

Community Broadband Snapshot Report™

How to Navigate, Mitigate or Eliminate the Impacts of State Restrictions on Public Broadband

Analysis report prepared by:



Craig J. Settles

craig@cjspeaks
www.cjspeaks.com

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Executive Summary

Across the United States, businesses, local governments, institutions and individuals of all stripes and political beliefs want faster, better broadband—speeds measured in hundreds of megabits, if not gigabits. Legislative restrictions on public-owned broadband in 21 states are a collective barrier to this goal, plus there is always the danger of barriers being introduced into other states.

Currently, 20 states have statutes addressing public networks, and Iowa legislators expanded a long-standing law that governs public utilities to also apply to public networks. These laws in many cases negatively affect the ability of communities to pick the best solutions to meet their broadband needs, subsequently shortchanging local opportunities to expand economic development.

While these laws often are described as prohibitions, careful examination uncovers three types of barriers: mandated procedures that require varying levels of effort to navigate litigation minefields and, yes, total bans. Dissecting these obstacles with a critical eye, however, can uncover avenues to mitigating or removing some of them. It may be better to leave several of the laws in place rather than try to remove them. Some of the total bans leave public entities with options for moving forward.

Wilson, North Carolina, and Chattanooga, Tennessee, in 2014 brought the issue to national prominence by petitioning the FCC to rescind their respective states' barriers. This has increased constituents' interests in all the states to force a change. But what happens if FCC Chairman Tom Wheeler heeds the calls to "[Tear down these walls](#)"? In some states, the gates holding back community networks might not open to the extent we expect.

Based on reviews of the states' statutes and interviews with community stakeholders and telecom attorneys, this report examines potential remedies from the federal level down and from the grassroots up to the statehouse. Starting with the most basic advice—know your state's law thoroughly—the report provides insights on increasing networks' financial sustainability, building political allies, uncovering new funding sources and securing private-sector partners. The report also confronts two of the most pervasive myths critics use to enforce these statutes, and it explains how to effectively counter the falsehoods with the facts.

Finally, interviews and online surveys with dozens of local government officials and municipal utility managers responsible for public networks highlight why we cannot confuse Wall Street's measure of success with what defines communities' successes. As a matter of course and for the public good, municipalities carry debt to make infrastructure investments with a 15- or even a 25-year payback. Those interviewed believe public broadband success stories are the narratives communities must enlist to roll back attempts to create new adverse statutes.

I. Defining the challenge and its importance

This report is a 30,000-foot view of what in some states are very complicated sets of legal issues. These observations and recommendations provide a general understanding of each state's law regarding public networks and are not legal advice. Communities should seek legal counsel skilled in this area during broadband planning.

Every day you read about at least one or two U.S. cities requesting assistance with planning a broadband network because they're in dire need of faster, better broadband for their constituents. This by itself is notable due to the accelerating pace of calls for assistance. But what is causing a disturbance in the free market Force is the desire of public entities to run these networks.

This isn't a flight of fancy by elected officials, nor is it some perverse desire to keep up with the Joneses, or rather the Chattanooga, of the country. Almost every city that currently owns a broadband network started with numerous, mostly fruitless appeals to incumbent telecom and cable companies.

Frustrated by repeated rejections, community leaders have done—and continue to do—what their predecessors did when private electric companies in the 1930s refused to bring electricity to areas beyond the biggest cities—they built it themselves. Some 400 communities have communitywide or partial-reach networks owned by local governments or public utilities. These networks are owned solely by the public entity or are the result of public-private partnerships. [This map](#) from the Institute for Self Reliance pinpoints public-owned networks

But this drive to provide public-owned broadband solutions in unserved and underserved communities is stymied by a daunting barrier. Twenty state legislatures passed laws restricting to varying degrees public-owned networks, and Iowa legislators expanded an existing law for public utilities to now require municipalities pass referenda to be able to provide broadband. Every year it seems that a new state legislature or two has nothing better to do than try to pass its own anti-muni network law, as we saw Georgia do in 2013 and Kansas in 2014.

Constituents and their leaders have finally said “Enough!” and are actively pushing back or aggressively planning ways to work around these legislative barriers. Even some of the more conservative legislators in the country are re-examining these laws with a growing sense that maybe they weren't the wisest decisions ever made. Most notably, Chattanooga, Tennessee, and Wilson, North Carolina, each has literally made a Federal case out of this issue, petitioning the Federal Communications Commission to rescind its states' anti-muni network laws.

As the battle lines over these laws are drawn nationally and in the states, the big questions are 1) should the laws be rolled back, and 2) if the laws disappeared

completely, what would be the practical impacts on cities and states? Would we see floodgates opening and broadband projects springing up everywhere in those states? Part of the answer to the second question depends on how well communities plan and build these networks. Large-scale network deployments are costly and complex, and some municipalities lack in-house resources to successfully design, build and operate their own fiber networks. For these communities to join any wave of new projects, they'll need to hire or retain knowledge experts in funding sources, infrastructure and multivendor network integration.

Why superfast Internet access is important

If the Internet were just an entertainment medium that existed mainly to numb the mind, there would very little cause for stoking the flames of private versus public sector conflict. Or if the primary role of the Internet were to facilitate academic research and military communications, the blood pressure of few people would rise at the thought of public ownership of "the tubes."

However, the network of networks has woven itself into nearly every aspect of private, public and nonprofit life to the point that there is a new tech world order. Starting largely with the feds' broadband stimulus, the past five years have seen the value proposition of this world order highlighted, tested, hyped and slowly validated in towns big and small nationwide.

A common analogy to help people understand why broadband has become vital infrastructure is that of electric utilities in the late 1890s. Once it became obvious electricity was going to enable a lot more than better views of dancing ladies and poker games, the doors broke open for all manner of inventions, opportunities and benefits that affected many aspects of life. To get electricity into small and rural towns that private companies refused to serve because of poor ROI prospects, local governments needed to step in or their communities would not have been served.

Seeing broadband as a basic communication "utility" similar to electricity, and knowing large incumbents weren't going to bring even basic Internet access to their small and rural towns, local governments once again are stepping up. However, two things are quite different this time around.

Private electric companies initially made the same arguments we hear today that munis should not be in the private sector's business. However, there weren't laws preventing public utilities because [muni ownership was viewed as the antidote to the ills of the natural monopolies](#) that electric companies were becoming. Also, today midsize and large cities such as Chattanooga and Seattle have built or are planning broadband networks, and their size will add considerable weight to drives to remove state barriers. Cities this size had been less inclined in the early 1900s to get into the electricity business.

More than a utility

While the “broadband as utility” analogy is pertinent and powerful, the four primary benefits that high-speed Internet access delivers validate community broadband’s importance. When people understand these, the insidious anti-economic development nature of these state laws comes into clear focus. Based on evidence from dozens of public networks, the four main categories of benefits derived are:

1. Improving local economies by making current companies more profitable and recruiting or generating new ones
2. Transforming how medical services and healthcare are delivered
3. Evolving how teachers teach and students learn
4. Increasing the efficiency and lowering the costs of local government operations

Success stories highlighting these benefits are the leverage points for influencing constituents, elected officials, the media and others who can effect changes in state laws. When we see support for these laws declining among legislators, it is often because those lawmakers fully appreciate how the benefits will affect their constituents.

Furthermore, elected officials at all levels are supporting and funding tech initiatives such as laptops to every student, electronic healthcare records management and tech-assisted traffic control and other government operations. These tasks demand fast broadband. As a school district administrator in one Iowa town learned, the district’s investment in the latest education technology is only partially successful because many homes lack sufficient Internet access or speeds for kids to use that technology. It’s difficult for legislators to champion laws that restrict public access when at the same time they are promoting broadband’s role as a technology enabler.

An increasing public pressure to get broadband deployments everywhere (typified by the FCC’s Gigabit Cities Challenge in 2013) elevates the importance of broadband in public policy circles. Subsequently elected officials in states such as Iowa, Minnesota and Colorado (ironically anti-muni network states) preached in 2014 the gospel of broadband’s importance, driving media stories on the topic.

