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July 29, 2021

**TO: RAPPAHANNOCK COUNTY
BROADBAND AUTHORITY**

FROM: SHARON E. PANDAK
and MICHAEL J. CONNOLLY
Outside Counsel

RE: BROADBAND ACCESS IN RAPPAHANNOCK COUNTY

This memorandum responds to the Authority's ("RCBA's") request for legal advice regarding the possibilities for entering into memoranda of understanding pertaining to broadband access in Rappahannock County ("County"). We have reviewed the Phase One Memorandum of Understanding ("Regional MOU") as well as the individual Memorandum of Understanding for Broadband Partnership, included in All Points Broadband Partners, LLC's ("All Points") response to the RCBA Request for Information (the "Individual MOU"). We have also discussed these MOUs with All Points' CEO Jim Carr.

In short, if the RCBA is inclined, it can agree to either the Regional MOU or the Individual MOU today. The Regional MOU provides flexibility while the Individual MOU requires an immediate commitment. Below we below briefly summarize pertinent background information, the MOUs, and the next steps:

I. BACKGROUND INFORMATION.

The Virginia Telecommunication Initiative Program ("VATI") is a principal source of funding for broadband. For 2022, the grant application deadline is September 14, 2021. Several important points concerning the VATI Application follow:

"Applications must be submitted by a unit of government (...Counties, Economic Development Authorities/Industrial Development Authorities...) with a private sector internet service provider as co-applicant;"

"Applicants must demonstrate that projects will be completed within 18 months. The project timelines begin with the contract execution between the applicant DHCD;" and

"VATI funding shall not exceed 80% of the total project cost."

2022 VATI Program Guidelines and Criteria, link at <https://www.dhcd.virginia.gov/sites/default/files/Docx/vati/2022-vati-guidelines-and-criteria.pdf>.

If RCBA wants to apply for the 2022 VATI grant, it must apply by the deadline. RCBA's options to work with All Points to submit this proposal are discussed below. We understand that no other entity has come forward to join the County in an application for a 2022 VATI grant.*

I. REGIONAL MOU

The Regional MOU is between All Points, Dominion, Shenandoah Valley Electric Cooperative (the "Organizing Parties") and participating localities. In our assessment, this MOU presents the least risk to the Authority and County[†] of making an agreement when factors are unknown, because there is only an agreement to Phase I which has no financial obligations to the other parties and is a study period.[‡] Further, this MOU can be terminated at any time before continuing to the next Phase.

Under this MOU, the Organizing Parties would gather information, including from the County, and All Points, in coordination with the other Organizing Parties, would prepare a presentation, to be provided around August 15, 2021.[§] We understand that this presentation would discuss the feasibility and financial analysis of broadband deployment in the County. Following the presentation, RCBA would decide whether to move to Phase II.

In Phase II, All Points will coordinate and oversee the submission of the VATI application by September 14th. Then RCBA must decide whether to move forward with Phase III. The move to Phase III likely depends largely on whether the VATI application is successful. To move to Phase III, RCBA would enter into a Definitive Agreement with All Points.

Region MOU Section 6 "Good Faith Commitment to Initiative," has been referred to as a non-compete clause. Under this section, RCBA would agree to not participate in any activity/conduct that is inconsistent with or competitive to the initiative while it is a party. (Since the RCBA Board is comprised of Board of Supervisors members, we think it good faith that the members would honor this section in their BOS capacity.) All Points CEO told us that this provision was not negotiable. In essence, if the RCBA agrees to this MOU, it cannot engage with other potential broadband providers while it is still a party. If RCBA elects not to move forward to any future phase and terminates its involvement in the MOU, the provision no longer applies.

* Importantly, funds from the American Rescue Plan Act ("ARPA") may also be available to the County.

[†] We generically refer to RCBA and the County. RCBA has been created by the BOS for the purpose of providing/pursuing communication services/ broadband for the County.

[‡]Regional MOU Section 5 states: "none of the parties herein shall be responsible for reimbursement of expenses to any of ht others, unless such reimbursement is to be funded by a Phase I grant or Phase II Grant." On our call, All Points stated that it had no anticipation of seeking reimbursement.

[§] Based on our conversation with All Points this date may be around early September 2021.

Of note, if the Authority elects not to proceed with Phase II, it is unlikely that there would be enough time for the County or RCBA to engage with another provider to meet the VATI application deadline of September 14, 2021. (However, this may not be an issue because we understand that there are no other offers or viable options currently.)

In sum, the Regional MOU, allows the Authority flexibility because it only agrees to Phase I. To quote All Points CEO from our call, under this MOU, you are only “dance partners.” If after Phase I, it does not appear financially feasible or RCBA has changed its mind, RCBA can terminate. Moreover, if the Authority decides to move forward with Phase II, All Points will prepare the application. The Authority can then decide if it wants to move forward to Phase III.

III. INDIVIDUAL MOU

The Individual MOU is a Broadband Partnership between the County and All Points. Where the Regional MOU has flexibility and leaves the definitive agreements until Phase III, the Individual MOU is closer to a definitive agreement. In essence if RCBA signs the Individual MOU, it is agreeing to work with All Points to bring broadband to the County.**

The Individual MOU contains more specifics, including timeframes for implementation. To that end, Exhibit A to the MOU provides a list of milestones and timelines. The initial term of the MOU is 18 months, and afterwards it “shall continue on a month-to month basis until either Party provides the other no less than 90 days advance notice of its intention to terminate.”

Of note, under this MOU, All Points recruited Rappahannock Electric Cooperative (“REC”) “as its primary deployment partner in the County.” ††

IV. NEXT STEPS

Time is of the essence if RCBA wants to proceed with the Regional MOU or the Individual MOU. To meet the All Points’ deadline of tomorrow the Authority must agree to one of the agreements tonight. As we indicated, the Regional MOU requires less commitment from RCBA at this time and allows the Authority to decide at each phase whether it wants to move forward. Conversely, the Individual MOU shows immediate Authority commitment to All Points in a Broadband Partnership.

All Points CEO indicated to us that it did not think a locality needed to sign off on the VATI. This seems consistent with the VATI’s guidelines, which allow applications by a unit of government. However, if the Authority agrees to an MOU, we suggest that have the Board of Supervisors to ratify any such agreement on behalf of the County. We believe that this will strengthen the perceived commitment to the application by DCHD staff who will review the VATI grant applications.

** Like the Regional MOU, the Individual MOU also has a non-compete term.

†† See also July 11, 2021 letter from All Points and REC, included in All Points response to the RFI.