislative-news/new-mexico-legislature/> (last accessed Aug. 18, 2022).

⁶⁶ NEW MEXICO GOVERNMENT, N.M. SECRETARY OF STATE: ABOUT NEW MEXICO, <https://www.sos.state.nm.us/about-new-mexico/nm-government/>.

appoints a cabinet that leads various agencies that have been created by statute. This includes the Department of Information Technology (DoIT).⁶⁷

Attached to the DoIT are the newly created “Connect New Mexico Council” (Broadband Council) & the “Office of Broadband Expansion (OBE).” The roles and responsibility of the Broadband Council and the OBE relevant to Broadband infrastructure projects was previously described in [a separate section](#) of this White Paper.

Local Government Public Entities

Local governing bodies consist of counties, municipalities and special districts.

Counties

New Mexico has 33 counties, classified as A, B – high and intermediate, and H (Los Alamos – which is actually a combined city-county government). Counties are generally classified based on population and the value of taxable property, and this classification primarily is relevant for the purposes of establishing the maximum salaries for county officials (commissioners, treasurer, assessor, sheriff, clerk, and probate judge).⁶⁸ Most Counties in New Mexico have only those powers granted in the New Mexico constitution (Dillion’s Rule [discussed later](#)). However, in 2017 Bernalillo County (which contains the City of Albuquerque) became a home rule incorporated county and derives its powers from its charter as well as state statutes.⁶⁹

Cities, Towns and Villages -- Municipalities

New municipal corporations can be called a city, town, or village. There is not a significant difference between those “names” and therefore all three will be referred to as a “municipality” or “municipalities” throughout the balance of the White Paper. Like new counties, most of New Mexico’s 106 municipalities⁷⁰ are subject to Dillion’s Rule (discussed later). However, currently 10 cities have elected a “home rule” form of government and are governed by a charter.⁷¹

Other Public Entities

New Mexico Statutes Authorize the creation of a number of other Public Entities (special districts, political corporations, and councils), some of which are authorized to fund and operate broadband infrastructure. These are discussed in later sections. 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 by voters. Many of

⁶⁷ DEPARTMENT OF INFORMATION TECHNOLOGY, NM.GOV, <https://www.nm.gov/departments-and-agencies/department-of-information-technology/>.

⁶⁸ [N.M. Stat. Ann. § 4-44-1](#); COUNTY CLASSIFICATIONS, N.M. DEP’T FIN. ADMIN., <https://www.nmdfa.state.nm.us/local-government/budget-finance-bureau/county-classifications/>.

⁶⁹ See BERNALILLO COUNTY CHARTER, <https://www.bernco.gov/county-manager/wp-content/uploads/sites/2/2021/08/2016-Bernalillo-County-Charter-CORRECTED.pdf>; . see also [N.M. CONST. art. X, § 6](#).

⁷⁰ *About NMML*, N.M. MUN. LEAGUE, <https://nmml.org/about-nmml/> (last accessed August 18, 2022)

⁷¹ See N.M. LEGIS., HOME RULE MUNICIPALITIES, https://www.nmlegis.gov/publications/handbook/home_rule_municipalities.pdf; see also N.M. CONST. [art. X, § 6](#).

these entities have broad powers to finance and, in some cases, may own and operate specific types of “projects” as a separate enterprise.

Relevant Limitations on Public Entity’s Power -- Dillon’s Rule, Home Rule Jurisdictions, the Antidonation Clause & Other Restrictions

Dillon’s Rule and Broadband

The state statutes governing most business entities (for-profit corporations, limited liability companies, and partnerships) and nonprofit corporations 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 rely on the broad grant of powers provided in the New Mexico Statutes⁷². Generally, these powers are broad enough to permit the corporation to engage in any business or activity that is permitted for an individual. 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 this may limit and restrict the role a Public Entity can play in a P3.

The powers of most (but not all) Public Entities in New Mexico are limited by a doctrine called “Dillon’s Rule.” Dillon’s Rule states that Public Entities have only those powers: granted in express words; (2) necessarily implied or necessarily incident to the powers expressly granted; and (3) absolutely essential to the declared objects and purposes of the corporation – not simply convenient but indispensable. Furthermore, any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.⁷³

Therefore, for Public Entities subject to Dillon’s Rule it will be very important to carefully analyze the New Mexico 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.

An Exception: Home Rule Municipalities

There’s an “exception to every rule,” and Dillon’s Rule is no exception to that old adage.

The New Mexico Constitution departs some from Dillon’s Rule and potentially grants certain New Mexico cities and certain counties the right to elect “home rule” status. These counties and cities will have more flexibility to work with private partners to develop broadband. Most New Mexico counties and cities are guided by Dillon’s Rule, and therefore must look to the New Mexico Constitution or state statutes for express

⁷² [N.M. Rev. Stat. Ann.](#) §53-8-5.

⁷³ Diane Lang, [Dillon’ Rule ... And the Birth of Home Rule](#), MUN. REP. (Dec. 1991); see, e.g., Dow v. Irwin, [157 P. 490](#) (N.M. 1915); El Dorado At Santa Fe, Inc. v. Board of County Comm’rs, [551 P.2d 1360](#) (N.M. 1976); Op. Att. Gen. N.M. [2018-03](#) (2018)

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 New Mexico 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 State Legislature *could confer* on the municipality or county under the New Mexico Constitution (even if it has not done so), *and* so long as neither the New Mexico Constitution nor state law *has prohibited* the municipality or county from exercising this power. As a practical matter, many local charters or constitutions are written with broad delegation of powers to the governing body. This means the home rule county or municipality can take any action and participate in a broadband P3 in any capacity municipality, so long as it is not prohibited by the New Mexico Constitution, state statutes or the local charter or constitution itself.⁷⁴

The Antidonation Clause

Introduction

Any discussion of the use of public-private partnerships New Mexico must include a discussion of the Antidonation Clause— a limitation and restriction imposed by Article 9, Section 14 of the New Mexico Constitution:

“Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation”

While almost every state has a similar provision prohibiting the expenditure of public funds for a private purpose, almost without exception they also recognize that so long as an expenditure of public funds serves a “public purpose,” *incidental* private benefit enjoyed by a private person or corporation is permissible and can be ignored.