While there may not be another federal multibillion-dollar effort similar to the 2009 broadband stimulus, communities located near stimulus-funded middle mile networks want to tap into this infrastructure. The FCC’s Connect America Fund (CAF) could evolve to include money for community networks. The CAF potentially could distribute over \$4 billion annually, so this evolution likely would put broadband on the front burner of even more cities.

Private sector firms not in the telecom or cable business are adding even more urgency to broadband deployment. Google raised the profile nationwide of broadband as a must-have technology. In Utah, a state with one of the most oppressive anti-public network laws, a private company, [Macquarie Capital, arrived on the scene](#) in 2013 with major investment capital and proposed to form a public-private partnership with eleven UTOPIA cities to provide a way forward and break the cycle of underperformance in which their network is mired. In the San Francisco Bay Area, OSISOFT, a software company, made a big splash as a private investor creating [Lit San Leandro's fiber network](#).

Communities with poor or no infrastructure grow increasingly frustrated seeing success stories for Chattanooga, Kansas City and other cities dominating the news. Many of these underserved communities realize public ownership of this valuable asset is an option they should explore. Being in states with restrictive anti-muni network laws makes the frustration worse, leading to an intense search for relief that adds to the chorus demanding change.

II. Dissecting the laws against public-owned broadband

It's good to have context when communities discuss these laws. Context helps keep expectations realistic as leaders work to comply with restrictions or find ways to get better broadband despite the restrictions. The 20 states' restrictive network laws are not the only barriers to more community networks, or in some cases, they are not the significant barriers that people believe.

Quite a few local governments have tight budgets and challenging roads to funding. According to Curtis Dean, broadband services coordinator for the Iowa Association of Municipal Utilities, "Bond markets are improving, but there's still a hesitation among city officials to pursue this option. In another year we should see a noticeable increase in bond measures to fund broadband, and subsequently, more projects."

Even without the laws, progress can be impeded by the politics driven by the free-market philosophy that only the private sector should undertake broadband projects. This philosophy ultimately was the rallying call that enabled state legislators to pass these laws in the first place.

In the poorest areas, the most sparsely populated areas or both, the build-out challenges and ongoing operating costs are so high and revenue prospects so low that marshaling support for public networks could be difficult. To get a sense of whether these regions would benefit if anti-muni network laws were rescinded, just compare the progress of last-mile networks in similarly populated states without restrictive laws such as Wyoming, Montana and Arizona.

Three categories of anti-muni network laws

I've arranged the 21 state laws restricting public-owned networks into three categories: the **If-Then Laws**, the **Minefield Laws** and the **Total-Ban Laws**. Each category presents communities with a different degree of difficulty in pursuing broadband deployments.

If-Then Laws

The If-Then Laws are fairly straightforward requirements rather than restrictions, and they don't require communities to jump through too many hoops in order to move forward: if you meet requirement "x," then your community can build a network. A couple of laws, such as the one in Washington state, are pretty simple. Several states such as Iowa and Colorado require communities to hold referenda: if a ballot measure passes, then the community can build a network. Pennsylvania is one of the states in which communities need to present their broadband wishes to

the incumbent for the area. If the incumbent won't build it, then the community can move forward.

A bigger barrier in these If-Then states, though, appears to be one of perception. Beth McConnell, policy director at [Philadelphia Association of Community Development Corporations](#) states, "Unfortunately, many communities honestly believe that the state has a complete prohibition of any kind of public-owned networks." One county in the Keystone State (Cambria) navigated the waters and built a network. But despite that county's success, no other Pennsylvania community has followed its lead.

States requiring referenda offer examples of communities' perceptions holding them back from building networks. Many communities fear a referendum is a near impossible mountain to climb because the incumbents will crush them in an electoral battle. However, they fail to realize that Longmont, Colorado, and a handful of small towns in Colorado and Iowa have created a roadmap for winning referenda. Longmont, backed with \$5,000 in contributions, passed its second referendum by a 2-1 margin despite Comcast's spending \$350,000 to oppose the measure. In November 2014, eight Colorado communities faced almost no opposition to passing referenda to take back their authority to pursue public broadband.

Minefield Laws

These state laws were written with the primary intent of prohibiting public-owned networks without coming right out and stating it. The laws create multiple layers of rules that are so onerous as to make compliance a significant financial burden. Or they are worded so vaguely that they become minefields in which one wrong step could trigger incumbents to take legal action. North Carolina and Louisiana are two states with laws of this type. Wilson, North Carolina unsurprisingly joins Chattanooga, Tennessee in petitioning the FCC to have their respective state laws rescinded.

Small and rural communities in these states are particularly disadvantaged because they don't have the legal resources and experience to battle giant incumbents' legal teams. Midsize cities such as Lafayette, Louisiana and Chattanooga have greater resources and were able to overcome major legal challenges. But these communities would prefer to avoid the additional costs and time delays while legal battles rage toward uncertain conclusions.

In general, these laws have so many levels of restrictions and requirements that the best way for cities to move forward—though not the only ways—is to get legislators to reverse all or parts of the laws. Or for the FCC to step in and use its authority to rescind the laws. Neither option is particularly easy.

Total-Ban Laws

These laws typically are short and unambiguous—public entities are prohibited from providing services, or they can provide services only to a limited audience and only on a wholesale basis. However, there may be loopholes in a couple of state laws that can be exploited, as you will read later in this report.

It may surprise many people that Texas is not in the report at all, particularly since the Lone Star State has a law that says public entities cannot own or operate telecommunications services. However, as was pointed out by Texas telecom attorney Clarence West in a filing with the FCC, “Texas cities are not prohibited from providing Internet connectivity, as it is a [sic] federally classified as an ‘information service,’ and not a ‘telecommunications service.’” There are Texas cities that have provided Internet connectivity on a citywide basis, and Greenville, Texas, currently provides both cable and Internet access service.”

States with If-Then laws



Alabama

When Alabama’s law was written in 2006, it would have qualified as a Minefield Law because three of its main restrictions would have created barriers sufficiently onerous to cause communities to give up hope. But in 2014, the law is more a series of If-Then requirements that are manageable.

Every community has to hold a referendum to get approval to build a network. It was a given, at that time, that incumbents would spend so much in a referendum campaign there was little chance of its passing. Longmont, Colorado, in 2011 and several Colorado and Iowa towns have shown how communities can win these referenda. Another restriction is, if towns offer a triple play of voice, Internet and video services, they can’t commingle funds. Essentially, they have to run three separate businesses. In 2006, it was considered impossible to have a successful network without marketing the three services together. Today, cities are proving they can operate just an Internet business and succeed if they market primarily to businesses. Selling in the residential markets still puts pressures on providers to offer triple play services.

The law prohibits cities from using taxes or bonds to pay build-out costs. But again, cities have worked around this by building a network for internal city or public

utility use and, by doing so, covering the biggest part of the costs. [[Text of the statute.](#)]



California

Probably few people are aware that California has any restrictions because there is no law that bans traditional local governments from building and operating broadband networks. However, there's an oddity buried in an out-of-the-way section of California statutes.

The state gives unincorporated areas the option to create temporary Community Services Districts to provide services such as wastewater management, garbage collection and security. Some 3000 districts exist. The last item on a 32-point list of state regulations governing these districts is a rule that allows districts to build broadband networks if no private provider responds to their requests for services. The definition of broadband is, essentially, whatever the FCC defines as broadband (e.g., 10 Mbps download, 1 Mbps upload).

Seemingly benign in its language, the law's "gotcha" is that districts that build a network have to turn it over or lease it to a private person or entity if one shows up "ready, willing, and able to acquire, construct, improve, maintain, and operate broadband." Language in the regulation says the private person or entity would have to match the network's service, pricing and quality.

The bottom line is that there is enough gray area and open-endedness to the regulation that it's possible for a district to face legal challenges. As interest in broadband builds in California, and a generally progressive philosophy drives the legislature —as evidenced by a recent bill to increase funding options for muni networks —the relevance of this statute should decrease. [[Text for this statute.](#)]



Colorado

Colorado's muni network restriction via State Senate Bill 152, passed in 2005, is an interesting mix of legacy legislation and political compromise. In 1992, state voters added a Taxpayer Bill of Rights to the state constitution, including a provision that a city cannot increase taxes or debt without a vote of the people.

