Department of Public Service Response to Allegations made by a Member of the Public to the Senate Finance Committee on March 19, 2021

March 22, 2021

Allegation 1: The Connectivity Advisory Board has for 5 years failed to meet its statutory obligation to hold certain public meetings. Department not responsive to request regarding missing Broadband Action Plan – Alleged that the Governor had not appointed enough people and the Telecommunications and Connectivity Advisory Board ("TCAB") could not constitute a quorum.

Response: The Department disagrees with these characterizations. The last annual TCAB public meeting pursuant to 30 V.S.A. § 202f(j) was convened on January 10, 2020. Following that meeting procedural changes were instituted on January 13, 2020 to ensure that meetings are convened regularly. All meetings of the TCAB are open to the public. These meetings are scheduled by the TCAB chair. Neither the Commissioner nor the Public Advocate are consulted and nothing in statute prevents the TCAB from meeting without Department permission or involvement.

The TCAB has held publicly accessible meetings since 2016. Meetings and information about TCAB can be found at the Department's TCAB webpage: https://publicservice.vermont.gov/connectivity/advisory_board .

The TCAB has struggled at times to maintain a quorum of members. At least 5 members have resigned since the inception of the board. There has been an unexpectedly high rate of resignations from the TCAB. There has been a corresponding unwillingness of capable and qualified people who will agree to serve on the TCAB.

Broadband Action Plans are filed with Connectivity Annual Reports. Copies of current and past broadband action plans can be found on the Department's website: https://publicservice.vermont.gov/content/connectivity-division-annual-reports.

Allegation 2: The Consolidated Incentive Regulation Plan expires in July 2021. There will not be a duly adopted telecom plan in place, and the IRP should be delayed until a telecom plan is in place.

Response: The allegation is incorrect. The Consolidated Incentive Regulation Plan (IRP) expires on July 31, 2022, not July 2021 (see Case No. 20-2684-PET). In October 2020, the Department requested that the PUC extend the current IRP until July 2022 in order for it to, among other things, focus on the 2021 State Telecommunications Plan (2021 Plan) survey process, which the Department expects will develop crucial public input about the telecommunications needs of Vermonters crucial to any successor IRP. Specifically, the Department's survey of Vermont residents and business' need for increased, ubiquitous

and affordable service consistent with state policy will influence any successor IRP. The Department made clear in its extension request that in order to ensure a close nexus between state policy and the needs of Vermonters, it is prudent for any successor IRP to be revisited after the 2021 Plan is adopted. The Department plans to retain outside expert telecommunications consultants for any successor IRP filed by Consolidated.

Allegation 3: Commissioner elects to not assert jurisdiction over VoIP providers regarding resiliency and hardening, especially during extended power outages (battery back-up).

Response: The allegation is incorrect. The approach the Department has taken for many years with respect to VoIP service is based on what is and is not permitted under state and federal law.

Fixed VoIP service qualifies as a telecommunications service under Vermont law subject to state jurisdiction. This is because fixed VoIP service (such as that offered by Comcast) is offered at fixed locations, making it possible to determine whether calls are placed on an interstate or intrastate basis (states only have jurisdiction over intrastate services). The ability to determine the source of a call makes state regulation of the service possible

Nomadic VoIP services are preempted by federal law and states therefore lack jurisdiction. This is because it is impossible to tell whether calls placed with a nomadic VoIP service provider (such as Vonage) are interstate or intrastate, which renders any assertion of jurisdiction over the service difficult and likely in violation of federal law.

With respect to fixed VoIP services and resiliency thereof during extended power outages, the Department in 2019 (Case No. 19-0705-PET) petitioned the PUC to examine and review the steps fixed VoIP providers are taking to ensure their compliance with federal backup power obligations (47 C.F.R. § 9.20, formerly 47 C.F.R. § 12.5), which require fixed VoIP providers to offer subscribers the option to purchase backup solutions capable of 24 hours of standby power. Federal requirements also require fixed VoIP providers to engage in various consumer outreach initiatives.

In response to Act 79 of 2019, which directed the PUC to expand the scope of the proceeding, the PUC filed with the Legislature a report addressing VoIP providers' compliance with the federal standard. The report concluded that providers that participated in the PUC proceeding are in compliance with federal backup power standards and summarized various best practices for minimizing disruptions to E911 service during power outages. The PUC explained that the recommended best practices are voluntary measures that may be used by VoIP providers and the E911 Board to inform and assist those most at risk when power is lost and a 911 call for emergency services is harder to make. The PUC explained that because the backup power obligations are federally imposed, state authority is limited over those entities subject to it, and while the state clearly has jurisdiction over 911 emergency services regarding health and safety concerns, state jurisdiction over battery backup power obligations for fixed VoIP providers is preempted. Thus, the assertion that the state has jurisdiction over fixed VoIP providers to

impose specific backup power obligations must invariably confront the practical limits of state authority.