However, a 1915 decision of the New Mexico’s Supreme Court set New Mexico on a different trajectory.⁷⁵ In that case William Harrington challenged a \$500 appropriation by a County Board of Commissions to a corporation that hosted a county fair. The Commissioners argued that the money was well-spent for the public good, as such events helped provide a showcase for agricultural products and helped spur economic development. While acknowledging this was true, the opinion of the Court found it to be irrelevant in light of the constitutional language:

The language of the constitutional provision is so clear and explicit that it does not require construction; all that need be done is to read it and apply the language in its ordinary sense. It prohibits the state, county, and other agencies of the state named, from making any donation to or in aid of any person, association, or public or private corporation, except as otherwise provided in the Constitution. Therefore, an act of the Legislature appropriating money, or directing a county to appropriate money to a private corporation engaged in conducting a county fair, for the purpose of paying premiums on agricultural and horticultural

⁷⁴ See generally, *Cities 101*, NAT’L LEAGUE CITIES, <https://www.nlc.org/resource/cities-101-delegation-of-power/>.

⁷⁵ *Harrington v. Atteberry*, [21 P. 153](#) (1915).

and other exhibits, which is a duty assumed by such corporation, is in conflict with section 14 of article 9 of the state Constitution, prohibiting donations to persons, associations, and public and private corporations.⁷⁶

The constitutional provision contains an exception for the care of the sick and indigent, and over the years additional exceptions have been added. In 1994, an amendment was added for donations designed to spur job creation.⁷⁷

In January 2022, the New Mexico legislature authorized an election to add yet another targeted exception for public infrastructure.⁷⁸ Approved by the voters in the November 8, 2022, general election, the New Mexico Constitution amended article 9, section 14 to read:

Nothing in this section prohibits the state from expending state funds or resources for the purpose of providing essential services primarily for residential purposes if the assistance is granted pursuant to general implementing legislation approved by a majority vote of those elected to each house of the legislature. The implementing legislation shall provide for accessibility to essential services primarily for residential purposes and include safeguards to protect public money and other public resources used for the purposes authorized in this subsection. As used in this subsection, "essential services" means infrastructure that allows internet, energy, water, wastewater or other similar services as provided by law." [Emphasis added]

Obviously, this amendment potentially eliminates a major impediment for Public Entities that wish to participate and support P3s that are designed to deploy broadband for residential, noncommercial use. When paired with the previously described exception for "job creation" the Antidonation clause may no longer prohibit New Mexico from using P3s to implement broadband deployment. However, it is important to emphasize that the amendment is not self-executing; it requires enabling legislation to be passed by the New Mexico Legislature to become effective. That legislation hopefully will be crafted and adopted during the 2023 legislative session. Once that happens, it will be much easier to structure a P3 that involves the contribution of money or assets to assist in the development of broadband infrastructure for New Mexico's residents.

At present, however, it must be recognized that the language used in the clause is quite broad, purporting to not only bar donations or the lending of credit to Private Entities, but to "public corporations" as well. While case law seems to have limited the scope of the Antidonation Clause to donations and the lending of credit in situations where the donation or lending of credit involved a subordinate governmental entity and the State itself,⁷⁹ the fact that the question has arisen and been litigated in such a case is testament to the vitality and breadth of the Antidonation Clause. Even following adoption of the additional exception through

⁷⁶ Harrington, at pages 54-55.

⁷⁷ [N.M. Const. Art. IX, §14\(D\)](#). "Nothing in this section prohibits the state or a county or municipality from creating new job opportunities by providing land, buildings or infrastructure for facilities to support new or expanding businesses if this assistance is granted pursuant to general implementing legislation that is approved by a majority vote of those elected to each house of the legislature. The implementing legislation shall include adequate safeguards to protect public money or other resources used for the purposes authorized in this subsection. The implementing legislation shall further provide that: (1) each specific county or municipal project providing assistance pursuant to this subsection need not be approved by the legislature but shall be approved by the county or municipality pursuant to procedures provided in the implementing legislation; and (2) each specific state project providing assistance pursuant to this subsection shall be approved by law."

⁷⁸ [House Joint Resolution 1](#) (January 19, 2022).

⁷⁹ See, e.g., *White v. Board of Education of Silver City*, [75 P.2d 712](#) (N.M. 1938) (School District's issuance of bonds to construct a "state school" is not a lending of credit to the state).

in the 2022 amendment to Antidonation Clause, Each proposed project likely needs to be carefully examined by local legal counsel to determine its legality.

Exceptions to the Antidonation Clause

But even assuming the Antidonation Clause amendment had not been adopted, there other methods exist to infrastructure broadband P3s. Several of these are discussed below.

New Jobs – New & Expanded Business

First, access to broadband often leads to enhanced economic development and employment in a community. This is true not only with respect to the jobs created in constructing, maintaining, and operating a broadband network, but through indirect gains in employment as well.⁸⁰ Assuming the statutory criteria and requirements are satisfied, providing public funding for public and private entities may be permitted to support new jobs created as a result of a new or expanded ISP network, and spin off businesses as well.⁸¹

Bargained-for Consideration

Second, to trigger the Antidonation Clause claim, there must be a “donation.” The clause does not apply to expenditures of public funds or the appropriation of money or property for adequate consideration. Thus, for example, a municipality or county issuing industrial revenue bonds to finance a project leased to and payable solely from payments made by a private company does not violate the Antidonation Clause because there is nothing given by the municipality that is not fully compensated for – there is no “donation,” even if the private corporation may benefit in some way – through the contractual arrangement.⁸² Furthermore, the consideration received may not necessarily need to take the form of a cash payment. For example, a recent New Mexico Attorney General Opinion concluded that the Antidonation Clause would not be violated on account of a forest service grant to a private entity for the purpose of remediating noxious weeds on its land, reasoning that the forest service’s own land likely benefited from the action because the spread of weeds onto its property was reduced.⁸³

State or Local Government Serves as a Pass-Through

Third, the Antidonation Clause also has been held inapplicable if the funds are not from the general funds of a county/municipality. In *Hotels of Distinction W., Inc. v. City of Albuquerque*, 755 P.2d 595, (N.M. 1988), the New Mexico Supreme Court rejected the argument that the clause could be read to include funds provided to a private hotel developer that was funded by the federal government for the express purpose of funding economic development projects. This arrangement seems very similar to the use of ARPA funds

⁸⁰ See for example, MU Extension, “[The Economic Benefits of Expanding Broadband in Missouri](#)” (2022) and New Mexico Economic Development Department, “[2019 House Memorial 16 Economic Development Innovation Task Force Report](#)” (2019). See also Williams, et. al., Economic Development You Can Do With (or in spite of) the NM Antidonation Clause,” Presentation to the Municipal Official Leadership Institute, September 25, 2014, https://www.nmmainstreet.org/WPBeta/wp-content/uploads/2018/06/NMMS.ED_MOLI_presentation.pdf (last accessed August 8, 2022).