SB 152 took away cities' authority to own and operate broadband networks unless voters restored that authority. School districts are considered separate public entities, and the same requirements apply to their networks. [Click here](#) for SB 152 text.

A city must conduct a referendum to re-establish its authority to explore options for broadband, which Longmont did in 2009 (lost) and again in 2011 (won). Afterward, if research shows a high likelihood for a network's success, the city can hold a second referendum to get approval to raise taxes or create debt to build the network. In 2013, Longmont conducted and won that second referendum, while Centennial won its referendum to get its authority back.

Until 2014, the greater barrier to Colorado communities moving forward with broadband, however, was the fear of the referendum process rather than the process itself. This fear was amplified in 2009 when pro-Comcast astroturf group called No Blank Check spent \$300,000 to defeat Longmont's ballot measure.

Referenda, however, are winnable. Industry lobbyists outspent Longmont constituents 60:1 in 2011, yet the referendum passed by nearly a 2:1 margin. Other Colorado communities can replicate this feat. In 2013, Centennial won its referendum by a similar margin. Montrose is one of the most conservative cities in the state, and its referendum passed with 70 percent of the vote. Whatever doubts were remaining about cities' abilities to win referenda should have evaporated with the November 2014 election when [eight Colorado communities, some heavily conservative and others heavily liberal](#), prevailed with their measures.

In Colorado, as in other states with If-Then Laws, some believe it would be better to comply with the law than try to change it. On the other hand, rescinding the law would accelerate efforts to build community networks, according to Ken Fellman, vice president at Denver-based Kissinger & Fellman law firm and advisor to many public broadband projects. "Local governments would seriously explore the option, and cities with public electric utilities likely would build networks. If a Gig.U or Google came to town offering to assist in a project, they would be well received."

Fellman believes the threat by incumbents that they will not invest in communities with public networks is mostly empty rhetoric. "The limited experiences in the state suggest there actually would be more interest from incumbents and an increase in competitors. Once Montrose passed its referendum, for example, incumbents who previously had ignored the town rushed in to offer services."



Iowa

Iowa's If-Then Law doesn't pertain to broadband per se. "The legislature determined that the basic authority to run a broadband network should be the same as for any utility, which is already defined by law," said Curtis Dean, broadband services coordinator at Iowa Association of Municipal Utilities. "Fifty-one percent of voters need to establish that a city can have a broadband utility. In most cases, communities will pass an ordinance that says 'we operate this utility,' and then decide later who will run the utility, how it will be funded and so on."

Cities have to go to voters again only if they want to issue general obligation (GO) bond debt supported by taxes. Bond issues require approval by 60 percent of the voters. Emmetsburg in 1998 passed a referendum to be in the broadband business. In 2013, the city called a referendum asking voters to approve a bond measure, but only 57 percent agreed. The town is putting this to a second vote in spring 2015. If a city can raise revenue bonds rather than GO bonds, they don't need to have a vote.

The only other state requirement is that the broadband utility can't use other city or utility funds to pay for operating expense. They can, though, get a loan from another city agency or utility for build-out costs.



Minnesota

This state has one of the most straightforward If-Then laws. Communities have to pass a referendum with at least 65 percent of the vote in order to own and operate a telephone exchange ([click here](#) for the law's wording). "What we have is a psychological barrier to broadband that's built from the fear of being sued more than a real restriction," said Danna MacKenzie, executive director, Office of Broadband Development for the state of Minnesota.

Besides the referendum requirement, which is a surmountable challenge, no one's considering building telephone exchanges anymore when communities are contemplating broadband networks. Cities can make the case that their network is only for data and avoid the referendum altogether, which Lake County did. MacKenzie said, "Their legal department felt the county was not subject to this particular law. The county took a political hit for bypassing the referendum but has moved past it to begin building the network."

Monticello partnered with Hiawatha Broadband Communications to jointly own and operate a fiber data network, and Windom built a citywide network. Lac qui Parle and Sibley counties partnered with a telephone and broadband co-op, respectively.

Scott County built its network infrastructure to address public safety, city facilities and anchor institutions, and then started offering services to businesses.

The referendum actually can be viewed as a positive requirement for communities. Local governments are not accustomed to operating in a competitive environment. To pass referenda, they would have to do extensive needs assessments, consensus building, planning and marketing within the various communities. Ultimately, this can lead to a better broadband strategy and ultimately a better network with a stronger potential for financial sustainability.



Nevada

This state's restriction is a kooky kind of If-Then Law with a partial Total Ban and a pair of financing handcuffs thrown in for fun. The law, passed in 2003 via two statutes ([710.147](#) & [268.086](#)), states that counties with fewer than 50,000 people, can start a telephone company, and those with fewer than 55,000 can create and own cable businesses. If cities have less than 25,000 people, they can own and operate telephone or cable businesses. There's nothing written addressing broadband specifically, but the text implies that if you offer cable or telephone, you also can offer broadband.

By defining who can own a network, this law bans large cities and counties (primarily Clark and Washoe counties) from owning networks. Oh, and by the way, those cities and counties with eligible population sizes can't use bonds or taxes to pay for their networks.

As only two or three Nevada communities own networks —there's here's been almost zero response to Churchill County's offer to help others finance networks — there doesn't seem to be much pressure against the legislative glass ceiling. The financing is, of course, a challenge given the no-bond/no-taxes handcuffs. "But if you use potential revenue of the network as collateral, it's possible you can work out some sort of funding arrangement," said Mark Feest, general manager of Churchill County's CC Communications network. "The primary barrier seems to be that many communities are opposed to public networks because of political philosophy."

An interesting side note here: Churchill County probably has the oldest public rural telephone company in the U.S. at 125-years old. The county bought the local branch of Western Union Telegraph for about \$900, and in 1889 became a telephone company after seeing Alexander Graham Bell's newly invented telephone. Churchill County was one of the first communities to widely deploy DSL service in the '90s, and in 2004, it began building a fiber-to-the-home network, years before FTTH was

a blip on the radar.



Pennsylvania

This state has a pretty straightforward If-Then Law that passed in 2004, but unfortunately, it is clouded in the rhetoric (a.k.a. perception) that there is a total ban on public-owned networks. If a community approaches the large incumbent in its area with a specific plan for a broadband network, the private provider has 60 days to agree to either execute on the plan or reject it. Should the incumbent agree to execute, it has 12 months to complete the build-out. If the incumbent rejects the plan or fails to complete the build-out before the clock runs out, the community is free to execute the plan.

Only one local government—Cambria County—has followed the rules and built its own fiber/wireless network. Steve Ettien, the former director of the County Technology Department who headed up this effort, [explained the details](#). “In 2006, we went to Verizon with a plan for a network to deliver a minimum of 3 Mbps download and upload speeds to residences or businesses, up to 15 Mbps possible. Verizon reviewed the plan, which by the way is a very involved legal process and decided they were unable to build this network.”

Ettien furthered stated, “Once Verizon turned the plan down, Cambria County was clear to build the system. We added the network infrastructure that serves constituents to our existing 911-network backbone system, and then recruited small ISPs to provide service over the network.” There have been some [modifications made to the statute](#) since it initially passed.



Washington

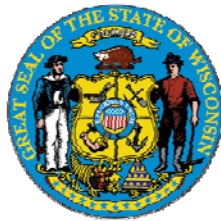
Many Washington cities and towns have their own municipal codes (a.k.a. code cities) but some do not. Washington’s law requires that only code cities can provide telecom services, which they can retail directly to end users. A public utility district (PUD), however, only can provide wholesale fiber to third-party ISPs that offer retail services directly to individuals and businesses.

A code city or PUD can provide service to a noncode city if the latter permits it,

perhaps through an interlocal agreement to get to the right of way or via a franchise agreement. Mount Vernon PUD, for example, initially provided services just to city facilities in 1995 and began providing wholesale services to an ISP in 2002. Later the PUD expanded services to the city of Burlington and the port of Skagit via those entities' fiber infrastructures starting in 2008 and 2009, respectively. [Click here](#) for the law's details.

