

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7044

Petition of City of Burlington, d/b/a Burlington Telecom,)
for a certificate of public good to operate a cable)
television system in the City of Burlington, Vermont (In)
Re: Petition to Effectuate Settlement and Resolve)
Outstanding CPG Violations, and Request for)
Associated Approvals))

Hearing at
Montpelier, Vermont
July 22, 2014

Order entered: 11/3/2014

PRESENT: James Volz, Chairman
John D. Burke, Board Member
Margaret Cheney, Board Member

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For Comcast of Connecticut/Georgia/Massachusetts/New
Hampshire/New York/ North Carolina/Virginia/Vermont LLC
d/b/a Comcast

I. INTRODUCTION

On March 28, 2014, the City of Burlington ("City") filed a petition with the Public Service Board ("Board") for approvals related to the City's efforts to resolve long-standing problems related to investments in Burlington Telecom, the City's cable television and telecommunications enterprise. In its petition, the City requests that the Board: (i) approve and authorize the City to implement a settlement (the "Citibank Settlement") of a federal district court proceeding (the "Citibank Lawsuit"); (ii) grant certain approvals under 30 V.S.A. §§ 109, 231, and 232 related to a sale and lease financing that the City proposes to enter into in connection with the Citibank Settlement; (iii) amend Condition 17 of a Certificate of Public Good issued to the City, d/b/a Burlington Telecom ("Burlington Telecom " or "BT") in this Docket on September 13, 2005 (the "CPG"), to eliminate a requirement to build out the BT network throughout Burlington; and (iv) approve an Assurance of Discontinuance ("AOD") between the Vermont Department of Public Service ("Department") and the City pursuant to 30 V.S.A. § 509(c) to resolve outstanding violations of the CPG.

For more than five years, the City and its finances have been burdened by the consequences of actions taken by former City officials in funding investments in Burlington Telecom from 2007 to 2009. The most serious of these continuing burdens involve the potential exposure of the City of more than \$33.5 million in the Citibank Lawsuit and the consequences of an unauthorized \$16.9 million investment by the City in BT that was funded through non-reimbursed short-term advances to BT. The officials now in charge of the City's government and administration were not responsible for the City's actions that led to the Citibank Lawsuit, the City's unauthorized funding of investments in BT, or the CPG violations found by the Board in October 2010. These officials now seek Board approvals to address and resolve some of the most significant consequences of the City's past conduct.

Under a Mediated Settlement Agreement of January 29, 2014 (the "Settlement Agreement"), the Citibank Lawsuit will be dismissed and all claims of the parties released in exchange for payments to Citibank totaling \$10.5 million, of which the City's share is approximately \$9.03 million. In this Order, the Board approves the Settlement Agreement and

authorizes the City to take action to implement the Settlement Agreement, including through payments to Citibank from non-Burlington Telecom assets.

The City proposes to fund the largest component of the City's \$9.03 million settlement payment through a sale of substantially all the assets of Burlington Telecom to Blue Water Holdings LLC, a Vermont limited liability company formed by Raymond C. Pecor III as owner and managing member ("Blue Water"), as part of a sale and operating lease financing. No party offered evidence opposing the proposed Blue Water sale and lease financing. Rather, all parties to this proceeding – the City, the Department, and CCTV, RETN, and VCAM,¹ a/k/a Burlington Access Management Organizations ("BAMOs") – support Board approval (with some conditions in the case of the BAMOs) of the proposed Blue Water sale and lease financing.

Based on the evidence presented in this proceeding, including the importance of the Citibank Settlement to the City, we conclude on balance that the general good of the state will be promoted by allowing the City administration and the City Council to make the funding and financing decisions in connection with the Citibank Settlement that they believe best serve the interests of the City, taxpayers, and BT customers. Given the unique circumstances involving BT and the changes in the City's leadership discussed above, it is appropriate for the Board to give due consideration to the informed choices and judgments of the City's elected officials, who are actively involved in this matter and are accountable to Burlington voters. Accordingly, in this Order, the Board approves, pursuant to 30 V.S.A. §§ 109 and 232, a sale by the City of substantially all the assets of Burlington Telecom to Blue Water and a lease of BT assets by Blue Water back to the City.

Also in this Order, the Board conditionally approves an amendment to BT's CPG to reflect Blue Water's ownership of BT's assets subject to a compliance filing, as detailed below, to establish the Board's personal jurisdiction over Blue Water. The Board further concludes that Blue Water will acquire a controlling interest in BT upon the closing of the proposed sale and lease financing and is subject to the requirements of 30 V.S.A. § 107. The manner in which the filing requirements of Section 107 may be addressed by Blue Water is set forth below.

1. CCTV refers to Channel 17/ Town Meeting Television; RETN refers to Regional Educational Television Network; and VCAM refers to Vermont Community Access Media.

