

CLOSING THE “DIGITAL DIVIDE” IN TEXAS

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

Why Was This White Paper Written?

Over the next decade, the federal government will make tens of billions of dollars available for the development of high-speed internet infrastructure (broadband infrastructure) throughout the United States. That being the case, it may not be clear why there is a need for a “White Paper” specific to Texas 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 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>.

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

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

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

Federal Government Bias for Public-Private Partnerships

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

Each State’s Approach to Economic Development Is Unique

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

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

How to Use this White Paper and Understanding Its Limitations

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

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

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

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

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

A major theme of this White Paper is that to truly close the digital divide Public Entities and Private Entities will need to “partner” to draw on the strengths of each and access funding opportunities traditionally used in P3s for economic development as well as traditional government financing tools. To help Public Entities and their advisors solicit Private Entities willing to engage in this process, a memorandum entitled “Soliciting Broadband P3 Partners -- Drafting an Effective Public Entity Request for Information/Qualifications (RFI/RFQ) or Request for Proposal (RFP)” is included as an Appendix.

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

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

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

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. Finally, I want to thank and acknowledge Finley Engineering Company, Inc., for the generous financial support that helped make this White Paper possible.

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

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

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

P3s Defined

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

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

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

In the second alternative, the roles are largely reversed, with the Private Entity assuming many of the risks associated with the design, construction, maintenance, and operation of the network. However, even here the Public Entity’s obligations pursuant to the 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 Texas and many other states prohibit direct investment in a business entity (a for-profit corporation, limited liability company, or partnership).⁹ 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

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

⁹ See, for example, [Tex. CONST. art. III, § 52\(a\)](#); [art. XI, § 3](#). “No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association...”

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

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

Why Are P3s Used for Broadband?

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

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

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

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

Second, both the Public Entity and the Private Entity must possess resources that the other is missing. For Private Entities, this often is the technical expertise and specialized resources that can be deployed to facilitate efficient construction and operation of a broadband network. For Public Entities, resources could include the ability to access federal and state funding more effectively, economic and tax incentives, the potential to provide a stable long-term revenue source through an IRU agreement, or access to public right-of-way and necessary easements over private property.

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

"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.

Traditional Public Economic Development Tools

Introduction

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

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

What follows is not an exhaustive discussion of these tools, but instead is an overview to help in understanding the role they have played in P3 projects over the past 30-40 years. Later sections will emphasize how these tools can be useful in “bridging the financial divide” to create an economically viable broadband P3 project. Some of these tools have been used to great effect by Texas local government; others while used extensively in other states, have not been used as much – if at all in Texas.

Tax-Exempt Financing

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

Any time a Public Entity is involved in a broadband P3 project, one should immediately consider ways the financing component of the plan could involve debt, the interest on which is exempt from federal and/or state income tax (“tax-exempt”) when received by the debtholder. All broadband P3 projects will rely on a limited stream of subscriber revenues to fund operating costs, maintenance, and the repayment of the capital (equity and debt) that was invested to finance the network. For Public Entities, the “investment” is typically sourced primarily from interest-bearing debt (“bonds”).¹¹ 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

¹¹ 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, certificate of participation in a financing lease, certificate of obligation – that can be treated as “debt” for income tax purposes, 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.¹² For those reasons, all other things being equal, interest rates on tax-exempt bonds are typically lower than taxable bonds.¹³ While the amount of that difference has varied considerably over time depending on the borrower’s credit rating, the overall level of interest rates in the marketplace, and the actual and expected future federal and state tax rates, tax-exempt bonds have been an important tool for economic development projects for many years.

Categories of Tax-Exempt Bonds

There are different types of “tax-exempt bonds,” and each has traditionally had a different level of interest savings, or “discount,” when compared to fully taxable debt. The least valuable, in terms of closing a project’s “financing gap,” are bonds the interest on which is fully taxable for federal income tax purposes but exempt from state tax. Unlike most states, Texas imposes no state individual or corporate income tax so obviously the fact that interest on the bonds technically might not be subject to state income taxation, has no real value to a Texas investor.

Qualified Broadband Project Private Activity Bonds

Private Activity Bonds are one type of tax-exempt bond the interest on which is exempt from “normal” federal income tax. 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 IIJA added a new specific category of tax-exempt AMT bonds to the Internal Revenue Code (IRC)¹⁴ for qualified broadband projects.¹⁵ If the broadband infrastructure project meets all requirements for tax exempt financing,¹⁶ broadband project tax-exempt bonds can be used by a Public Entity to finance a broadband project that will be wholly owned and operated by a for-profit Private Entity and secured and paid solely by that Private Entity. This opens up the possibility for a Public Entity to supply a significant contribution toward supplying access to broadband without any direct financial investment in the project.

¹² 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).

¹³ Continuing with the example in the prior footnote, an individual taxed at the maximum federal income tax rate of 37% would receive the same after-tax return (after paying the federal income tax liability) from a federally tax-exempt bond paying 3% as they would from a taxable investment paying 4.76%. Yet from the perspective of the Public Entity, its interest expense is 59% higher on a taxable bond when compared to a tax-exempt bond.

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

¹⁵ 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.

¹⁶ There are many other limitations that apply to these bonds. Among them is a requirement that the state designate the project to receive a portion of the state’s overall private activity bond allocation limit. See [I.R.C. § 146](#); Tex. Bond Rev. Bd., *Private Activity Bond Allocation Program*, http://www.brb.state.tx.us/programs_pab.aspx (last visited Oct. 19, 2022).

Governmental Bonds and Qualified 501(c)(3) Bonds¹⁷

Two additional categories of tax-exempt financing that can be useful in funding a broadband P3 “governmental bonds” and “qualified 501(c)(3) bonds.” These bonds are tax-exempt from normal federal income tax and the interest paid is not subject to alternative minimum tax. Therefore, these bonds have the lowest interest rates, and 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 and/or financial commitment to repay the debt, either by a Public Entity directly or by a non-governmental organization (NGO) that is closely aligned with a Public Entity. For example, a city municipal electric utility might issue tax-exempt revenue bonds to finance a broadband network in the city, but unlike the Qualified Broadband Project Private Activity Bonds described above, the city could not require a private ISP to be responsible for repaying the bonds and still qualify the bonds as Governmental Bonds. A qualified 501(c)(3) bond has similar 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) will be treated as a Public Entity.¹⁸

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

Tax Assessments and Tax Assessment Financing

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

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

¹⁷ [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.

¹⁸ For more discussion of the issuance of revenue bonds by NGOs see [Using “Publicly Aligned” NGOs organized under the General Nonprofit Corporation Act -NGO Financing on Behalf of a Public Entity](#).

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

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

The payment of a special assessment tax typically is not a personal liability of the property owner, but payment of the tax assessment can be enforced through a tax lien that is “senior” to all mortgages/deeds of trust held by secured creditors. For this reason, and because interest on the obligations usually is tax-exempt, special assessment debt normally has an interest rate that is significantly below the rate at which a private entity could borrow.

As [described later](#), Texas law may permit special assessments to be imposed to finance broadband infrastructure in certain limited circumstances.

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, in some states, a Public Entity’s 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.

However, as [discussed later](#) in this White Paper, the Texas Statutes have generally restricted tax abatement/exemption to blighted or economically distressed areas. A single exception for property tax is the provision permitting school districts to grant 10-year property tax abatement for their operation and maintenance property tax has been used to promote economic development, but it is set to expire at the end of 2022.¹⁹

When used in connection with economic development or blight remediation, tax abatement or exemption nearly always is conditioned on the taxpayer’s agreement to take some action in connection in exchange for continuing to keep the property off the tax rolls. When used to incentivize a project – the idea is that because the taxpayer has reduced its property tax burden, it should be in a position to use the dollars saved to help close the financing gap that otherwise would make the economically impossible to undertake the project.

Tax Increment Financing

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

¹⁹ See the [later discussion](#) of Chapter 313 exemptions.

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

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

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

Special Taxing Districts

Special taxing districts are geographic areas of a city or a county. These districts differ from traditional political subdivisions because they have a limited mission and powers (e.g., transportation, parking, community improvement, storm water, flood control, utilities, etc.), and they may exist only for the limited time period necessary to construct and complete the financing of a particular capital project. However, some special taxing districts continue in existence indefinitely, particularly if the district assumes responsibility for the ongoing operation and maintenance of an infrastructure project. Texas has a number of special taxing districts that can issue debt and fund projects with taxes. These are also discussed throughout this White Paper.²⁰

²⁰ Several are discussed under [Taxes and Special Assessment Funding for Broadband](#) in this White Paper.

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

Federal Income Tax Ownership vs. State Law "Title"

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

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

For federal income tax purposes, Private Entities participating in the P3 view legal title as only one factor, and often not the most important factor, in determining who is treated as the owner of property for federal income tax purposes, and often for purposes of financial accounting as well. This question is important for purposes of claiming depreciation and other tax benefits, and it also may be relevant for purposes of using tax-exempt financing and certain federal income tax credits.²¹

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.²² 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 Public Entity with rights equivalent to ownership of an asset through a capital lease or a long-term contract

²¹ 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.

²² 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.

(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 asset²³ or using tax-exempt bonds to finance the asset²⁴ requires 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.²⁵ 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.

²³ [I.R.C. § 168\(g\)\(1\), \(5\).](#)

²⁴ [I.R.C. § 168\(g\)\(1\), \(h\)\(1\).](#)

²⁵ 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 Limits on Telecommunication Regulation and State Regulations of Broadband

The Telecommunications Act of 1996 and Broadband

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

That section provides:

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

However, there are some exceptions to this prohibition. States can impose competitively neutral requirements necessary to preserve and advance universal service in all communities. Regulations that protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers also are permitted – as long as those policies don't conflict with those developed by the FCC. In addition, states and local governments are entitled to manage the public rights-of-way or to provide competitively neutral charges for the use of that right-of-way. Again, those rules and regulations cannot have the effect of prohibiting any entity from providing internet service.²⁶ 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 Public Utility Commission of Texas (PUC) and Telecommunications

The Texas Public Service Commission (PUC) generally regulates investor-owned utilities in Texas. The PUCT has retained authority over local telecommunication providers.²⁷ As [discussed next](#), the PUCT also regulates the provision of middle mile internet access by investor-owned electric utilities. The PUCT is prohibited by law from providing *Public Entities* with the necessary authorization to provide “telecommunication services.”²⁸ However, the provision of internet service alone (using internet protocol – IP programs) does not fall within the definition of “telecommunication service” regulated by the PUCT.²⁹ In 2017, one

²⁶ [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).

²⁷ See Pub. Util. Comm'n of Tex., *Utilities Not Regulated by the PUC.*, <http://www.puc.texas.gov/consumer/complaint/utilitiesnot.aspx> (last visited Sept. 19, 2022).

²⁸ [TEX. UTIL. CODE § 54.201](#). “The commission may not grant to a municipality a: (1) certificate of convenience and necessity; (2) certificate of operating authority; or (3) service provider certificate of operating authority.”