Kim Kleppe, Mount Vernon information services director, believes the law was passed in response to the Tacoma public utility's [Click! Network](#), built in 1998 to offer Internet services directly to subscribers. "[PUDs do have to work very hard at cultivating ISPs](#) to provide services over the network. The hardest ISP to close was the second one, because it was leery about the business opportunity in a competitive environment." Code cities have no restrictions on retail sales, but many strongly prefer to have one of the public utilities and ISPs deal with all of the operations logistics because of the costs involved.

"Even if the law went away, we'd still have struggles in some communities getting elected officials on board because their towns are low on cash, and not enough community people understand broadband's value," Kleppe said.



Wisconsin

Legislators in Wisconsin in 2003 created a fairly straightforward If-Then Law. Before a public entity can construct a broadband network, it must perform a feasibility study with a three-year horizon. This study must be made public for 30 days before the city council in a public hearing can consider adopting a resolution that would create a utility to operate the network. Broadband utilities cannot cross-subsidize their networks with funds other public entities. This is a long-standing rule that applies to all public utilities in the state. If the council approves, off you go.

A municipality that doesn't want to do this cost-benefit analysis can conduct an advisory referendum election to present to the community the question of creating a broadband utility. If a majority votes yes, the city won't have to do the study. Or, a muni can go to providers to approve the network, but this is so complicated that cities probably would prefer to do an analysis than pursue either of these options. [The law's details](#) start at 66.0422.

Should a local government decide to go the distance, the process to get provider approval is similar to Pennsylvania's right of first refusal approach. Incumbents have the same 60-day timeframe in which to accept or reject a community's plan to

build a network, and nine months to complete the build-out. However, wording requires the plan to be a “reasonable” demand without defining what reasonable is. Other hoops and hurdles also make this an unwelcomed process.

In Wisconsin, the interest in community networks is driven by the strong need to improve local economies. The most likely business model is to form public-private partnerships, both to lessen costs and to blunt some of the incumbents’ opposition. “Reedsberg built a triple-play network, but they’re an exception,” said attorney Anita Galucci, who works with municipal clients for the firm Broadman & Clark LLP. “Oconto Falls is representative of cities pursuing partnerships in which private companies operate the network.”

States with Minefield Laws



Florida

Florida’s law (actually, a string of statutes: [125.421](#), [166.047](#), [196.012](#), [199.183](#), [212.08](#) and [350.81](#)), is a minefield designed not to trigger lawsuits but rather to make it extremely difficult to raise money. Cities that want to build networks must offer local incumbents the right of first refusal. But unlike the law in Pennsylvania, Florida’s law doesn’t appear to specify a time by which incumbents must reply, so incumbents could drag this process on indefinitely. Also, conditions aren’t specified that prevent incumbents from obstructing cities’ plans, so a provider could declare a city’s plan “unworkable,” or say it’s offering the proposed service already because incumbents’ ads claim wide availability.

A city has to present a business plan at a public meeting, followed by a council vote, a city referendum or both. These requirements allow incumbents to beat cities to the draw, execute predatory marketing or otherwise cripple the business before it even gets started. The public network has to turn a profit in four years (or lose the network) and the city can’t use tax money. Furthermore, revenue bond maturities are limited to 15 years (or the city has to have a referendum for longer maturities), and below-cost pricing is prohibited.

Collectively, these and other requirements make it difficult to secure financing to build a municipal network if a city approaches this expecting to build an entire network at one time. A network that costs \$8 to \$10 million, for example, would be hard pressed to generate enough revenue in four years to clear the debt and make a profit. However, if a city builds the infrastructure to connect city facilities and then expands the network, the entire funding strategy changes.

Courtney Violette, SVP of operations for Magellan Advisors, a broadband planning consultancy, was the IT and communications director for the city of Palm Coast in 2005 when it decided to build a fiber network. “We got a loan from the general fund to build infrastructure to connect city facilities. Then we partnered with two ISPs to provide services. The city still had to register with the public utilities commission and have all the required public hearings.”

Violette believes that rural communities are interested in triple play services (data, voice and cable/video), and a number of them are willing to work through the legislative process. “Many, though, plan to build in an incremental approach similar to Palm Coast’s. Very few, in my opinion, plan to issue bonds unless there is a huge local opportunity.” If the law were rescinded, they’d probably jump in right away. Incumbents often say they won’t invest in broadband if public entities run networks, but odds are good that with or without public involvement incumbents will avoid sparsely populated areas.



Louisiana

This Minefield Law state has a famous survivor of the type of legal gauntlet that communities face if they attempt to deliver public-owned broadband services to their constituents. Lafayette Utilities System maneuvered through three years of continuous litigation before prevailing and moving forward with its LUS Fiber project.

In 2004, the state legislature crafted a series of daunting hurdles, each with hooks and open-ended wording that invite mischief by muni network opponents. A separate entity must be established to run the network that cannot get assets or resources from other parts of government, so at its launch, it’s financially hobbled. LUS Fiber issued \$125 million in bonds to build its system and cover early operating costs until revenues covered costs.

There are additional provisions for a referendum, and if a city doesn’t conduct one, it could no longer collect franchise fees from providers for 10 years, potentially losing millions of dollars. Something as random as a library offering free wireless could put a city in violation of a provision that could endanger franchise fees. Public entities must pay taxes in an amount telcos and cable companies supposedly would pay—this is an extra financial burden since, in reality, incumbents get various substantial tax breaks. There are conditions on advertising and other business operations that incumbents don’t face. Even though public entities can sell services wholesale, complicated rules could trigger court challenges.

LUS Fiber is subject to seemingly endless audits, with competitors demanding expensive and labor-intensive special audits beyond the regular ones mandated by the Louisiana Public Service Commission to ensure adherence to its rules. The audits leave munis vulnerable to new court actions that could swamp small towns.

“Elected officials in other communities may look at these laws and realize that a broadband project could trigger legal battles that could last the entire time they are in office,” states LUS Fiber Director Terry Huval. “Apparently this intimidation has been effective, as no other community in Louisiana has attempted a broadband project. We were fortunate to have strong bipartisan support for this project.”

There is probably little hope that the legislature will make changes to the law. David Moore, IT statewide project director, believes the chances are “less than 10 percent. Louisiana is a red state, and, for some reason, broadband availability appears to be a blue issue. A number of municipalities have expressed interest in owning and operating their own networks, assuming the law could be rescinded, but funding remains a significant barrier. Municipalities, for the most part, favor a federal funding model on broadband and are unwilling to make the investment on their own.” Details of the law that pertain to broadband are at [45:844.47-45:844.56](https://www.ncleg.gov/Sessions/2019/Bills/Informational/Chapter_1160/Details.aspx?bill=1160&toSession=2019).



North Carolina

North Carolina’s restriction on municipal networks places 15 hurdles in front of communities and each requirement is structured or worded to invite incumbents’ challenges no matter what a city does to comply.

For example, cities can’t price services below costs. The fluid nature of component pricing, labor costs and other elements of network operations make determining what’s “below costs” difficult, exposing munis to potential suits. Also, cities have to prove 50 percent of constituents aren’t getting broadband already, so you have to go home-by-home to show that each is getting less than 1.5 megs down and 256K up. Cities have to present these findings to public utilities commissions, where the industry can challenge the data by census block.

“The entire law is designed to create processes that are very difficult and expensive to comply with, or written in wording so vague that incumbents’ lawyers can tie a city up in court for months if not years,” observed Will Aycok, general manager for the Wilson, North Carolina, Greenlight fiber network. “Most cities in the state don’t have enough lawyers—or enough with telecom law expertise—nor the budget to

fight these kinds of drawn out battles.”

Public entities are free to create public-private partnerships, but they can only provide dark fiber and must allow the private company to sell Internet services to subscribers. But even with that arrangement, the cloud of potential lawsuits still would hang over the partnership because of the law’s wording. Furthermore, the law forces the PPP to report much of the network’s businesses operations and expose everything, making it possible for an incumbent to read it and stymie the PPP’s business. “With the law as written, cities can’t comply with it,” Aycock said. “You have to get rid of the law to be able to move projects forward.”

If the law suddenly were to go away, it’s a safe bet that plenty of cities would step up to build their own networks. For now, the economics of putting in their own infrastructure is much less expensive than relying on incumbents, even for service as basic as a city’s phone services. There were 35 communities in 2008 eager to build their own networks. This number dropped to a handful after the law was passed. [Click here](#) for the law’s details.