In addition, the Board approves in this Order an amendment to Condition 17 of the CPG to remove the requirement that BT build out its network to serve every address in Burlington. Such a modification of Condition 17 is warranted given the substantial and uneconomic investment such a build-out would entail and the effect this requirement would have on the value of Burlington Telecom in a future sale. The Board notes that BT plans to continue to build out the BT network to areas of Burlington not currently served by BT when BT is able to recoup the value of any such investment within a reasonable time frame.

Finally, the Board determines in this Order that all existing and ongoing violations of Conditions 2, 17, 56, and 60 of the CPG, as found and described in the Board's Order of October 8, 2010, are resolved. In making this determination requested by the City, the Board does not find it necessary to accept or approve the AOD, but instead bases its determination to resolve these violations on other evidence and considerations.

II. PROCEDURAL HISTORY RELATED TO PETITION

The current proceeding in this Docket commenced on March 28, 2014,² when the City filed the Petition together with a memorandum of law and the prefiled testimony and exhibits of Robert Rusten, Terry Dorman, and Stephen Barraclough.

On April 4, 2014, the Board issued a procedural order scheduling a prehearing conference and requesting the parties to address alternatives to the City's sale and lease financing proposal in this proceeding (the "April 4 Procedural Order").

On April 30, 2014, the Board held a prehearing conference in Montpelier, Vermont. At the prehearing conference, it was agreed that the City would file a proposed schedule, as well as supplemental prefiled testimony and draft financing documents, by May 29, 2014.

On May 14, 2014, the Board issued a prehearing conference memorandum and procedural order.

On May 29, 2014, the City filed the supplemental prefiled testimony of Mr. Dorman and exhibits (which included drafts of most of the financing documents), the prefiled testimony of

2. For prior procedural history in this Docket, *see* Order of 9/13/05 at 4, Order of 1/8/10, Order of 2/16/10, Order of 10/8/10 at 2-3, and Order of 11/23/11 at 1-2.

Mayor Miro Weinberger, and a memorandum of law addressing alternatives to the Blue Water sale and lease financing.

On June 2, 2014, the City filed a proposed schedule.

On June 5, 2014, the Board issued a procedural order ("Scheduling Order") establishing a schedule for this proceeding.

On June 9, 2014, the City filed additional supplemental testimony of Mr. Dorman and exh. supp. TD-8 (a pre-approval letter regarding a minimum purchase price for a future sale of BT).

On June 23, 2014, the Board issued a further procedural order related to scheduling matters.

On July 3, 2014, the Department submitted the prefiled testimony of Jim Porter together with a proposed AOD pursuant to 30 V.S.A. § 509(c). On the same date, the BAMOs submitted the prefiled testimony and exhibits of Lauren-Glenn Davitian.

Also, on July 3, 2014, as contemplated in the Scheduling Order, the Board submitted written questions to the City's witnesses.

On July 8, 2014, the Board conducted a public hearing in Burlington, Vermont.

On July 11, 2014, the City filed further supplemental testimony from Mr. Dorman with exhibits related to the sale and conveyance of BT assets to Blue Water.

On July 16, 2014, the City responded to the Board's questions of July 3 in the form of additional supplemental prefiled testimony and exhibits of Mr. Barraclough, Mr. Rusten, and Mr. Dorman together with a memorandum.

On July 22, 2014, the Board held a technical hearing with respect to the petition in Montpelier, Vermont.

On July 31, 2014, the Board issued a memorandum, as discussed at the technical hearing, with record and briefing requests.

On August 8, 2014, the City filed responses to the Board's record requests, including exhibits. The Board admits these responses into the record together with the exhibits accompanying the record request responses.³

On August 12, 2014, the City filed a proposed decision ("City's PFD"), and the Department filed its brief.

On August 14, 2014, the Department and the BAMOs filed their briefs.

On August 22, 2014, the City filed a reply brief.

On September 9, 2014, the City filed the affidavits of Messrs. Rusten, Dorman, and Barraclough with respect to the responses filed on August 8 to the Board's record requests.

III. REQUESTS FOR CONFIDENTIAL TREATMENT OF EVIDENCE

On June 9, 2014, the City filed a motion for confidential treatment of evidence regarding information in exh. supp. TD-8 about the minimum purchase price in a future sale of BT for which Blue Water's pre-approval of the sale would not be required.

On July 16, 2014, the City filed a motion for confidential treatment of evidence with respect to portions of the supplemental prefiled testimony of Mr. Barraclough filed on that date.

On September 5, 2014, the Board issued a Protective Order and Rulings on Confidential Evidence in which it ruled on certain motions for confidential treatment, granting the July 16 motion and denying the June 9 motion.

On September 18, 2014, the City filed a motion for reconsideration of the denial of the June 9 motion for confidential treatment. On September 22, 2014, the Board stayed the effect of its ruling pending a decision on the motion for reconsideration.

The Board has determined to grant the City's motion for reconsideration with respect to the denial of the June 9 motion for confidential treatment. An additional order to that effect will follow.

3. If a party objects to the admission of these responses and exhibits, it should set forth its objection and the basis for its objection in a motion for reconsideration.

