

To: Senate Committee on Government Operations
From: Christa Shute
Date: 05/10/2021
Re: Senate Version of H360

Chair White and Government Operations Committee Members,

Thank you for your request to speak today and your accommodation of my schedule. My name is Christa Shute. I grew up in the Northeast Kingdom, and moved to Stowe for high school. I am an attorney in Vermont and New Hampshire. In Vermont, two of my clients are Communications Union Districts: NEK Broadband and CVFiber. In New Hampshire, I am the Staff Attorney for the Office of the Consumer Advocate in front of the Public Utility Commission. My testimony today reflects only my own views; it does not express the views or opinions of my employer or my clients.

I joined the Vermont Telecommunications Authority in 2009 and stayed there until shortly before the VTA was shuttered in 2015. I was the Director of Business Development and Finance at the VTA with a primary focus on cellular and the development of the state-owned fiber infrastructure projects. I was the key negotiator in the Northeast Kingdom Fiber Network of 175 miles, the East Central Vermont network of over 150 miles, and the roughly 13 miles built in Putney.

My views on the House and Senate version of H360 have developed over time due to the unique circumstances we find ourselves in. I will share with you my original position and, to the extent it may have changed, my current position on the importance of a statewide telecommunications entity, what type of entity, and the breadth of what that entity might cover. I believe a tremendous amount of work and expertise has gone into this bill from both the House and Senate committees. That being said I have some concerns with the current version of the bill that I will share. And, I believe the conference committee can address these issues. Lastly, because of my experience with the development of the state fiber assets under the Vermont Telecommunications Authority (VTA), I will share my opinion on why the transfer from one body politic to other bodies politic is appropriate.

While my views have shifted, I have generally advocated for a statewide entity focused on communications that can strategically address the broadband and cellular issues faced due to the topographical and population density challenges of our most rural areas. This arena faces great challenges because it is a largely unregulated business where companies don't face a mandate to provide service in areas that do not allow for a return on investment. We have lacked statewide leadership on how to strategically address the issue in a commercially sustainable manner that not only provides service to the unserved but provides that service in a way that continues to be adequate, affordable and accessible

into the future. Our attempts to date have failed to look at the big picture as a whole but have thrown public money at private companies in the hopes that something would help alleviate the issue - oftentimes for scattered locations at far less than optimal speeds or results. Even with very modest speed goals, many of those attempts have fallen well short for any number of reasons.

Last summer, I was advocating that an independent quasi-state entity should be formed to deal with both broadband and cellular issues. I argued that it should be independent because that would be necessary to a) bring in the right level of experience and knowledge as the necessary people were unlikely to work for the State at State salaries; and b) the entity should be removed from the Public Service Department because i) of its role as a public advocate in front of the Public Utilities Commission, and ii) the lack of commercial expertise necessary to determine how to strategically and successfully address the issues. I argued that this entity should address both cellular and broadband issues because, to some degree, they influence each other. Broadband deployment can support cellular solutions that in turn help the economics for the broadband deployment. Cellular solutions can also become interim broadband solutions.

So why have I made those statements in the past tense? The short answer is the impact of the pandemic and the speed with which the Biden-Harris administration and Congress have pushed through broadband infrastructure development. The pandemic highlighted the vast inequities from inadequate or non-existent broadband. Broadband must have a higher priority because with high-speed broadband, people not only have better access to education, healthcare, government services, and social interactions, but they also have cellular coverage over wi-fi. The safety issues that cellular can address on our rural roadways should substantively be addressed through the State's First Net contract with AT&T.

Even with those items I might still have argued for broadband and cellular to be addressed by the same entity, however the push from the President and Congress to make broadband infrastructure funds available immediately means that we have a moral obligation to work as quickly and effectively as possible. That means that we need to focus on the most important build of public infrastructure in three quarters of a century. We must focus on strategically using these public funds to build public broadband assets that help people now and into the future. For these reasons I think it is important that this state wide entity focus on a strategic approach to building public broadband assets. Should the statewide entity take into consideration cellular needs and opportunities? Of course, the director of the statewide entity should help facilitate statewide negotiations with AT&T as they roll out First Net and with other carriers and technology solutions. These negotiations, working with and on behalf of CUD's, could both create additional uses and income streams for the public broadband assets and potentially make it more cost effective to actually install such cellular services. They should help determine whether there are technical implications to

keep in mind as fiber is built across the State. But does that mean that it should be legislatively mandated? No, the legislative mandate needs to focus on the strategic deployment of public broadband assets that can serve Vermont and Vermonters for decades to come.

The other statement I put in the past tense was the issue of creating a quasi-state entity. While I think creating a quasi-state entity is generally a better solution in this arena, I am concerned with the time to establish such an entity. Doing so will take setting up the accounting, the human resources, hiring the necessary people, establishing and approving purchasing and contracting policies, and establishing a board and people with enough experience to do all of the above in addition to bringing the financial, technical, commercial, and legal expertise needed for a successful strategic statewide public broadband deployment. I have come to accept that we don't need to waste the time and the resources IF, and I mean IF, there is independence within the State.