²⁹ See [TEX. UTIL. CODE § 51.002 \(3-a\)](#). “Internet Protocol enabled service” means a service, capability, functionality, or application that uses Internet Protocol or a successor protocol to allow an end user to send or receive a data, video, or voice communication in Internet Protocol or a successor protocol.” And Tex. Util. Code §52.002 “(d) Notwithstanding any other law, a department, agency, or political subdivision of this state may not by rule, order, or other means directly or indirectly regulate rates charged for, service or contract terms for, conditions for, or requirements for entry into the

municipality, the City of Mont Belvieu, Texas, obtained a declaratory judgment that it had legal authority under its home rule powers to issue debt to fund the cost of a broadband internet network and to offer broadband service to its residents.³⁰ In addition, the Texas statutes do not bar a Public Entity from leasing excess capacity on fiber optic cable and facilities on a nondiscriminatory basis.³¹

Nevertheless, municipally owned and operated broadband as a utility in Texas has been rare. This is likely due to the fact that older technologies relied on telephone service to deliver internet service, as well as the United State Supreme Court's holding in [*Nixon v. Missouri Municipal League*, 541 U.S. 125 \(2004\)](#). The legal question posed in *Nixon* was whether § 253(a) of the Telecommunications Act preempted enforcement of a Missouri statute, that like the Texas law, prohibited municipalities from offering traditional telephone service.³² In other words, did § 253(a) not only prohibit states from barring private companies from offering telecommunication service, did it also apply bar legislation that would prevent the state's *political subdivisions* from doing so? Did Congress intend to prohibit state legislatures from barring entities that were created as political subdivisions of the state government from providing telecommunication services?

The Court held that this reading of the Telecommunications Act went too far because political subdivisions were created by the state as extensions of state government itself – and states of course retained the right to determine whether they would or would not offer telecommunication service to the public. Thus, while the holding in *Nixon* did not by its terms *prohibit* a political subdivision from being an internet service provider, it did leave open the possibility that the legislature could bar political subdivisions from doing so in the future, if it decided that was appropriate.

However, at the time of the decision, if the state had already barred its political subdivisions from offering traditional telephone service, the decision in *Nixon* had the practical effect of making it impractical for political subdivisions to offer internet service as well. When the case was decided in the early 2000s, the delivery of internet service relied heavily on access to traditional telephony infrastructure. Dial-up modems were the norm and digital subscriber line service (DSL) was just becoming more prevalent in commercial and residential applications. Both technologies worked in conjunction with traditional telephone service, so practically the only way a municipality could offer internet service was as part of a suite of telecommunication services offered by commercial telephone companies.³³ So, at that time, as a practical matter if a municipality wanted to offer internet service it needed to operate a traditional telephone

market for Voice over Internet Protocol services or other Internet Protocol enabled services.” See also Tex. Utility Code §51.002(10) "Telecommunications provider":(B) does not mean: (i) a provider of enhanced or information services, or another user of telecommunications services, who does not also provide telecommunications services....” This term is defined by the FCC to include data transfers by internet protocol. See Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 59-66 (Off. Plan. Pol’y, Working Paper No. 30) (available at https://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp30.txt)

³⁰ Final Judgment, In Re The City of Mont Belvieu & Certain Pub. Secs., [No. CV-30781](#) (Dist. Ct. Chambers County, Texas) (April 20, 2017). In addition to the City of Mont Belvieu, GEUS provides broadband service to Greenville, Texas. See *Packages & Rates*, GEUS, <https://www.geus.org/189/Packages-Rates> (last accessed Oct. 19, 2022).

³¹ [TEX. UTIL. CODE § 54.2025](#).

³² [MO. REV. STAT. § 392.410.7](#).

³³ See Samantha Cossik, *Throwback Thursday: Dial-up and our Fondness for the First Internet Connection*, ALLCONNECT (June 29, 2019), <https://www.allconnect.com/blog/enduring-interest-dial-up-internet> for an interesting discussion of the rise and decline of dial-up connections in favor of DSL during the early 2000s.

company serving retail customers, and admittedly there was no exception for that in either the Missouri or the Texas statutes.

However, today the delivery of traditional wireline telephone service has virtually disappeared in favor of mobile phones or an online web-based service that allows the subscriber to place the call (audio or video) from their computer. A provider of internet service no longer needs to also offer voice or video communications, television video streaming, email, or other services originally bundled with internet access. This means that even with limitations placed on Public Entities providing traditional telephone and other telecommunication services, Public entities might be able to only offer internet access as a municipal utility.³⁴

The PUCT and Electric Utility Providers and Internet Service

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

Regulated Investor-Owned Electric Utilities and Middle-Mile Broadband

The operation and rates set by for-profit, investor-owned, electric utilities (“investor-owned electric utilities”) are regulated by the PUCT. However, the PUCT has more limited authority over the operation of municipal and rural electric cooperatives.³⁵

in 2021 the Texas legislature enacted new statutory provisions that allow investor-owned electric utilities to offer middle-mile broadband service in unserved and underserved areas of the state.³⁶ The PUCT adopted rules implementing this statute in March 2022.³⁷ These rules define an unserved area as one where at least 80% of the locations lack access to service of 25 Mbps download and 3 Mbps upload. An underserved area is one where 80% of the locations lack service of at least 100 Mbps download and 20 Mbps upload. Utilities wishing to offer middle mile service to ISPs must do so on a competitively neutral basis, may not include any of the cost of the fiber in the rate base for electric customers, and may not offer retail service to any customer. Utilities wishing to provide this service must make an application to the PUCT (which is required to approve or reject them within 181 days).³⁸ Finally, as discussed in greater detail [later](#) in this White Paper, the statute contains new provisions for landowners whose property is currently burdened by an existing easement for electrical service to receive notice and protest the use of the easement for the provision of middle-mile internet service.³⁹

³⁴ Of course, Public Entities, particularly those subject to Dillon’s Rule, must have legislative authority to offer internet service, as discussed in [later sections](#) of this White Paper.

³⁵ [Tex. Util. Code §31.002\(6\)](#). That excludes municipal corporations and cooperatives from the definition of “Electric Utility” that are subject to the PUCT jurisdiction.

³⁶ [Tex. Util. Code Ch. 43](#); Regarding Easements see §43.053. Enacted in H.B. [3853](#), 87th Leg. Ch. 727 (2021).

³⁷ Public Utility Commission of Texas Final Rule and Order for Middle Mile Broadband, [47 Tex. Reg. 1993](#) (April 15, 2022) [hereinafter Final Rule].

³⁸ See generally [Final Rule](#); and [TEX. UTIL. CODE § 43.102\(c\)](#).

³⁹ [TEX. UTIL. CODE § 43.053](#).

Rural Electric Cooperatives

Unlike investor-owned utilities, rural electric cooperatives⁴⁰ are not defined as “electric utilities” subject to comprehensive regulation by the PUCT.⁴¹ Generally, restrictions imposed on investor-owned utilities by the PUCT do not apply to rural electric cooperatives.⁴²

In 2019 the Texas Legislature⁴³ authorized Rural Electric Cooperatives to “construct, operate, and maintain fiber optic cables and other facilities for providing broadband service over, under, across, on, or along real property, personal property, rights-of-way, easements, and licenses and other property rights owned, held, or used by the cooperative.”⁴⁴ This new power exists in addition to the cooperative’s right to use and maintain fiber optic cable to manage and control its electrical power distribution system.

The statute also contains provisions with respect to the use of a cooperative’s existing easements for broadband deployment, similar to those described for investor-owned electric utilities, that may streamline the process of obtaining landowner approval. Finally, the statute prohibits cooperatives from charging electric service customers for any of the costs related to providing broadband service and requires the cooperative to offer access to their poles and other assets to others seeking to install fiber optic cable at reasonable rates and pursuant to reasonable terms.

⁴⁰ Rural Electric Cooperatives are organized and operate pursuant to [Tex. Util. Code Chapter 161](#).

⁴¹ [TEX. UTIL. CODE § 31.002\(6\)](#).

⁴² [TEX. UTIL. CODE § 43.051\(a\)](#)

⁴³ [S.B. 14, 86th Leg.](#) (Tex. 2019 enacted).

⁴⁴ [TEX. UTIL. CODE § 181.048\(b\)](#).

Texas Broadband Development Office (BDO) and the State Broadband Plan

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

The Governors Broadband Development Council

In 2019, the Texas legislature authorized the Governor to create a Broadband Development Council.⁴⁵ Among the duties of the Broadband Development Council is the preparation of annual reports of its findings and recommendations. In its first report released in 2020,⁴⁶ the Council recommended that the state legislature create a broadband plan and a state broadband office, but deferred recommendations for a broadband funding program for further study.⁴⁷ In 2021, the Council added recommendations ten additional recommendations for Texas, including:

- In its state broadband plan, Texas should plan for and invest in technologies offering download and upload speeds greater than the definition of broadband established by the Federal Communications Commission (FCC) 25/3 Mbps.
- Strategic investment in middle mile and last mile infrastructure.
- Funding digital literacy and cybersecurity
- Study broadband costs
- Partner with community anchor institutions to provide broadband
- Apply a portion of ARPA funds toward broadband infrastructure.⁴⁸

2021 Legislation

Many of these recommendations were enacted by the Texas legislature through the passage of comprehensive legislation in 2021.⁴⁹ That legislation Created the State's Broadband Development Office (BDO) and required it to:

1. Create a broadband map of served and unserved areas
2. Develop and administer a broadband grant/loan program
3. Create a state "broadband plan"

⁴⁵ See Generally [TEX. GOV'T CODE Ch. 490H](#).

⁴⁶ Governor's Broadband Dev. Council, *2020 Texas Report - Governors Broadband Development Council*, [https://gov.texas.gov/uploads/files/press/2020 Texas Report - Governors Broadband Development Council.pdf](https://gov.texas.gov/uploads/files/press/2020_Texas_Report_-_Governors_Broadband_Development_Council.pdf) [hereinafter 2020 Report].

⁴⁷ Governor's Broadband Dev. Council, *2021 Report*, [https://gov.texas.gov/uploads/files/business/2021_GBDC_Report_\(Final - 9-17-21\).pdf](https://gov.texas.gov/uploads/files/business/2021_GBDC_Report_(Final_-_9-17-21).pdf). 4

⁴⁸ See [2021 Report](#) *supra* note 43, at 4-5.

⁴⁹ [H.B. 5](#), 87th Leg. (Tex. 2021 enacted).

The State Broadband Development Office (BDO)

Since its formation in 2021, the Texas Broadband Development Office has acted as the chief broadband planning agency and the broadband funding administrator in Texas. State legislation⁵⁰ required BDO to:

- Create an accurate broadband map of eligible vs. ineligible areas for financial assistance. The map will have a challenge process to dispute any perceived inaccuracies.
- Establish a long-term, statewide plan that addresses strategies and goals for expanding access to and further adoption of broadband service.
- Award [grants or other financial instruments](#) to meet the goals of the plan.
- Set the effective threshold speed for broadband service (25 Mbps download/3 Mbps upload).
- Engage in outreach to communities regarding the expansion.
- Address barriers for future expansion efforts.

The BDO is housed within the Office of the Texas Comptroller of Public Accounts, led by Glen Hegar, the elected Texas Comptroller. This is an elected office position, and the Texas Comptroller of Public Accounts serves as the state treasurer, check writer, tax collector, procurement officer, and revenue estimator.⁵¹ Hegar also leads an eight member “advisory council” that meets periodically to discuss needs and progress towards the achievement of BDO’s goals.