⁸¹ [N.M. CONST. art. IX, §14\(D\)](#). Of course, those programs must be pursuant to “implementing legislation that is approved by a majority vote of those elected to each house of the legislature,” but that legislation is [discussed later](#) in this White Paper. See N.M. REV. STAT. §§ [5-10-1](#) to -17.

⁸² *Village of Deming v. Hosdreg Co.*, 303 P.2d 920 (N.M. 1956); see also N.M. Att. Gen. Advisory Opinion [No. 2002-02](#) (June 13, 2002) (Development agreement between private developer and municipality that provided for transfer of sales tax revenue derived from development up to half of its cost in exchange for commitment to construct the public and private improvements to the city).

⁸³ N.M. Att. Gen. Advisory Opinion [No. 2022-04](#) (April 4, 2022).

granted to the state, counties, and cities to finance broadband projects, and it likely will apply to BEAD program grants under the IIJA as well. In each case, the state, municipality, or county is acting as a conduit for funds provided by others rather than donating its own funds.

Most recently, on July 19, 2022, the New Mexico Attorney General issued a formal legal opinion⁸⁴ that confirmed two important points. First, it noted that the [Joint Powers Agreement Act](#) was available as a means for intergovernmental cooperation for the development of broadband infrastructure. Second, with respect to the Antidonation Clause, it concluded that it was inapplicable because the money provided was from a federal grant – channeled through a state agency.

Limits on Legislative Appropriations to Nonprofits

Somewhat related, but much less troubling than the Antidonation Clause is the separate limitation on appropriations by the state legislature for charitable purposes. Article IV, § 31 provides:

No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state,

However, this language has been read literally to apply only to the *state legislature's appropriation*, and not to the “end use” of the money. For example, in *Moses v. Ruszkowski*, [458 P.3d 406](#) (N.M. 2018) the Supreme Court held the provision to be inapplicable to a textbook lending program to public and private K-12 schools. The Court found that since the appropriation was made to the New Mexico Public Education Department, the clause was not violated. The ultimate disposition and use of the textbooks was found to be irrelevant.

Public Use Doctrine & Eminent Domain

As is generally the case for all state and local government, the New Mexico Constitution⁸⁵ prohibits the taking of private property by eminent domain except for a “public use” and just compensation. A [later section](#) will describe the extent to which the use of private property to deploy broadband infrastructure may constitute a “taking” under New Mexico law.

⁸⁴ N.M. Att. Gen. Opinion [2022-06](#) (July 19, 2022).

⁸⁵ [N. M. CONST. art. II, § 20.](#)

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

Introduction

As [discussed earlier](#), most Public Entities organized in New Mexico must comply with Dillon's Rule. This means that these Public Entities need express or implied legislative authority to participate in a broadband P3. Public Entities, in addition to using express or implied authority of state statutes, also can rely on additional powers granted in their charter, so long as those powers do not conflict with the State or Federal Constitution. However, they also need some authority or basis to be part of a broadband P3. This section describes express and implied authorization for Public Entities subject to Dillon's Rule to participate to own and operate broadband infrastructure projects, but likely these can also be applicable to most Public Entities as well.

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 broadband 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, that does not mean it can be compelled to do so, and in some cases a local government can achieve that result only if it obtains the approval of a state agency or a state-sponsored Public Entity. In some cases, such as the issuance of [private activity bonds](#), action may be required of a state agency by federal law, and in every case, public officials likely will be very concerned about the financial viability of the broadband 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 broadband 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.

The Infrastructure Development Zone Act⁸⁶

New Mexico statutes permit electors in one or more counties or municipalities to petition to form an Infrastructure Improvement District as a separate political subdivision to provide any one or more of several infrastructure services. In 2017, the statute was amended to include “cable or other telecommunications lines and related equipment, including fiber optic transmission facilities designed to carry communication signals such as voice, data and video and any broadband technology infrastructure.”⁸⁷ To initiate the process of creating an Infrastructure Improvement District, a petition must be signed by the lesser of 30% or 400 taxpaying voters, and it must contain a detailed description of the service plan and financial feasibility of the proposed project. The petition must be submitted to the governing body or bodies of each county and/or municipality within the proposed district’s service area.

Following notice to all affected residents, a hearing and approval by the governing body or bodies, the district is formed as a separate political subdivision, and an organizing election will be held to elect its board. At that point it can commence operations pursuant to its approved service plan.⁸⁸ It is also possible for an existing Infrastructure Development District formed for some other purpose, to petition the governing body of the municipality or county that approved its formation to add broadband services to its service plan.⁸⁹

The governing board of an Infrastructure Improvement District has broad powers to construct, maintain and operate broadband infrastructure pursuant to its approved service plan.⁹⁰ In addition to user fees, it may impose a property tax and issue bonds (with voter approval)⁹¹ revenue bonds (with board approval),⁹² or impose a special assessment and issue bonds payable from those assessments.⁹³

⁸⁶ N.M. REV. STAT. ANN. § [5-17-1](#) to -22.

⁸⁷ N.M. REV. STAT. ANN. § [5-17-2J \(12\)](#); [2017 N.M. LAWS Ch. 141 § 1](#).

⁸⁸ See N.M. REV. STAT. ANN. §§ [5-17-3](#) to -13. The description of the organization of a district is extremely abbreviated. The actual steps are quite complex and will require legal and financial advice to successfully navigate.

