MEMORANDUM

TO: Frank Smith, President and CEO

FR: Michael W.S. Lockaby, Guynn & Waddell, P.C., Special Counsel

CC: Sam Darby, Glenn, Feldmann, Darby & Goodlatte, General Counsel

DA: January 13, 2017

RE: Summary of House Bill 2108—Virginia Broadband Deployment Act

You have asked me for a section by section layman's summary of HB2108 and some of the possible practical impacts of the legislation. The following is the summary, set out by section.

Analysis

Amendments to §§ 2.2-3705.6, 2.2-3711, 10.1-1458, 15.2-2160, 32.1-276.5:1 & 56-265.4:4.

These amendments remove all FOIA exemptions, both for documents and closed sessions, for (1) broadband authorities created under the Wireless Service Authorities Act[1]; (2) municipalities[2] with electrical utility systems that provide broadband[3]; (3) municipalities that provide cable television service on which broadband might piggyback[4]; and (4) localities that hold State Corporation Commission certificates to operate as local telephone exchange carriers (LECs).[5] In short, this applies to every local entity that is able to provide internet service in any capacity under current technology.

The rationale here is to remove local entities as effective competitors for private internet providers. By way of comparison, in the water industry, water authorities, municipal water systems, and public service corporations operate in a highly regulated environment in which their services normally do not overlap, due to local and state certification and rate regulation requirements. By contrast, under the federal Telecommunications Act of 1996 and the modern, deregulated version of the state-level Utility Facilities Act, the statutory model is based on overbuilding of different technologies in order to foster competition. Originally, the FOIA exemptions were built in recognition that local entities might wish to enter and compete in this market, at the Act envisioned.[6] In order effectively to compete, these entities would naturally

[1] Va. Code §§ 15.2-5431.1 *et seq.*
[2] In accordance with standard nomenclature, I am going to refer to Wireless Service Authorities as "Broadband Authorities" or simply "Authorities"; counties, cities, and towns generically as "localities"; counties as "counties"; and cities and towns as "municipalities" or "municipal corporations." *See* Va. Code §§ 1-221, 1-224.
[3] Va. Code § 15.2-2160.
[4] Va. Code §§ 15.2-2108.3 *et seq.*
[5] Va. Code § 56-265.4:4; *see also* 20 Va. Admin. Code § 5-417.
[6] Note that there is case law that notwithstanding the Telecommunications Act of 1996, states may prohibit their own local entities from competing in the telecommunications market. *See Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004); *Tennessee v. F.C.C.*, 832 F.3d 597 (6th Cir. 2016).

want to act in some respects as other market participants do, i.e., by keeping trade secrets[7] from competitors that water providers (for instance) might freely provide because they are working within a highly regulated market in which competition is not nearly so much of a factor.

New § 56-484.26.

This section deals with definitions. A couple of points for clarification purposes:

(1) "Locality" and "affiliate." The term "locality" is defined to mean a county, city, or town, which is a typical definition. However, it also defines "affiliate" to include broadband authorities and any other similar local entity that might provide any service. So it ensures a broad scope for the statute.
(2) "Broadband expansion services" is defined as broadband provided in an area where there is not currently broadband *at all*.
(3) "Broadband speeds" is down-defined from federal standards. This statute defines "broadband" to mean 10 downstream/1 upstream. The current federal regulatory standard is 25 downstream/3 upstream.[8]

New § 56-484.27.

Clarifies that the statute does not apply to governments' internal computer systems.

New § 56-484.28.

This begins the meat of the bill, and almost every subsection requires some explanation:

1. Requires a locality or affiliate to get a study either from the Center for Innovative Technology (CIT), which appears to be an obscure state agency, or a private consultant, on broadband availability in the locality prior to making any plan for provision of service. The report must be made public. It also says that the locality or affiliate must pay for it—this might mean the end of the currently prevalent Department of Housing and Community Development (DHCD) grants for rural broadband studies.

2. Governing body must formally adopt broadband goals in specific unserved areas.

3. Prior to adopting any plan, a locality or affiliate must solicit private providers and give them 180 days to respond with proposals to serve the area, including with government subsidies. By way of comparison, a request for proposals (RFP) or invitation to bid (ITB) under the Virginia Public Procurement Act (VPPA) is only required to be advertised for 10 days, and more than 30 would be atypical.[9] Under the

[7] A trade secret is defined in Virginia law as "a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or us, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Va. Code § 59.1-336. In other words, these confidentiality provisions mainly apply to documents and meetings in which information that would be economically harmful for an entity to disclose is written or discussed.
[8] *In re FCC Finds U.S. Broadband Deployment Not Keeping Pace*, 30 F.C.C.R. 1375, 1377 (Feb. 4, 2015).
[9] *See* Va. Code §§ 2.2-4302.1(2), 2.2-4302.2(A)(2).

Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA), a 30-day advertisement period is typical.[10]

I also note that there are potential issues with localities or affiliates simply giving funds to private entities to build privately-owned infrastructure, including several state statutes and constitutional provisions.[11] There are probably some ways to skirt these issues, but this subsection seems not to be fully taking those issues into account.

4. This section provides that *if and only if* no private provider makes a proposal, the governing body may authorize the project. It appears that there is no provision for what would happen if the proposal is not credible, unlawful, or proposes a timeline that is not acceptable to the locality or affiliate. There is also a provision requiring a certification by the "chief executive officer" of the locality or affiliate. I am not familiar with any provision of law that provides for a "chief executive officer" of a locality or affiliate, nor a requirement that one be appointed, and therefore see this as an inoperative provision.

5. Requires that at least 90% of the project be in "unserved areas."

6. Must file all documentation with Virginia Broadband Advisory Council, and certify annually that the project continues to meet all operating requirements under § 56-484.30 (Q.V.).

No cause of action or standing for enforcement is created.

New § 56-484.29.

This is a grandfather clause. It allows a broadband authority to continue offering the same services in the same area that it has in the past, but requires an Act of the General Assembly to expand these services in any way.[12] This would likely be the death knell for most existing broadband authorities, including RVBA.

New § 56-484.30.

This continues the meat of the bill, and each clause requires explanation:

1. A locality or affiliate must apply its own ordinances, including bonding notwithstanding the usual bonding exemptions, to public providers.

2. A locality or affiliate must set its rates at actual direct and indirect costs (no definition here), and all taxes, permitting fees, franchise fees, etc.

3. Must keep accurate records and provide them to Auditor of Public Accounts.

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[10] *See* Va. Code §§ 56-575.1 *et seq.*

[11] *See, e.g.,* the Credit Clause, Va. Const. Art. X § 10; *Harrison v. Day*, 202 Va. 967, 121 S.E.2d 615 (1961) (lease and operating service agreement of Port of Virginia to railroad approved; however, ownership remained with Port Authority); *Button v. Day*, 208 Va. 494, 503, 158 S.E.2d 735, 741 (1968).

[12] Failure to include this clause would likely be a taking without just compensation under *Town of Culpeper v. Va. Elec. & Power Co.*, 215 Va. 189, 207 S.E.2d 864 (1974).

4. Must provide private providers access to all facilities.

5. May not use eminent domain against any private provider.

6. Localities, affiliates, and other agencies and authorities are not permitted to loan or borrow money to an entity not in compliance with this section.

7. Creates standing for private internet companies to sue for violations of this section. Does not create a cause of action. In order for a person to bring a lawsuit, he or she must have both (1) standing and (2) a cause of action. I do not see a cause of action created here, so standing seems superfluous.

New § 56-484.31.

Any sale of a system must be at a public auction. It appears that this would even include transfers between governmental entities, such as a merger of broadband authorities or a broadband authority taking over a municipal system.

New § 56-484.32.

Simply reiterates that FOIA would not apply to localities or affiliates for internet service anymore.

New § 56-484.33.

Grandfathers existing bonds.

Concluding Note

The provisions of this Act would essentially end viable broadband authorities in Virginia, and plainly violate the spirit if not the word of the Telecommunications Act of 1996. Broadband authorities normally have significant startup costs, and those costs are generally funded with grants and loans. At first, to be operational, broadband authorities also need to pick at low-hanging fruit, like industrial parks, local government offices, and schools, in order to have cashflow to pay on bonds and finance expansion. This is exactly the business model that this Act is designed to prohibit. Furthermore, by essentially prohibiting competition in the marketplace, it plainly violates the spirit and intent of the Telecommunications Act of 1996, which was intended to promote competition. If taxpayers were not clamoring for utility-based solutions there would be no need for broadband authorities or other municipal systems, and no consequent desire to prohibit them from entering the market.

This bill, hopefully, will be killed or diluted to a sufficient degree that it does not hamper the underlying goal of providing universal, high-quality, broadband (25/3) service at fair, reasonable, and uniform rates. This bill does not further that goal.