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The Infrastructure Investment and Jobs Act: Understanding the Regulatory Toolbox to Accommodate Deployments to the Unserved and Underserved

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We often joke with our colleagues that broadband service and puppies are loved by both sides of the political aisle. Because of the COVID-19 pandemic, both have become increasingly important to the American way of life. If H.R. 3684, the Infrastructure Investment and Jobs Act (IIJA), eventually becomes law, a new “litter” of broadband service will be delivered to the unserved and underserved American public. The broadband infrastructure industry will be tasked with delivering this service. How it goes about this task may affect the development and re-development of areas of our country most in need.



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The Issues

The COVID-19 pandemic reminded us that a digital divide exists in both rural and urban America. For some Americans, the lack of adequate broadband results from geography and/or economics. This is due in part to the high cost of deploying networks and the lack of competition. For instance, 36 percent of rural Americans have no broadband, 47 percent have only one provider and only 14 percent have two providers to choose from whereas, in low-income urban areas, 34 percent of residents face a broadband service monopoly and 48 percent have two provider choices.

The legislative intent of the IIJA as it relates to broadband is simple and straightforward – “the digital divide disproportionately affects communities of color, lower-income areas, and rural areas, and the benefits of broadband should be broadly enjoyed by all.” One way Congress intends to achieve this goal is through increased competition in the marketplace. To aid these competitive endeavors, the IIJA will commit billions of federal grant dollars towards developing broadband networks in mostly unserved and underserved areas.

Is our nation’s regulatory climate, especially in unserved and underserved areas, ready for the uptick in new infrastructure projects that will result from these federal grants? Can our nation’s regulators and broadband network developers work together to carry out the intent of Congress?

The answer to both questions is yes. However, much like raising a puppy, this may take some work by the broadband industry, especially in those areas where local governments may not be as familiar with or are resistant to the current environment relating to broadband infrastructure deployments.

The Opportunities

The infrastructure aspects of the IIJA include:

Grants. The Broadband Equity, Access and Deployment Program is established to award grants totaling \$42.5 billion to deliver broadband service to the “unserved” (a serviceable location with no broadband service or that lacks access to service with minimum download speeds exceeding 25 Mbps and upload speeds exceeding 3 Mbps) and “underserved” (a serviceable location that is not unserved but can only access service with download speeds less than 100 Mbps and upload speeds of less than 20 Mbps). Each state will receive a minimum allocation of \$100 million in funding to be awarded to “subgrantees” that meet the program requirements. Additional awards will be allocated to each state based on the number of unserved areas it has per the FCC’s broadband data maps.

Award priority is given to projects serving unserved areas, underserved areas and projects in persistent poverty counties and high poverty areas creating broadband opportunities in both rural and urban areas. Grant awards require the recipient to contribute not less than 25 percent of the project cost, except in certain high-cost areas. Service established with grant funding must have minimum download speeds of 100 Mbps and minimum upload speeds of 20 Mbps.

Middle Mile Broadband. Defined in the IJA as “broadband infrastructure that does not connect directly to an end-user location,” middle mile fiber includes a variety of technology platforms including leased dark fiber and private wireless networks including microwave links, towers, and fiber. Middle mile networks provide the important link between the fiber backbone and the “last mile” infrastructure serving customer premises. Middle mile networks can be the catalyst for creating broadband competition, however they can be one of the most expensive components of a broadband network to construct and access.

The appropriated sum for this grant program is \$1 billion. Award priorities are to be given to “projects that leverage existing rights-of-way, assets and infrastructure to minimize financial, regulatory and permitting challenges.” Projects funded with middle mile grants must be capable of supporting retail broadband service. In an effort to encourage broadband competition for consumers, grantees must prioritize connecting their middle mile infrastructure to last mile networks that provide or plan to provide service to households in unserved areas and to offer wholesale broadband service at reasonable rates.

Broadband service developers detest network deployment delays imposed by local and state regulations. Thankfully, Congress intends for middle-mile infrastructure developers to avoid the regulatory red tape and related implementation delays. It incentivizes speed to market and efficiency by prioritizing those applications for projects with a minimal regulatory footprint.