IV. FINDINGS

Background

Burlington Telecom CPG and CPG Violations

1. The Board issued the CPG to the City, d/b/a Burlington Telecom, under 30 V.S.A. §§ 231 and 503, on September 13, 2005, authorizing the City to provide cable television services in Burlington. BT currently provides and sells cable television and telecommunications services to the public over a fiber-optic cable network. BT is not owned or operated as a legal entity separate from the City, but is separately accounted for as an enterprise fund of the City. Order of 9/13/05 at 48; CPG of 9/13/05; petition at ¶ 2; Barraclough pf. (3/28/14) at 6; exh. Board-4 at 38-40.
2. In accordance with a provision of the City Charter, the Board imposed conditions in the CPG to ensure, among other things, that any and all losses of BT and any costs of investment in the BT system would ultimately not be borne by the City's taxpayers. 24 V.S.A. Appendix § 3-438(c)(1); Order of 9/13/05 at 3 & 23-28, 39-41; CPG of 9/13/05 (Conditions 56 to 65); Order of 2/16/10 at 3.
3. From 2007 to 2009, the City made payments from the City's pooled cash management system on behalf of Burlington Telecom that were not reimbursed by BT as the CPG required. As of June 2010, the outstanding amount of payments made from the cash pool on behalf of Burlington Telecom that had not been reimbursed by BT totaled \$16.9 million. On the basis of facts that were undisputed by the City, the Board issued an Order in this Docket on October 8, 2010, granting certain motions for partial summary judgment and determining that certain violations of Conditions 2, 17, 56, and 60 of the CPG by BT had occurred. Order of 10/8/10 at 9-10, 27 & 32-33.
4. Since the conduct that resulted in the CPG violations found by the Board, the City has elected a new mayor, and the City's chief administrative officer, BT's general manager, and most of BT's executive staff, who were in place at the time of such conduct, have been replaced. Porter pf. (7/3/14) at 4.
5. The City has taken significant steps since 2010 to ensure that BT is operated on a positive cash flow basis and that City monies are not used to fund Burlington Telecom operating

expenses or the costs of investments in the BT system. Rusten pf. (3/28/14) at 7-8; Barraclough pf. (3/28/14) at 3-5; exh. SB-3.

BT Finances

6. Since at least October 2010, Burlington Telecom has had enough revenue to cover its expenses and, as of February 28, 2014, had accumulated approximately \$1.25 million in cash earnings. Barraclough pf. (3/28/14) at 3&5; Rusten pf. (3/28/14) at 8&12; exh. SB-3; City's Response to Board Record Request (8/8/14) at 2.

7. As of January 30, 2014, Burlington Telecom had 4,579 subscribers to its services, which at the time was the highest number of subscribers in its history. On June 30, 2014, the number of BT subscribers was 4,740. Barraclough pf. (3/28/14) at 12; Barraclough pf. supp. (7/16/14) at 1.

8. BT's net operating income or earnings before interest, taxes, depreciation, and amortization ("EBITDA") was \$912,000 in fiscal year ("FY") 2011, \$1.19 million in FY 2012, \$1.56 million in FY 2013, and, based on a preliminary accounting, \$1.55 million in FY 2014. As a percentage of BT's revenue, EBITDA was 12.7% of revenue in FY 2011 and 21.3% of revenue in FY 2014. Barraclough pf. supp. (7/16/14) at 2.

9. BT made capital expenditures of \$290,000 in FY 2011, \$367,000 in FY 2012, \$647,000 in FY 2013, and, based on a preliminary accounting, \$591,000 in FY 2014. These capital expenditures were funded solely from BT's net cash flow. Barraclough pf. (3/28/14) at 3; Barraclough pf. supp. (7/16/14) at 3; exh. SB-3.

10. Since the termination of a Master Lease/Purchase Agreement ("CitiCapital Lease") in 2010, the only significant indebtedness or non-current liability on the enterprise fund balance sheet of Burlington Telecom is the \$16.9 million due to the City from the advances made to BT from the City's cash pool. Since before October 2010 to the date of the Settlement Agreement, BT made payments of interest on the \$16.9 million of advances from the City's cash pool to the City or, as provided in a stipulated federal district court order in March 2012 (the "2012 Joint Stipulation"), to the federal district court. Tr. 7/22/14 at 236-240 (Barraclough) and 240-241 (Dorman); exh. supp. RR-8 at 28; exh. Board-4 at 28-29.

CitiCapital Lease and Citibank Lawsuit

11. On August 9, 2007, the City entered into the CitiCapital Lease with Municipal Leasing Consultants (which was subsequently assigned to Citibank on or before August 15, 2007). The City entered into this capital lease financing to fund the acquisition of equipment to build out BT's system. Petition at ¶ 3; exh. Board-4 at 95; exh. Board-2.

12. Payments under the CitiCapital Lease were subject to annual appropriation by the City. The CitiCapital Lease terminated pursuant to its terms when the City did not appropriate funds to make such payments for the City's 2011 fiscal year (July 1, 2010, through June 30, 2011). Exh. Board-2 at 2; exh. Board-4 at 95.

