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# COMMONWEALTH of VIRGINIA

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## DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

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Chair Kory,

Thank you for your request and your leadership on this important topic. The pandemic has exacerbated the connectivity needs of Virginians and accelerated the Commonwealth's efforts to reach its goal of achieving universal broadband in Virginia by 2028. Along with the hundreds of thousands who lack access to the internet because of infrastructure, there are many Virginians that currently lack access because of cost.

Localities seeking to deliver broadband services have three legal avenues:

- Creating a broadband authority under the Wireless Service Authorities Act
- Seeking approval from the State Corporation Commission (SCC) under § 56-484.7:1 of the Code of Virginia, or
- For a small subset of localities that operate an electric distribution system, seeking approval from the SCC under § 15.2-2160 of the Code of Virginia.

### Broadband Authorities:

The principal avenue for localities seeking to deliver broadband service has been through broadband authorities, a legally separate entity from the locality created via the Wireless Service Authorities Act, or § 15.2-5431.1 *et seq.* Broadband authorities operate in a similar legal space as a water authority or economic development authority, with the ability to issue revenue bonds financially independently from the participating locality. Some key powers of an authority include the power to:

- Acquire, construct, reconstruct, improve, enlarge, operate or extend any project;
- Issue revenue bonds of the authority, such bonds to be payable solely from revenues to pay all or a part of the cost of a project;
- Borrow at such rates of interest as authorized by the general law for authorities and as the authority may determine and issue its notes, bonds or other obligations therefor. The political subdivision creating the authority may lend, advance or give money to such authority;
- Fix, charge and collect rates, fees and charges for the use of or for the services furnished by or for the benefit from any project operated by the authority.



- Contract with any person, political subdivision, federal agency, or any public authority or unit, on such terms as the authority deems proper, for the purpose of acting as a billing and collecting agent for service fees, rents or charges imposed by an authority.<sup>1</sup>

As of October 2020, SCC records shows there have been 34 wireless service authorities incorporated. These broadband authorities have exercised their powers to a varying degree. Some authorities serve as advisory councils to the participating locality or as the legal entity for partnerships with private sector broadband providers in pursuit of grants. Meanwhile, some authorities have constructed broadband networks and connected residents and businesses directly. The varying approach amongst localities reflects how each Virginia community has its own unique and differing broadband circumstances.

For some localities, particularly those with limited resources or seeking to take advantage of a time-sensitive opportunity, establishing a broadband authority may be an arduous process. The steps for establishing an authority are as follows:

1. The governing body of the participating locality presents a resolution establishing an authority.
2. The participating locality schedules a public hearing on the resolution and must advertise the public hearing at least 30 days before the hearing.
3. If substantial opposition is heard during the public hearing or if 10% of voters in a locality file a petition calling for a referendum, then the participating locality shall hold a referendum on the matter.
4. After a public hearing, the locality may approve the resolution creating the authority. The locality then must file the authority's articles of incorporation for certification from the State Corporation Commission. If all the requirements have been met, this certification process typically takes a week.

This timeline meant that in the spring of 2020 when some localities sought to use federal CARES Act funding for broadband related expenses, they could not both establish a new authority and feasibly expend the funding by year's end.

Another reason localities have forgone creating broadband authorities are requirements pertaining to locality-owned telecommunications distribution facilities. Under subsection 35 in the Wireless Service Authorities Act, "In any instance in which a locality makes rights-of-way, poles, conduits or other permanent distribution facilities available to the authority, the authority shall make these facilities available to private providers of communications services in a nondiscriminatory basis unless the facilities have insufficient capacity for such access and additional capacity cannot reasonably be added to the facilities."<sup>2</sup> Although there may be interest in leveraging existing infrastructure for low-cost broadband service, localities with distribution

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<sup>1</sup> § 15.2-5431

<sup>2</sup> § 15.2-5431.35



facilities have expressed concern about making available locality-owned assets for broader use amongst the private sector.

#### SCC Petition:

The second avenue for municipal broadband without creating an authority requires localities to petition the SCC for approval, proving that functionally equivalent telecommunications services are not available in the geographic area identified by at least three private providers. If SCC approval is granted, localities must provide access to any distribution facilities used for the network, such as poles or conduit, to private providers as well on a first-come, first-served basis. Localities are also barred from setting prices for service “lower than the prices charged by any incumbent provider for a functionally equivalent service that is as generally available from such incumbent as it is from such governmental entity.”<sup>3</sup> Only one locality has attempted to petition the SCC under this code section since 2003.<sup>4</sup> A final decision under the statute was not reached as the locality's initial petition was dismissed without prejudice so that the locality could file a new petition, but no subsequent filing was made.