⁸⁹ See N.M. REV. ANN. § [5-17-14](#).

⁹⁰ See N.M. REV. ANN. § [5-17-22](#).

⁹¹ N.M. REV. STAT. ANN. § [5-17-28](#)

⁹² N.M. REV. STAT. ANN. § [5-17-30](#)

⁹³ N.M. REV. STAT. ANN. § [5-17-29](#)

Cooperation Among Public Entities – the Joint Powers Agreement Act⁹⁴

There is express authority under the Joint Powers Agreements Act (JPAA) for Public Entities⁹⁵ to join together and organize a new Public Entity with a self-governing board. However, before any agreement is effective, it must be approved by the Secretary of Finance and administration.⁹⁶ A Joint Powers Agreement (JPA) generally may undertake collectively, any project authorized and permitted to be undertaken individually by the Public Entities. The JPA also may provide for a separate governing board and the issuance of revenue bonds to finance its activities.⁹⁷ [Redi-Net](#) is perhaps the most well-known example of a JPA dedicated to broadband infrastructure development and expansion currently operating in New Mexico. In addition, the Local Economic Development Act specifically authorizes the creation of a regional economic development plan among multiple counties and/or municipalities, to permit development of a multi-jurisdiction broadband infrastructure project.⁹⁸

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

New Mexico Statutes do not contain a universally applicable statute permitting the formation of public-private partnerships or “P3s.” Several statutes do make direct reference to P3s⁹⁹ and P3s are specifically permitted to develop and increase the use telehealth technologies and rely heavily on the use of broadband.¹⁰⁰ On the other hand, the New Mexico Finance Authority, is specifically prohibited from issuing bonds or other forms of debt to finance gaming facilities, including public-private partnerships projects for gaming facility projects.¹⁰¹

However, the Local Economic Development Act (LEDA) ([discussed in the next section](#)) *requires* that any broadband project receiving public support be documented with a project participation agreement – (a P3 Agreement).¹⁰² Additionally, subject to compliance with various Constitutional limitations such as the [Antidonation Clause](#), even without specific authorization to enter into a “P3” all Public Entities have the

⁹⁴ N.M. REV. STAT. § [11-1-1](#) to -7.

⁹⁵ See N.M. REV. STAT. § [11-1-2\(A\)](#). The statute applies to a public agency defined to include “the federal government or a federal department, agency or instrumentality; this state, another state or a state department, agency or instrumentality; an Indian nation, tribe or pueblo; a subdivision of an Indian nation, tribe or pueblo that has authority pursuant to the law of that Indian nation, tribe or pueblo to enter into joint powers agreements directly with the state; a county, municipality, public corporation or public district of this state or another state; a New Mexico educational institution specified in Article 12, Section 11 of the constitution of New Mexico; and a New Mexico school district” – As such it would seem to include (and be limited to) “Public Entities” as that term was defined earlier at footnote 6.

⁹⁶ See DFA JOINT POWERS AGREEMENT REQUEST, N.M. DEP’T FIN. & ADMIN. <https://www.nmdfa.state.nm.us/legal/jpa-request/> (last accessed August 8, 2022) for information regarding the format of the agreements and procedures for obtaining approval.

⁹⁷ See N.M. REV. STAT. ANN. §§ [11-1-3](#) (authority), [-4](#), [-5](#) (terms and powers), [-7](#) (revenue bonds).

⁹⁸ N.M. REV. STAT. ANN. § [5-10-4](#)

⁹⁹ See, e.g., N.M. REV. STAT. § [71-7-7](#) (state participation in P3’s to develop of hydrogen fuel cell industry); § [21-8-44](#) (limited authority and restrictions for P3’s involving New Mexico State University at San Louis Potosi); § [22-13-26](#) (education); § [9-15E-3](#) (bioscience)

¹⁰⁰ N.M. REV. STAT. § [24-1G-4\(c\)\(6\)](#) (the New Mexico Telehealth and Health Information Commission Act).

¹⁰¹ N.M. REV. STAT. § [6-21-23\(G\)](#) (The Authority may not “end money, issue bonds, including public-private partnership project bonds, or make a grant for the promotion of gaming or a gaming enterprise or for development of infrastructure for a gaming facility”). This would seem to imply that the New Mexico Finance Authority is not barred from financing a Public Entity’s contribution to other public-private partnerships.

¹⁰² N.M. REV. STAT. ANN. § [5-10-10](#) . An extensive discussion of the LEDA is included in a [separate section](#).

power to contract on matters within the scope of their authority, either under State statutes or their charters (in the case of home rule municipal corporations).¹⁰³

The Local Economic Development Act (LEDA)¹⁰⁴

Qualifying Entity and Eligible Projects

The Local Economic Development Act or “LEDA” implemented the 1992 amendments to the [Antidonation Clause](#) that authorized legislation expenditures of funds for job creation and economic development.¹⁰⁵ The LEDA expressly authorizes any New Mexico municipality or county to provide public support to a “Qualifying Entity” for an economic development project.

LEDA Qualifying Entity Definition

The term “Qualifying Entity includes an individual, corporation, association or other legal entity that is “a business that involves the supplying of services to the general public or to governmental agencies or to a specific industry or customer.” However, retail businesses are permitted only in municipalities with a population of 15,000 or less, unincorporated areas of a county or municipalities with a population of more than 15,000, so long as the project is receiving funding from the state. A “commercial enterprise” is Qualifying Entity so long as it does not involve “distribution to the public of electricity, gas, water or telephone or other services commonly classified as *public utilities*.”¹⁰⁶ The term “public utilities” is not defined in the LEDA, but the Public Utilities Act generally is defined to include the sale or distribution of gas, electricity or steam.¹⁰⁷

LEDA & Broadband Facilities

Amendments to the LEDA adopted in 2021 add “broadband telecommunications network facilities” to the list of permitted public support (public money) that can be provided for an economic development project¹⁰⁸ so long as the facilities provided are owned by the provider of the service are capable to transmitting data at rates meeting the Federal Communications Commission’s baseline speed for broadband.¹⁰⁹

The effect of all of these provisions (particularly in light of the 2021 additions) is somewhat ambiguous. A privately owned ISP would seem to qualify a “business selling and supplying services” (provided it is a retail business in a county or meets the population limits previously discussed above for a municipality). There also is an argument that privately-owned ISP might be a “commercial enterprise,” although the prohibition

¹⁰³ For example, the Procurement Code, N.M. REV. STAT. ANN. §§ [13-1-28](#) to [-199](#).