13. On September 2, 2011, Citibank filed a complaint in the United States District Court for the District of Vermont against the City and McNeil, Leddy & Sheehan, P.C., the law firm that represented the City in the CitiCapital Lease financing ("Law Firm"). The complaint involves claims against the City, not limited to the assets and revenue of BT, for more than \$33.5 million of monetary damages and for equitable relief. Rusten pf. (3/28/14) at 2, 10 & 12; Rusten pf. supp. (7/16/14) at 3; tr. 7/22/14 at 32 (Rusten); exh. RR-1 at 1; exh. RR-2; exh. Board-4 at 95.

14. In March 2012, the City and Citibank entered into the 2012 Joint Stipulation. The 2012 Joint Stipulation provided for monthly payments of 60% of BT's net cash flow, a portion of which, equal to interest payments on BT's \$16.9 million debt to the City's cash pool, would first be paid into and held by the court, and the balance of which, if any, would be paid to Citibank's counsel on account of the continued use by BT of equipment financed under the CitiCapital Lease. As of January 29, 2014, BT had paid approximately \$720,850 to the court and \$260,235 to Citibank's counsel pursuant to the 2012 Joint Stipulation. Dorman pf. (3/28/14) at 6; exh. RR-1 at 2-3; exh. Board-6.

15. The City and Citibank had settlement discussions in February 2012 and, as part of a mediated settlement process, in January 2013, but the parties were not able to reach an agreement on a dollar value for a settlement. Dorman pf. supp. (5/29/14) at 2 & 4.

Effect of BT Advances and Citibank Lawsuit on City's Finances

16. From March 2010 to June 2012, the City's bond rating by Moody's declined from Aa3 to Baa3 with a negative outlook. A Baa3 rating is Moody's lowest investment grade rating. Bonds

with a Baa3 rating present, according to Moody's, moderate long-term credit risk and certain speculative elements. Rusten pf. (3/28/14) at 4-5 & 6-7; exhs. RR-4, 5, 6 & 7.

17. Moody's has emphasized in its credit reports that the liquidity strains on the City's finances created by the non-repayment of the \$16.9 million of BT advances and, since September 2011, the uncertainty surrounding the City's potential exposure to the Citibank Lawsuit constitute the most significant ratings considerations and challenges for the City. Rusten pf. (3/28/14) at 6-7 & 11; exhs. RR-4, 5, 6 & 7; exh. supp. RR-2; exh. Board-12.

18. The City's issuance of \$9 million of general obligation bonds in April 2013 ("Fiscal Stability Bonds") reduced, but did not remove in Moody's view, the ongoing strains on the City's liquidity related to the BT advances. In its ratings report related to the Fiscal Stability Bonds, Moody's continued to emphasize a reduction or elimination of the BT advances to the general fund as a factor that would lead to improved ratings. Rusten pf. supp. (7/16/14) at 7 & 13; exh. Board-4 at 11; exh. Board-12.

19. As of April 14, 2014, Moody's changed the outlook for the City's Baa3 bond rating from negative to stable. Rusten pf. supp. (7/16/14) at 2; Porter pf. (7/3/14) at 5; exh. supp. RR-2.

20. An improvement in the City's bond rating would lower the interest costs on new bond issuances by the City and might allow the City to lower its debt service costs by refinancing some of its outstanding bonds. Rusten pf. (3/28/14) at 12-15.

Citibank Settlement

21. On January 30, 2014, Citibank, the City, and the Law Firm executed the Settlement Agreement. Under the Settlement Agreement, the Citibank Lawsuit will be dismissed and claims released in exchange for a total \$10.5 million of payments, with the City's share of such payments being \$9,031,085, \$500,000 of which will be paid by the City's insurance carrier. Approximately \$1.469 million was paid by the Law Firm and/or its insurance carrier. Rusten pf. (3/28/14) at 10; exh. pet. RR-1 at 2 and 5; exh. pet. supp. RR-4 (Schedule 3.5); exh. Board-4 at 96.

22. The Citibank Settlement eliminates the risk that the City could be found liable and face a significant financial judgment in court. Rusten pf. (3/28/14) at 12; tr. 7/22/14 at 32 (Rusten); Porter pf. (7/3/14) at 5.

23. Some general fund revenue will probably be used to make certain payments in connection with the Citibank Settlement. Such funds will be used for purposes of the Citibank Settlement and for minimizing the losses of, and consequences for, the City and its taxpayers resulting from the actions and decisions by the City prior to 2010. Rusten pf. (3/28/14) at 9; Dorman pf. supp. (6/9/14) at 4.

24. To provide the expected funding for most of the \$9.03 million settlement payment, the City was obligated under the Settlement Agreement to finalize the terms of a proposed lease financing of at least \$6 million by February 28, 2014. Exh. RR-1 at 4 (Section 4.1).