South Carolina

South Carolina’s bill, passed in 2012 and similar to the law in North Carolina, creates a series of hurdles designed to immobilize communities through the fear of incumbents’ lawsuits. The bill was the legislative response to Orangeburg County’s receiving an \$18 million broadband stimulus grant to build a 300-square-mile network to help the economy of an area where over 20 percent of the population lives below the poverty line.

The final law allows the county to keep its network but creates various regulatory boundaries for other communities. “They dictate customer rates incorporating factors that are ambiguously worded and leave open debates that could go to court,” said Orangeburg County Administrator Bill Clark. “The law uses definitions that make it appear public-owned networks can only be built for unserved areas, but then define ‘served’ as areas with 768K symmetrical speeds that reach 25 percent of an area. By this definition, all of South Carolina is covered.”

Other sleight-of-hand wording jumbles the maze. For example, text that, in effect, says public-owned networks must increase their subscriber fees to cover taxes a private carrier should pay. But the law doesn’t specify what industry actually pays given all the tax breaks telcos receive. There are requirements for operating procedures that are way above what are basic sound business practices. Even if communities could afford legal expertise needed to comply with the rules, it’s hard

to find telecom law firms that aren't already committed to large telecom and cable clients. [Click here](#) for details on the statute (warning: it is quite a verbal maze).

While it would be a plus to have the law rescinded, it's difficult to predict how many communities would pursue public-owned networks, particularly given the economic conditions in much of the state. Public-private partnerships might be the preferred model communities would adopt.



Utah

Utah legislators didn't create as many minefields as North Carolina's, but nevertheless the ones that are in place serve the same purpose, which is to make compliance very difficult and to discourage outside investors in muni networks. What's more, some legislators seem prepared to jump in on short notice to create a new law in a minute should communities find ways around the current law. We saw this in the 2014 legislative session after firm Macquarie Capital offered to invest in UTOPIA. Two bills were introduced (HB60 and SB190) that would have crippled the deal. Fortunately, broadband advocates rallied enough public opposition to kill the bills.

The core of the current law is that a public network can only sell Internet access wholesale to ISPs who then sell to the public. Additionally, cities can't bond for more than 50 percent of the network buildout, a situation that makes potential investors nervous because of the uncertainty. Without full funding, cities have to carefully pick the right neighborhoods to build that 50 percent because the initial infrastructure must generate enough income to sustain its own operation plus the rest of the build-out costs. The law throws in a few financial reporting requirements that can cause compliance problems even for private-sector companies.

Utah is another state that holds little hope for a legislative change of heart. "There's zero chance of getting any existing restrictions on munis overturned in the foreseeable future," said Jesse Harris, editor of the blog Free UTOPIA! and long-time follower of broadband developments in the state. "We can barely hold the line on expansion of the restrictions that already exist. Most of the legislators come from very conservative districts, and UTOPIA is an easy target to attack. Most people running for elective office are going to take the bait."

States with Total Ban laws



Michigan

I put Michigan in this category to make a point. “These laws are now being represented by industry to municipal elected officials as absolute bans,” said Michael J. Watza, head of the governmental litigation and affairs practice at the Kitch Drutchas Wagner Valitutti & Sherbrook law firm. In a reality created by the incumbents, communities have self-imposed a near-total barrier on themselves.

Michigan’s law is actually a complicated If-Then Law designed seemingly more to intimidate by volume of work than fear of a lawsuit. “There are statutory restrictions, competitive bidding with an industry bias built in, mildly onerous separate accounting and projection requirements, industry-biased geographic limitations and artificial time delays,” Watza said.

Incumbents actually wanted a total ban on muni networks when the bill was first introduced. What incumbents settled for is a process in which a city has to get council approval for a network, issue an RFP for it, and wait 61 days. If fewer than three “qualified” ISPs respond, the city can take on the project—but only after it prepares and presents to council a cost-benefit analysis that predicts costs and number of subscribers and posts this publicly for 30 days.

Assuming cities decide to move forward and no ISP responds, there must be a public hearing to authorize construction, and then a CPA must review the document. Cities must pay for all of these tasks. “And if there are responses, the key is determining whether they are qualified to do the work,” Watza said. “A decision the community may make, but one potentially subject to challenge by industry.” If an RFP respondent wins it, it does not have a set amount of time in which it must build the network. The statute is silent other than the “qualified” term.

The political climate in the state is such that it is doubtful the legislature will rescind this law unless there is a serious public outcry. However, if that were to happen, we should expect to see a sizeable number of communities begin network projects as chambers of commerce and local economic development staffs are realizing their current broadband deficiencies. [Over 3,000 miles of new middle-mile network](#) were built using broadband stimulus by Merit Network, Inc., a nonprofit network created in 1966 to connect Michigan public universities. Merritt is a valuable resource for communities wanting to navigate these waters.

[Click here](#) to read details about Michigan’s law.



Arkansas

This state's legislature creates a law that appears to be straightforward at first blush. "A government entity may not provide, directly or indirectly, basic local exchange service."

However, the Texas position that telecom restrictions do not restrict broadband seems relevant when reviewing the second part of the statute. "After reasonable notice to the public and a public hearing, a governmental entity owning an electric utility system or television signal distribution system may make any telecommunications capacity or associated facilities that it now owns, or may hereafter acquire, available to the public upon terms and conditions as may be established by its governing authority, except the government entity may not use the telecommunications capacity or facilities to provide, directly or indirectly, basic local exchange service."

Very interesting. In the state of Arkansas, are local exchange services meant to include Internet services? Lawyers, of course, may interpret the bill differently, but the way seems open to challenge conventional orthodoxy that this is a ban on public-owned broadband.



Missouri

The law, written in 1997, bans public entities from owning and providing telecom services, as does Texas', but it's always been an implied or assumed ban because an exception for broadband was written into the bill. One Missouri city has successfully built a network without challenge, and now Columbia recently announced its [plans to play the same "Get Out of Jail Free" card](#). Some incumbents, predictably, have begun making noise about tightening up the restriction. It will be interesting to see how that effort goes.

Missouri's anti-muni network law has the distinction of invoking the Supreme Court's blessing and thus becoming a poster child of sorts for other state legislators to emulate. The law was challenged all the way up to SCOTUS, where the highest court declared it too legit to quit, which went a long way in reinforcing the image of a total ban. [Click here](#) for details of Missouri's law.

A number of community networks in the state were built and are run by electric co-ops' rather than by local governments. Many co-ops such as CoMo Electric, whose subsidiary is building a 4,000-mile fiber infrastructure to sell services to constituents, started with extensive fiber networks to improve their smart grids and electricity services. An increasing number of co-ops are joining CoMo in expanding the fiber infrastructure.



Montana

For some reason, Montana has not shown up on any of the lists of states with laws restricting broadband. It is only a few sentences but is overly broad in its reach. This sentence is the heart of the restriction: “An agency or political subdivision may act as an internet services provider when providing advanced services that are not otherwise available from a private internet services provider within the jurisdiction served by the agency or political subdivision.”

Just about anyone with even a basic knowledge of broadband realizes communities that can build a gigabit network will be better served than a private-sector provider that can barely deliver 5 or 10 Mbps. However, a broad interpretation of the wording gives the upper hand to private-sector companies regardless of how bad the provider's service may be.

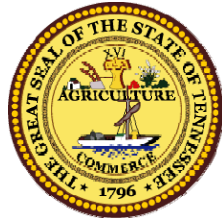
If you have a minute, literally, you can read [the law in its entirety](#).



Nebraska

Nebraska has a Total-Ban Law that's also short and sweet. City and county governments cannot sell broadband, telecommunications or cable services—neither wholesale nor retail. However, they can sell or lease dark fiber to a list of approved carriers as long as they follow guidelines for “market pricing.” Otherwise, public utilities are allowed only to transport data for internal use, use by other utilities in the state and for public safety within the respective utilities' service areas. Currently only a handful of utilities, including Nebraska Public Power District and Omaha Public Power, offer dark fiber.