And there can be. I work for the Office of the Consumer Advocate in New Hampshire. We are a tiny "agency" of five people that is administratively attached to the Public Utilities Commission. But my boss, the Consumer Advocate, does not report to the Governor or any Commissioner. He reports to an Advisory Board appointed by the governor and council, the house, and the senate. Our office is completely independent of other state entities but uses a variety of state resources from different agencies.

As a quasi-state entity, the Vermont Telecommunications Authority really couldn't avail itself of the state resources and had to expend its own financial and limited capacity resources to just keep the entity functional. Several years ago, the legislature made the determination to shutter the Vermont Telecommunications Authority and further enable Communications Union Districts. The creation of the CUDs was in part a recognition that various parts of our state have different needs and face different challenges. There was also a recognition that CUDs can put together an alternative solution that focuses on bringing access and affordability to its residents rather than profits to shareholders. Since that time a vast majority of municipalities have joined a CUD and CUDs have been building strategies appropriate to their areas and the capacity to functionally accomplish the work. The challenges faced in the vast and sparse Northeast Kingdom are not the same as those in Central Vermont or Southern Vermont. There are different electric utilities with different boards and goals, different economic zones, different population densities, different topographies, different existing providers. The solution that has worked for ECFiber may not be the right solution for the Northeast Kingdom. In addition, the CUDs bring together representation from each of their municipalities and have an ability to translate those needs through their governing boards. The CUD chairs and administrative directors can work with this newly formed state entity to create a strategic use of the \$100 million in federal funds and additional state funds. But the leader of the a statewide entity is in the best position to understand and negotiate with

incumbent providers that will also be receiving tens and tens of millions of dollars from the FCC. Each CUD is not in a position to do that, nor would it be appropriate.

But there are two keys to a successful VCCB: 1) independence from the Public Service Department; and 2) the authority to do more than just dispatch funds – they must have the authority and power to set goals, to negotiate, to create strategic alliances, to marshal resources and funds to accomplish the goals by working with CUDs to build public broadband assets and leverage the borrowing capacity. We tried the free market, not only did it fail in our most vulnerable economic and social areas, but it failed after \$100s of millions of dollars in public investment. This time the investment needs to go into public infrastructure that is controlled by Communications Union Districts that are laser focused on this issue and have the ability with the right support to leverage the federal and state funds, and their borrowing authority to achieve success for their districts.

Here are the critical changes that I think are necessary to make this happen:

1) The VCCB needs a five person board. We are building this on the backs of the CUDs and so the statewide VCUDA should appoint the additional two board members with approval from the Governor. This also addresses the issue of having an unintentional quorum of the VCCB anytime two members of the current three-member board are in the same conversation – an untenable situation.

2) There needs to be a cleaner delineation of authority between the VCCB and the Department. The VCCB should administer the Fund. They should have the authority and responsibility to create a strategic approach to how the funds are allocated and spent and how to help CUDs use the funds to accomplish the overall goal. If we only have a Board that “approves” grant requests rather than helps to guide the Executive Director in establishing strategy for implementation and coordination of programs then we risk not having a strategy for the deployment of \$100 million plus. The VCCB should be responsible for the deployment of all funding sources geared toward broadband so that two bodies are not working at cross-purposes. Whether the High Cost Fund or whatever remains of the Connectivity Initiative, these efforts need to sit under one roof – a roof focused on strategic deployment rather than regulatory oversight. As a statewide strategic entity for the deployment of all broadband funds, the VCCB can negotiate with entities such as Consolidated to create consistency across the state and help increase the transparency between the CUDs.

3) The VCCB should be up and running within 60 days of passage of the bill with a board and an executive director, therefore the Department should not be given the authority to spend \$20 million of the \$100 million in funds without a strategic plan. I understand there are preconstruction funds and construction funds that are needed now to get the work underway so a portion of it should be cleared to

be disbursed while the formation of the Board is underway - I am just not sure that it should be such a large percentage.

4) The VCCB needs to support CUDs and not work at cross-purposes with a CUD. Eligible providers need to be working with CUDs or in non-CUD towns working with that municipality.

I would like to address some of the other concerns that Mr. Whitaker has brought to your attention. I don't think it is reasonable to require CUDs to address mobile wireless and fixed wireless. As I stated earlier, the VCCB should certainly be taking these into consideration as part of the strategic approach, but not as a requirement. The public safety, first responder issue is being addressed through First Net and the AT&T contract. As mentioned previously, the VCCB will be in the best position to identify opportunities and assist CUDs in any potential negotiations.

I agree that unserved addresses must get service quickly and that CUD plans should address the timing of interim and long-term solutions for the unserved. Many CUDs are currently focused on those constituents with all tools on the table for both interim solutions and longer-term solutions.

