

GEO. E. PENN (1895-1931)  
WM. A. STUART (1922-1976)  
G.R.C. STUART (1952-1991)

# PENNSTUART

Since 1890

## ATTORNEYS AT LAW

Post Office Box 2288  
Abingdon, Virginia 24212-2288

208 East Main Street  
Abingdon, Virginia 24210-2904

Telephone 276/628-5151  
Facsimile 276/628-5621

Offices in Abingdon and Richmond, Virginia,  
Bristol and Johnson City, Tennessee and Prestonsburg,  
Kentucky

All Attorneys Licensed in Virginia, Except as Noted with \*

### Additional Bar Memberships:

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June 13, 2017

VIA EMAIL and MAIL  
Bristol Virginia City Council  
Mayor Bill Hartley  
Vice Mayor Archie Hubbard  
Councilman Doug Fleenor  
Councilman Kevin Mumpower  
Councilman Kevin Wingard  
Randall C. Eads, Esq.  
300 Lee Street  
Bristol, Virginia 24201

Re: Questions regarding Asset Purchase Agreement

Dear Council and Mr. Eads:

As you know, this firm represents BVU Authority ("BVU"). Last evening, BVU became aware through media reports that the City of Bristol had concerns regarding the impending closing of the transaction between BVU and Sunset Digital Communications, Inc. ("Sunset").

Council has not contacted BVU directly regarding any concerns, so please accept this overview of the transaction to address any anticipated questions. As background, I have enclosed my letter dated March 11, 2016 to Council, along with the "term sheet" that summarizes the transaction. In essence, BVU is transferring the assets associated with OptiNet to Sunset in exchange for a payment of \$50 million. The purchase price has not changed.

Since the deal was signed between the parties on February 5, 2016, the parties have sought a number of consents. The City granted its consent at its meeting on March 15, 2016. It imposed no conditions upon that consent.

The parties have amended the Agreement, copies of which I also enclose:

First Amendment to Asset Purchase Agreement dated May 23, 2016 (amends the date in Section 9.01(b)(ii) to August 1, 2016);

Second Amendment to Asset Purchase Agreement dated July 19, 2016 (amends the date in Section 9.01(b)(ii) to December 31, 2016);

Third Amendment to Asset Purchase Agreement dated August 19, 2016 (contemplated a two-phase closing. This option was later rescinded by letter dated October 31, 2016); and

Fourth Amendment to Asset Purchase Agreement dated December 16, 2016 (amends the date in Section 9.01(b)(ii) to March 31, 2017).

Among the other required consents, BVU is indebted to Virginia Resources Authority ("VRA") pursuant to the Virginia Pooled Financing Program, Series 2010C bond issue. VRA has granted its consent to the transaction and has further allowed BVU to partially defease only the OptiNet portion of the debt. (See attached). Currently, the principal amount owed is \$20,840,000. In order to defease that portion, BVU will be required to pay associated interest and expenses. VRA is working to determine the exact amounts owed on the date of closing. BVU estimates the amounts owed will be in the range of \$26-28 million to defease that portion of the debt.

OptiNet was funded through many granting agencies, including Economic Development Authority ("EDA"), National Telecommunications and Information Administration ("NTIA") and Virginia Tobacco Region Revitalization Commission ("VTC"). The grant funding totals as follows:

EDA:	\$7,308,058
NTIA:	\$21,256,749
VTC:	\$30,055,863

EDA and NTIA have granted their consent to the transaction (See attached letters). EDA's consent, however, is subject to payment from BVU of \$1,238,138, which represents the "federal share" established by federal statutes, regulations and grant requirements as explained in EDA's consent letter.

Similarly, VTC (the largest third-party funder of OptiNet) will require a clawback of funds in order for it to grant its consent. OptiNet received grant funds through nineteen grants<sup>1</sup>.