The Broadband Plan

A core mission of the BDO is the creation and update of the Texas Broadband Plan.⁵² Released June 15, 2022,⁵³ the Texas Broadband Plan (Plan), the Plan is over 120 pages in length. It focuses primarily on developing a plan for securing federal funding under the IIJA BEAD and Digital Equity Programs in 2023. The deployment of those funds will be informed by the evaluation of needs and the potential development of broadband infrastructure and adoption programs in the state’s 12 identified economic regions.

The State Grant Programs

ARPA Capital Projects Fund

In 2021, the Texas legislature appropriated \$500.5 million of federal ARPA Capital Projects Fund (CPF) money for broadband infrastructure grants. This grant program is to be implemented by BDO. However, the State’s grant plan apparently has not been approved by the United States Treasury, so apparently no grant funding

⁵⁰ See [TEX. GOV’T CODE CH. 490I](#).

⁵¹ *About*, TEX. COMPTROLLER’S OFF., <https://comptroller.texas.gov/about/bio.php> (last visited Oct. 19, 2022).

⁵² [TEX. GOV’T CODE § 490I.0107](#). In preparing the plan BDO is directed (1) to the extent possible, collaborate with state agencies, political subdivisions, broadband industry stakeholders and representatives, and community organizations that focus on broadband services and technology access; (2) consider the policy recommendations of the governor’s broadband development council; (3) favor policies that are technology-neutral and protect all members of the public; (4) explore state and regional approaches to broadband development; and (5) examine broadband service needs related to public safety, education and health.

⁵³ Glenn Hegar, *Texas Broadband Plan*, TEX. COMPTROLLER’S OFF. (June 15, 2022), <https://comptroller.texas.gov/programs/broadband/plan.php>

is available at this time for last mile internet infrastructure under this program.⁵⁴ However on September 23, 2022, Rules to establish the Texas program were proposed for public comment.⁵⁵

Pole Replacement Program

In 2021, the Texas legislature created and authorized BDO to establish a pole replacement grant program to support aerial fiber broadband deployment and appropriated \$75 million out of the ARPA Capital Projects Fund.⁵⁶ However, in June BDO learned that pole replacement was an ineligible use of ARPA CPF money.⁵⁷ As a result the funding status of this program also is unclear.

⁵⁴ [TEX. GOV'T CODE § 490I.0106](#); Section 5, [S.B. 8, 87th Leg., 3d Spec. Sess.](#) (Tex. 2021 enacted). The deadline for submitting a plan to Treasury is September 26, 2022, according to information on the BDO website <https://comptroller.texas.gov/programs/broadband/toolkit/funding.php>.

⁵⁵ See 34 TAC §§ 16.30 - .46 (Published in the [Texas Register](#), 47 Tex. Reg. 6174 (Sept. 23, 2022)).

⁵⁶ [TEX. GOV. CODE § 403.503](#). Section 5, [S.B. 8, 87th Leg., 3d Spec. Sess.](#) (Tex. 2021 enacted).

⁵⁷ Minutes BDO Board of Advisors meeting May 3, 2022. Access download at: <https://comptroller.texas.gov/programs/broadband/leadership/docs/220601-board-book.pdf> (accessed through BDO website September 20, 2022).

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

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

This section starts with a general overview of how the Texas government (and its many potential Public Entity “partners”) are organized. It then describes general rules governing the ability of Texas 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 public entities can play in providing financial resources to a broadband P3.

General Organization of Texas State Government

The Texas Constitution

Texas government is organized and governed by its constitution. The current Texas constitution was adopted in 1876 and has been amended many times since then.⁵⁸ The Texas Constitution creates legislative, executive, and judicial branches and establishes a general framework for the organization and operation of counties and municipalities (cities).⁵⁹

The Texas Legislature

The Texas Legislature consists of a House of Representatives (150 members) and a Senate (31 members) elected to 2- and 4-year terms, respectively.⁶⁰ It exercises legislative power in Texas. The Texas 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 Federal and Texas Constitutions.

The Executive Department

The Texas Executive branch or “department” is somewhat unusual when compared to other states because executive power in Texas is disbursed among elected officials rather than concentrated in a single elected official (the governor). The key officials of the Executive Department of Texas are the Governor, Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General. All are elected, except for the Secretary of State, who is appointed by the Governor and confirmed by the State Senate.⁶¹ Consistent with the federal government’s system, bills enacted by the Texas

⁵⁸ See generally *Texas Constitution and Statutes*, <https://statutes.capitol.texas.gov> (last accessed Oct. 20, 2022).

⁵⁹ See [TEX. CONST. art. XI](#).

⁶⁰ [TEX. CONST. art. III, §§ 2, 3, 4](#).

⁶¹ [TEX. CONST. art. IV, § 1](#)

Legislature must be approved by the governor to become law, except in cases where the Governor's veto is overridden by a 2/3's vote of both houses of the Texas Legislature.⁶²

Broadband programs are administered by the Broadband Development Office (BDO), which is under the direction of the Comptroller of Public Accounts. The role of the BDO relevant to Broadband infrastructure projects was described in greater detail in [a separate section](#) of this White Paper.

Local Government Public Entities

Counties and Cities

The basic units of local government in Texas are counties and cities.⁶³ Both counties and cities are described in the Texas Constitution. Article XI of the Texas Constitution addresses the establishment and powers of Counties and Cities.

Article IX of the Texas Constitution governs the creation of counties. In Texas, counties are created by the legislature and must contain at least seven hundred square miles.⁶⁴ County governments have only the powers granted to them by the Texas Constitution and state statute.⁶⁵ Thus, they are governed by Dillon's rule as discussed in greater detail [later in this White Paper](#).

Article XI Section 4 and 5 of the Texas Constitution categorizes cities based on population thresholds. Cities with populations less than 5,000 are governed by "general law" ([Dillon's Rule](#)), and those with populations greater than 5,000 may, but need not elect [home rule status](#).⁶⁶ Texas statutes further define the scope and powers of general law cities by categorizing them as Types A,⁶⁷ B,⁶⁸ and C⁶⁹ based on their status under prior law, their population, and other characteristics.⁷⁰

Other Political Subdivisions and Bodies Politic and Corporate, Special Districts, Boards and Government Sponsored Nonprofit Corporations

In addition to counties and cities, Texas has other political subdivisions to address more specific public needs and interests. They include school, junior college districts and housing authorities.⁷¹ However, the list also

⁶² [TEX. CONST. art. IV, § 14.](#)

⁶³ Texas made extensive amendments to its Local Government Code in 1987 (Acts 1987, 70th Leg., Ch. 149, Sec. 1, eff. Sept. 1, 1987). A few type A cities in Texas are still called "towns." This name does not in any way affect its powers under Texas law. See [TEX. LOCAL GOV'T CODE § 5.902](#).

⁶⁴ [TEX. CONST. art IX, § 1.](#)

⁶⁵ See, e.g., *Lewis v. Cameron County*, [24 S.W.3d 617](#) (Tex. Ct. App. Corpus Christi 2000)).

⁶⁶ Additionally, certain Texas cities that operated pursuant to a special legislative charter approved by the legislature prior to 1987, may their charter and become a "home rule" city. See [TEX. LOC. GOV'T CODE § 5.903](#).

⁶⁷ [TEX. LOC. GOV'T CODE Ch. 6.](#)

⁶⁸ [TEX. LOC. GOV'T CODE Ch. 7.](#)

⁶⁹ [TEX. LOC. GOV'T CODE Ch. 8.](#)

⁷⁰ To determine the classification of various cities in Texas see <https://directory.tml.org/search/government>.

⁷¹ See [TEX. LOC. GOV'T CODE § 172.003](#) (defining political subdivisions for purposes of municipal employee benefits).

includes nonprofit corporations such as development corporations (Type A & B corporations),⁷² public facility corporations,⁷³ and local government corporations.⁷⁴ Each of these is discussed later in more detail.

The above-listed entities are all “Public Entities” created or authorized by state statutes. In some cases, they have been granted the power to impose taxes; in others, they are supported through appropriations and/or fees. In many cases, state statutes authorize counties and municipalities to create them. They may be governed by the entity that created them with or without an advisory body or governed by an appointed board. Some of these entities have broad powers to finance and, in some cases, may own and operate specific types of “projects” as a separate enterprise.

Counties, and cities can make use of these other Public Entities to avoid constitutional or statutory restrictions that apply to other political issues that make it difficult to act directly. Even if these Public Entities don’t have express authorization in the statute to finance and operate telecommunication or broadband service for individual or business subscribers, they generally can finance broadband infrastructure if it facilitates the delivery of services contemplated as part of a project that is permitted in the enabling statutes. Like counties and general law cities, these Public Entities are governed by general law ([Dillon’s Rule](#)) and have the powers expressly granted or implied by the enabling statutes.

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

Dillon’s Rule and Broadband P3s

The state statutes governing most business entities (for-profit corporations, limited liability companies, and partnerships) and nonprofit corporations (NGOs) enable them to operate, enter into contracts, and conduct any lawful business to the same extent as a natural person. While this power can be specifically limited in the entity’s organizational documents, most instead elect to include a general “catch-all” purpose/authorization, such as “to conduct and transact any lawful business.”⁷⁵ Typically there are few if any restrictions imposed on a Private Entity’s powers. So long as the proper officers, directors, managers, or members approve an action taken (entering into a contract or authorizing a borrowing, for example), a court will recognize and enforce the contract or action.

Things are much different for many Public Entities. The powers of Public Entities that lack “home rule” authority ([described later](#)) are strictly limited by statute, and it is very important for anyone working on a

⁷² [TEX. LOC. GOV’T CODE Ch. 501.](#)

⁷³ [TEX. LOC. GOV’T CODE Ch. 303.](#)

⁷⁴ [TEX. TRANS. CODE §§ 431.101 to .110.](#)

⁷⁵ For example Texas general business “domestic entities” are generally only prohibited from “in a business or activity that: (A) is expressly unlawful or prohibited by a law of this state; or (B) cannot lawfully be engaged in by that entity under state law; or (2) operate as a: (A) bank; (B) trust company; (C) savings association; (D) insurance company; (E) cemetery organization, ...; or (F) abstract or title company governed by Title 11, Insurance Code.” And “(1) operate a cooperative association, limited cooperative association, or labor union; (2) transact a combination of the businesses of: (A) raising cattle and owning land for the raising of cattle, other than operating and owning feedlots and feeding cattle; and (B) operating stockyards and slaughtering, refrigerating, canning, curing, or packing meat;(3) engage in a combination of: (A) the petroleum oil producing business in this state; and (B) the oil pipeline business in this state other than through stock ownership in a for-profit corporation engaged in the oil pipeline business and other than the ownership or operation of private pipelines in and about the corporation’s refineries, fields, or stations; or (4) engage in a business or activity that may not be engaged in by a for-profit corporation without first obtaining a license under the laws of this state and a license to engage in that business or activity cannot lawfully be granted to the corporation. [TEX. BUS. ORG. CODE §§ 2.003, .005.](#)

broadband P3 to understand this difference and appreciate how it may limit and restrict the role a Public Entity can play in a P3.