25. The Settlement Agreement required the City to file a petition with the Board by March 15, 2014, seeking Board approvals to implement the Citibank Settlement and for the proposed lease financing and to pursue the receipt of the requested approvals from the Board. Section 5.4 of the Settlement Agreement required the City to seek Board approval of: (a) payment to Citibank from non-Burlington Telecom assets in order to settle Citibank's claims against the City; and (b) the proposed lease financing and resolution of the CPG violations as required by the lender for the financing and applicable law and current Board orders. Exh. RR-1 at 2 (Section 4.4) and at 4 (Sections 5.4 and 5.5).

26. As provided in the Settlement Agreement, the City is currently making monthly payments to Citibank of 60% of BT's net cash flow (which will not be credited against the balance of the \$9.03 million settlement payment). The City is required to make such payments until the closing. Dorman pf. (3/28/14) at 6 (footnote); Dorman pf. supp. (7/16/14) at 23; Barraclough pf. supp. (7/16/14) at 5-6; exh. RR-1 at 3-4 (Section 5.2).

27. Section 5.5 of the Settlement Agreement provides that a stay of the Citibank Lawsuit (stipulated to by the parties as part of the Settlement Agreement) may be terminated by Citibank or the City "in the event that the [Board] disapproves the Petition." Exh. RR-1 at 1-2 (Section 3), at 4-5 (Section 5.5).

28. Section 7 of the Settlement Agreement provides, if the Board approves the Petition, that the City will close the proposed lease financing and pay the balance of the \$9.03 million settlement payment not less than 5 business days after such Board approval becomes final. Exh. RR-1 at 5.

29. Upon payment by the City to Citibank of the balance of the \$9.03 million settlement payment, Citibank has committed to convey its interests in the assets of the BT system to the City or the entity providing the proposed lease financing, and each of the parties to the Settlement Agreement "shall execute mutual general releases for all claims arising or that could have been asserted in connection with the [Citibank Lawsuit]." Exh. RR-1 at 5 (Section 7).

30. Section 8 of the Settlement Agreement states that the settlement "is predicated on the assumption" that the proposed lease financing "is intended as a bridge to the eventual arm's length sale of [the BT system] to a private entity" and provides that the City will share the "Net Proceeds" received by the City from such sale equally with Citibank. If the terms of the financing do not require the City to sell the BT system during the term or at the maturity of the financing, "or provide for a similar liquidity event resulting in Net Proceeds being payable to [the City] or Citibank from the assets of the [BT system], then the consent of Citibank shall be required, such consent not to be unreasonably withheld or delayed." Except for this consent provision, the terms of the lease financing are not subject to Citibank's review and approval. Dorman pf. (3/28/14) at 7; Dorman pf. supp. (7/16/14) at 1; exh. RR-1 at 6 (Section 8).

Sale and Lease Financing

City's Efforts to Find Lender, Investor, or Strategic Partner for BT

31. The City made significant efforts over the years prior to the Citibank Settlement to find a lender, investor, or strategic partner willing to provide debt financing for Burlington Telecom or to make an equity investment in Burlington Telecom. Dorman pf. supp. (5/29/14) at 2-3; Weinberger pf. (5/29/14) at 6.

32. The Citibank lawsuit was a major impediment to the City's efforts over the last several years to find a purchaser or investor for BT, as no private purchaser was willing to invest in BT with that lawsuit pending. Prior to the Citibank Settlement, no financing for BT was available because the resolution of the Citibank Lawsuit was uncertain and any settlement amount was speculative. Investors and other funding sources were not willing to devote substantial resources to a possible transaction when the outcome was unknown. Weinberger pf. (5/29/14) at 6; Dorman pf. (3/28/14) at 5; Dorman pf. supp. (7/16/14) at 18.

33. The milestones and tight deadlines imposed on the City in the Settlement Agreement were a significant factor in limiting the City's ability to expand the scope of its post-settlement solicitations to a larger universe of potential financiers/lenders and strategic partners. Dorman pf. supp. (7/16/14) at 12 & 13.

34. In preparation for the January 2014 settlement negotiations with Citibank, the City and its financial advisor, Dorman & Fawcett ("D&F"), negotiated with five special-purpose financing entities to obtain financing for a resolution of the Citibank Lawsuit. One of those entities, Rosemawr Management LLC ("Rosemawr"), provided a preliminary term sheet which served as the basis for the lease financing described in the Settlement Agreement. Dorman pf. supp. (5/29/14) at 1 & 5.

35. In March 2014, D&F received a preliminary term sheet from Mr. Pecor related to the proposed Blue Water sale and operating lease financing. Dorman pf. supp. (5/29/14) at 5.

36. During March 2014, D&F had extensive discussions with Rosemawr and Mr. Pecor regarding their term sheets, and, in the week prior to the filing of the Petition, both submitted commitment letters to the City. Dorman pf. (3/28/14) at 4; Dorman pf. supp. (5/29/14) at 5; exh. TD-1; exh. supp. TD-2.

37. On March 26, 2014, the City Council unanimously approved the terms of the proposed Blue Water sale and lease financing as set forth in Mr. Pecor's commitment letter. The Blue Water sale and lease financing documents and the closing of such financing are subject to further approval by the City Council. Dorman pf. (3/28/14) at 4; Dorman pf. supp. (5/29/14) at 18; Weinberger pf. (5/29/14) at 7; exh. RR-9.