¹⁰⁴ N.M. REV. STAT. ANN. §§ [5-10-1](#) to -17.

¹⁰⁵ N.M. REV. STAT. ANN. [§ 5-10-2](#).

¹⁰⁶ LEDA defines a “Qualifying Entity” that can receive public support as “a corporation, limited liability company, partnership, joint venture, syndicate, association or other person that is one or a combination of two or more of the following.” The term includes “telecommunications sales enterprise that makes the majority of its sales to persons outside New Mexico.” N.M. REV. STAT. ANN. [§ 5-10-3L](#).

¹⁰⁷ N.M. REV. STAT. ANN. [§ 62-9-1](#). The definition of commercial facilities also expressly excludes certain telecommunication facilities.

¹⁰⁸ [2021 N.M. LAWS 2021 Ch. 3, § 1](#).

¹⁰⁹ N.M. REV. STAT. ANN. [§ 5-10-3\(B\)](#). Presumably this is the FCC definition of “broadband.” This currently is 25 Mbps download and 3 Mbps upload but this is expected to be increased to at least 100/20 Mbps. See *Chairwoman Rosenworcel Proposes to Increase Minimum Broadband Speed*, FED. COMM’N COMM’N, <https://www.fcc.gov/document/chairwoman-rosenworcel-proposes-increase-minimum-broadband-speeds> (last accessed Aug. 18, 2022).

against utilities might eliminate most traditional investor-owned utilities. However, eliminating a privately owned ISP from the definition of a “Qualifying Entity” entirely would seem to be an odd result, since the LEDA now specifically authorizes “assistance by the state to a local or regional government or the provision of direct or indirect assistance to a qualifying entity by a local or regional government [including]the placement of new broadband telecommunications network facilities [and] rights-of-way infrastructure, including trenching and conduit, for the placement of new broadband telecommunications network facilities.”¹¹⁰ Finally, of course, all of this needs to be considered in light of the voter’s decision to create a specific exception to the Antidonation Clause for infrastructure, which specifically includes “broadband” within the categories of “infrastructure” that can be supported by state revenue, if authorized by the New Mexico legislature.

Hopefully, at least some of these issues will be resolved by the New Mexico when it returns for its 2023 legislative session in January. However, given the fluid state of affairs, it would seem wise to secure legal advice before committing a substantial resources for a private-ISP sponsored economic development project proposal.

LEDA General Provisions

In order to use the LEDA for broadband infrastructure, an economic development plan must be adopted (or amended) to include economic development strategies or goals comprehensive enough to include a broadband project or projects, and that plan must generally comply in all respects to the other requirements in the Act.¹¹¹ The LEDA also authorizes the creation of regional economic development plans and to make use of the [JPPA](#) to facilitate the implementation of regional projects (including broadband infrastructure).¹¹² Once the economic development plan has been adopted, individual projects that will implement the plan and that make use of public funds or public credit can be authorized by the municipality, county, or regional economic development authority. Each project must be evaluated and determined to be economic viable, documented by a project participation agreement with adequate protections to protect the public investment and a schedule for implementation.¹¹³

Accessing Public Funds

Projects approved under the LEDA can receive public support (money and credit support) in an amount up to up to 10% of the Public Entity’s annual general fund expenditures, however a number of items are excluded from that calculation including land and buildings, proceeds of a municipal or county gross receipts tax, and infrastructure revenue bond proceeds.¹¹⁴ Projects also can apply to the New Mexico Economic Development Department for State funding of a Project pursuant to N.M. Rev. Stat. Ann. §§ 5-10-14 to -17.

Tax Increment for Development Act (TIDA)

As [discussed earlier](#), New Mexico’s Tax Increment for Development Act (TIDA)¹¹⁵ can be useful source for financing a Public Entity’s investment in a P3 project. In limited situations this might include using the TIDA

¹¹⁰ N.M. REV. STAT. ANN. [§ 5-10-3K\(1\)\(b\), \(c\)](#).

¹¹¹ N.M. REV. STAT. ANN. [§ 5-10-6](#).

¹¹² N.M. REV. STAT. ANN. [§ 5-10-7](#).

¹¹³ See, generally, N.M. REV. STAT. ANN. §§ [5-10-6](#) to -10.

¹¹⁴ N.M. REV. STAT. ANN. [§ 5-10-4\(B\)](#).

¹¹⁵ See N.M. STAT. ANN. [§§ 5-15-1](#) to -29.

to fund a broadband P3 as part of a comprehensive economic development project. The advantage of TIDA financing is that it can access multiple types of tax revenues (property tax and gross receipts tax) to fund the payment of principal and interest on the financing and in many cases, all or part of the debt can be issued as tax-exempt bonds.

Formation and implementation of a TIDD Financing project can be particularly complex, and procedures required can vary depending on the location and makeup of the district.¹¹⁶ However, formation does not require a finding that the district is “blighted.”¹¹⁷ Broadband may well qualify as part of an overall financed project because the availability of reliable broadband service likely is a critical element in the overall development. However, the TIDA appears to require public ownership of the financed broadband infrastructure.

Industrial Revenue Bond Financing

The advantages of industrial revenue bond financing¹¹⁸ also were [discussed earlier](#). They include, the fact repayment of the bonds does not involve any direct Public Entity financial support, the ability of project to qualify for [property tax exemption](#), and the possibility of using [tax-exempt bonds](#), and finally, the ability to qualify the project for an exemption for New Mexico gross receipts tax on tangible property purchased as part of the project. The discussion that follows is intended to focus on unique issues that might arise from using the industrial revenue bond statutes for broadband infrastructure, particularly infrastructure used by privately owned ISPs. The process for issuing industrial revenue bonds is complex and like other financing programs authorized by New Mexico statutes requires legal and financial expertise.¹¹⁹

New Mexico Statutes authorize both counties and cities to issue industrial revenue bonds to finance projects however the definition of a “project” differs depending on whether a county or a city is the issuer, and those differences may create legal questions for some privately owned projects.