In Texas, counties, general law cities, and other Public Entities that cannot or that have not elected home rule status possess only limited powers, governed by what is commonly known as “Dillon’s Rule.” Dillon’s Rule states that Public Entities have only those powers: “(1) granted in express words; (2) necessarily or fairly implied in or incident to the powers expressly granted; [or] (3) ... essential to the declared objects and purposes of the [local government] —not simply convenient, but indispensable.”⁷⁶

Therefore, for Public Entities subject to Dillon’s Rule, it will be very important to carefully analyze the Texas 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 Cities

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

The Texas Constitution grants Texas cities with a population greater than 5,000 the ability to elect “home rule” powers status in a local election.⁷⁷ Cities that adopt home rule status are governed by a “charter” that is approved by the voters and amended as deemed necessary by its citizens. Thus, these cities have more flexibility to own and/or operate broadband infrastructure and to work with private partners to develop broadband networks. Texas counties and cities governed by Dillon’s Rule must look to the Texas Constitution and state statutes for express or implied statutory authority to participate in a broadband P3. However, a home rule city also derives its power from its charter, which govern so long as neither the Texas Constitution nor state law *prohibit* the city from acting. As a practical matter, many local charters are written with a broad delegation of powers to the governing body.

This generally means the home rule city can take any action and participate in a Broadband P3 in any capacity, so long as it is not prohibited by the Texas Constitution, state statutes, or the local charter itself.⁷⁸ However, the Texas Constitution does generally limit the amount of debt a city can incur to no more than 2.5 percent of the taxable property located within the city.⁷⁹

Specific Limits on Public Entities Imposed by the Texas Constitution

The Public Use Doctrine & Eminent Domain

Like most states, the Texas Constitution permits the taking of property by exercise of the power of eminent domain only for public purposes.⁸⁰ The Texas Constitution generally limits the exercise of the power only for “public use” which generally includes use and enjoyment by the public at large or for the elimination of

⁷⁶ [City of Brenham v. Holle Seelhorst](#), 153 S.W. 345 (Tex. Civ. App. 1913).

⁷⁷ [TEX. CONST. art. XI, § 5.](#)

⁷⁸ See generally, NAT’L LEAGUE OF CITIES, *Cities 101 – Delegation of Power*, <https://www.nlc.org/resource/cities-101-delegation-of-power/>.

⁷⁹ [TEX. CONST. art. XI, § 5.](#)

⁸⁰ [TEX. CONST. art I, § 17.](#)

blight. For purpose of exercising the power of eminent domain “public use” *does not* include the transfer of property to a private entity for purpose of economic development. Further, the state Legislature may grant another entity the right to exercise the power of eminent domain only with approval of a two-thirds vote of each house of the Legislature. Subject to these limitations, Texas case law generally limits legislative review of the exercise of the power to whether the legislature could reasonably have considered the use of a public one.⁸¹

Within these constraints, the governing body of all Texas cities (home rule and general law) have the power to take property for a public purpose for many enumerated purposes as well as “any other municipal purpose the governing body considers advisable.”⁸² Counties have more limited powers to exercise eminent domain “for the construction of a jail, courthouse, hospital, or library, or for another public use authorized by law.”⁸³ The exercise of the power for municipalities and counties is governed by procedures set out in the Texas Property Code.⁸⁴

Grant of Funds and Lending of Credit to Private Persons – Public Purpose & Incidental Benefit

The Texas Constitution generally prohibits the Texas Legislature from lending its credit,⁸⁵ or granting public money or property to any person, association, or corporation.⁸⁶ This restriction generally extends to counties, cities, and towns as well.⁸⁷

However, in many cases this strict language has been mitigated by a judicial interpretation. Specifically, Courts recognize that public expenditures may “benefit” a private person indirectly without violating these provisions of the Texas Constitution so long as there is a substantial public purpose.⁸⁸ The Texas Supreme Court stated that statutorily authorized expenditure accomplishes a public purpose so long as the legislature “(1) ensure[s] that the statute’s predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain[s] public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) ensure[s] that the political subdivision receives a return benefit.”⁸⁹

⁸¹ [West v. Whitehead, Civ. App., 238 S.W. 976 \(Tx. Ct. App. 1922\)](#); see also *City of Austin v. Whittington*, [384 S.W. 3d 766](#) (Tex. 2012)(Examining a the purported “public purpose” of property for infrastructure that was part of the City’s convention center).

⁸² [TEX. LOC. GOV’T CODE § 251.001.](#)

⁸³ [TEX. LOC GOV’T CODE § 261.001.](#)

⁸⁴ [TEX. PROP. CODE Ch. 21.](#)

⁸⁵ [TEX. CONST. art. III, § 50.](#)

⁸⁶ [TEX. CONST. art. III, § 51.](#)

⁸⁷ [TEX. CONST. art. III, § 52\(a\); art. XI, § 3.](#) “No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law or to prevent a county, city, or other municipal corporation from investing its funds as authorized by law.”

⁸⁸ “An expenditure to accomplish a public purpose is constitutional even though it incidentally benefits a private interest.” [Op. Tex. Att. Gen. GA-0076 \(May 27, 2003\)](#) (citing *Byrd v. City of Dallas*, 6 S.W.2d 738,740 (Tex. Comm’n App. 1928); *Graves v. Morales*, 923 S.W.2d 754, 757 (Tex. App.- 1996)).

⁸⁹ *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers’ Comp. Comm’n*, [74 S.W. 3d. 377, 384.](#) (Tex. 2002).

Development and Diversification of the Economy as a Public Purpose

Since 1987, the Texas Constitution has contained a provision permitting the expenditure of public funds for economic development.⁹⁰ The Texas Legislature has adopted multiple statutes that permit the collection and dedication of taxes for economic development purposes and the issuance of the bonds for economic development purposes.

⁹⁰ [TEX. CONST. art. III, § 52-a](#). The Legislature is authorized to create loan and grant programs “for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state.”

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

The Texas Legislature enacted legislation requiring that some state and local projects that propose to use a P3 to develop or operate, adopt certain standards and practices designed to encourage and improve the efficiency and quality of P3 arrangements.⁹¹ In the case of state or state-agency-sponsored projects, the proposed P3 plan must be submitted to the State's Advisory Commission for review.⁹² In addition, local government political subdivisions can elect to operate under the provisions of this Act.⁹³ However, the statute does not by its terms apply to most broadband infrastructure P3 projects.⁹⁴ Texas statutes also authorize municipalities to acquire and construct facilities for (i) political subdivisions or state agencies for public use and (ii) for individuals, private corporations, and other private entities for manufacturing or commercial activities.⁹⁵

Chapters 380 and 381 of the Texas Local Government Code authorize expenditures of public funds for economic development. Texas municipalities and counties likely will rely on Chapters 380 and 381 for authority to document and enforce the terms of broadband P3. The reason is simply that since the development of broadband infrastructure is widely recognized as a critical "driver" of economic development within communities, the quickest, and in many cases, the most attractive way to achieve the community's economic development goals will be by providing this resource to citizens in a community. Both Chapter 380 and 381 provide funding mechanisms to incentivize the private investment and deployment of broadband throughout the community.

Chapter 380 authorizes municipalities to establish programs to make loans and grants of public money and to provide municipal personnel and services to promote state or local economic development and to stimulate business and commercial activity.⁹⁶ Home rule municipalities with populations over 100,000 also are authorized to enter into similar arrangements with 501(c)(3) organizations (federally tax-exempt charities) for similar purposes.⁹⁷ Further, all municipalities are specifically authorized to step in and provide local matching funds to access federal funding that requires a matching state grant.⁹⁸ Chapter 381 provides Texas counties with similar authority to create a county industrial commission to promote the location and development of new businesses and industries in the county and the maintenance and expansion of existing businesses.⁹⁹

⁹¹ TEX. GOV'T CODE CHS. [2267](#); [2268](#).

⁹² [TEX. GOV'T CODE § 2268.002](#).

⁹³ [TEX. GOV'T CODE § 2267.001\(5\)\(B\)](#).

⁹⁴ [TEX. GOV'T CODE § 2267.003](#). "This Chapter does not apply to: . . . (3) any telecommunications, cable television, video service, or broadband infrastructure other than technology installed as part of a qualifying project that is essential to the project. . . ."

⁹⁵ [TEX. GOV'T CODE § 1509.001\(1\); \(2\)](#).

⁹⁶ [TEX. LOC. GOV'T CODE §380.001](#)

⁹⁷ [TEX. LOC. GOV'T CODE §380.002](#)

⁹⁸ [TEX. LOC. GOV'T CODE §380.003](#)

⁹⁹ Specifically, [TEX. LOC. GOV'T CODE § 381.004](#) authorizes the county to establish and administer various economic development programs with government and commercial business, including providing tax abatement for the project

Recent legislation likely should provide a new tool for advisors to learn about creative uses of § 380 and § 381 agreements to promote broadband expansion. In 2021, the Texas legislature began requiring cities and counties to provide the Comptroller of Public accounts a copy of their agreement within two weeks of execution.¹⁰⁰ Copies of these agreements are now posted in a searchable database on the [Comptroller's website](#). Although not indexed by topic, it often should be possible to identify broadband infrastructure agreements by the name of the private entity.¹⁰¹

¹⁰⁰ Laws 2021, 87th Leg., R.S., Ch 208. See [Tex. Loc. Gov. Code §380.004](#) and [Tex. Loc. Gov. Code §381.005](#).

¹⁰¹ For example, a quick search disclosed Anderson County Texas' September 2021 agreement with ETEX Communications. *Comptroller's Online Chapter 380-381 Economic Development Agreements Database*, TEX. COMPTROLLER'S OFF., <https://comptroller.texas.gov/economy/local/ch380-381/reporting-entity-details.php?agreement=0006239>. Pursuant to that agreement the county agreed to provide ETEX a set grant for each new fiber connection installed in specified areas of the County.

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

As [discussed earlier](#), many Texas Public Entities must comply with Dillon’s Rule. This means that these Public Entities need express or implied legislative authority to enter into a P3 and to take the action and assume the responsibilities contemplated by a P3 agreement. Home rule cities face somewhat the same limits. However, since they are governed by their charter, they typically have more flexibility to act, and the potential to amend their charter (with voter approval) if necessary to accommodate a proposed P3 arrangement. In either case of course, the Texas legislature may impose limitations on local government’s power, thereby overriding the city’s charter to the extent it conflicts with the state statute.

This section describes examples of home rule cities that provide broadband currently, as well as express and implied authorization for Public Entities subject to Dillon’s Rule to participate in broadband P3s. Possible issues and limitations are described, and possible options to work around the limitations imposed by Dillon’s Rule (or legislative restrictions imposed on home rule Public Entities) using affiliated NGOs.

Express Legislative Authority for Local Government Broadband Infrastructure

Middle Mile Connectivity – Lower Colorado River Authority

The Lower Colorado River Authority (LCRA) is a government agency, and a body politic and corporate, established during the Great Depression to provide water conservation, flood control, and electrical service for a substantial part of central Texas.¹⁰² In 2021, the Texas Legislature authorized LCRA to provide “middle mile” broadband connection to retail ISPs and, under certain conditions, to municipal ISPs. In either case, the authority is required to provide service on “reasonable terms and conditions.”¹⁰³

Home Rule Cities

As [previously discussed](#), home rule cities generally have whatever powers granted under their charters so long as the activity is permitted by the city’s charter and is not prohibited by the Texas Constitution or state statute. At least two cities in Texas are now providing broadband service. The city of Mont Belvieu, Texas obtained a declaratory judgment in 2017 authorizing it to finance, own and operate a retail municipal broadband network.¹⁰⁴

¹⁰² [TEX. SPEC. DIST. CODE § 8503.001](#). For a map of LCRA’s service area see <https://maps.lcra.org/interactive.aspx>.