The Nebraska Public Service Commission approves—or not—the eligible carriers. Theoretically, the Commission could increase competition by registering a lot of smaller carriers and rural telecom companies or by redefining the requirements for being a carrier. But there doesn't appear to be much if any political interest in this topic. If you have another minute you can read the [text of this law](#).



Tennessee

This state has an interesting If-Then and Total Ban hybrid statute. On the positive side, the 60 Tennessee municipalities that own their electric utility businesses are allowed to own their own broadband and cable TV services if the utility passes through a series of time- and money-consuming hoops. These include fees and financial obligations, preparing a network business plan the state comptroller must approve, getting a vote of approval from 2/3 of the city council or 51 percent of citizens and various public disclosure requirements.

These are manageable obligations, as Chattanooga, Pulaski and eight other public utilities have proven. The law's prohibitions, though, are problematic. For one, utilities are prevented from offering services outside of their electric service area. Currently quite a few communities have asked Chattanooga's utility (EPB) to expand broadband to their towns if the law can be rescinded. Chattanooga has petitioned the FCC for relief specifically from this restriction in order to meet the demands of communities asking them for service. The likelihood of success here is unknown.

Additionally, electric co-ops are expressly banned from providing Internet services, although other nonprofits are allowed to offer services. Cities without utilities can only build a network for "historically" unserved communities (neither broadband speed nor unserved is defined) and cities must run the networks along with private-sector partners.

The impact of removing Tennessee's law would be that EPB and other utilities would expand quickly into surrounding cities. There are 22 electric co-ops providing service to 800,000 homes, farms and institutions, so eliminating the ban on them providing broadband, which many co-ops are in other states are doing, enables potentially 2 million people to benefit from community networks. Restricting cities without utilities to building out only in unserved areas can debilitate munis that fear a variety of challenges from incumbents, so removing the law opens the door for them as well.

Given that eight bills advanced in the 2014 legislative session to remove some of these obstacles, including the restriction on utilities expanding to other cities, it is

clear that lawmakers see a need for getting out of the way of communities. It seems incumbents' pressure derailed these efforts, but expect to see a grassroots attempt to enable utilities to expand their broadband services. Here are [details on the law](#).



Virginia

Virginia's law is an interesting hybrid of a Total Ban and an If-Then Law. Cities without a public utility are forbidden to provide services to constituents. Local governments that own electric utilities technically can provide ISPs with wholesale access to their telecom or broadband infrastructure, but they can do so only under heavy restrictions that discourages trying to do this. Bristol's network was grandfathered to be exempt from the restrictions.

On the other hand, if individual cities or groups of cities are willing, they're allowed to create broadband authorities, which are separate legal entities that can fund, build and operate Internet access services. Although this option appears to be a fairly favorable situation for public ownership of broadband, there are practical realities that can hobble efforts to move forward with network projects.

"The problem I've seen over and over is that those projects still require funds, and a startup authority typically doesn't have any income or funding of its own," said Jeffrey Gore, an attorney with the law firm Hefty & Wiley, PC. "So as far as financing projects, it still falls on the local government. The authority could conceivably issue debt, but with no financial track record, a bank or bondholders will require the backing of the local governing body."

Authorities lean toward forming public-private partnerships, often through wholesale arrangements in which the authority builds infrastructure and ISPs sell services over the network. Local governments typically don't want to use tax money or issue bonds to support these authorities, so authorities want to secure federal or state grants to cover their part of the partnership investment. Forward momentum can stall here because federal grants are scarce except potentially from the FCC's Connect America Fund. State grants are even scarcer because state legislators are pressured by incumbents to impede the rise of public-owned competitors.

[Overview of the law](#) (bottom of page).

III. Analysis

To help with the analysis, here is a list of states that fall within each category.

If-Then Laws	Minefield Laws	Total Bans
Alabama	Florida	Arkansas
California	Louisiana	Missouri
Colorado	North Carolina	Montana
Iowa	South Carolina	Nebraska
Michigan	Utah	Tennessee
Minnesota		Virginia
Nevada		
Pennsylvania		
Washington		
Wisconsin		

Thoroughly review legal situations, options

One big surprise uncovered while researching these laws is the depth of belief in many of these states that there are total bans when, in fact, many of the barriers are relatively small or at least manageable for cities willing to put in some hard work. Once you dig into the nature of the restrictions of If-Then laws, communities can get a clear understanding of what the real situation is. The minefield states are a mix of those with so many barriers they may as well be total bans and Florida and Tennessee, where stouthearted communities with good lawyers have reasonable shots at overcoming the barriers.

That said, for many of the 21 states the threat, however vague, of an incumbent lawsuit is always there when cities decide to sell broadband to constituents, or even if legislators start trying to appeal their laws. Communities whose constituents have a strong need for faster, better broadband have to decide if the fear of legal action is greater than meeting that need. I expect in another two years that the pressure to save struggling economies will drive communities to take the risks.

If the laws disappear tomorrow, then what?

All those engaged in trying to counter the effects of anti-muni network laws need realistic expectations about what they hope to achieve. The petitions of Wilson, North Carolina, and Chattanooga, Tennessee, asking the FCC to rescind their states' laws shine a bright spotlight on these statutes across the country. Some people assume 1) the FCC can prevail in such a showdown, and 2) we'll see a flood of new

community initiatives to build municipal networks if these laws are removed. But are these assumptions accurate?

The FCC's chances at overturning state laws present a complex question and food for another discussion. However, responses of those interviewed for this report were mixed about a hypothetical flood of muni networks resulting if the FCC is successful. Removing the laws would be a net positive in terms of increasing the number of community networks. But other barriers would remain that communities must address.

The age and political disposition of elected officials are factors that won't be affected by changing these laws. Anecdotal evidence abounds that elected officials in quite a few small towns and rural counties are nearing retirement age, technology-inexperienced, conservative, and not open to public-owned networks, even in politically blue states. A look at states without restrictive laws and the percentage of communities pursuing public networks gives you a good idea what to expect in those 20 states that currently have restrictions.

"I don't think floodgates would open," states Bill Clark from South Carolina. "Some municipal entities that have the personnel who can handle this will consider building their own, and a few public-private partnerships might form." Mark Feest in Nevada adds, "It's possible that CC Communications could help others fund networks, but our offer wasn't embraced a couple years ago."

Conversely, 35 North Carolina communities in 2008 were ready to pursue public networks but backed away after their state law passed, and Chattanooga's EPB cites various requests from neighboring communities to come to their towns. If Tennessee and North Carolina get their laws rolled back, the first wave of communities getting broadband likely would be those that convince existing utilities' networks to expand into un-served areas. Communities in these states that want to build networks from scratch will need well-thought-out strategies for funding them.

In Iowa, "The main barrier also is financing," said Curtis Dean. "Those cities that voted to become broadband utilities but haven't built a network yet don't have a lot of money sitting around." Attorney Ken Fellman believes most Colorado cities would explore public network strategies, particularly if an organization such as Google or Gig.U offered to step in to help fund them. Even communities in widely conservative of Louisiana would consider government-owned networks if someone else paid.

Rural America could wake up with zip, nada, nothing but cellular

Few people are aware of the state-by-state stealth campaign by large incumbents to get out from under Carrier of Last Resort (COLR) obligations. This is a state-regulation issue, so the national media have given it little coverage, and it is obscure telecom law, so probably not on the radar of local media. However, the issue will loom large in states with anti-muni network laws.

In many states, if not all, COLR laws were passed years ago to ensure rural communities got telephone services. Deals struck with large telecom and cable companies said, in effect, “We’ll give you favorable treatment, if not near-monopoly advantages in some areas, if you agree to provide service to customers even in sparsely populated areas, come hell or high water.”

Over the past three years, carriers have [lobbied state legislatures to pass bills to free them of these obligations](#), including in New Jersey, Michigan and Kansas (both [passed in 2014](#)), California and Kentucky (killed in 2014). A lot of rural constituents won’t become aware of this activity in their states until after these requirements are lifted. Communities, particularly rural ones, in those states with anti-muni net laws will suffer a double miscarriage of justice. 1) Regulations that had guaranteed communities in otherwise poorly served areas disappear and now constituents have decrepit copper infrastructure, cellular service insufficient for future needs or nothing. 2) Communities will be legally prohibited from replacing the COLRs with local public networks that could compensate for the loss of incumbents’ services.