County Industrial Revenue Bonds

New Mexico Revised Statutes Annotated §§ [4-59-1](#) to [-16](#) contains the county industrial revenue bond act. Generally projects financed must be located in unincorporated portions of the county. Generally these projects must be located in unincorporated portions of the county. However, there is an exception for Bernalillo County (because it has a population over 300,000). This means that county industrial revenue bonds can finance projects with the city of Albuquerque.

The term “project” does not include a commercial enterprise facility ... designed for the sale or distribution to the public of electricity, gas, telephone, or other services commonly classified as public utilities, except for” certain water and electric utilities. However, the term does include “a business in which all or part of the activities of the business involve the supplying of services to the general public or to governmental

¹¹⁶ See *Forming Tax Increment Districts*, TAX’N & REVENUE N.M., <https://www.tax.newmexico.gov/governments/municipal-county-governments/forming-tax-increment-districts/> (last accessed Aug. 19, 2022).

¹¹⁷ *Finance Facts: Tax Increment Financing*, N.M. LEGIS. FIN. COMM., https://www.nmlegis.gov/entity/lfc/Documents/Finance_Facts/finance%20facts%20tidd.pdf.

¹¹⁸ For a general discussion of Industrial Revenue Bond Financing in New Mexico see IRB SUMMARY: CITY OF ALBUQUERQUE INDUSTRIAL REVENUE BONDS (IRBs), N.M. LEGIS., <https://www.nmlegis.gov/handouts/RSTP%20072111%20Item%200%20IRB%20SUMMARY%207-20-11.pdf> (Last Accessed 8-14-2022).

¹¹⁹ See N.M. REV. STAT. ANN. § [4-59-5\(E\)](#). For Example, in some instances requires the employer using a leased facility to offer subsidized health insurance coverage.

agencies or to a specific industry or customer.” The statute also authorizes projects for use by a 501(c)(3) corporation or any other nonprofit corporation engaged in healthcare.¹²⁰

Again, the carve-out for public utilities in the statute may be troubling in light of the [2022 amendment](#) to the Antidonation Clause that specifically includes broadband within the definition “utilities.” On the other hand the statutory definition of a “commercial enterprise facility” is separate from businesses “supplying of services to the general public or to governmental agencies or to a specific industry or customer,” which might mean that a broadband P3 project might qualify under the latter definition, even if was a “utility” and therefore ineligible for financing as a “commercial enterprise facility.” In any event, the New Mexico legislature adopts enabling legislation to implement the 2022 amendment to the Antidonation Clause, individual legal advice should be sought when considering county industrial revenue bond financing for a broadband P3.

Municipality Industrial Revenue Bonds

A similar industrial bond act has been enacted for New Mexico Cities.¹²¹ The definition of industrial revenue bond projects contained in the industrial bond act is similar to the county statute. However, there are some important differences that likely make that statute even less useful in financing infrastructure for a privately owned ISP. Like the county statute, N.M. Stat. Ann. § [3-32-1\(B\)\(2\)](#) defines a project to include: “a commercial enterprise ... but not distribution to the public of electricity, gas, water or telephone *or other services commonly classified as public utilities.*” However, unlike the county statute: “a business in which all or part of the activities of the business involve the supplying of services to the general public or to governmental agencies or to a specific industry or customer *but does not include an establishment primarily engaged in the sale of goods or commodities at retail.*”¹²²

Using the Industrial Revenue Bond Act for Broadband Infrastructure

For these reasons, as currently drafted the Industrial Revenue Bond Act seems to be an imperfect tool for financing broadband infrastructure. Neither statute seems to help investor-owned utilities or cooperatives, given the language barring utilities from using the statute. Some county-based for-profit ISPs might be able to qualify as “a business in which all or part of the activities of the business involve the supplying of services to the general public ...”, but that option seems unavailable to a New Mexico municipality, because of the “retail business” prohibition. The inability to easily use the industrial revenue bond statutes for broadband infrastructure is particularly frustrating in light of the [availability of federal tax-exempt](#) financing for these projects added by the IIJA that was discussed earlier.

On the other hand, both statutes do provide that projects can be financed for the benefit of a 501(c)(3) corporation, which suggests that in limited situations the New Mexico nonprofit corporation act might be used as part of an overall plan to bring broadband to a community using a nonprofit corporation.

¹²⁰ N.M. REV. STAT. ANN. § [4-59-2\(F\)](#).

¹²¹ N.M. REV. STAT. ANN. §§ [3-32-1 to -16](#)

¹²² Like the county statute, a City may finance a project for use by a 501(c)(3) corporation. See N.M. REV. STAT. § [3-32-1B\(6\)](#).

New Mexico's Nonprofit Corporation Statute¹²³

Purposes, Powers, and Restrictions

A nonprofit corporation (a “nongovernment organization” or “NGO”) may be organized under the New Mexico Nonprofit Corporation Act for “any lawful purpose or purposes, including, without being limited to ... charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; social; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; and professional, commercial, industrial or trade association.”

While NGOs generally have broad powers, equivalent to those possessed by for-profit corporations,¹²⁴ they are prohibited from issuing shares of stock, paying a dividend, or otherwise distributing income to its members, directors, officers, or others.¹²⁵ Thus, no matter what the purpose of the NGO is, it cannot operate “for profit” – it has no “investor owners” and its members/directors, while able to exercise some degree of control over the entity, do not participate in its profits or losses.

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

One use of an NGO could be to assist a municipality or county by providing the local government greater flexibility to perform tasks necessary to bring high-speed internet access to a community. Since the NGO is not a local government, Dillon’s Rule and other statutory restrictions and limitations that apply to Public Entities should not apply to it. However, on the other hand it may be able to take advantage of certain tax and economic incentives that otherwise only available to a Public Entity.¹²⁶

This advantage may depend in large part on whether the NGO can achieve favorable status as a federally tax-exempt charity under IRC §501(c)(3). In this regard, it is important to understand that the standard for achieving tax-exempt status under federal income tax rules is not the same as the broad authority granted to form an NGO under the New Mexico Nonprofit Corporation Act.