Allegation 4: Reference cell towers – DPS could require generators. DPS could require towers hardened to a specific standard that they won't blow down in a storm. Alleges that DPS could impose conditions when the CPG is issued that would require back-up or hardening requirements.

Response: **The Department disagrees. If jurisdiction exists, it is the PUC, and not the Department that has the power to decide what conditions will be imposed in a CPG. Wireless carriers in Vermont can elect to permit their facilities through either Act 250 or the Section 248a process. Most carriers choose to forgo the Act 250 process and obtain cell siting permits from the PUC via Section 248a. The Section 248a process as set out in Title 30 is a rigorous one requiring detailed review, including criteria dealing with public health and safety by the Department and the PUC.**

With regard to backup generators, they are crucial to providing power to cellphone towers during extreme weather events. To that end, the majority of wireless carriers in Vermont have backup generators installed at cell towers that are maintained on a consistent basis. Currently, this is a voluntary framework. In the wake of hurricanes Katrina and Harvey, the FCC attempted to impose backup power conditions on wireless providers, which were fiercely opposed and litigated by carriers and thus never took effect. States are not per se preempted from imposing backup power obligations under which a cell tower backup generator requirement would fall. However, because attempts to assert such authority have failed at the federal level and are likely to be challenged at the state level (see California Public Utilities Commission Rulemaking 18-03-011), the Department has historically refrained from recommending that the PUC impose such a condition for purposes of Section 248a permits.

Allegation 5: Resiliency (911) proceeding before the PUC – DPS recommended that we include only residential fixed-line customers. In the investigation the Department or the PUC "did a half – not even an effort to investigate and come up with remedies and solutions and hardening to make 911 calls go through."

Response: The allegation is incorrect. The facts regarding this petition were not presented accurately. PUC Case 20-0141-INV involves an investigation into electrical power losses and their impact on telecommunications resiliency. The Department did not initially recommend that the workshop process be limited to only residential, fixed-line customers. Rather, in its written comments (filed with the PUC on February 10, 2020) the Department recommended that the Commission and workshop participants address the following issues as part of the workshop process:

- **How electric distribution utilities prioritize capital investments for network reliability and resiliency upgrades generally;**

- **Cost-recovery for and ratepayer impacts of (for both telecommunications and electric customers) electric distribution utility network resiliency upgrades;**
- **Communications and coordination between electric distribution utilities and ILECs during storm recovery events;**
- **Whether and to what extent electric distribution utilities prioritize restoration of service to critical telecommunications and public safety facilities during outage events, such as hospitals, E-911 public service answering points (PSAPs); law enforcement and first responder stations; and telecommunications providers' central offices;**
- **Whether existing regulatory mechanisms, such as integrated resource plans (IRPs) and service quality performance metrics, can and should be better used to specifically address resiliency of the telecommunications network.**

Allegation 6: The Emergency Broadband Action Plan is a farce of a document. It has no standing or authority, yet it is presented as our policy.

Response: The Department disagrees. The Department has standing to produce the Emergency Broadband Plan. Such authority derives from 30 V.S.A. § 202d(a) and 30 V.S.A. § 202e(b)(4),(6),(7) and (8). The Department sought extensive public feedback on the Emergency Broadband Action Plan published last year. The product of these efforts proved to be a rich source of material that has contributed to efforts to bring Vermonters broadband. Many of its recommendations were enacted into law by the General Assembly after a thorough review by the House Energy and Technology Committee and Senate Finance Committee.

Allegation 7: Regarding the GMP and VEC broadband tariffs: The Department petitioned to have these tariffs approved. These tariffs were not approved or even reviewed by the Telecommunications and Connectivity Advisory Board. It has never been in a Ten Year Telecom Plan. These tariffs are a "backdoor attempt to allow the further creation of 25/3 cable line extensions with public subsidies built into the electric rate base."

Response: The Department disagrees. The Telecommunications and Connectivity Advisory Board has no advisory role in the PUC process for review and adjudication of tariffs filed by electric distribution utilities. The distribution utilities' interest in broadband deployment throughout their service territories is to ensure equitable access to innovative services and devices that can be load controlled by the utility, such as electric vehicle chargers and battery installations. The 25/3 connection is the standard that the electric utilities have determined is necessary to have a reliable remote connection to load-controlled devices. The tariffs are otherwise agnostic to the broadband technology that is utilized and expire in three years.