¹⁰³ [TEX. SPEC. DIST. CODE § 8503.032](#). Prior to offering service to a municipal ISP LCRA must (1) post on the authority’s Internet website information concerning the proposal to lease the capacity or facilities to the municipality not less than 90 days before entering into the lease agreement with the municipality; and (2) for the 90-day period beginning on the date that the authority posts information under Subdivision (1), makes the capacity or facilities available for lease to any commercial broadband provider that provides broadband services in the municipality, on the authority’s standard terms and conditions.

¹⁰⁴ Final Judgment, In Re The City of Mont Belvieu and Certain Public Securities, [No. CV-30781](#) (Dist. Ct. Chambers County, Texas) (April 20, 2017).

A news article¹⁰⁵ reported that the trial court’s decision in the Mont Belvieu followed the analysis discussed earlier in this White Paper to conclude that so long as the city did not offer traditional local or long-distance telephone service it was not required to obtain a certificate of convenience and necessity; a certificate of operating authority; or a service provider certificate of operating authority from PUCA pursuant to Section 54.201 of the Texas Utility Code. Further, the article reports that the court was persuaded that the broadband network was a public work, and that the city could operate the network as a public utility.

While the result decision in Mont Belvieu appears favorable, the trial court’s order itself is not binding on other courts in Texas, and the order itself omits any rationale for the conclusions reached. As indicated by other legislation, including but not limited to the above-cited provision of the Texas Utility Code, there are powerful constituencies in the legislature that are opposed to ownership and/or operation of broadband networks as a municipal utility, and of course the outcome for any particular city may differ because of differences in the city’s charter. For these reasons, any city contemplating establishment of a city-owned broadband network should seek legal counsel early in the process.

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

It goes without saying that broadband access is critical to the efficient conduct of most business transactions in the United States, and that includes the *business* of counties and municipal governments. Traditional municipal utilities increasingly rely on high-speed internet infrastructure to manage the operation and delivery of utility services, handling issues such as metering, balancing system demand, and identifying potential maintenance and repair needs. More generally, county and municipal governments, like their business counterparts, increasingly rely on internet-based applications to handle traditional government functions more efficiently. These functions include paying taxes, applying for permits, and asking for public comment on proposed zoning changes or other government actions. Of course, school districts relied heavily on online remote learning during the pandemic, and although in-person learning has returned, the ability to continue instruction in lieu of snow days offers the potential of supplying students with a better learning experience while saving money by avoiding makeups.

Based on these realities, advisors should consider whether various Public Entities can support the expansion of Private Entity led broadband deployment both by partnering to deploy “dual-use” broadband infrastructure that will support the Public Entity’s need for broadband and by encouraging public adoption of broadband-related applications to deliver government services more efficiently.¹⁰⁶

Economic Development and Job Creation

[Article III, §52-a](#) of the Texas Constitution authorizes the legislature to create programs, make loans and grants of public money, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion

¹⁰⁵ Lisa Gonzalez, *Court Confirms Texas Home Rule Authority to Build, Finance Community Network*, CMTY. NETWORK (Oct. 17, 2018), <https://muninetworks.org/content/court-confirms-texas-home-rule-authority-build-finance-community-network>.

¹⁰⁶ See for example Brownsville’s P3 with LIT Communities to build and connect city facilities that will also serve as an open access last mile connection to the homes and businesses. Ann Treacy, *Brownsville, Texas and Lit Communities partner to Build Citywide Fiber Network*, CMTY. NETWORK (Aug. 26, 2022), <https://muninetworks.org/content/brownsville-texas-and-lit-communities-partner-build-citywide-fiber-network>.

of transportation or commerce in the state. Bonds, or other obligations of any Public entity, issued for the purpose of making loans or grants for these purposes that are payable from ad valorem taxes and must be approved by voters. However, a program that is not secured or paid from ad valorem taxes does not constitute or create a “debt” for the purpose of any constitutional or statutory limitation. Chapters 380 and 381 generally authorize cities and counties to establish programs, provide loans and make public assets available to encourage economic development and job creation. Section 1509 of the Texas Government Code was enacted to enable municipalities to implement Article III, §52-a. It authorizes municipalities to acquire and construct facilities for lease to the public, higher education institutions, and private businesses and to finance the cost of those projects with bonds, including, with voter approval, bonds payable from ad valorem (property) taxes.¹⁰⁷

Using Other Government Sponsored Nonprofit Public Corporation Public Entities

While counties and cities may have the authority to own and directly operate a broadband network as a public utility or may act directly to establish programs to encourage Private Entity ISPs to develop and expand economic broadband, some communities may prefer instead to work with a Private Entity using a government-controlled separate entity.

Public Facility Corporations (PFC)

Chapter 303 of the Texas Government Code permits municipalities, counties and certain other Public Entities¹⁰⁸ to form a controlled public corporation to act on its behalf to accomplish any public purpose and specifically to acquire, construct and/or finance any “public facility.” A public facility is defined to include “any real, personal, or mixed property, or an interest in property devoted or to be devoted to public use.”¹⁰⁹ This can include traditional tangible infrastructure or less obvious public resources such as a contract to purchase natural gas for a utility. Public Facility Corporations have broad corporate powers both under Chapter 303 as well as by reference to Texas Nonprofit Corporation Act.¹¹⁰ For these reasons, assuming the specific role to be played in a Broadband P3 would be to create an asset or right of Public Entity (or the public at large) to use a broadband network, a PFC might be a useful mechanism for a City, County or another Public Entity (such as a local school district) to participate in a broadband P3.

Local Government Corporations (LGC)

While one might not expect to find it in the *Texas Transportation Code*, Subchapter D of Chapter 431 contains another nonprofit public corporation that may be an appropriate partner in a broadband P3, a “local government corporation” or “LGC”.¹¹¹ Like a public facilities corporation, an LGC can be formed by a city,

¹⁰⁷ See [TEX. GOV'T CODE Ch. 1509](#).

¹⁰⁸ [Tex. Loc. Gov't Code § 303.003\(11\)](#). “Sponsor” means a municipality, county, school district, housing authority, or special district that causes a corporation to be created to act in accordance with this chapter.” A sponsor may form multiple Public Facility Corporations. The sponsor of a Public Facility must pass a resolution stating that the corporation is acting on its behalf § 303.022 and appoints and removes (with or without cause) the corporation’s board. § 303.035.

¹⁰⁹ [Tex. Loc. Gov't Code § 303.003\(7\)](#).

¹¹⁰ [TEX. LOC. GOV'T CODE § 303.022](#); [TEX. BUS. ORG. CODE Ch. 22](#).

¹¹¹ For a useful article discussing local government corporations see Kevin B. Laughlin, *What The Heck Is A Local Government Corporation And Why Would My City Ever Want To Create One?*, TEX. CITY ATT’YS ASS’N (2016), <https://texascityattorneys.org/wp-content/uploads/2016/06/Local-Government-Corporations-TCAA-2016-Summer-Conference-KBL77225.pdf> (paper Presented at the Texas City Attorney Association Meeting, June 2016).

county, and certain other Public Entities.¹¹² Local Government Corporations have broad powers granted in Chapter 431 itself, and by cross-reference to the Texas Nonprofit Corporations Act.¹¹³ An LGC is governed by a board of directors appointed by the local government that created it. For purposes of this White Paper, the difference between an LGC and a PFC is that for the most part an LGC can do anything to further the public purposes of the Public Entity that created it.¹¹⁴

These characteristics also may give an LGC several advantages over other public corporations. For example, an LGC may be better equipped to access tax-exempt private activity bonds for broadband infrastructure than an Economic Development Corporation (EDC). In addition, in a proper setting, these LGCs may be better equipped to take on the operation and maintenance of a publicly used portion of a broadband P3's network, because, unlike a PFC, its role is not limited to simply acquiring, constructing, and financing the network.¹¹⁵

Economic Development Corporations Type A & Type B (EDC)

Likely the most well-known of all economic development tools in Texas are Economic Development Corporations (EDCs). EDCs come in two varieties: Type A and Type B.¹¹⁶ EDCs can be used by municipalities to directly fund projects using a dedicated sales taxes (up to 1% for Type A and up to an additional 1% for Type B). They also can issue tax-exempt conduit financing that is paid, in whole or in part by a private business that benefits from the financed project.

However, even though it may seem somewhat counter-intuitive given the critical role broadband access plays – directly and indirectly in the economic development and vitality of communities, there likely will be significant hurdles that will limit the utility of EDCs in a broadband P3. These are discussed below, but readers are cautioned to review their specific situation with legal and financial advisors before abandoning consideration of EDCs as an appropriate tool for their broadband P3.

¹¹² [TEX. TRANS. CODE § 431.003](#). In addition to cities and counties, local government corporations can be formed by i) a navigation district, hospital district, or hospital authority; (ii) a regional transportation authority governed by Chapter [452](#); (iii) a rapid transit authority governed by Chapter [451](#); or (iv) a coordinated county transportation authority governed by Chapter [460](#).

¹¹³ [TEX. TRANS. CODE § 431.102](#). Local Government Corporation statute provides that these corporations operate and are governed in most respects in the same manner as public housing authorities. See Tex. Local Gov. Code Chapter 394.

¹¹⁴ [TEX. TRANS. CODE § 431.102\(a\)](#). “A local government corporation may be created to aid and act on behalf of one or more local governments to accomplish any governmental purpose of those local governments.”

¹¹⁵ See for example, the discussion of the limitation of eligible projects for EDCs in the [next section](#). Also see the discussion of the wide uses of LGCs in K. Laughlin's paper previously cited and the Travis County's statement of regarding the advantages and purposes of its LGC, the Travis County Development Authority at <https://corporations.traviscountytexas.gov/corporations/transportation-development>. An overriding point here is that not every public corporation, city or county may be able to participate effectively in every type of broadband P3, and in each case it is important to review this issue with legal advisors early in the structuring process to identify the options available under Texas law.

¹¹⁶ TEX. LOC. GOV'T CODE Chs. [501](#), [504](#), [505](#).

EDC Basics¹¹⁷

Like the PFC and LGC, both Type A and Type B EDCs are public nonprofit corporations. They are governed by a board of directors appointed and serving at the pleasure of the city that created the entity. They have the power to finance projects both within and, with certain limitations, outside their borders.

The Texas statutes governing EDCs have been amended several times since the original legislation (the Economic Development Act) was passed in 1979. The use of EDCs expanded significantly in 1989 when cities were given the power to enact a voter-approved sales tax of up to 1% to fund projects authorized by the Act. Type B EDCs were created by the Texas legislature thereafter to provide another vehicle to fund the projects authorized by Type A EDCs and to expand the types of projects that can be financed to include certain public amenities (such as parks, stadiums, and convention centers) that make the community more attractive for economic development and expansion and improve the quality of life in the community. Type B EDCs also can impose a voter-approved sales tax of up to 1%. However, no city may enact an EDC sales tax if it causes the aggregate of all local sales taxes to exceed 2%. Many cities have both a Type A and a Type B EDC.