For example, merely operating as a *nonprofit* ISP, (without more) while literally meeting the requirements of the New Mexico Nonprofit Corporation Act would be considered federal income tax purposes to be engaging in a “trade or business,” and *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 that term is defined by federal income tax regulations.

The Internal Revenue Code and Treasury Regulations define “charitable purposes” to include “lessening the burdens of government.” This is a term used to describe arrangements where an NGO is organized and operates 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 Internal Revenue Service training memorandum (which is used to train IRS agents auditing NGOs) states that depending on the level of local government

¹²³ N.M. Rev. Stat. Ann. §§ [53-8-1](#) to -99.

¹²⁴ N.M. REV. STAT. ANN. [§ 53-8-5](#).

¹²⁵ N.M. REV. STAT. ANN. [§ 53-8-28](#). Payment of reasonable compensation and benefits for services rendered is not prohibited.

¹²⁶ For example, an NGO might be the ISP provider that owns and operates a broadband network financed through issuance of industrial revenue bonds

involvement, a nonprofit ISP may qualify for tax-exempt status under 501(c)(3).¹²⁷ [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 For federal income.

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

An additional 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 to issue the debt. This option can be useful in situations where a Public Entity wants greater overall control over the disposition of broadband infrastructure used by the broadband P3, particularly 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 is used, typically a new nonprofit corporation (NGO) is created with a board of directors closely aligned with the Public Entity’s governing body or public officials. The NGO would issue bonds to 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 issued 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 in such a broadband P3 might include design and construction and/or maintenance and operation of the broadband network.

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).

Potential Issue With New Mexico’s Participation in IIJA Grant Programs

While New Mexico statutes have taken a somewhat ambiguous approach toward specifically defining investor-owned utilities and even privately owned ISPs to act as “eligible entities” to participate in economic development incentives, it seems unlikely that it will want to exclude them from participation in the BEAD grant program enacted as part of the IIJA. BEAD program funds will be distributed to states once they submit a plan that outlines a program to spend awarded funds. That proposal may involve distribution of funds from the state to other entities. However, any approved state programs approved for BEAD funding “may not exclude cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local government from eligibility for such grant funds.”¹²⁸ Given that express direction, it may be difficult for the Connect New Mexico Council or broadband office to exclude these entities from participating in the BEAD program. Like many other issues raised in this White Paper, resolution of this question likely awaits enabling legislation to implement the [2022 amendment to New Mexico’s Antidonation Clause](#).

¹²⁷ 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>).

¹²⁸ IIJA [§60102\(h\)\(1\)\(A\)\(iii\)](#) 135 Stat. 1171.

New Mexico Specific Broadband & Right-of-Way and Easement Issues

New Mexico 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 *easements* (granted by private entities) to co-locate broadband infrastructure.

Legislation Permitting Use of Public Right-of-Way

In 2018 New Mexico has enacted the Wireless Consumer Advanced Infrastructure Investment Act¹²⁹ to simplify and standardize the rules related to a Public Entity’s process of approving the locating wireless towers and equipment on existing public owned property. The Act applies to counties and municipalities, it generally prohibits exclusive access licenses and limits the amount of fees that can be charged for access and costs that can be recovered as a condition to access. It does not apply to cooperatives, utilities, or locations of facilities in private easements.¹³⁰

New Mexico also has a much older law that regulates the excavation and installation near the “facilities of any cable television system or closed-circuit coaxial cable communications system,”¹³¹ but does not have adopted similar comprehensive legislation related to the laying of fiber in the public right of way. However, in 2017, legislation was adopted giving Indian tribes, nations and pueblos access to the state’s broadband network, in exchange for a grant of right-of-way to the state for the purpose of installing fiber infrastructure over Indian lands.¹³²

Restrictive View of Existing Easements

Less progress has been made to rationalize the process for using existing utility easements to locate wireless and wired internet infrastructure. The most pressing question relates to whether a new, separate easement is required to use or to install fiber optic or wireless equipment on land already covered by an existing utility easement. From the perspective of broadband deployment, the issue is best illustrated by *Barfield v. Sho-Me Power Electric Cooperative*, [10 F. Supp. 3d 997](#) (W.D Mo. 2014), *aff’d* [853 F.3d 795](#) (8th Cir. 2017). While *Barfield* was litigated in a different federal judicial circuit and its outcome was heavily influenced by Missouri state law, one commentator has suggested that the same outcome is possible, perhaps likely, in New Mexico.¹³³

The Missouri controversy arose when a rural electric cooperative, Sho-Me Power Electric Cooperative attached fiber optic cable to its existing electric utility poles. This initially was done to permit the electric utility to manage the distribution of power throughout its service area. However, the installed fiber optic cable had far more capacity than was necessary for that purpose, and this enabled Sho-Me – through its

¹²⁹ [2018 N.M. Laws Ch. 17, § 2](#); N.M. REV. STAT. ANN. §§ [63-9I-1](#) to [-9](#).

¹³⁰ See N.M. REV. STAT. ANN. §§ [63-9I-2](#), [-9](#).

¹³¹ 1977 N.M. LAWS Ch. 328; N.M. REV. STAT. ANN. §§ [63-11-1](#) to [-8](#).

¹³² [2017 N.M. Laws Ch. 7, § 9](#); N.M. REV. STAT. ANN. [§ 9-27-26](#).

¹³³ See Janette A. Duran, [Bringing Broadband to the Desert: Rural New Mexico, Fiberoptic Cable, and Electric Utility Cooperatives](#), 49 N.M. L. REV. 384 (2019).

wholly-owned subsidiary, to begin providing internet service to business customers using the excess capacity of fiber optic cable.

Barfield owned land over which Sho-Me Power had previously been granted an easement, and the initiated a class action lawsuit representing the landowners who had previously granted easements to Sho-Me Power for electrical power transmission lines. Barfield claimed that the use of the easement to provide internet communications to customers was neither contemplated nor approved under the terms of the original easements and therefore that Sho-Me's use of the easement for that purpose trespassed on their property. Sho-Me argued that its use was merely an extension of that which was already permitted under the easement, to deploy fiber optic cable to manage its electric transmission system, and that the use in any event did not exceed the permitted use in a way that harmed the landowners.