Allegation 8: Pole "hygiene": - There is no enforcement or even monitoring of the reckless and hazardous accumulation of hardware and wires dangling on each, against each other's wires…"

There's absolutely no regulation by the Department or the PUC of the hazardous conditions being created by these years and years of build out.

Response: The Department disagrees.

Pole owning utilities as well as those entities who attach to them are subject to the jurisdiction of the PUC and to PUC Rules. The Commission's pole attachment rule (Rule 3.700) governs the process for placing new attachments on existing poles, which includes filing applications with the pole-owning entity and an engineering review before any attachments are completed. The Commission's rule also sets out complaint and grievance process if any attaching entity violates the rules or the applicable engineering or safety standards. In addition, Commission Rule 3.500 requires that all construction and maintenance of electric, telephone, telegraph and cable television systems and facilities in all locations within Vermont shall conform to the National Electrical Safety Code. Thus, the utilities are charged with maintaining the poles and wires and ensuring that electrical safety hazards do not attain.

Neither the PUC nor the Department have never been resourced to continuously monitor the status of pole attachments on the thousands of miles of poles and wires located within the state. Instead, when specific concerns or complaints regarding potentially hazardous conditions are made known to either the PUC or the Department, these reports are reviewed and investigated as warranted, with corrective action ordered when necessary.

Allegation 9: When Verizon sold to FairPoint, there was a million dollars escrow required to be set up to address double poles. It has not been addressed – it has only compounded.

Response: The allegation is incorrect. In its February 18, 2008 Order, in Docket No. 7270, the PUC ordered, among other things, that Verizon provide $6.7 million dollars to be held in escrow so that FairPoint could remove the dual poles that had accumulated during Verizon's ownership of the Vermont property. Several years later, FairPoint demonstrated to the PUC that the dual poles subject to this condition had been removed.

Allegation 10: Consolidated sold its half interest in the poles to GMP and no provision has been made.

Response: The Allegation is incorrect. GMP's purchase of Consolidated's interest in previously jointly-owned poles did not require regulatory approval from the Commission. However, to the extent this allegation relates to dual poles, consolidating ownership with the electric utility increases the likelihood that dual poles will be removed in a more timely and safe manner. In a separate docket related to this transaction (Docket No. 19-1034-SC), Consolidated assumed the obligation to remove a minimum of 500 dual poles per year. On January 21, 2021, Consolidated submitted a compliance filing reporting that as of December 31, 2020, it had removed 506 dual poles

Allegation 11: CoverageCo: The Department sided with the carriers to disconnect service despite the risk of putting the public in a position where they could not make 911 calls on rural roads.

Response: The Department disagrees with this characterization. In November of 2017, Vanu Bose, the owner of CoverageCo, died unexpectedly. In the months that followed his untimely death, the company struggled and its financial resources spiraled downward. It reached the point where it could no longer pay for the electricity or backhaul service necessary to operate its small cell sites. For a period of time the Department participated in discussions with CoverageCo and the various companies to whom it owed back payments. The companies that were owed money had threatened, and in some instances, disconnected service to the CoverageCo sites.

Finally, CoverageCo sought protection from disconnections from the PUC. The threshold question before the PUC was whether it had jurisdiction over Consolidated's retail DSL internet access service. The law is well settled on this point. The Department correctly asserted that the PUC has no jurisdiction over retail DSL internet access service because state regulation of such service is preempted by federal law.

It is worth noting that CoverageCo's business model (neutral host small cell network) was not economical and does not work for rural highway cell service. At the point when Vermont-based vendors shut off service, CoverageCo owed substantial sums of money to nearly every one of its vendors. No amount of delaying the inevitable by supplying more public funds would have saved the network.

Allegation 12: The legislature required the Department to do an after-action report and an analysis of whether a public subsidy is warranted to keep mobile wireless coverage on the rural roads. The Department failed miserably in not doing the analysis required by the legislature.

Response: The allegation is incorrect. The report in question was submitted to the Vermont General Assembly on December 3, 2018. The link to the report is: https://legislature.vermont.gov/assets/Legislative-Reports/12.03.2018-E911-Compliant-Microcell-Service-in-Vermont.pdf

Allegation 13: The Connectivity Division has specific mobile wireless coverage as part of their scope and yet that have not required any addressing of the mobile wireless coverage in any of the grants from the Connectivity Division or the CRF awards. They continue the increasing scope of monopolies to the detriment of the public.