Eligible Projects

The definition of “projects” eligible for funding and financing by either a Type A or a Type B is not limitless and was significantly curtailed by the Texas legislature in 2003. Some “broadband infrastructure” is eligible for financing by both Type A and Type B EDCs. For example, internet infrastructure is specifically listed among the “infrastructure improvements found by the EDCs governing board to be required or suitable to promote or develop new or expanded business enterprises,”¹¹⁸ but that language implies that the improvements undertaken must be tied to some business enterprise development and excludes infrastructure related to providing residential access to broadband. Further, even though privately owned ISPs are among the business industries that may be financed directly,¹¹⁹ most project financing to help a Private Entity ISP expand its network will not create *primary jobs* – a requirement added to the statute by the Texas Legislature in 2003. To meet this primary jobs requirement, a majority of the products or services of the company must ultimately be “exported” and “infuse new dollars into the local economy.” A typical ISP business model instead seeks to tap *local* subscriber revenues and arguably directly brings little if any revenue from outside the community being served.¹²⁰

¹¹⁷ A full discussion of the requirements and rules applicable to EDCs and the Type A and Type B sales tax is well beyond the scope of this White Paper and there are a number of excellent resources available. A great overview of EDCs can be found in a narrated power point prepared by the Russell Gallehan, Texas Controller’s Office. It is available at <https://www.youtube.com/watch?v=xm54VPlc-Qs>.

¹¹⁸ [TEX. LOC. GOV’T CODE § 501.103](#).

¹¹⁹ [TEX. LOC. GOV’T CODE § 501.002\(12\)\(ii\)](#). “[I]ncluded in one of the following sectors of the North American Industry Classification System. . . 51 (excluding 512131 and 512132).” (The NAICS code for internet providers is 518111. See *NAICS 518111 – Internet Service Providers*, INDUSTRIUSCFO, <https://secure.industriuscfo.com/industry-metrics/naics/518111-internet-service-providers#:~:text=NAICS%20518111%20%2D%20Internet%20Service%20Providers> (last visited Oct. 20, 2022).

¹²⁰ [TEX. LOC. GOV’T CODE § 501.002\(12\)](#). “Primary job” means: (A) a job that is: (i) available at a company for which a majority of the products or services of that company are ultimately exported to regional, statewide, national, or international markets infusing new dollars into the local economy.”

Federal Tax Exemption for a corporation that Lessens the Burdens of Government

Chapter 22 of the Texas Business Organizations Code, (“NGO Act”) generally permit formation of a nonprofit corporation (an NGO) for any lawful purpose including serving a charitable purpose.¹²¹ For federal income tax purposes, such an NGO might also achieve favorable status as a federally tax-exempt charity. In this regard, it is important to understand that the standard for achieving tax-exempt status under federal income tax rules (IRC §501(c)(3)) is not the same as the broad authority granted to form an NGO Act, and at least in this regard, the standards of §501(c)(3) are more stringent.

For example, merely operating as a *nonprofit* ISP (without more), while possibly meeting the requirements of the NGO Act because it is not operated for profit to any private shareholder, would be considered to be engaging in a trade or business. This alone would make it ineligible 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 more narrowly defined by the Internal Revenue Code.

The Internal Revenue Code includes “lessening the burdens of government” as a recognized “charitable purpose.” This is a term used to describe arrangements where an NGO is organized and operated in a manner closely aligned with a county, city, or other political subdivision so that it can work to help the local government achieve an identified public objective. An IRS training memorandum states that depending on the level of local government involvement, a nonprofit ISP might qualify for tax-exempt status under 501(c)(3).¹²² 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.

¹²¹ [TEX. BUS. ORG. CODE Ch. 22](#); §§ 22.051; 2.002.

¹²² 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>).

Funding the Public Entity's Contribution Using Tax Revenue, Debt, & Other Incentives to Finance Broadband

Introduction

As discussed, [earlier](#) in this White Paper, there is authority for home rule cities in Texas to own and operate retail broadband networks as a municipal utility. However, an important advantage of a P3 is that no single “partner” need be responsible for all aspects of a broadband network design, construction, maintenance, and operation. This means that Public Entities can play a limited role in the ownership, maintenance, and operation of a broadband network, but still play a very important role in the success of the P3 by working with Private Entities to help fund the construction and ongoing operating costs of the network.

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

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

Discretionary Power of the Governing Body of Public Entities

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

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

Debt Financing for Broadband

General Obligation Bonds & Property Tax Supported Debt

Home-rule municipalities may issue debt – bonds -- to make permanent public improvements or for another public purpose in the amount and to the extent provided by its charter.¹²³ However, these bonds must be

¹²³ [TEX. GOV'T CODE § 1331.052](#). The City of City of Mont Belvieu case, [discussed earlier](#), provides an example of a city charter found by a court to authorize construction, ownership and operation of a broadband network.

sold at a public sale and, in addition to being authorized by the city's charter, the bonds can only be issued after being approved by the majority of voters in a city election.¹²⁴

Texas statutes authorize bonds to be issued by any municipality bonds payable for ad valorem taxes (property taxes) for "permanent improvements inside the municipal boundaries," but internet infrastructure is not specifically listed among the examples of permanent improvements in the statute. For that reason, municipalities will want to confirm with their legal advisor that the contemplated project is permitted, particularly in the case of general law municipalities that subject to Dillon's Rule.¹²⁵

Municipalities with a population of at least 750,000 are authorized to issue bonds payable from taxes so long as the aggregate amount of the debt incurred does not exceed 10% of the appraised value of property in the jurisdiction. This authority supersedes any limitation supersedes any lower limit contained in the city's charter.¹²⁶

Funding Broadband from Municipal Utility, Service or Enterprise Revenues

Municipalities that establish broadband service as a municipal utility or as a service or enterprise are authorized to apply any net revenue derived from that operation to fund debt service on bonds issued to fund that system.¹²⁷ Those revenues presumably could be derived either by the municipality from local subscribers or from a Private Entity that operated the system on behalf of the municipality.

Certificates of Obligation (COs) (Public Financing)

Generally, in traditional types of public debt, bonds can be secured and repaid directly by tax revenues only with public vote. Certificates of Obligation represent an important exception to this rule for certain "public works" (and have been used to finance a municipal broadband network in at least one Texas city).¹²⁸ The option is available to counties and cities having home rule powers. However, the requirements for issuing can be complex and require legal advice. For example, most projects require public notice and give citizens the option of petitioning to require an election before proceeding. The option to issue COs is unavailable if the project to be financed had been subject to an unsuccessful election within the last three years.¹²⁹ Even considering those issues, however, in the property setting, COs may be a useful tool for a city or county seeking to fund an investment in publicly owned broadband infrastructure that could be deployed as part of a broadband P3 project.

Certificates of Participation (COP) (Lease Obligations Payable only from Current Budgeted Revenues)

Texas statutes provide that a Public Entity may contract to acquire property using a lease. If the lease provides no more than the governing body will use its "best efforts" to obtain and appropriate funds during the term of the lease but reserves to the government the right to terminate the lease at the end of each

¹²⁴ [TEX. GOV'T CODE §§ 1331.052\(b\), .053.](#)

¹²⁵ [Tex. Gov't Code § 1331.001.](#)

¹²⁶ [TEX. GOV'T CODE § 1331.051\(b\).](#) Currently Houston, San Antonio, Dallas, Austin and Fort Worth have populations of 750,000 or more.

¹²⁷ [TEX. GOV'T CODE § 1501.1051.](#)

¹²⁸ See [Tex. Loc. Gov't Code §§ 271.041-.064](#). The City of Mont Belvieu, [discussed earlier](#) in the section dealing with municipal broadband networks authorized by cities having home rule powers used COs to finance its broadband network.

¹²⁹ See generally Liz Vela, *Certificates of Obligation, A Flexible Tool for Local Projects*, TEX. COMPTROLLER'S OFF. (Jan. 2017), <https://comptroller.texas.gov/economy/fiscal-notes/2017/january/co.php>; [TEX. LOC. GOV'T CODE § 271.047\(d\)](#).

fiscal year, it will not be treated as long term obligation for state law limits on the issuance of debt.¹³⁰ A certificate of participation or “COP” – is a certificate evidencing the right to receive a portion of the payments made under such a lease with a Texas Public Entity. This COP can be sold to investors, in much the same way as any other bond. If the lease and the COPs are structured properly with lease payments consisting of identified interest and principal components, then for federal income tax purposes payments made will be treated as principal and interest on a debt. Thus, a COPs are sometimes used as a substitute for debt financing by a Public Entity.¹³¹

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

Another 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.¹³² This option can be useful in situations where a Public Entity wants greater overall control over the disposition of broadband infrastructure used by the P3 and when it is able to dedicate some funding annually to cover debt service on the bonds issued by the NGO to fund the broadband project.

If this structure were used, a new NGO is created with a board of directors closely aligned with the Public Entity’s governing body or public officials. The NGO acquires constructs the broadband project and then leases 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 issues to finance the cost of the project. When the bonds are fully repaid, the Public Entity purchases the project from the NGO 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.¹³³ 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).

Taxes and Special Assessment Funding for Broadband

Public Improvement Districts (PIDs) (tax assessments)

Chapter 372 of the Texas Local Government Code¹³⁴ authorize cities and counties, upon petition of a majority of the affected taxpayers or owners of property,¹³⁵ to request the formation of a special assessment district

¹³⁰ [Tex. Loc. Gov. Code § 271.903.](#)

¹³¹ Like other government bonds and most other debt issued by a Public Entity, COPs must be registered with the Texas Attorney General. See *Public Finance*, OFF. OF THE ATT’Y GEN., <https://www.texasattorneygeneral.gov/divisions/public-finance> (last visited Oct. 20, 2022).

¹³² [TEX. BUS. ORG. CODE Ch 22.](#)

¹³³ See the [earlier discussion](#) on tax-exempt financing for certain projects owned and used by 501(c)(3) organizations.

¹³⁴ [TEX. LOC. GOV’T CODE Ch. 372.](#)

¹³⁵ [Tex. Loc. Gov’t Code § 372.005\(b\)](#). Generally, the petition requesting formation of the District is sufficient if signed by: “(1) owners of taxable real property representing more than 50 percent of the appraised value of taxable real property liable for assessment under the proposal, as determined by the current roll of the appraisal district in which the property is located; and (2) record owners of real property liable for assessment under the proposal who:(A)

to finance various public improvements. Broadband infrastructure is not a public improvement specifically defined by the statute. However, §372.003 does define a qualifying project to include “special supplemental services for improvement and promotion of the district, including services relating to advertising, promotion, health and sanitation, water and wastewater, public safety, security, business recruitment, development, recreation, and cultural enhancement.”

Broadband is generally recognized as critical to improving many of these services (e.g., public safety, security, development, and cultural enhancement). In an appropriate situation, communities should work with their advisors to consider how if a PID might be used to provide additional public financial resources to encourage and facilitate the expansion of broadband in a community. For example, a local community might create a PID to work with a private ISP to develop broadband infrastructure to improve emergency service communications in conjunction with the ISP’s deployment of subscription broadband services to residents.

