

2nd ANNUAL VATOA CONFERENCE

Richmond, Virginia

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Collision of Technology and Regulation

Jim Baller

The Baller Herbst Law Group, PC

Washington, D.C.

(202) 833-1144

Overview

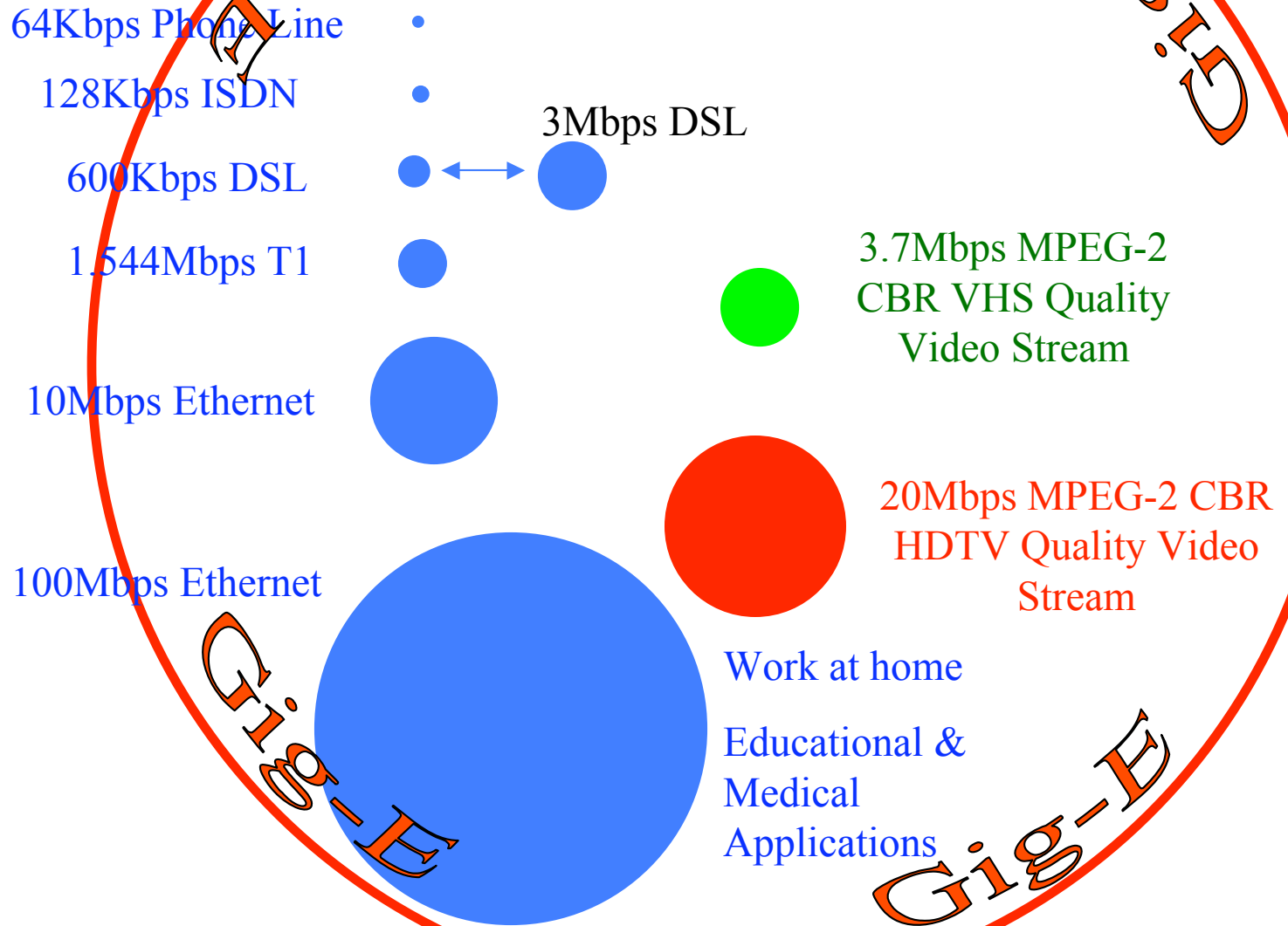
- Federal Communications Laws and Cases
- Virginia's Legal Environment For
Community Communications Projects
 - Legislation
 - Litigation
 - SCC Developments
- The Adelphia Bankruptcy

The Stakes

“It is important to note here that the current generation of broadband technologies (cable and DSL) may prove woefully insufficient to carry many of the advanced applications driving future demand. **Today’s broadband will be tomorrow’s traffic jam, and the need for speed will persist as new applications and services gobble up existing bandwidth.**”

Office Technology Policy, U.S. Department of Commerce, *Understanding Broadband Demand: A Review of Critical Issues*, at 6 (Sept. 2002)