Some feel the FCC should step in and force states to hold incumbents to their obligations, but this enters into that politically risky realm of the federal government interceding in state laws. On the other hand, you could argue “in for a penny, in for a pound,” since we’re already asking the FCC to rescind anti-muni network laws. Maybe the FCC and local broadband advocates can combine efforts and try to force incumbents into an “either honor your COLR obligations or allow public networks” decision.

The FCC should press on, but on two fronts

The FCC, either by design or by circumstance, has been thrust into the middle of the national focus on these state laws. There seems to be a consensus that even if the FCC prevails, the large incumbents will tie the ruling up in court for years or lean on Congress to take away the FCC’s money.

Broadband advocates nevertheless see value in the FCC’s efforts because they give the issue a lot of publicity it otherwise wouldn’t get and energize communities to fight for modifying or rescinding the laws. However, research of the laws reveals the FCC should continue down the path of raising the speeds that define broadband, which inadvertently can make some of the state laws less burdensome.

Several of the laws, such as South Carolina's, tie the definition of broadband to whatever criteria the FCC uses to define it. Other legislatures, including North Carolina's, used the FCC's previous criteria of 4 Mbps download and 1 Mbps upload speeds to help push its laws into place, claiming that if providers advertise these speeds to an area, that community is served. The FCC in December 2014 proposed [raising the speed](#) requirements for broadband to 10 Mbps download and 1 Mbps upload in order to be eligible for their Connect America Fund grants for building broadband networks. And now, not even a month later, we learn that FCC Chairman Wheeler is proposing to [redefine broadband across the board as 25 Mbps down and 3 Mbps up](#). These policy changes should give communities in several states leverage to fight back against restrictions designed around the lower speeds, though many of us advocates would lobby for 25 Mbps symmetrical down and up.

You can't predict change based on partisanship

Conventional wisdom says that majority-conservative legislatures usually oppose public networks, while strongly progressive legislatures support them. However, in 2014 you couldn't always tell a book by its partisan cover. A conservative member of the North Carolina legislature encouraged a group of local government IT officials to elect representatives who favor community networks and indicated legislators are having doubts about their law. Eight bills to modify state restrictions worked their way toward passage in the Tennessee assembly and senate until an AT&T executive's veiled threat of "[Well, I'd hate for this to end up in litigation](#)" killed their advance.

On the other side of the aisle, several Democratic legislators organized to reverse Colorado's public broadband restrictions until their leaders told them the bill couldn't be touched. Democrats at that time controlled the state house of representatives and had a slim majority in the senate. California, with one of the bluest of state legislatures, in 2014 saw several measures there and in the California Public Utility Commission that advanced broadband, but just one that helps municipal networks specifically.

Each state is different, but communities often find that getting better broadband is locally a nonpartisan call to arms driven by strong economic and quality of life issues throughout their areas. The bipartisan nature of public broadband was on full display in November when eight Colorado communities, some with distinctly left- or right-leaning constituencies, [passed referenda by over 75 percent margins to take back broadband authority](#). This, together with constant coverage of success stories, is driving constituents to pressure state legislators to support rather than hinder public broadband. The rise of public-private partnerships in which public entities own the network infrastructures and private companies deliver services to customers further reduces legislative support for these laws.

While Wilson, Chattanooga and others lobby the FCC to bring government pressure from the top down, alternative forces need to come into play from the local level up to the state. Bipartisan pressure at the ballot box is one force to bring to bear. Another is revving up electric co-ops and other nonprofits to become broadband providers, as Missouri has done to keep local control while avoiding the restrictive tenets of this state's laws. Finally, riding the public-private partnership wave can be a strong counter to the effects of If-Then Laws in particular and some of the milder Minefield Laws.

Vigilance must be the watchword when it comes to the political landscape of state legislatures, both in the 21 states with restrictions and in those without. There is always the danger that some legislators will become inspired to introduce new restrictions to existing laws—or create new laws in states that have no barriers. Conversely, some conservative legislators are shifting their positions and becoming allies to communities. Cities and counties with networks need to be frequently present in the halls of the legislature while they are in session—and in lawmakers' home offices at other times. The more success stories legislators hear the better.

Some laws actually provide an impetus to build better networks

If a state has a law that requires a referendum or a right of first refusal approach, consider this an invitation to create a better infrastructure with greater consensus among stakeholders and a much higher likelihood of financial sustainability. In meeting the letter and the spirit of these laws, communities by default end up (or should end up) following best practices for effective broadband strategy planning. Cambria County, Pennsylvania, Longmont, Colorado, and Lafayette, Louisiana, through navigating their states' rules, are cities that exemplify those practices.

When you look at what drives the crafting and passage of many of these laws in the first place, you almost always hear a faction screaming there's no need for public networks and that all municipal networks are failures. The thoroughness of a six-to-12-month proper needs assessment leaves little doubt that if needs do exist, the process will uncover them and document them. And enthusiasm created during the assessment activities translates into referendum votes in the short term and into paying subscribers in the long term.

All this being said, setting up and running special elections can be a significant time and money sink that communities can do without. For this reason, and the fact that just having the law on the books can prevent certain private investments for broadband, some communities still may try to have these restrictions removed.

Creative financing for those states with laws that hobble funding

So many communities delay moving forward with broadband projects because they see bonds and taxes as the only funding options. However, there are [at least eight options for funding these networks](#) with new possibilities constantly under review. Communities need to review those pioneering new strategies. UTOPIA in Utah is pursuing a deal in which Macquarie Capital funds the network buildout. [Steuben, Chemung and Schuyler counties in New York](#) state as well as San Leandro, CA got local companies to underwrite much of their fiber networks' buildout costs.

The laws such as the ones in Florida, Nevada and Utah that make it difficult to raise money force a level of creativity into the process of funding networks. Local governments or public utilities funded quite a few networks initially with capital funds to facilitate their business operations. Infrastructure in Reedsburg, WI and Mount Vernon, WA, for example, paid for itself from the outset through reduced spending for outdated communication technology. They then expanded their infrastructure to serve businesses and individuals, and remained cash positive by growing network business directly in step with their increasing subscriber base.

Debunking the myth that incumbents won't go where muni networks exist

Legislators need not worry about losing incumbent investments if they modify or remove these laws. A city simply issuing a credible threat to build a network is probably the fastest, least expensive thing to do that will increase the kind of competition in their states that lowers prices and increases options for constituents. A day after the eight Colorado communities passed ballot measure to return their authority to pursue broadband, Comcast announced they are [doubling broadband speeds to all customers](#) in the state at no extra charge. Coincidence? I think not.

One piece of rhetoric justifying anti-muni network laws is that private providers can't possibly compete against public networks' unfair advantages, so incumbents won't invest where public networks exist. When Philadelphia got a waiver from Pennsylvania's law and began building a citywide wireless network, a funny thing happened, though. Verizon started offering incredible discounts to wireless customers. Monticello, Minnesota, announced it was moving forward with plans to build a public network, and incumbents that for years refused to improve service there suddenly started promising Monticello infrastructure investments.

Time and again, once a public network is in the picture, most places where incumbents refused to provide adequate service all of a sudden find giant providers getting religion. Some incumbents often don't even wait for public-owned networks to be built before they start issuing press releases and promising faster speeds and better service. We saw this with AT&T's Fiber-to-the-press-release announcement promising initially to build gigabit networks in 100 cities, apparently in response to all the media coverage Google is receiving for anointing gigabit cities.

Challenging myth of the “unsuccessful” public network

The overwhelming majority of public networks are successes. Critics of public-owned broadband want to measure success in terms of profit margins, high revenues, subscriber numbers and quick debt retirement. The reality is that communities measure success based on cost reductions in local government operations, positive local economic impact and quality of life improvements.

A piece of rhetoric in support of these anti-muni network laws, and one of the most persistent fallacies preached, is that most of these projects are failures that waste taxpayer dollars. The reality is far from it, and communities need to understand the success stories that drive these projects.