Response: The allegation is incorrect. As provided in 30 V.S.A. § 7515b, connectivity grants are open to all broadband providers, including CMRS (wireless) carriers. CMRS carriers have never applied for a connectivity grant in Vermont. In the most recent round of grant funding using CRF appropriations, the Department awarded grants to several wireless internet service providers ("WISPs"). VTel was one WISP that received grant

money and carries voice and data traffic for both T-Mobile and AT&T. Another grantee was Wireless Partners for its Ridgerunner service. Wireless Partners also carries CMRS voice and data traffic for AT&T.

Allegation 14: AoT not assessing Right-of-Way charges:

Response: The Department disagrees and has consulted with AoT in this response. 19 V.S.A. § 26a(b) directs AoT to charge broadband providers for the use of the state's rights-of-way, unless otherwise required by federal law. AoT has undertaken the initiative to implement this requirement in the context of its federally-required Utilities Accommodation Plan, and has sought input from the Department of Public Service. PSD has provided assistance to AoT in the formulation of policy recommendations. Both AoT and the Department of Public Service have raised concerns about the chilling effect that these charges will have on rural broadband deployment. This concern, along with the definition of public utilities, is reflected in AoT's decision to continue evaluating the applicability of charges to providers of broadband or wireless communications facilities or services.

Allegation 15: Telecom Engineer: The Department has not had a telecommunications engineer on staff since 2004.

Response: The Department disagrees. The Department does not have a staff position titled telecommunications engineer. Rather, the responsibilities associated with that title are performed by two individuals with different titles.

The person who holds the position of telecommunications infrastructure specialist came to the Department in 2007, having had 15 years of working experience within the telecom industry. These positions included significant experience in network design and engineering, which were operation of a competitive telecom company which interconnected with several major U.S. carriers. This person also designed and deployed multiple international telecommunication systems for multinational companies. The qualifications and knowledge of telecom engineering of the Department's telecommunications infrastructure specialist are among the best in the state.

Further, in 2019 the Department hired a Fiber Optic Project Manager. The person who filled this position came to the Department with more than twenty years of industry experience which included serving as a lead technician and field engineer with the network planning team with Hyperion/Adelphia Business Solutions/Telcove/Level 3/CenturyLink. This person is also well versed in Optical Networking including splicing and documentation processes, and Critical infrastructure such as DC power, and emergency power systems.

Allegation 16: Public Advocate: Lied on the witness stand regarding telecom plan hearings.

Response: Incorrect. The allegation lacks any factual foundation and is without merit.

Allegation 17: Deerfield Wind: Department failed to see appropriate sound measurements were required – did not include background radiation from Searsburg.

Response: The Department disagrees. This is an incorrect and inaccurate characterization of how sound levels are to be monitored at the Deerfield Wind project site. The Vermont Public Utility Commission approved the Deerfield Wind Sound Monitoring Protocol in Docket No. 7250, which describes a sound monitoring program to confirm, under a variety of climactic conditions, the Deerfield Wind project's compliance with the maximum sound levels allowed per its Certificate of Public Good. Specifically, the sound monitoring program provided in the Protocol is designed so that background sound levels—including any noise detected from the Searsburg Wind turbines—are removed for purposes of determining the accurate sound levels emitted from the Deerfield Wind project.

Allegation 18: The Department will not provide an adequate Telecom Plan because it has not exercised its authority under Section 202d that allows it to require information from utilities. Rather, the Department elects to rely upon its authority under Section 202e which allows non-disclosure agreements.

Response: The Department agrees that it does rely upon its Section 202e authority to collect data for many regulatory purposes, including regulatory planning. The Department disagrees that use of Section 202e will result in an inadequate Telecom Plan. The Department has retained an independent consultant, CTC Energy and Technology, Inc., with considerable telecommunications engineering expertise to draft the 2021 Plan. The Department is confident that it will produce a robust Telecom Plan. The development of the 2021 plan is under way and is on track for delivery by June 30, 2021. The Department is working with the consultant to obtain the information it needs to complete the plan.

30 V.S.A. § 202d(d) provides that the Department "may require the submission of data by each company subject to the supervision of the Public Utility Commission." While the PUC may have supervision over telecommunications carriers, it does not necessarily have jurisdiction over every service provided by those companies. 202e(c) provides for the voluntary disclosure of information related to broadband and telecommunications facilities. The Department also draws on other sources of information including annual reports and third-party data. Much of the information sought for inclusion in the Plan by this member of the public is competitively sensitive, proprietary, and critical infrastructure. Such information sought includes details about pole attachments, network architecture, electric utility middle mile fiber data and the like. This data at this level of detail, does not aid readers in understanding the policy positions advanced by the plan and its inclusion in the plan must be weighed against these competing concerns.