Bandwidth Comparisons



Federal Laws and Decisions

- Federal communications laws encourage, but do not authorize, public communications services (47 U.S.C. §§ 230, 253, 254, 533(e), 706)
- Must have authority under state and local law
- Supreme Court's *Missouri* Decision
 - “Any entity” not clear enough in Section 253
 - Not decision on merits of municipal role
 - Court noted localities have “respectable position”
 - Helpful citations to FCC findings, amici briefs

Evolution of Virginia Requirements

- **1998** Complete ban (except Abingdon)
– statute was to sunset July 1, 1999
- **1999** Dark fiber “exception” – Sunset repealed
- **2001** *City of Bristol v. Earley* (telecom)
- **2002** MLEC and “Significant Gap” exceptions
- **2003** SCC issued MLEC rules

Evolution (Continued)

- 2003 *Marcus Cable v. City of Bristol* (cable)
- 2003 SB 875, HB 2397, HB 2164
- 2003 SCC MLEC and *Staunton* decisions
- 2004 SCC conducting “Significant Gap” rulemaking
- 2004 Dickenson County and Shenandoah form wireless authorities

MLEC Option

- VA Code §§ 15.2-2160 and 56-265.4:4
- Only for localities that operate own electric utilities
- Become subject to SCC jurisdiction
- Must meet all requirements applicable to CLECs
- Must separately account for telecom services
- Cannot cross-subsidize, with some exceptions
- Must make reasonable estimates of taxes, fees, charges that private provider would pay

MLEC Option (continued)

- In establishing rates, MLECs must “take into account, by imputation or allocation, equivalent charges for all taxes, pole rentals, rights of way, licenses, and similar costs incurred by for-profit providers”
- Must file annual report demonstrating compliance
- Must provide nondiscriminatory access to poles, conduits, ROW, permanent distribution facilities
- Can provide all services that system capable of providing (but for cable must meet special rules)

Significant Gap Option

- VA Code § 56-484.7:1 (“Article 5.1”)
- Applies to “any county, city, town, electric commission or board, industrial development authority, or economic development authority,” except if eligible for MLEC option and have population over 30,000
- Eligible entities can petition SCC for authority to provide “qualifying communications service[s]”
- Petition must make threshold showing that criteria met

Significant Gap Option (Continued)

- A "qualifying communications service" can be any service other than cable TV or other video programming
- And must NOT be:
 - **readily and generally available** in the specified geographic area
 - from **three or more nonaffiliated companies**, and
 - **functionally equivalent for consumers** to one or more services offered by each of the three or more competitors

Significant Gap Option (Continued)

- SCC cannot disapprove unless objector(s) show that (1) proposed service does not qualify; (2) petition does not meet requirements; or (3) not in public interest
- Must provide non-discriminatory access to poles, conduits, ROW, distribution facilities
- No eminent domain for facilities used to provide qualifying communications services
- Prices can't be lower than incumbent's

Special Cable Service Requirements

- VA Code §§ 15.2-2108.3 – 15.2-2108.17
- Authority only for municipalities, not for counties or other political subdivisions of the Commonwealth
- Restrictions apply only to direct or indirect **retail** cable service, not to service for own use or to facilities sold or leased to private providers
- Locality must hold preliminary public hearing
- Most engage consultant to conduct feasibility study, covering specified issues over 5 year period

Special Cable Requirements (Continued)

- Annual revenues must exceed annual costs for first year and five-year projection, in amount sufficient to cover bond obligations, based on full cost accounting
- Public hearing on feasibility study
- Referendum - majority vote
- Must create enterprise fund for cable service
- Only revenue bonds, unless establish phone utility
- No cross subsidies or preferences
- No anti-trust immunity

Virginia Wireless Service Authority Act

- VA Code §§ 15.2-5431.1–15.2_5431_37
- A locality can “convey or lease to [an] authority, with or without consideration, any systems or facilities for the provision of qualifying communications services” and “contract, jointly or severally, with any authority for the provision of qualifying communications services.” VA Code §§ 15.2_5431.5.1 and .2
- Authority can have very broad powers to contract, borrow, provide services

Wireless Option (Continued)

- Locality makes own Article 5.1 findings
- Locality must give public 30 days notice and hold hearing on resolution creating authority and authority's articles of incorporation
- Locality must then still go to SCC, but only for routine approval of articles of incorporation
- Process saves considerable time, expense

Adelphia Bankruptcy

- Filed in June 2002 in NYC
- Affects 60+ Virginia localities and electric utilities
- Steering Committee: VML, VACO, VMDA and VATOA
- Adelphia paying both pre-petition and post-petition fees – in some places, slow on other obligations
- Local franchising authorities retain broad Cable Act and police powers

Adelphia (continued)

- Adelphia must eventually adopt or reject executory contracts and unexpired leases – if adopts, must pay **all** outstanding obligations
- In February 2004, Adelphia management proposed to bring company out of bankruptcy intact
- Equity Committee, Rigases and others opposed plan; suggested company should be sold
- **Last week, Adelphia management announced it will entertain bids for company as a whole or in parts**

Questions & Discussion