Currently over 140 local governments or public utilities own citywide networks, many of which I surveyed for this report, while over 250 more own partial-reach networks that cover portions of their cities and towns. A sizeable number have been operating successfully since at least 2003, and some have operated since the late 90s. These communities defined success as meeting the goals set that justified the investments in their networks. From data gathered so far, we get a good idea what to expect in those states if anti-muni network laws are revised or eliminated.

- About half of networks were initially built with the goal of facilitating government or utility operations.
- Over half had a second goal of improving economic development, mainly by retaining current businesses or attracting new ones.
- Most of those interviewed had one or both of these goals initially added more goals along the way that further justified the investments in the networks. About two-thirds report reaching or exceeding one or both of their initial goals.
- About half report their networks increased local government efficiency, boosted economic development, transformed healthcare delivery and improved education. An additional one-quarter said their networks mainly helped the economy.
- Initial investments range from as little as \$160,000 to \$750,000 and to as much as \$12 to \$15 million. Investment amounts vary depending on a range of factors, including the size of the community, number of public resources to wire and whether residential subscribers were connected. Larger cities such as Chattanooga and Lafayette made considerably higher investments in the initial years.

- Some networks have never operated at a deficit because 1) the initial infrastructure for government or utility use paid for itself in cost reductions, and 2) they incurred costs for expanding the network for the public that were directly in proportion to subscriber revenue growth.

Cities such as Santa Monica and Burbank, California, for example, cover all costs for personnel, network operations and network expansion by adding just three to four business customers per month. They're also able to build free public Wi-Fi capability throughout the city, thanks to the fiber infrastructure connecting government and utility facilities.

- A number of cities carry their initial debt for build-out anywhere from 10 to 25 years, and most (except some networks built within the past two years) currently generate enough revenue to retire the debt on schedule, if it hasn't been retired already. This, by the way, is what cities do—they carry debt for many years for infrastructure projects. Critics try to paint this as another negative that justifies anti-muni network laws—"we're protecting" taxpayers from debt.

IV. Recommendations

- Know the law. Many communities have been misled into believing statutes place total prohibitions on the creation and operation of muni networks when some do not.
- [Be ready to fight on a moment's notice](#) in the state legislature any attempt to make current laws worse, or introduce restrictive laws (no matter how benign they sound) in other states. In Kansas, a cable industry lobbyist wrote the draconian bill in 2014 AND entered it on the state Senate Commerce Committee docket. In Utah a few weeks later, the incumbents at least tried to maintain the charade of representative democracy and influenced their legislative ally in the house to introduce that bill. Expect both states and maybe others to try again.
- Communities in states with the easiest to address restrictions should deal with these head-on without trying to rewrite or remove the laws.
- Find out ASAP which incumbents are pushing efforts in your legislature to escape their Carrier of Last Resort (COLR) responsibilities. This could be a little time-consuming because lobbyists are keeping this effort on the down low as much as possible and some statutes mask the intended ultimate result. But if such efforts are underway, take appropriate action, including trying to tie any COLR escape legislation to a clear unrestricted pathway to public network options.
- In states that require referenda or have established right of first refusal procedures, commit to executing a thorough needs assessment process and developing a broadband plan. Use the results of these activities to develop a referendum strategy—or a strategy for approaching incumbents.
- File comments with the FCC in support of Wilson, North Carolina's, and Chattanooga's petitions. Keep that momentum going, because we are likely to see action in the FCC accelerate now that the congressional elections are over.
- Petition the FCC to increase the speed that defines broadband. Some have floated 25 Mbps symmetrical as the next possible speed minimum, but communities should push for higher. In reality, the definition of broadband should be that speed which communities (the market) determine sufficient to meet their needs as determined by community research. However, political necessity for a while likely will dictate incremental minimum speed increases by the FCC.

- Prepare to play the lobbying game at your state capital. Understand how lobbying is done—influence through education, cash distribution and delivering souls to the polls. Communities can't compete with industry lobbyists in cash and perks. But if 10 Colorado communities can deliver 70 percent of the vote to pass broadband referenda, this kind of vote delivery commands respect among elected officials. Also, legislators are forever short on time, and many have limited knowledge of technology. Become the master of delivering the 30-second elevator pitch describing why public networks are great and writing two-page summary documents that tell compelling stories while delivering jargon-free educations on key public broadband points.
- Push the envelope for developing funding strategies. The FCC has four programs that could fund potential grants. Two of these, E-rate and the Connect America Fund, are being remodeled. Track changes in these programs and work with the FCC to influence reforms so community broadband networks will be supported. Other federal agencies such as Rural Utilities Service have grant money for broadband-related projects but are relatively small or, in some cases, shrinking.
- An additional approach may be to determine what outcomes broadband can produce for your community, such as improving education or healthcare, and find agency grants that will fund your targeted outcomes rather than the network itself. Consider a similar approach for approaching state agencies, corporate foundations and nonprofit organizations. Fund the outcomes, not the network.
- Broadband strategies should include aligning with trusted partners with expertise in financing, infrastructure buildouts and multivendor network integration. They can offer sound guidance so you can mitigate or circumvent challenges and minimize project risks.
- Rethink your approach to public-private partnerships. UTOPIA and San Leandro break new ground by adding funding elements to the standard wholesale approach of cities building infrastructure and private companies delivering services across the network.
- Take a page from Missouri co-op playbook: hold open houses for legislators to show them the success of your network. Legislators love to hang their hats—and photo ops—on high-profile, successful community projects.
- Also, take a page or two from the Kit Carson Electric Cooperative playbook. At one time, the state of New Mexico had a statute that forbade co-ops from providing broadband services. Kit Carson CEO Luis Reyes, Jr., began a systematic campaign of building local political support that was rolled up

into state political support. “We started with big education and face time with elected officials at local levels. Not just mayors and city council, but anyone who ran for elected office who would benefit by having better broadband.” The co-op also got involved with economic development projects in the three counties it services, and developed a track record of success stories.

By supporting projects that directly brought jobs to the communities, Kit Carson built a strong credibility. They then educated the communities on how broadband would bring jobs to the area. With the support built among constituents and elected officials, the co-op generated 1000 letters of support for their broadband plans, which they leveraged with state legislators to get the restrictive law removed. Furthermore, Kit Carson created allies by partnering with lawmakers to help legislators implement their economic development initiatives. “Cities always go to the legislature asking for something,” said Reyes. “But we developed relationships because legislators could count on us to deliver support from our 29,000 customers.”

Conclusion

In many parts of the country, communities are pushing hard to find ways to get faster, better broadband to their constituents. Community stakeholders agree that removing or mitigating laws hindering municipal and public power utility networks would be a huge win for constituents.

What path your community takes to address your state's statutes, or what you do to prevent these types of laws from being enacted in the first place, varies depending on the broadband needs, the politics, economic conditions and so forth. A lot of research is required and consulting with legal experts as well highly advisable.

It also is important that everyone have realistic expectations of how a world without barriers would look because, just by itself, removing them may not open the floodgates to hundreds of new networks. It is very frustrating to marshal resources, time and money to reach what was thought to be the final challenge to better broadband, only to find out that much more is required of communities.

This report is a first step in understanding what is involved with addressing broadband in those states with various legislative challenges to one category of broadband solution, public-owned networks. There are several options for communities to consider. Do your homework well and thoroughly examine your options. Never be afraid to get help from those whose knowledge and expertise can help you best address the challenges.

About the author

For over 25 years Craig Settles' workshops, [consulting services](#) and books have helped public, private and nonprofit organizations worldwide use technology to cut costs, improve business operations and increase revenue. His community broadband experience, analysis and strategy development skills establish Mr. Settles as a thought leader on using public networks to transform education and healthcare delivery, improve local economies, and increasing government efficiency. His industry reports and books, including *Building the Gigabit City*, add to his industry position.

Mr. Settles began following community broadband consulting in 2005. His public-sector client list includes Ottumwa, IA, Benicia, CA, Glendale, CA and the State of California, with Calix, Ciena, and AT&T among those on his private sector client list. In addition, he has testified for the FCC and on Capital Hill. Mr. Settles hosts the [Gigabit Nation](#) radio talk show, and is Director of [Communities United for Broadband](#), a national grass roots effort to assist communities launching their broadband networks.