#### Municipal Electrical Distribution:

The third avenue for municipal broadband are for the localities that operate their own electrical distribution systems.<sup>5</sup> These localities must obtain a certificate to operate as a telephone utility under § 56-265.4:4 of the Code of Virginia. As with other methods to create municipal broadband, localities that obtain this certificate must provide access to any distribution facilities used for the network, such as poles or conduit, to private providers as well on a first-come, first-served basis. Localities are also barred from cross-subsidizing prices and revenues for providing broadband service “by other revenues of the locality or affiliated entities, except in areas where no offers exist from for-profit providers of such telecommunications services,” or if the locality successfully petitions the SCC<sup>6</sup>. Since 2003, only one locality – the City of Danville – has provided broadband service using this legal avenue.

#### Service Districts:

In 2019, broadband was added to the list of services provided via Chapter 24 of Title 15.2 of the Code of Virginia regarding service districts by localities. A service district is “created to provide additional, more complete, or more timely services of government than are desired in the locality or localities as a whole.”<sup>7</sup> Under subsection 15 of § 15.2-2403, localities could use service districts “to contract with a nongovernmental broadband service provider who will construct, maintain, and own communications facilities and equipment required to facilitate delivery of last-mile broadband services to unserved areas of the service district, provided that the locality documents that less than 10 percent of residential and commercial units within the project area are capable of receiving broadband service at the time the construction project is approved by the

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<sup>3</sup> § 56-484.7:1

<sup>4</sup> State Corporation Commission Case No. PUC-2003-00065

<sup>5</sup> § 15.2-2160

<sup>6</sup> § 56-265.4:4

<sup>7</sup> § 15.2-2400



locality.”<sup>8</sup> This process would work by, for example, a locality creating a service district in an unserved section of the locality, raising property taxes within the district with the new revenue earmarked for broadband, and issuing a bond to pay for the cost of building broadband infrastructure.

Unfortunately, while this language was intended to provide an additional tool for localities, local government advocates have voiced concern with the effectiveness of the statute and DHCD is unaware of any locality to date that has created a service district for broadband. The issue derives from the requirement that the locality contract with a nongovernmental broadband service provider. Since the locality would not own the assets, it is believed that the locality would be unable to access tax-exempt municipal bonds to finance any project.

### Conclusions:

In your request, you asked about the “local government capability to offer broadband services to low-income residents either at cost or at no charge through their networks already in place.” For most Virginia localities, the current legal framework allows this to happen via a broadband authority. Even localities with existing networks, according to the Wireless Service Authority Act, may “convey or lease to any authority, with or without consideration, any systems or facilities for the provision of qualifying communications services.”<sup>9</sup>

For the Virginia localities that own their roads, such as Arlington and Henrico counties and all Virginia cities, the issue gets more complex. The requirement that any rights-of-way, poles, and conduits made available to an authority also be made available to the private sector has been a hindrance for these localities, as they may want to support low-cost or free broadband to their low-income residents but are wary of opening up locality-owned distribution facilities to the private sector. The legislative intent of the initial language was to safeguard against unfair behavior by a locality against a private broadband provider but an outcome of that language is that it prevents these localities from fully utilizing their locality owned existing broadband networks for the benefit of their residents.

The lack of utilization of service districts for broadband will likely persist under the current legal framework as it is not in the financial interest of a locality to assume taxable bonds for infrastructure privately owned and operated. If localities were permitted to own the assets, there would likely be greater usage of this funding tool. Although it varies across the industry, some broadband providers partner with localities who own broadband assets.

In summary, the majority of local government broadband availability and affordability efforts for residents and businesses are undertaken in partnership with the private sector. There are currently legal avenues for localities to provide broadband service yet, as this letter outlines, there are some major limitations in current law. These limitations have prevented localities from directly providing broadband service either through creating new broadband infrastructure or sharing

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<sup>8</sup> § 15.2-2403

<sup>9</sup> § 15.2-5431.35



access to locality owned infrastructure with broadband authorities to serve residents that cannot afford private sector service.

Thank you for your interest in this topic. DHCD appreciates the Governor and General Assembly's leadership in expanding access to broadband across the Commonwealth and looks forward to continuing to work with localities and all providers of internet service.

Respectfully,



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