

Testimony of F. X. Flinn, Chair, East Central Vermont Telecommunications District on regarding S.166 and work on utility 'easement poles'

Tuesday, January 18, 2021

Vermont Senate Committee on Judiciary

The district does business as ECFiber, and to date it has built nearly 1,700 miles of network in 23 towns. ECFiber is the state's original Communications Union District, having converted from an interlocal contract on January 1, 2016, during its 8th year of existence. During 2020, the district admitted 8 new towns. At maturity the network will consist of over 2,100 miles of network passing over 31,000 premises in 31 towns and parts of more than a half-dozen others.

The network has been financed through borrowing. Initially this was done through private placement promissory notes, a cumbersome mechanism. Investment bankers would look at our audited financials and ask why we were not a specialty municipality such as a regional water treatment district; they would then be more than happy to sell municipal revenue bonds. This is why we drafted the CUD legislation and why we converted to that form when it became law. In March 2016 we retired most of the notes with the proceeds of our first municipal revenue bond. As of December 15th 2021 we have issued 63.8 million in bonds. This represents over 90% of the funding.

The district has no employees. We contract with ValleyNet, Inc., a non-profit internet service provider whose mission is to bring world-class broadband to areas where the marketplace has failed. ValleyNet in turn contracts out most of the network construction, principally to Eustis Cable Enterprises, one of the crown jewels of Vermont's business community.

S.166 has been introduced with the expectation that it will prevent tragedies such as the one Scott and Amber Hoyt are experiencing. I wish I could tell you it will, but I cannot. The contracts ECFiber, ValleyNet, and Eustis have entered into over the past decade have had very strong language, stronger even than what S.166(a) calls for. As I explained in testimony before House Ag last week, not only does the contract specify that cleanup is required, insurance is required, skilled professionals are required, it also makes plain that all these contractual provisions are applicable to and must be passed along to any subcontractors. In effect, it was for this situation as if (a) were already in place.

So on to (b), which would make this an unfair act in commerce and expose those liable to punitive damages. This seems like a great hammer to put in the toolbox, but I personally wonder if it would make insurers more responsive in a situation like this. As you are all probably aware from seeing the press release ECFiber issued on November 19, 2021 ("ECFiber Supports Hoyt Hill Farm, Seeks Resolution By Christmas"), and reading news articles about the matter, ECFiber has been trying to

use its moral authority to bring the parties together and get the issues resolved without having to subject everyone to the time and expense of an adversarial process managed by the courts – a lawsuit. One of the biggest hurdles we faced was getting the subcontractor’s insurer to even consider revisiting its denial of coverage. I have little doubt that staring at extended damages would have made them even more resolute. And on the other side, the plaintiff’s attorney seemed willing in early August to start discussions if we could bring everyone on our side together before autumn, as we did. Here too, I wonder if there would be any interest if there were the prospect of double or triple damages. My point is this: the threat of extended damages is not likely to speed up resolution if something like this happens. To the contrary, both sides would have more reason to turn to the courts.

Would it make it more likely that companies would take pains to prevent these things from happening? Maybe for the first year or two, for companies working in Vermont, but I predict that over time it would fade from awareness.

So back to square one: how do we prevent these incidents, and how to we speed restitution when they do happen?

Personally, I think it would not take that much effort to identify every easement pole in Vermont that was located on agricultural land. We have pole location data and we have land use data and analyzing the data is a very ordinary sort of GIS task. The poles all get visited within a several-year period by the pole-owning utility, and warning notice signs could be put on every 3rd or 5th pole reminding pole workers of their duty to clean up. Or pole attachers could do it as part of the job.

Here's another idea: require site inspection by the pole licensing entity once they are notified the pole attachment work is complete, at the cost of the pole licensee. This would make it part of the existing system. This committee and other legislative committees will need to hear from utilities, utility contractors, and pole attaching entities to validate these ideas and turn them into legislation.

The second question, speeding restitution, must begin with an acknowledgement that the existing system assumes that between insurance coverage and the legal system, it’ll all work out in a fair, reasonable, and timely manner. In this case, the insurance coverage question still has not really gotten off the ground. No insurer has denied a specific claim to the Hoyts as far as I can tell; instead, the insurer for the subcontractor has denied coverage on other grounds.

Perhaps if Vermont were to set up a captive insurance company for the Ag department, that insurer might have taken the position that the Hoyt claims were valid and paid it, and then that insurer would turn around and subrogate the claim to the subcontractor insurer. That would be an entirely different legal battle and one that would take place on technical merit.

Again, this is just the germ of an idea – using the subrogation process to make the state whole after the state elects to make a farmer whole.

I believe everyone involved with shaping state law should follow the filings in Hoyt v Eustis (Orange County Superior Court 21-CV-03497) carefully. There is already a considerable amount of analysis of how the law comes into play in a situation like this, and perhaps there are additional elements that should be added to S.166, or perhaps funding specific preventative measures and setting up new mechanisms for the state to have at hand would be even more effective.

F. X. Flinn
Quechee, VT
1/17/2022

Public roles:

Town of Hartford VT: Justice of the Peace (2000-2012, 2015-present), Selectboard Vice-Chair (2012-2014), delegate to the ECFiber board (since April 2012)
Chair, ECFiber board (since May 2020), previously Vice-Chair 2016-2020
Chair, VCUDA board (Vermont Communications Union Districts Association est. 2020)

Charitable roles:

Equal Access to Broadband, Inc., founding board member/Secretary (est. 2020)
Society for American Baseball Research (SABR) board member/Treasurer (2001-2021)

Work roles:

Expert Systems Development Corp. (founder & President) est. 1991

Relevant professional experience with insurance:

CIO Narragansett Bay Insurance Co, Pawtucket RI 2006-2010