38. The City administration, City Council, D&F, and attorneys for the City had less than a month from the receipt of Mr. Pecor's preliminary term sheet to review the proposals of Mr. Pecor and Rosemawr, to consider the possible availability of alternatives to these proposals, and to complete a number of significant actions, including the filing of the Petition, because of the date milestones for City actions in the Settlement Agreement. Dorman pf. supp. (7/16/14) at 13.

39. The City would have come up with another source of funding for the Citibank Settlement for the benefit of the taxpayers, if it had then been possible, "but we were not able to see an alternative." Tr. 7/22/14 (Rusten) at 120-121.

Proposed Blue Water Financing

40. Blue Water is a Vermont limited liability company, which is owned by Mr. Pecor and was formed by him, as managing member, for the purpose of entering into the proposed sale and lease financing with the City. Dorman pf. (3/28/14) at 8 & 9; Dorman pf. supp. (7/11/14) at 3; exh. supp. TD-9 at 1.

41. At the closing of the proposed Blue Water sale and lease financing, the City will sell to Blue Water the telecom assets of BT (including accounts receivable, contract rights, billing records, customer lists, and other business assets as well as equipment and inventory used in the operation of BT's telecom system), and Blue Water will pay \$6 million to the City to provide funds for the Citibank Settlement (which will occur on the same date). Through the proposed sale of BT telecom assets by the City and Citibank's conveyance of its interests in BT system assets upon the City's payment of the balance of the \$9.03 million settlement payment, Blue Water will own substantially all of the components of the BT system ("BT's Assets"). Dorman pf. (3/28/14) at 8; Dorman pf. supp. (5/29/14) at 12; Dorman pf. (7/11/14) at 3; exh. RR-1 at 5; exh. supp. TD-9 (Bill of Sale and Schedule A).

42. Blue Water will lease BT's Assets back to the City under an operating lease with a maximum lease term of five years (the "Lease"), and Blue Water will be entitled to receive monthly rental payments during the lease term from BT's net cash flow of \$46,544.33 (approximately \$558,500 a year). The rental payments reflect a 7% interest rate on \$6 million and a 20-year amortization of principal. Rental payments will be subject to annual appropriation by the City, and the City will not be obligated to make rental payments from its general fund. Dorman pf. (3/28/14) at 8 & 9; Dorman pf. supp. (5/29/14) at 10-11; tr. 7/22/14 at 171 (Dorman); exh. supp. TD-4 (Proposed Lease Agreement).

43. Based on BT's average monthly net cash flow before debt service since July 1, 2011, BT's debt service coverage ratio for the rental payments under the Lease would have been 1.52 to 1 for fiscal year 2012, 1.62 to 1 for fiscal year 2013, and 1.86 to 1 for fiscal year 2014. Dorman pf. supp. (7/16/14) at 12; exh. SB-3 (BT Financials).

44. The CitiCapital Lease involved a capital lease financing under which BT would have acquired ownership of the financed assets through payments made during the lease term; the

proposed Lease of BT's Assets by Blue Water to the City for a maximum five-year term is an operating lease under which Blue Water will retain ownership of BT's Assets during and after the Lease term unless there is a further sale of BT's Assets. Tr. 7/22/14 at 19-21 (Rusten); tr. 7/22/14 at 170-171 (Dorman).

45. At the closing of the Blue Water financing, a trust account (the "Revenue Fund") and two operating accounts, an operating expense fund and a lease payment fund (together, the "Operating Accounts"), will be established at Merchants Bank. All revenues from the operation of BT will be directly deposited into the Revenue Fund. Amounts necessary to meet current operating expenses, including rental payments to Blue Water, will be transferred each month to the Operating Accounts, and such expenses will be paid from the Operating Accounts. BT will not make any payment or distribution to the City other than for actual costs and expenses incurred by the City in the operation of the BT system. Dorman pf. (3/28/14) at 9-10; exh. supp. TD-6 (Proposed Deposit Trust Agreement with Merchants Bank); exh. supp. TD-5 (Proposed Management and Sale Agreement) at 7-8.

46. Subject to the continued agreement of Blue Water and the City, BT will be managed by D&F during the term of the Lease. The City may not amend or terminate D&F's contract without Blue Water's prior written approval. D&F estimates that its monthly fees during the Lease term will be approximately \$35,000 (\$400,000 a year). These fees will be deferred until the closing of a future sale of BT's Assets and will be paid, together with interest at a rate of 7% per annum, solely from the proceeds of such future sale and from amounts then held in the Operating Accounts and the Revenue Fund. Expenses of D&F will be billed and paid from the operating expense fund during the lease term. Dorman pf. (3/28/14) at 8-10; Dorman pf. supp. (5/29/14) at 11; Dorman pf. supp. (7/16/14) at 4-6; exh. supp. TD-5 (Proposed Management and Sale Agreement); exh. supp. TD-6 (Proposed Deposit Trust Agreement with Merchants Bank).