The Tools

Wireless and wireline broadband infrastructure developers are fortunate to have effective tools to call upon as it navigates the state and local regulatory requirements during the implementation process. These tools include:

47 U.S.C. § 253(a) The statutory underpinning of the policies and rules in the Small Cell Order and Moratoria Order is 47 U.S.C. § 253. This law has been on the books for over 25 years and was part of the Telecommunications Act of 1996. Section 253 applies to wireless and wireline telecommunications services and provides that “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.” Any State or local regulation that does have the effect of prohibiting the provision of service can be preempted by the FCC. Unfortunately, there are no automatic remedies for violations of Section 253(a). Seeking pre-emption requires time and money and under the circumstances it may not prove to be the best remedy. However, it can be used as a guideline when interacting with inexperienced or unreasonable state and local regulatory bodies.

Small Cell Order-Shot Clocks While we could compose pages about which shot clocks apply to wireless applications, we offer some general advice as to how to best use this tool in the infrastructure development process. Applicants should know shot clock timelines will vary based on the site (macro or small cell) that is sought, whether the applicant is relying on a state clock or federal clock, when the clock starts ticking and the remedy for a shot clock violation (e.g., deemed approved or is injunctive relief required).

An applicant should be on the same page as the regulatory body as to what shot clock is being relied on, so all parties involved have the same expectation as to the review and approval timelines. Applicants should also use discretion when enforcing their rights related to a shot clock violation, especially in a jurisdiction without staffing and experience in reviewing wireless infrastructure applications. We are not aware of any shot clocks for fiber deployments at the federal level, although there may be state or local regulations which establish approval timelines for these projects.

Small Cell Order-Regulation of Property in the Public ROW One question that has arisen and has been decided by the courts is whether the preemption provision of Section 253(a) applies to municipal regulation of access to municipally owned infrastructure such as poles placed the public rights-of-way. Courts have concluded that a municipality's control of access to the public rights-of-way was regulatory and not proprietary, and therefore such actions were subject to preemption under Section 253(a). Applicants should remember this when seeking permits to either install fiber or small cells in the public rights-of-way. While there is no guarantee that an applicant will be granted access, local governments cannot impose regulations which arbitrarily prohibit access to the public rights-of-way.

Moratoria Order Express moratoria, including a "temporary" moratoria, contradict section 253(a). Such moratoria limit the provision of service, harm competition, and impose significant costs that impede the deployment of telecommunications infrastructure and exacerbate the digital divide. Section 253(a) also prohibits de facto moratoria such as state or local actions, not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities.

De facto moratoria have the same effect as express moratoria since they, by their operation, prohibit or have the effect of prohibiting deployment of telecommunications services and/or telecommunications facilities. Common themes comprising de facto moratoria include refusal to follow ordinances or to execute documents, non-response, and other situations where the applicant cannot reasonably foresee when approval or an application will be granted because of indefinite or unreasonable delay. Moratoria could be an area of concern for a developer's permitting efforts in those unserved areas that may not have experience in addressing telecommunications permits.

One-Touch Make-Ready Order The intent of the One-Touch Make-Ready Order (OTMR) is to make it easier for broadband providers to attach to existing poles. This benefits the deployment of both wireless small cells and fiber. Before this order, the prep work necessary for an attachment was performed by the pole owner. This could often be a source of delay as the utility would have to schedule this work around its own work. Per OTMR, entities seeking pole attachments can now do the prep work on their own. Broadband developers should recognize that OTMR applies only to the thirty (30) states where the FCC has jurisdiction. There are 20 states with their own pole attachment regulations.

Best Practices & Conclusions

Congress intends for these federally funded broadband infrastructure projects to be deployed rapidly so that the unserved and underserved may participate in our economy and society. At both the federal, state, and local levels there are regulations that facilitate infrastructure development in a manner similar to Congress's intent under the IJA.

Developers will need to engage local and state officials long before any broadband projects commence. Such engagement will enable the parties to build goodwill, get on the same regulatory page and foster further project endorsement from a community.

Infrastructure developers should weigh the use of their regulatory tools against building goodwill with a regulatory body. Imprudent use of the regulatory tools may cause unnecessary delay and cost in the infrastructure deployment process, foreclose the possibility of creative partnering with a state or local government entity and may cast a long-term sour note within a community.

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For any questions on the topic discussed in this article or for more information about Husch Blackwell's Telecommunications Law Practice, visit https://www.huschblackwell.com/industries_services/Telecommunications.