County Assistance Districts (CADs) (Sales Tax)

Texas counties may seek voter authorization to create an assistance district, a CAD,¹³⁶ within the county to perform one or more functions including public welfare and the promotion of economic development.¹³⁷ Once formed, these districts can be managed either by the governing body of the county directly or by a board of directors appointed by the county commission.¹³⁸ Within the general 2% limit on local sales taxes, a CAD can impose a sales tax within the district to fund its operations.¹³⁹ Since it is generally accepted that reliable high speed internet is critical to the general welfare and economic development, communities without adequate service should consider consulting with their legal advisors to determine if a CAD, acting alone or in conjunction with the Private Entity in a broadband P3, might be appropriate.

Tax Increment Financing Districts (TIF)

The use of tax increment financing as an economic development tool throughout the United States was [discussed earlier](#) in this White Paper. Chapter 311 of the Texas Tax Code authorizes municipalities to create reinvestment zones in areas that are blighted or that otherwise meet one or more of specific statutory requirements.¹⁴⁰ After following a complex procedure, normal property tax collections in these districts are frozen and the increment is diverted to pay project costs including public infrastructure that eliminate the blighted or other deteriorated conditions (or principal and interest on obligations issued to fund those

constitute more than 50 percent of all record owners of property that is liable for assessment under the proposal; or (B) own taxable real property that constitutes more than 50 percent of the area of all taxable real property that is

¹³⁶ [TEX. LOC. GOV'T CODE Ch. 387.](#)

¹³⁷ [TEX. LOC. GOV'T CODE § 387.003.](#)

¹³⁸ [TEX. LOC. GOV'T CODE § 387.005](#)

¹³⁹ *County Assistance Districts*, TEX. COMPTROLLER’S OFF., <https://comptroller.texas.gov/economy/local/county-assistance-districts/> (last visited Oct. 20, 2022).

¹⁴⁰ [TEX. TAX CODE § 311.005\(a\)\(4\)](#). The area conditions must – “substantially impairs the sound growth of the municipality or county” or “constitute an economic or social liability to public health.” However, these conditions must be because of: (A) a substantial number of substandard, slum, deteriorated, or deteriorating structures; (B) the predominance of defective or inadequate sidewalk or street layout; (C) faulty lot layout in relation to size, adequacy, accessibility, or usefulness; (D) unsanitary or unsafe conditions; (E) the deterioration of site or other improvements; (F) tax or special assessment delinquency exceeding the fair value of the land; (G) defective or unusual conditions of title; (H) conditions that endanger life or property by fire or other cause; or (I) structures, other than single-family residential structures, less than 10 percent of the square footage of which has been used for commercial, industrial, or residential purposes during the preceding 12 years, if the municipality has a population of 100,000 or more.”

costs).¹⁴¹ A municipality also may by ordinance create a sales tax increment that also can finance these project costs.¹⁴² Admittedly, TIF Districts likely would not be used as a stand-alone source of funding only for broadband in a community, but in the context of a TIF District created for the purpose of remediating blight and economic distress, broadband infrastructure costs might be included within the plan project costs.

Economic Development Sales Taxes (Sales Tax)

As previously discussed, Economic Development Corporations (EDCs) are used by many Texas municipalities to further economic development. Much of this work is funded through voter-approved local sales and use taxes authorized by Chapters 504 and 505 of the Local Government Code. While this dedicated funding source could be extremely useful in funding a Public Partner's investment in a broadband P3, its utility is limited somewhat by the definition of "eligible projects" that can be funded under the Economic Development Act.

Chapter 380/381 Agreements

Chapters 380 and 381 of the Texas Local Government Code were [mentioned earlier](#) in the context of statutory authority for Public Entities to participate in a broadband P3.¹⁴³ As the name implies, in each case statutory legislation authorizes funding projects or other programs using city or county revenue but only if the funding is pursuant to [a written agreement](#) with the benefited Private Entity, this agreement must be submitted to the office of the Comptroller of Public Accounts for publication. The written must obligate the Private Entity to spend funds in accordance with the purposes of the grant, loan or other program.¹⁴⁴ However these Chapters would seem to authorize the expenditure of any available funds to further a broadband P3 for the community so long as the general requirements are met.¹⁴⁵

Tax Abatement and Tax Exemption

Several Texas Statutes may apply to permit Public Entities of off Private Entity ISPs limited property tax and in some cases sales tax exemption for property used in a broadband P3. First, Texas law generally exempts property owned or acquired by a Public Entity from property and sales and use tax. Texas law governing PFCs clarifies that this exemption extends to property owned by an entity that owns or otherwise would be subject to those taxes if they are leased to a Public Entity or other corporate entity that is exempt from those taxes.¹⁴⁶ Thus, this statute appears to offer a method to exempt portions of a broadband network leased by a Public Entity and used to support its activities, from property and sales tax to the same extent as if the property was acquired and owned by the Public Entity directly.

¹⁴¹ [See TEX. TAX CODE § 311.010\(b\).](#)

¹⁴² [TEX. TAX. CODE § 311.0123.](#)

¹⁴³ Chapter 380 provides authority to cities while Chapter 381 provides permits counties to fund Private Entity's efforts to promote economic development.

¹⁴⁴ [See Tex. Loc. Gov't Code §§ 380.002, 380.004, 381.002, 381.004.](#)

¹⁴⁵ See for example Anderson County Texas' September 2021 agreement with ETEX Communications. *Comptroller's Online Chapter 380-381 Economic Development Agreements Database*, TEX. COMPTROLLER'S OFF., <https://comptroller.texas.gov/economy/local/ch380-381/reporting-entity-details.php?agreement=0006239> (last visited Oct. 20, 2022). Pursuant to that agreement the county agreed to provide ETEX a set grant for each new fiber connection installed in specified areas of the County. Of course, any program established, or agreement entered into pursuant to Chapters 380/381 must be in accordance with a home-rule city's charter and not otherwise be in conflict with a specific state law.

¹⁴⁶ [See Tex. Loc. Gov't Code § 303.042](#)

Chapter 312 Reinvestment Zone Abatement

Chapter 312 of the Texas Tax Code generally grants many taxing districts the ability to enter into property tax exemption agreements for new improvements or personal property in a designated reinvestment zone, but the criteria for establishing the zone are fairly limited, and similar to those for designating the area for tax increment financing ([described previously in this White Paper](#)).¹⁴⁷ Additionally Texas school districts are not permitted to use Chapter 312 to provide Tax Abatement. For these reasons, Chapter 312 may be useful only in encouraging Private Entities build out broadband networks in existing reinvestment zones.

Chapter 313 Economic Development Tax Abatement

Chapter 313 of the Texas Tax Code (the Economic Development Tax Act) provides a mechanism for school districts to provide limited tax abatement for the O&M portion of its budget, subject to restrictions tied to the level of taxable property in the district and the proposed investment.¹⁴⁸ Generally, most tangible property placed in service pursuant to an agreement with the District that meets the requirements of the Act would qualify, however, the Texas Legislature is required to “make up” revenues lost from this form of local tax abatement, and this has made Chapter 313 tax abatement both costly and controversial. This provision is set to expire at the end of 2022, and efforts to renew so far for another ten years have been unsuccessful.¹⁴⁹

¹⁴⁷ [See Tex. Tax. Code. § 312.202.](#)

¹⁴⁸ See [Tex. Tax Code Ch. 313](#); see generally *Chapter 313 School Value Limitation Agreement Documents*, TEX. COMPTROLLER’S OFF., <https://comptroller.texas.gov/economy/local/ch313/agreement-docs.php> (last visited Oct. 20, 2022); *Chapter 313 Property Requirements*, TEX. COMPTROLLER’S OFF., <https://comptroller.texas.gov/economy/local/ch313/requirements.php> (last visited Oct. 20, 2022).

¹⁴⁹ John Stock, *To Be or Not To Be – Texas Chapter 313*, VORYS (Fall 2021), <https://www.vorys.com/publication-To-Be-or-Not-To-Be-Texas-Chapter-313>.

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

Right of Way

Texas has ISP-favorable rules intended to encourage and streamline the process of locating wireless and wireline infrastructure in a public right of way, as well as new favorable legislation that can assist electric cooperatives that will wish to co-locate broadband infrastructure over easements dedicated, they hold only for electrical service.

Legislation Permitting Use of Pole Attachments in the Public Right of Way

Texas has enacted legislation governing applications and the permitting process for use of the public right of way to locate *wireless* internet infrastructure.¹⁵⁰ It is intended to streamline the process of locating or co-locating wireless towers and equipment on existing public or utility-owned property. The statute does not supersede the FCC's authority to regulate the placement of wireless communication devices on poles owned by investor-owned utilities.¹⁵¹ The statute generally prohibits municipalities from granting exclusive access to any provider, sets minimum time periods for granting or denying requests for access, establishes uniform criteria for evaluating requests for access, and establishes maximum charges both for the initial application and annual fees.¹⁵² In 2021, the Texas legislature required the Texas Highway Commission to adopt rules to permit broadband infrastructure to be located in State-owned right of way.¹⁵³

Existing Easements and Broadband

The statutes that encourage and streamline the use of public rights-of-way to locate wireless and wired internet infrastructure contrast with potentially more difficult issues that arise when broadband infrastructure needs to be located in an existing easement held by an electric cooperative or utility. Unfortunately – at least for ISPs and others seeking to expand broadband access – Texas caselaw dealing with this issue is not helpful. The most relevant decision is [Marcus Cable Associates L.P. v. Krohn, 90 SW3d 697 \(Tex. 2002\)](#). In that case, Marcus Cable Associates (MCA) relied on a 1939 easement that granted an electric cooperative the right to install and operate “an electric transmission or distribution line or system” on privately owned land, to permit its use the same easement to hang cable on poles that would provide residential television service.

After seven years of use, the Krohn's (landowners burdened by the easement) sued MCA for common law trespass arguing that the use was beyond the scope of the original easement. The Krohn's apparently did not contest the cooperative's right to assign its easement to MCA.

To defend against the trespass claim, MCA maintained that its use was permissible because, like the cooperative's existing lines, its cable carried an electrical signal. Marcus also argued that the use should be permitted both because it did not in any way burden the Krohn's use of their property more than that already made by the electric cooperative and because permitting the use served a valid public purpose. In particular,

¹⁵⁰ [TEX. GOV'T CODE Ch. 284](#).

¹⁵¹ [47 U.S.C. 224](#). The FCC does not have jurisdiction over municipal utilities or cooperatives.

¹⁵² There apparently is no similar legislation regulating access to municipally-owned poles or right of way for wired broadband access (for example fiber optic cable), although [Chapter 283](#) does provide rules for telecommunications providers.

¹⁵³ [TEX. TRANS. CODE § 250.002](#). Final Rules were adopted by the Commission to implement this statute in September 2022. See MINUTE ORDER, TEX. TRANS. COMM'N (Sept. 22, 2022), <https://ftp.txdot.gov/pub/txdot/commission/2022/0922/10b.pdf>.

MCA pointed to a Texas statute that expressly called for utilities to grant cable providers reasonable access to their utility poles.¹⁵⁴

The Texas Supreme Court rejected these arguments. First, it ruled that even if MCA's cable carried an electrical signal, the actual intent of the parties was to grant an easement to run lines that produced electrical power (not telecommunications). Second, it rejected the public purpose argument as that it was irrelevant to the question of what rights were granted under the easement, and specifically found that this statute only applied to utilities that operated in public right-of-way – not over a private easement. Finally, the Supreme Court specifically rejected the notion that property owners had to prove an impermissible use burdened them in some way that was greater or different from what they faced from a permitted use under the easement.