47. The Lease will terminate upon the completion of a future sale of BT's Assets, the expiration of the maximum five-year term of the Lease, the failure of the City to make an annual appropriation of rental payments, or an uncured event of default. Dorman pf. (3/28/14) at 11; exh. supp. TD-4 at 6 & 12-13.

48. Upon a future sale of BT's Assets following the closing of the Blue Water sale and lease financing (and assuming there is no uncured event of default or act of non-appropriation), the City, Blue Water, D&F, and Citibank will share in the proceeds of such sale subject to certain deductions. Under the Management and Sale Agreement, "Net Sale Proceeds" would consist of (a) the gross proceeds of such sale and all amounts held in the Operating Accounts and the Revenue Fund ("BT's Accumulated Retained Earnings"), less (b), in the following order of priority: (i) the balance of \$6 million of "unamortized principal" and any accrued and unpaid interest, which will be paid to Blue Water; (ii) accrued and unpaid fees of D&F (together with interest at the rate of 7% per annum); (iii) any transfer taxes; and (iv) sale expenses of Blue Water and the City. Dorman pf. (3/28/14) at 6 & 12; Dorman pf. supp. (7/16/14) at 3; exh. supp. TD-5 (Proposed Management and Sale Agreement) at 3; exh. RR-1 at 6 (Section 8).

49. For the first four years after the closing of the Blue Water sale and lease financing, the City will have the right under the Management and Sale Agreement to direct the sale of BT's Assets without Blue Water's consent provided the sale price is at or above a pre-approved price. Dorman pf. (5/29/14) at 16; Dorman pf. supp. (6/9/14) at 1-2; exh. supp. TD-5 (Proposed Management and Sale Agreement); exh. supp. TD-8 (Pre-approval Letter).

50. The City will ultimately receive 25% of the net proceeds (after payment to Blue Water of the unamortized balance of \$6 million and other deductions) from a sale of BT's Assets upon such a sale if a definitive agreement for such a sale is entered into within three years, or 17.5% of such net sales proceeds if an agreement is entered into within four years, of the closing of the Blue Water sale and lease financing. Dorman pf. (3/28/14) at 11-12; Porter pf. (7/3/14) at 6-7; exh. supp. TD-5 (Proposed Management and Sale Agreement) at 9-10; exh. RR-1 at 6 (Section 8).

51. After four years, Blue Water may sell or not sell BT's Assets at its sole discretion. The City has no ability to require Blue Water to pursue a sale of BT's Assets either during the fifth year of the Lease term or after the end of the Lease term. If Blue Water does sell BT's Assets before the end of the Lease term, the City will ultimately receive 12.5% of the net proceeds of such sale. If Blue Water sells BT's Assets after the end of the maximum five-year Lease term, the City will ultimately receive 5% of the net proceeds of such sale. Dorman pf. (3/28/14) at 11-

12; Dorman pf. supp. (7/16/14) at 20; Porter pf. (7/3/14) at 6-7; exh. supp. TD-5 (Proposed Management and Sale Agreement) at 9-10; exh. RR-1 at 6 (Section 8).

52. BT expects that it will need at least 30 months of further operations to optimally position the enterprise for a future sale following the closing of the Blue Water sale and lease financing. Dorman pf. (3/28/14) at 10.

53. The City has not provided any estimates or projections of the present or future enterprise value of BT or any projections of a future sale price for BT's Assets within the next three or four years. Mr. Dorman would base his estimate of a reasonable sale price for BT "on a per subscriber and EBITDA review." If its operating goals for BT are met, D&F is reasonably confident that the City will be able to direct a sale of BT's Assets during the first three years of the Lease term at a price that is close to BT's enterprise value at the time of sale. The City is also unable to estimate the possible recovery to the City of its investment upon a future sale of BT's Assets during the Lease term. Dorman pf. (3/28/14) at 13; Dorman pf. supp. (7/16/14) at 8-10, 16 & 18; exh. Board-9.

54. The City did not obtain an appraisal of BT's value in connection with the proposed Blue Water sale and lease financing. The City has not made a determination as to whether and to what extent it will need to write-off the City's \$16.9 million of advances to BT and to record a loss on the City's books and records upon the closing of the proposed sale of BT's Assets to Blue Water. Tr. 7/22/14 at 30 & 109-116 (Rusten).

55. Under the Blue Water Agreements, Mr. Pecor may sell some or all of his ownership interests in Blue Water, and Blue Water may issue and sell additional ownership interests in Blue Water to any person or entity (except to the operator of a telecommunications system or an affiliate of an owner or operator of a telecommunications system). Dorman pf. supp. (7/16/14) at 19-20; exh. supp. TD-5 (Proposed Management and Sale Agreement) at 11.

