Introduction

In the 21st century, a basic building block of economic development is access to high-speed telecommunications services. The locality that cannot provide high-speed telecommunications cannot hope to land business prospects in its local business park and risks losing existing businesses that increasingly depend on that access. In addition to businesses, citizens increasingly are expecting and demanding high-speed access to the Internet.

The last decade has brought tremendous growth in access to those services in urban areas across Virginia and across the country. However, the spread of telecommunications services has missed rural areas, many suburban areas, and some inner cities. For example, in significant parts of Loudoun County, the new home of AOL, Internet access is available only via the old phone line.

This article explores the current state of access to telecommunications services across the commonwealth, looks at related legal and political issues, and unabashedly recommends that the General Assembly take steps to assist local governments to provide high-speed telecommunications services in all areas where private industry has not provided it.

Background

A national undercurrent of excitement surrounds new kinds of industry that exist because of the Internet. Intel, AOL, Microsoft—most localities would do everything possible to land any one of these companies. Without the availability of high-speed telecommunications services, a locality simply cannot compete for that kind of business. The same problem exists in today’s market for more traditional kinds of industry. A book or magazine publisher no longer relies on physical plates or negatives to start the publication process. The material for publications comes via the Internet or a dedicated fiber-optic cable. A phone-line Internet connection simply will not work. The customer’s magazine that takes a few minutes to download over a fiber network would take half a day over a phone-line. Hospitals and other medical service providers need high-speed communications to transmit medical data. Traditional businesses cannot obtain contracts with vendors or customers unless they can send and receive data electronically.

Rural localities and many urban or suburban areas in Virginia simply have no broadband services to meet their businesses’ and residents’ needs and expectations. A recent Wall Street Journal article\(^1\) states that nationally, while over 73 percent of residents in cities with over one-half million population have cable modem access to broadband, only 15.9 percent of residents in cities between 25,000 and 50,000 have that access. For residents of cities between 5,000 and 10,000, only 5 percent have access, and the percentage drops for smaller localities. As the article notes, cable modem access is a slow broadband service. For many categories of business, higher speed access is needed to be useful. Other recent publications point out the lack of broadband access in parts of the commonwealth.\(^2\) The point of the recent news items and editorials is that across Virginia, more broadband access is needed, and in many areas, private telecommunications companies are not providing the services and do not have current business plans to provide them.

An article in the spring 2001 issue of Virginia Issues & Answers identified lack of high-speed telecommunications access as a part of the digital divide in the commonwealth.\(^3\) According to the article, “Of primary concern is the intense disparity in the last-mile telecommunications infrastructure available to rural homes, schools, and offices compared to their metropolitan counterparts. More than any other information technology factor, this infrastructure affects the potential economic development of rural areas and the capacity of rural residents to take full advantage of Internet resources.”

The population density of major areas of the state is too low to justify private telecommunications companies installing the equipment to provide broadband services. As a business proposition, the less

![Percentage of Residents in Cities with Cable Modem Access to Broadband](chart.png)

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dense areas of the state will remain unattractive to the telecommunications industry for years to come, given the major expense of developing such networks. Thus, local governments must look to themselves to resolve this dilemma.

A common vehicle for local governments to provide broadband services is the local public utility. Beginning in the 1980s, public utilities began installing fiber-optic networks for their own purposes. Utilities use the networks for reading customer use of the system, determining status of the power system, and determining use throughout the day so they can generate the power needed to meet demand. The utilities use only a small portion of the network capacity for their own needs. Therefore, the excess can be used for broadband services to the community. The utility systems run that “last mile” to the customer’s door. The services can include phone service, cable TV access, Internet access, and high speed point-to-point connection for industry.

Legal and political background

The first major recent action affecting the rights of local governments to provide broadband services was the 1996 Telecommunications Act. When Congress passed the act, section 253(a) became the focus of debate over the right of local governments, especially public utilities, to provide telecommunications services. The first subsection sets the standard, stating:

§ 253 Removal of barriers to entry
(a) In general
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.

In a proceeding before the Federal Communications Commission (FCC) following the enactment of the 1996 act, Virginia Congressman Rick Boucher, one of the authors of the act, urged the FCC to permit a local government-owned utility in Missouri to provide telecommunications services. His letter to the commission demonstrated that the act was intended to allow local governments to provide such services.5 The conference reports for the act also demonstrate that many members of Congress agreed that the provision was intended to grant local governments the authority to provide the services.