I am intimately familiar with the state fiber assets built by the Vermont Telecommunications Authority as the primary negotiator for the development of the nearly 175 miles in the Northeast Kingdom, the roughly 150 miles in Central Vermont and the 13 miles in Putney. These assets are controlled by a series of dark fiber agreements that prohibits any one entity from controlling more than one third of the 144 strand count in given areas. I approached NEK Broadband with a recommendation to transfer the assets from the State to the CUD. So while this is a position that my client certainly agrees with – everything I have to say on this issue is strictly my personal view on what is the most appropriate thing to do with these public broadband assets so that they are used to the best extent possible.

The transfer of assets is NOT a give away, it is the transfer from one body politic to another body politic. These assets constitute public broadband assets that will remain public broadband assets. The difference is that instead of being controlled by a state entity that has not done anything with the asset in 5 years and considers them a drain on their capacity resources and to a limited degree their budget, they will instead reside with a body politic that is focused on how to use and leverage the asset for the good of their community. A body politic that in taking assignment of the associated contracts will still be bound by the terms the VTA was bound by. In all of the contracts the entities actually licensing strands are theoretically responsible for the maintenance and repair of the fiber – this was by design so that the State would never be obligated for costs beyond its fiscal budget. I will run through the three fiber networks from smallest to largest to give you a sense of the state's physical assets and licensed assets developed by the VTA.

1) The 13 miles in Putney was built in conjunction with Southern Vermont Cable, SVC owned the sheath and controlled 24 strands. The remaining 120 strands are controlled for the life of the fiber by the State. In 2020 Comcast purchased Southern Vermont Cable. As owner of the sheath, Comcast should now be paying for any associated costs with the fiber. DVFiber could take control of the remaining 120 strands and choose to do nothing if Comcast was providing quality, high speed, affordable service to all the residents passed. Or it could elect to offer a service using those strands to compete with Comcast – though it would incur the cost to build the drops. In either event – the CUD will have the leverage to ensure quality, affordable service from Comcast in that area.

2) The 150 miles in Orange County and the Central Greens were built in conjunction with ECFiber. On the 36 miles of fiber in that network owned by the State, ValleyNet is a licensee of 36 strands. Consolidated also licenses strands. On the 117 miles of fiber in that network owned by ECFiber, the State controls 96 strands for the life of the fiber.

3) The 175 miles built in the Northeast Kingdom is owned by five different entities that swapped strands with each other, including 65 miles built by the VTA. The state has between 96 and 140 strands available to license throughout 120 miles of the network for the life of the fiber. In the remaining 55 miles of network the available strands are controlled by Northern Enterprises. Once the NEK Broadband CUD takes control of the state fiber assets in the Northeast Kingdom, Northern Enterprises will work with its funding entity – the Economic Development Administration to also transfer its fiber assets to the CUD. This will mean that to use the fiber in the Northeast Kingdom will only require negotiating with one entity – an entity laser focused on getting service to it's constituents.

The CUD's are the right entities to hold the fiber assets and should do so now. There is precedent for the transfer of state property without receiving fair market value when transferring to a municipality or school district (see 29 VSA 165-166). Therefore, no appraisal or other information is necessary and I would leave the bill as it stands. You will note, that the bill provides the State a reversionary right to the assets and the CUDs can each make the decision of whether or not to take on the asset in the first place.

Here is a summary of why I believe the CUD's are the right entities to hold the fiber assets:

- 1) Each CUD is a body politic formed of Vermont municipalities for the good of its citizens and the development of broadband, not the development of profit.
- 2) The contracts enforce a mandatory open access by preventing any one entity from licensing more than 1/3 of the fiber strands. The CUD's will need to abide by the terms of the agreement.

- 3) Ownership of communications plant is within the district powers delineated in 30 V.S.A. §202(e).
- 4) The Legislature in 2015 Act 041 in transferring many of the VTA responsibilities under Chapter 82 to the Division for Telecommunications and Connectivity did not include in 30 V.S.A. § 202e investments in infrastructure to be owned by the State as it had with the VTA 30 V.S.A. §3062(a)(4) which implies that state investment in fiber is not viewed as the appropriate path.
- 5) The CUD's are in a better position to hold and develop the type of "open access telecommunications infrastructure that can be shared by multiple service providers" described in 30 V.S.A. §8060;
- 6) In the NEK, the CUD is in a position to bring together the available strands of the State and Northern Enterprises to better facilitate the use of the fiber asset.

It is critical that the State and the CUDs not be working at cross-purposes in each territory as CUDs invest resources in strategic and administrative capacity to facilitate broadband development. The CUDs can use the assets to accomplish their goals by leasing the fiber, directly using the fiber, facilitating borrowing by having a physical asset that has no corresponding debt thereby increasing critical borrowing ratios, trading fiber strands for further investment by private partners. These are all ways the CUDs, and not the Department, can put the fiber assets to use.

Thank you very much for your time today. I recommend that you pass the bill out of committee. I believe that the remaining issues can be ironed out during conference. I would be happy to answer any questions.

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