The lone dissent accused the majority of failing to follow the plain language of the easement. After all, the easement permitted lines that transmitted electricity, and no one contested that MCA's cable did carry and transmit an electrical signal. The dissent argued that resorting to historical context in which the original easement was granted was inappropriate. It's useful to quote from the dissent because it illustrates just how far the majority was prepared to go to invalidate a use that fit within the language of the easement, even if it clearly was not contemplated at the time the easement was created:

So if the question is, what were the Curtises [the original property owners] thinking in 1939 when they gave the Co-op an easement for “an electric transmission and distribution line or system”, the answer is easy: they were thinking about electric power, not an electric cable television signal, even though both are electric. But that's not the question because, as the Court correctly holds, the scope of an easement is measured by the parties' intent as expressed in the words used, broadened by changes in the manner, frequency, and intensity of the intended use that are due to technological advances and do not unreasonably burden the servient estate. An easement need not accommodate unintended uses merely because they present no additional burden, nor can an easement be enlarged merely because additional uses would benefit the public. But a use that is within the language of an easement as it has come to be understood with changes in technology is not prohibited simply because it was not part of the parties' original thinking.

Regardless, of course, Marcus Cable Associates is settled law, but its scope has been limited in subsequent decisions. For example, in *CenterPoint Energy Houston Elec. LLC v. Bluebonnet Drive, Ltd.*, [264 S.W.3d 381](#) (Court of Appeals of Texas, Houston (1st Dist. 2008)), the Court refused to limit an easement granting a right to electric transmission and distributing lines consisting of variable numbers of wires” and “all necessary and desirable appurtenances,” including “towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys” to only telephone and telegraph used by the electric utility for the provision of service. Thus, no trespass was found by the use of the easement to provide cellular telephone service using wireless transmission and fiber cable. Most recently, in *Boerschig v. Southwestern Holdings, Inc.*, [322 S.W.3d 752](#) (Tex. Ct. App. 2010), the court rejected the argument that an easement granted for a road to service a ranch would be construed to not permit a road that would instead service a resort. The court's opinion found that Marcus Cable Associate's decision was predicated on a judicial finding that settle law required that the term “electric transmission and distribution” be limited to electrical power distribution, and thus the discussion regarding the party's intent was unnecessary to support its conclusion.

These cases seem to make two points particularly clear. First, the language used in a utility easement is critical to the analysis. Second, the Texas Supreme Court seems to be unimpressed by arguments that a new contemplated use imposes no greater burden on the property subject to the easement. This, of course,

¹⁵⁴ TEX. UTILS. CODE § [181.102](#)

makes it particularly critical for participants in a proposed Broadband P3 to address easement issues as early in the process as is feasible.

Easements for Middle Mile Access

As [previously discussed](#) in this White Paper, pursuant to legislation passed in 2021, electric utilities regulated by PUCT are specifically authorized to use or deploy fiber and other broadband infrastructure to provide middle mile broadband service. As part of that legislation, Section 43.053 of the utility code contains provisions that apply to easements held by these utilities and apparently to electric cooperatives as well. The new provision states that because this broadband infrastructure is typically used by the electric utility in the operation of its electric service, involves no greater use or burden to the landowner where the exiting easement is located, and is of great public importance, the use of that easement to provide middle mile broadband service does not require an additional authorization or amendment to the easement – *provided* that the holder of the easement is provided notice of the intended use and thereafter fails to object within 60 days. However if the landowner does object, the utility apparently must either seek to expand the easement or take other action to resolve the issue. Thus, the legislation does not purport to impact whether an amendment to an easement is required, but it does significantly shorten the time frame during which the landowner can contest the proposed use.¹⁵⁵

Easements Rural Electric Cooperatives

As [previously discussed](#) in 2019 authorized rural cooperatives to offer broadband service. That legislation contained a separate section¹⁵⁶ that incorporates notice provisions that are largely identical to those discussed earlier for middle-mile providers. Again, those provisions do not directly affect the landowner's right to contest the use of an existing easement for broadband service, but they do dramatically shorten the time limit during which that claim must be asserted.

In 2021 the Texas legislature enacted a new Chapter¹⁵⁷ that deals specifically with the right of ISPs to use a rural cooperative's poles to attach both wired and wireless broadband infrastructure. Generally, the legislation requires cooperatives to make reasonable accommodation to permit any ISP to connect on reasonable terms and conditions. The legislation also sets parameters on the cooperative's ability to require an ISP to pay for pole replacements if the poles were already in need of replacement due to normal wear and tear. The legislation specifically does not require the cooperative to expand any additional easement it has to accommodate the broadband provider's use of the pole and it requires the broadband provider to assume all responsibility for legal claims that arise as a result of its use of the cooperative's poles and easement.

¹⁵⁵ See also [16 TEX. ADMIN. CODE § 25.218](#) (PUCT provides additional guidance regarding implementation of this provision).

¹⁵⁶ [TEX. UTILS. CODE § 181.048](#).

¹⁵⁷ [Tex. Utils. Code Ch. 253](#).

Recent Proposed Legislation

Texas is one of the few states in the country with a legislature that is not in session each year. The next session will be in 2023. As the [earlier discussion](#) in this White Paper illustrated, the 2021 session contained a number of consequential laws enacted to implement the Governor's broadband Plan. Given the level of activity, and the work that remains to be done to implement portions of that legislation, it seems unlikely that 2023 will repeat that level of activity. Texas almost certainly will need to consider some legislation to secure the state's participation in IJA BEAD and Digital Equity Act Funding programs, but these likely will not require extensive changes to the broadband grant infrastructure put in place during 2021.

One area of policy that seems almost certain to be a topic of discussion is the current administration's concern that the NITA oversight of the Infrastructure Act funding programs is far too biased in favor of fiberoptic broadband infrastructure, leaving other technologies (5G and Starlink) out of consideration for funding.¹⁵⁸ Whether and how this concern will manifest in Texas legislation in 2023 remains to be seen, but regardless it may well result in controversy and potential delays in approval of Texas' broadband funding plan by NTIA, a prerequisite for the release of Texas' share of the \$42.5 billion appropriated by Congress pursuant to BEAD.

Based on legislation proposed by not adopted in 2019, additional items that likely deserve to be monitored going forward are:

1. Legislation that relates to the creation of broadband offices within certain governmental divisions to better facilitate broadband throughout the state
2. Legislation that provides for broadband development efforts to utilize more public funds in effort to expand and improve broadband throughout the state
3. Legislation that provides funds and efforts for the facilitation of broadband for public schools and to foster remote learning.

A representative sample of the bills proposed in both the 2019 and 2021 session that were not enacted is included below.

2019 Proposed Legislation (Not Enacted)

| Bill | Sponsor | Bill String | Date/Last Action |
|---|----------------------|-------------|--|
| Bill Information | | | |
| HB 669 | King | HB 669 | 5/3/2019 – S Referred to Business & Commerce |
| Allows PUCT to issue rules governing local exchange companies that elect to obtain for support from the universal service fund for the provision of broadband service in underserved rural areas. | | | |

¹⁵⁸ See, for example Press Release from the Comptroller of Public Accounts Glenn Hagar June 21, 2022, criticizing NTIA's BEAD Act Notice of Funding Opportunity. <https://comptroller.texas.gov/about/media-center/news/20220621-texas-comptroller-glenn-hegar-statement-on-new-broadband-grant-rules-released-by-national-telecommunications-and-information-administration-1655759740516>.

[HB4577](#) [Smithee](#)

HB 4577

3/26/2019 – H Referred to State Affairs

Enacts a new Chapter to the Utility Code to spur broadband service in rural areas of the state by offering incumbent retail broadband suppliers a right of first refusal to provide broadband service in underserved areas.

2021 Proposed Legislation

Sponsor

Bill String

Date/Last Action

Bill Information

[King](#)

HB 425

5/10/2021 – H Considered in Calendars

Similar to HB 669 described above

[Guillen](#)

HB 1206/SB 241

5/14/2021 S – Referred to Education

Relates to permissible uses of the instructional materials and technology allotment – specifically allowing for funds to be used for costs associated with Wi-Fi, internet hotspots, wireless network service, broadband service, and other services necessary to facilitate internet access.

[Button](#)

HB 1511

3/8/2021 – H Referred to State Affairs

Relates to the creation of the connectivity office within the office of the governor in order to collaborate efforts with the Broadband Development Office and create a Broadband Development Map to chart progress.

[HB2907](#) [Raymond](#)

HB 2907

3/25/2021 – H Withdrawn from Schedule

Relating to the reporting of broadband speeds by Internet service providers to the governor's broadband development council.

[HB3406](#) [Raymond](#)

HB 3406

3/22/2021 – H referred to Public Education

Relating to the creation of a mobile Internet access hotspot grant program to provide grants to facilitate distance learning for public school students.

[HB3591](#) [Jetton](#)

HB 3591

5/4/2021 – H Committee report sent to Calendars

Relating to the creation of a high-speed Internet access grant program to facilitate instruction and learning for public school students.

[HB3889](#) [Powell](#)

HB 3889

5/21/2021 – S Left pending in committee

Relating to the cost for certain public-school students of a broadband Internet access program offered by the Texas Education Agency.

[HB 4375](#) [Rodriguez](#) HB 4375 3/29/2021 – H Referred to State Affairs

Relating to the establishment of the Broadband Development Office and defining the scope of its powers and duties

[HJR 2](#) [Huberty](#) HJR 2/SJR 62 5/5/2021 – S Received from the House

Proposing a constitutional amendment creating the State Utilities Reliability Fund and the State Utilities Reliability Revenue Fund to provide financial support for projects that enhance the reliability and resiliency of water, electric, and natural gas utilities, broadband providers, and power generation resources in this state.

[SB 5](#) [Nichols](#) SB 5 4/7/2021 – H Referred to State Affairs

Relating to the establishment of the Broadband Development Office and defining the scope of its powers and duties

[SB 154](#) [Perry](#) SB 154 3/3/2021 – S Referred to Transportation

Relating to the creation of the broadband office within the Public Utility Commission of Texas and the establishment of a broadband service investment grant program.

[SB 200](#) [Nelson](#) SB 200 3/3/2021 – S Referred to Finance

Relating to the exclusion of Internet access service from sales and use taxes.

[SB 258](#) [Menéndez](#) SB 258 3/3/2021 – S Referred to Education

Relating to a remote education and distance learning allotment under the Foundation School Program.

[SB 618](#) [Gutierrez](#) SB 618 3/11/2021 – S Referred to Business & Commerce

Relating to the creation of the Texas Telecommunications Infrastructure Board which would be the state agency primarily responsible for telecommunications infrastructure planning and for administering telecommunications infrastructure financing for the state.

[SB 686](#) [Lucio](#) SB 686 3/11/2021 - S Referred to Business & Commerce

Relating to the creation and funding of the Texas student connectivity account; imposing a fee.

[SB1799](#) [West](#) SB 1799 3/26/2021 – S Referred to Transportation

Relating to the creation of a broadband Internet connectivity and broadband access grant program to facilitate instruction and learning for public school students.

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.