The telecommunications industry lost the argument in Congress over the right of local governments to provide broadband. They next turned to state legislatures for the enactment of state laws to accomplish the objective of preventing local governments from becoming telecommunication providers.

In 1998 the Virginia General Assembly amended Virginia Code § 15.2-1500, thereby enacting a law prohibiting local governments and their public utilities from becoming involved as telecommunications providers. The amendment was a simple prohibition on local governments offering telecommunications equipment, infrastructure, or services except to other governmental entities.

The amendment exempted Abingdon. “However, any town which is located adjacent to Exit 17 on Interstate 81 ... is hereby authorized to continue to offer such telecommunications services.” Abingdon is the home of Congressman Boucher, an author of the federal act and a supporter of the rights of localities to become telecommunications service providers.

The impact of the law was immediate. Lynchburg had installed a fiber-optic system and was in the planning process of providing services. Other localities considered that the amendment stopped them in their efforts to enter the broadband arena. Some members of the General Assembly recognized that the law cut off large parts of the state from broadband. As a result, a work group was established in 1998 to make the law more workable and to allow local governments to provide such services. The work group was also needed, from the industry perspective, to prevent the 1998 version’s two-year sunset clause from removing the prohibition on locally provided telecommunications services.

The 1999 version, which was developed by the work group, became today’s dark fiber law. In the statute, “dark fiber” is defined as fiber-optic cable that is not lighted by lasers or other electronic equipment. This definition allows a locality to put the cable in the ground but not operate or light it. Local government members of the work group did not support the final version of the law. The 1999 version allowed a locality to lease its fiber network to a certified local exchange company (telephone company). However, it prohibited localities from lighting the fiber, that is, from providing telecommunications services to the public or to businesses and industry on their own or from selling capacity to telecommunications providers. Only by entering into a maximum 10-year lease with a private provider could a locality get into the broadband arena. Further, the lease was made subject to review and approval by the State Corporation Commission under Virginia Code § 56-484.7-1.

Local governments have remained frustrated by the effects of the 1999 Virginia
dark fiber law. The mechanism in the law to limit leases to a local exchange carrier has proven unworkable. As a result, despite local government interest in taking steps to pull all of Virginia into the 21st century, no leases have been established.

However, Abingdon has continued to enjoy success enabled by the exemption that was retained in the 1999 law. It provides fiber-optic access to the Internet through a partnership with Sprint that allows small businesses affordable Internet presence and that allows residents high-speed access, all on a very cost-competitive basis.

Bristol, Va., had installed a fiber-optic network for its public utility in the mid-1990s. During the past few years, the city felt increasing competition from Bristol, Tenn., which has broadband services, and from Abingdon with its successful program. Both areas had a competitive advantage over Bristol, Va., in attracting or retaining businesses by providing high-speed telecommunications services since the city was stymied by the dark fiber law. The city filed suit against the Virginia attorney general in federal court in Abingdon, seeking to have the dark fiber law declared in violation of the federal law. The basis of the suit was that the Virginia dark fiber law violates section 253 of the 1996 federal telecommunications act because the state statute prohibits Bristol, an entity under the federal law, from providing telecommunications services. Congressman Boucher filed an amicus curiae with the district court, supporting Bristol. The major argument in his brief is that “Congress clearly intended to include municipalities as 'entities' protected by section 253(a) of the telecommunications act.”

In May 2001 the district court judge ruled that the state dark fiber law violates prohibition against local governments providing broadband services will end. If it reverses the decision, Bristol will have to discontinue the services it has begun offering. The Fourth Circuit decision will apply statewide. If the Fourth Circuit decision is appealed to the U.S. Supreme Court, another two years could be tacked on the time for a final decision.

Rural Prosperity Commission

The Rural Prosperity Commission was created by the 2000 General Assembly to undertake a detailed analysis of Virginia's rural economies and to recommend flexible but targeted state policies that, combined with local efforts, will help foster sustainable economic growth in Virginia's rural areas. The commission shall study and recommend what policies and strategies can be instituted or restructured to help rebuild Virginia's rural economy to maximize the effectiveness of federal, state, local, and private efforts to assure rural prosperity and a high quality of life in rural communities.