VTC's grant documents contain the following requirements for each grant:

Clawback. All assets acquired or improved as part of the Project shall be held in trust by the Grantee for the benefit of the Commission. During the estimated useful life of the Project, the Commission retains an undivided equitable reversionary interest in such assets. Such assets shall not be leased, sold, disposed of, used to secure a mortgage or deed of trust, or otherwise be used as collateral, or be encumbered without the prior written approval of the Commission. In the event that any such asset is disposed of without such approval, the Commission may assert its interest in the asset to recover the Commission's share of the value of the asset, or recover the same from the Grantee, or both. (See, e.g., Grant 1769 attached).

Under this provision, arguably, VTC could require full repayment of its \$30 million investment in OptiNet from the transaction.

BVU's Board formed a committee to discuss these issues with VTC as well as claims from Cumberland Plateau Planning District Commission and Cumberland Plateau Company, Inc. (collectively "CPC"). As a result of discussions, BVU's committee reached a resolution that it will recommend to the full BVU Board at the appropriate time as follows:

BVU and Sunset will amend the APA to provide that the \$50 million purchase price will provide for payment of (a) \$45 million at closing and (b) delivery by Sunset of a \$5 million note made payable to the VTC and BVU will then deliver to VTC at closing (a) \$3,761,862 in cash and (b) the Sunset \$5 million note.

CPC's Boards subsequently granted their consent to the transaction subject to conditions including a new operating agreement between CPC and Sunset for operation of CPC OptiNet, funding commitments from Sunset, as well as receipt of grant funds from VTC of \$2 million.

The Auditor of Public Accounts performed an audit of the BVU Authority as directed by Chapters 74 and 75 of the 2016 Acts of Assembly, which stated, "the Auditor of Public Accounts or his legally authorized representative shall examine the accounts

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<sup>1</sup> VTC grant numbers 501, 799, 957, 958, 959, 960, 961, 962, 1242, 1301, 1302, 1303, 1471, 1768, 1769, 1811, 1820, 2070, and 2391.

and books of the BVU Authority.” The full audit report is available at <http://www.apa.virginia.gov/reports/BVUA2016-web.pdf>.

As part of that audit, the APA found that, “In fiscal year 2007, the Utilities Board improperly removed from the financial statements all of an interfund receivable/payable in the amount of \$23,393,517 between the Electric Division and the OptiNet Division. While the APA found that some of this debt could have been removed (with Board approval, which was lacking in 2007), it found that the debt associated with cable and telephone could not. As a result, the APA stated that:

The BVU Authority should re-establish an interfund receivable/payable, including foregone interest, between the Electric and OptiNet Divisions in the amount of \$13,741,288.

The re-establishment of the interfund receivable/payable could affect the potential sale of the BVU Authority’s OptiNet Division because it will increase the amount of debt that the BVU Authority must pay off with proceeds from the sale and will reduce the amount of funds available to satisfy grantors with claims on the BVU Authority’s assets.

(Audit Report at 32-33.)

BVU’s Board has directed management to be in full and complete compliance with the recommendations of the APA audit.

As a result, if the BVU Board votes to approve the proposed resolution with VTC, the transaction proceeds will be as follows:

EDA:	\$1,238,138
VTC:	\$3,761,862 (cash)
	\$5,000,000 (note)
BVU Electric Division:	\$13,741,288
VRA:	<u>\$26,258,712</u> (estimate)
	\$50,000,000

Consequently, as the City had acknowledged when it granted its consent to the transaction in 2016, based upon current information it does not appear that there will be any remaining net proceeds of the transaction that would be payable to the City pursuant to paragraph 5(c) of the BVU Authority Transition Agreement dated November 2, 2009.<sup>2</sup>

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<sup>2</sup> BVU OptiNet also has outstanding potential liability including existing litigation with Cable Plus, Inc. and other liabilities that will be retained after the transaction closes.

BVU will agree to keep Council informed of any changes to this analysis as the parties continue towards closing.

The parties have been working diligently to close the transaction. Recently, third-party consent letters were mailed, a petition was filed with the State Corporation Commission, a fairness opinion was ordered and the parties are finalizing exhibits and schedules to the Agreement. The parties expect to close the transaction in the coming weeks.

If you have any questions, please let us know.

Sincerely,

  
Cameron S. Bell

cc: BVU Authority Board of Directors  
Donald L. Bowman, CEO  
Jeff Mitchell, Esq.