

**DOUGLAS R. HOFFER**  
**STATE AUDITOR**



**STATE OF VERMONT**  
**OFFICE OF THE STATE AUDITOR**

To: House Committee on Transportation  
Senate Committee on Transportation  
From: Doug Hoffer, State Auditor  
Re: 19 V.S.A. § 26a(b)  
Date: 31 May 2022  
Cc: Joe Flynn, Secretary, Agency of Transportation (VTrans)  
June Tierney, Commissioner, Department of Public Service (PSD)

My office has been conducting research on lease agreements with broadband and wireless telecommunication providers for access to State-owned rights-of-way (ROW), which are required under 19 V.S.A. §26a(b), to determine whether we should proceed with an audit. We found that VTrans has not entered into lease agreements with broadband and wireless providers for use of these ROW. The statute states:

*Unless otherwise required by federal law, the Agency [of Transportation] shall assess, collect, and deposit in the Transportation Fund a reasonable charge or payment with respect to leases or licenses for access to or use of State-owned rights-of-way by providers of broadband or wireless communications facilities or services. Agency may waive such charge or payment in whole or in part if the provider offers to provide comparable value to the State so as to meet the public good as determined by the Agency and the Department of Public Service. For the purposes of this section, the terms "comparable value to the State" shall be construed broadly to further the State's interest in ubiquitous broadband and wireless service availability at reasonable cost. Any waiver of charges or payments for comparable value to the State granted by the Agency may not exceed five years. Thereafter, the Agency may extend any waiver granted for an additional period not to exceed five years if the Agency makes affirmative written findings demonstrating that the State has received and will continue to receive value that is comparable to the value to the provider of the waiver, or it may revise the terms of the waiver in order to do so.*

While the statutory requirement for VTrans to obtain some form of compensation from broadband and wireless providers using State-owned ROW has been in effect since 2007, VTrans has yet to implement this requirement. VTrans officials we spoke with said that they were not aware of this requirement until 2015, which is when the statute was amended to remove mentions of the Vermont Telecommunications Authority. Since then, they have included the following clause in certain work permits VTrans issued to utilities to allow them to perform work in a State-owned ROW indicating the Agency's intent to develop lease agreements at some point:

*The Permit Holder acknowledges and agrees that pursuant to Title 19, Section 26a(b) and applicable federal regulations, VTrans is required to collect reasonable rent from providers of broadband or wireless communications facilities or services within State rights-of-way. To accomplish this, VTrans intends to develop lease or license agreements with all covered providers. The Permit Holder acknowledges and agrees that the principles recognized in this paragraph apply not only to the Permit Holder's installation(s) covered by this permit, but also to all past, current, and future situations in which the Permit Holder is a provider of broadband or wireless communications facilities or services within State owned, managed, or controlled rights-of-way.*

VTrans has not entered into lease agreement with broadband and wireless providers for use of state highway ROW, in part because they have yet to determine what rates they should charge. VTrans drafted rates in 2016 and 2017 and sought feedback from the PSD but has yet to finalize any rates. VTrans also does not know the extent to which broadband providers are using State-owned ROW. For example, VTrans does not know how many miles of fiber are within the state highway ROW.

While VTrans has the right to waive ROW lease fees if a provider offers to provide comparable value to the State as determined by the Agency and the PSD, they have never requested any waiver reviews from PSD.

According to the PSD Telecom Director, the Department has long held the position that charging broadband providers for use of the rights-of-way would directly and indirectly challenge the ability of carriers to expand broadband networks into rural areas. Furthermore, PSD believes such costs would be passed on to consumers, especially those who lack competitive choice in services. PSD believes the substantial proposed appropriations to communications union districts further justifies its position.

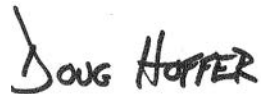
While we share the desire to see broadband services extended to unserved Vermont locations, PSD's position does not appear to be based upon any real analysis and ignores some important considerations:

- The PSD has provided no evidence that the prospect of charging a fee for access to State rights of way has hindered the ability or interest of carriers to expand services to rural areas. Utilities routinely build such costs into their rates and it's likely a fee would be a very small percentage of total costs. PSD provided no evidence that it had analyzed the possible impact of varying fee levels on the business plans of broadband providers.
- If the Department believes that a ROW fee would stunt broadband deployment to unserved areas, then it could easily design a fee that would be waived in certain locations under certain circumstances and/or for certain durations.
- The statute allows VTrans to waive the fee "if the provider offers to provide comparable value to the State." Because PSD has not undertaken an analysis of the benefit derived by providers for their use of the public rights of way, and in light of the Department's position stated above, the statute is currently rendered useless. Clearly though, the Legislature envisioned scenarios for which the value to the State would not be sufficient to result in a waiver of fees, or they would not have constructed the law in such a way.
- Unlike electric utilities that are required to serve everyone, cable and broadband providers have limited their services to the most profitable territories. This reflects the nature of the business, which is not about the public good *per se*, but rather profit. One can argue that leasing state land to ski resorts is a public good (e.g., recreation, tax revenues from tourists, etc.) but the legislature decided decades ago that we should try to get a fair return for the private use of a valuable public asset. It is not clear on what basis this public resource is being treated differently. Electric utility rates are regulated by the PUC, while cable and broadband providers are free to charge whatever the market allows. The Department's concern about rates in areas without competition could easily justify something similar to the universal service fee. In the absence of the necessary legal authority for that in the broadband arena, the State could use ROW fee revenues to support any of a number of important public policies, such as assisting low-income Vermonters.
- It is noteworthy that the Agency of Natural Resources charges [License and Special Use Permit Fees for Uses of State Lands](#) managed by the Agency. It is unclear why ANR and AOT are not consistent in their approach to this matter.

It can be tempting to avoid policy action in order to avoid unfounded claims. In this case, the collective desire to have ubiquitous broadband, and the fear of *appearing* to do anything to jeopardize that, have resulted in special treatment for a public resource which has proven extremely lucrative for some telecommunications providers. In fact, the largest beneficiaries of the current no-fee arrangement are the providers who have shown little to no interest in providing services to the unserved. Public resources are precious, and private access to profit from their use must be made with careful consideration.

Because VTrans has not entered into lease agreements as required by statute, we do not intend to conduct an audit regarding this requirement. I did think it necessary to inform you that VTrans is not in compliance with statute and leave it to your discretion to determine the path forward.

Sincerely,

A handwritten signature in black ink that reads "DOUG HOFFER". The letters are slightly slanted and connected, with a prominent initial "D".

DOUGLAS R. HOFFER  
State Auditor