Since late winter 2001, the commission has spent significant time and energy evaluating broadband access as an economic development tool. Certainly, telecommunications is a legitimate issue for the commission, considering the importance of high-speed telecommunications to economic development for rural areas of Virginia. The commission staff has recommended a position on broadband that includes the right of local governments to provide the services under certain circumstances as follows:

In areas not sufficiently served by the private sector (at minimum,
Virginia Telecommunications Industry Association, have argued strongly that their companies’ rights should be protected. No participant has questioned the need for broadband services for rural Virginia. The only question has been the proper means to meet the need. Local government representatives have questioned the timetable for high-speed access if Virginia has to wait on the industry’s schedules for broadband services.

As the commission continues to work on this issue, its legislative members are split on it. Whether or not the staff recommendation is adopted, it is unclear what will happen in the 2002 session of the General Assembly. The Rural Prosperity Commission is expected to make a recommendation to the legislature that may include the staff recommendation. The General Assembly has a policy of not considering legislation on a topic that is in litigation, and the Bristol case will still be before the Fourth Circuit through the session. However, the telecommunications industry considers this issue to be very important. As a result, it may apply some pressure to the legislature for a bill to fix the problem of the Bristol decision.

Policy discussion

The debate over whether local governments should be allowed to provide telecommunications services pits the rights of two significant forces: local telephone companies and cable companies against the needs of the citizens of the commonwealth and the local governments that serve those citizens.

The telecommunications industry argues that it alone should have the power to provide telecommunications services. The basis of the argument is that if local governments begin providing the service, the door to that community will be forever closed to that industry. They also argue that allowing government competition gives local government an unfair advantage since government regulates and taxes the industry.

Local governments argue that the industry should not hold rural, suburban, and poorer urban areas hostage to their own business plans. They argue that the citizens of the commonwealth need and expect modern high-speed telecommunications access without having to wait for some unknown future time that will suit industry’s business plans.

Rural electrification: Will history repeat itself?

History does not support the idea that once a government-owned network is in place, private industry will not be able to compete.

From the last decade of the 19th century into the 1930s, rural electrification was debated on very similar grounds. In the early years of electrification of the nation, private companies aimed their sights at the most lucrative markets, the biggest cities, initially wiring only the wealthier parts of those cities. This cherry-picking approach made sense from a business perspective—and continues to make good business sense. Because rural areas were overlooked, local governments began forming electric utilities to provide much-needed electric power to non-prime areas. The cost of providing the power initially exceeded the revenues, especially considering the costs of the infrastructure. Without that early government action, many rural areas of the country would have fallen irrevocably behind the urbanized areas in economic development.

The country avoided a power divide, similar to today’s digital divide, thanks largely to the efforts of local governments, local business groups, and the public utilities they formed. Had local governments not gotten involved in rural electrification in the early 20th century, rural areas would have been severely impacted, an impact that would have lasted through World War II. Economic development would have lagged behind urban areas more than it did. Rural electrification by governmental effort was critical in helping maintain growth.

As private power companies grew, the number of public utilities declined markedly. For example, from 1923 to 1927, a period when private companies began moving into smaller markets, the number of public electric utilities shrank from over 3,000 to 2,300.7

In the telecommunications arena, it is less likely that utility-provided services will decline as much as power providers did in the 1920s and 30s. When a public utility provides broadband service, it is more likely to remain in existence because, as shown above, it has its own needs for the fiber network. However, even in that case, utilities generally prefer to lease capacity of the local network to private telecommunications companies, staying out of the business themselves. Such was the preferred position of the American Public Power Association in a report issued in September 2000.8 Locally owned networks that are not a piece of a utility system could be transferred to private companies as those companies expand beyond the lucrative urban business centers.

The same argument applies today in the telecommunications arena. Telecommunications companies are private businesses, responsible to their stockholders to maximize profits. It does not meet their legitimate business goals to spend millions of dollars to install a network in a rural area where there are not enough subscribers to provide a cash flow to make a profit on the investment. Problems like the digital divide, the loss of existing businesses, and difficulty in attracting new businesses are neither the focus nor the primary concern of private telecommunication companies. Nor should they be.