The Court sided with the Barfield's, holding that under New Mexico law, the use of the easement to provide broadband service was not contemplated by the easement language, and was problematic even if they resulted in no more restrictions on the Barfield's use of their land than what that had currently. In other words, a 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 landowner.

[As previously discussed](#), New Mexico statutes have recently been amended to permit rural electric cooperatives to provide broadband service through an affiliate corporation, much in the same way as Sho-Me Power did. Just as in the Missouri case, it is quite likely that many of the easements (particularly those created years ago) provide for use restricted to the provision of electric service, and do not contemplate use by the cooperative or a subsidiary to provide commercial internet service.¹³⁴ The prospect of separately negotiating and paying for this right of use, without any consideration of the actual additional burden placed on the owner's use of its property, could greatly complicate efforts to involve rural electric cooperatives in the provision broadband service.

Of course, *Barfield* is a Missouri case, that applied Missouri law, but as one commentator noted, New Mexico law is similar Missouri's when it comes to interpreting the scope of an easement, and could lead to the same result.¹³⁵ For this reason, 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 the utility for which the easement was granted in the first place. As discussed in the [next section](#), in the past two sessions of the New Mexico legislature, bills have been introduced that would diverge from *Barfield's* holding

¹³⁴ 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 be problematic.

¹³⁵ See [Duran, supra note 130, at 391-94](#). "Comparable New Mexico cases have been more favorable to co-use of easements. In *Garry*, a conveyance specified that any warehouses erected must be used for the purposes of a railroad's shippers. The New Mexico court interpreted this conveyance to allow the railroad to lease their warehouses to private companies. The court reasoned that because the private companies likely desired the location for its easy access to the railroad, renting to them fell within the scope of railroad purposes. Similarly, the Hall Court found that a transmission line placed within the easement of a highway was not an additional burden. This difference in interpretation could indicate that New Mexico courts would be inclined to interpret the restrictions on easements more liberally. For some easements that make mention of telecommunications equipment, but not specifically for the purpose of delivering commercial broadband, a more liberal interpretation might be helpful. However, some conveyances are likely to be so strictly worded that no interpretation could allow for commercial telecommunications." [citations omitted].

by expressly tying the measure of compensation required for an expanded easement to the expected additional burden placed on the use of the property by the landowner.

Recent Proposed Legislation

Introduction

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 New Mexico 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 State Legislature related to broadband and broadband P3s.

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

Legislation to Implement HJR 1 (the 2022 Amendment to the Antidonation Clause) and to Expand the Role of Commercial ISPs and Utilities in Broadband Deployment.

This White Paper has [noted](#) that a critical part of New Mexico's efforts to expand broadband access will be adoption of enabling legislation to implement the 2022 amendment to the Antidonation Clause, in much the same way that the [LEDA](#) was necessary to implement the exception to the Antidonation Clause economic development expenditures. In addition, legislation such as HB 169, described below, would be helpful to clarify that broadband ISPs are qualifying entities under the LEDA.

Easements and Land Use

There likely will be a divergence of opinion and additional attempts to move legislation forward that seeks to speed the process of and provide assurance to utilities – investor-owned, municipal, and rural cooperatives, that they can use existing utility easements to locate broadband infrastructure. The prospect of having to separately negotiate and pay for a broadband access easement over property already burdened by a utility easement could be quite burdensome and unnecessarily delay broadband deployment, particularly if the cost of that easement must consider the potential net revenues derived from internet service long term. Absent a favorable court decision, legislation like the Utility Easements for Broadband Access Act would seem to be the only realistic solution.

2021 Proposed Legislation¹³⁶

HB 169 Amends the local economic development act; includes construction or upgrades to facilitate the use of water-efficient or clean energy technologies or to meet or exceed green building certification standards in the definition of "economic development project"; includes an entity that develops water or broadband infrastructure in the definition of "qualifying entity."

SB 24 Requires the adoption of rules to reduce and promote the parity of regulation for the telecommunications industry and encourage a broadband-focused competitive telecommunications market; prohibits individual contracts for telecommunications services to be offered on materially different terms to similarly situated customers without

¹³⁶ Heather Morton, *Broadband Legislation 2021*, NAT'L LEAGUE CITIES (Jan. 7, 2022) <https://www.ncsl.org/research/telecommunications-and-information-technology/broadband-2021-legislation.aspx>.

certain permissions; changes a measure for the calculation of a presumption of effective competition for regulated telecommunication services; replaces the application process for individual service contracting with a two-year requirement to retain such contracts on file; adds information to be included in the triennial reporting by the public regulation commission; repeals §63-9A-2.

SB 360 Enacts the Utility Easements for Broadband Act; authorizes the use and sharing of utility easements for the provision of communications service throughout the state; requires notice of use of utility easements to the property owner; provides for optional recording of such notice; establishes claims pursuant to the use of utility easements; allows cost recovery for communications infrastructure projects; provides definitions.

2022 Proposed Legislation¹³⁷

HB 120 Amends the Rural Telecommunications Act of New Mexico and the Connect New Mexico act to remove contingent wording from the definition of "statewide broadband plan"; amends the Connect New Mexico Act and the Broadband Access And Expansion Act to align the timing of required various annual reports to be Oct. 1 of each year; adds and removes definitions from the Connect New Mexico Act to align with the definitions in the Broadband Access And Expansion Act; amends the Connect New Mexico Act to provide for the adoption of a preliminary policy establishing a competitive grant program from the Connect New Mexico Fund for one year prior to the adoption of the policy by rule.

SB 42 Enacts the Utility Easements for Broadband Act; authorizes the use and sharing of utility easements for the provision of communications service throughout the state; requires notice of use of utility easements to the property owner; provides for optional recording of such notice; establishes claims pursuant to the use of utility easements; allows cost recovery for communications infrastructure projects; provides definitions

¹³⁷ Heather Morton, *Broadband 2022 Legislation*, NAT'L LEAGUE Cities (Apr. 27, 2022), https://www.ncsl.org/research/telecommunications-and-information-technology/broadband-2022legislation.aspx?utm_source=sendgrid&utm_medium=email&utm_campaign=Newsletters.

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.