Local governments, on the other hand, are not constrained by making a direct, profitable return on the investment. For local governments, the investment provides a return by keeping businesses in the community and by attracting new businesses to the community. Such a result allows the citizens of a community to live and work where they choose. They are not forced to choose between better-paying jobs and living where they grew up. The indirect returns justify the expenditures by local governments. This is not to rule out making a fair return on the local investment. In the case of a locally owned utility, where the installation of a system is largely in place for electric demand monitoring and for billing, the utility may be able to begin providing services without a major outlay.

Many local governments do not have the technical expertise to light the fiber once it is in the ground, to operate as an Internet service provider, or to bring telephone or cable service to homes and businesses in a community. For these reasons, local governments will generally prefer to enter into cooperative ventures with one or more private telecommunications companies.

Abingdon is a good example of the possibilities for cooperation. A small town, it has joined forces with Sprint to serve its community. When a locality partners with one or more private firms to lease part of its fiber-network capacity, that can become the first step of having private industry take over the network and
ultimately convert it to a completely private venture. In the case of public utility networks, as explained above, this may not be feasible. In other cases, however, where the network is installed by the locality to provide that last-mile infrastructure and service, a transfer of the assets to one or more companies is feasible and furthers the goals of the locality. A transfer of the assets would have to be made on a basis that is equitable for the local government, providing a reasonable return on its investment. In a sale of a network, the locality need not make a profit but should not subsidize a single company with public funds.

The argument that local government has an advantage because it regulates and taxes the competitor—private industry—is not supported by the facts. Localities that decide to install a network have their own, different sets of regulations with which to comply. For example, procurement is much more cumbersome for localities. The Virginia Freedom of Information Act makes much of the business plan of a local network being open for inspection by private companies that might want to compete. Private telecommunications companies generally have a network that extends to the customer's home or business that the locality lacks. In today's environment, localities are losing regulatory authority over telecommunications providers, particularly local exchange carriers. The telecommunications act itself prohibits discrimination against any providers.

Conclusion
Access to high-speed telecommunications services is an essential part of a successful future for Virginia's communities. The public needs and demands modern telecommunications services. Business must have access to high-speed communications services to be able to remain in a community as a jobs provider or to locate in a community to provide jobs. The need for telecommunications services is apparent and of high priority for local government. Local government is the most appropriate level of government to be concerned about and to work on plans to provide such services when the private industry is not coming to town.

We all support the concept of privatization in the modern world. However, the needs of Virginia's communities must not be held hostage to the business plans of the telecommunications industry. It is clear that private industry is not going to provide broadband services in rural, less populated areas of Virginia in the near future. Alternatives therefore must be kept open. The most viable alternative is to allow local governments to provide the services, either through partnering with private companies or through providing the infrastructure and the services over that infrastructure, the broadband network.

The General Assembly should take steps to facilitate the provision of broadband services by local governments and locally owned electric utilities in all areas of the commonwealth where private companies do not offer the services. The dark fiber law should be repealed. The citizens of Virginia will be well-served by the legislature if the bars to publicly owned telecommunications networks are removed. Citizens will find faster access to services they deserve and expect. Businesses will have access to what has become a critical element to survive in the 21st century.

Endnotes
5 The Congressional Reports are S. Rep. No. 103-367, 103rd Cong., 2d Sess. 122 (1994) and H.R. Rep. No. 104-230, 104th Cong., 2d Sess. (1996). The bill originated in the 103rd session, was passed by the 104th, and was signed into law by President Clinton on February 8, 1996. Detailed discussion of the process of the enactment can be found in the City of Bristol's briefs in Bristol v. Early, discussed in this article.
6 Senate Joint Resolution 140, Senator Charles Hawkins, of Chatham, chief patron, and House Joint Resolution 129, Delegate Whittington Clement, of Danville, chief patron.
7 R. RUDOLPH AND S. RIDLEY, Power Struggle: The hundred year war over electricity, 1986. Thanks is due James Baller and Sean Stokes of the Baller Herbst Group for the discussion of the electric utility legacy in America in their "The public sector's authority to engage in telecommunications activities" in the Journal of Municipal Telecommunications 1:1, April 1999.