56. In the event of an uncured default under the Lease or an act of non-appropriation: (i) the City would lose its rights to any Net Sales Proceeds (including BT's Accumulated Retained Earnings); (ii) Blue Water would have the right to purchase a City-owned building, with a current assessed value of about \$1.2 million, that houses BT's headquarters, for \$100; and (iii) the City would lose an initial deposit the City is required to make to the Operating Account. Without

taking into account the loss of its rights to any Net Sales Proceeds, the additional losses to the City and its taxpayers in the event of an uncured default or non-appropriation under the Blue Water financing agreements would be \$3,027,400. Dorman pf. (3/28/14) at 11; Dorman pf. supp. (5/29/14) at 17-18; Porter pf. (7/3/14) at 7; exh. supp. TD-4 (Proposed Lease Agreement) at 10-11; exh. supp. TD-5 (Proposed Management and Sale Agreement) at 10-11; exh. supp. TD-7 (Proposed Real Estate Lease Agreement) at 15-16.

57. BT will not pay interest on the \$16.9 million of advances from the City after the closing of the proposed Blue Water financing. At the current per annum rate of interest (2%) applicable to City advances to its enterprise funds, interest payments on these advances would be about \$340,000 a year. Rusten pf. supp. (7/16/14) at 12; tr. 7/22/14 at 236-240 (Barraclough) and 240-241 (Dorman); exhs. TD-4 and 5.

58. Annual budgets for BT during the term of the Lease will be subject to the review and approval of Blue Water, which shall not be unreasonably withheld or delayed. Without Blue Water's prior written consent (subject to certain exceptions), BT will not be permitted to make any material additions or improvements to BT's system. Capital expenditures outside of the ordinary course of business used to expand or improve the BT system will be subject to the approval of Blue Water at its discretion. Dorman pf. supp. (5/29/14) at 14-15; exh. supp. TD-4 (Proposed Lease Agreement) at 9-10.

59. The future and continued viability of BT depends on an infusion of new capital, which will not come from the City's taxpayers. The proposed Blue Water agreements do not require Blue Water to provide any funds or financing to BT for capital expenditures and improvements. Without a source of additional funding or financing, BT will remain dependent, as it has been for at least the last four years, on its cash flow to fund capital expenditures and improvements during the term of the Lease. Weinberger pf. (5/29/14) at 5; tr. 7/22/14 at 159-164 (Dorman); exh. SB-3.

60. Blue Water plans to obtain financing from Merchants Bank for the \$6 million payment Blue Water will make to the City at closing. Interest on the Merchants Bank loan to Blue Water is expected to accrue at the rate of 7% per annum. Merchants Bank will require collateral security in the form of mortgages, security interests, assignments of leases, and generally an

assignment of all right and title of Blue Water in the proposed sale and lease financing. The City understands that Mr. Pecor will provide a guarantee of the loan to Blue Water by Merchants Bank. The City is responsible for the payment of transaction expenses reasonably incurred by Blue Water in connection with the closing of the Blue Water financing, including any expenses of Merchants Bank for which Blue Water is liable. Dorman pf. (3/28/14) at 8-9; Dorman pf. supp. (6/9/14) at 3; Dorman pf. supp. (7/16/14) at 7; exh. TD-1 at 8 & 10.

Alternatives to the Blue Water Financing

61. The City has taken steps to ensure that, to the extent possible, no additional taxpayer funds related to BT are placed at risk. Given the City's significant past expenditure of \$16.9 million on BT without public knowledge, any further taxpayer expenditures on BT would be unacceptable to many City residents. Rusten pf. (3/28/14) at 7-9; Dorman pf. supp. (5/29/14) at 7-8; Weinberger pf. (5/29/14) at 3-4.

62. If the City were to fund an additional payment of \$6 million or more to Citibank in connection with the Citibank Settlement, the City would have to incur debt. Such a direct payment by the City or recourse loan would also create a risk of additional loss for City taxpayers. Weinberger pf. (5/29/14) at 3-4 & 7.

63. Conventional municipal financing, as an alternative to the Blue Water financing, would have required voter approval and a lengthy process. At the time the City entered into the Settlement Agreement, a revenue bond issuance would probably not have been an acceptable alternative for Citibank to fund the settlement payment because of the six- to eight-month process for issuance and because of the uncertainty as to whether voter approval for such issuance could be obtained. Dorman pf. (3/28/14) at 5; Rusten pf. supp. (7/16/14) at 8-9; tr. 7/22/14 at 53-54 (Rusten).

64. It was important for Citibank in reaching a settlement that the City had sources of settlement funds, the availability of which would be determined within a relatively short time frame. Tr. 7/22/14 (Rusten) at 55.

65. The Blue Water and Rosemawr proposals were the only funding alternatives raised or discussed with the City Council. Dorman pf. supp. (7/16/14) at 15; tr. 7/22/14 at 17 (Rusten).

Modification of CPG Condition 17 Build-Out Requirement

66. There are 18,882 service addresses within Burlington, and the BT network does not pass within 300 feet of 3,257 service addresses. Of these 3,257 service addresses, 1,913 are located on public rights-of-way. Barraclough pf. (3/28/14) at 8; exh. SB-4.

67. BT estimates that it would cost \$3,661,621 to build out BT's network to pass all the service addresses located along public rights-of-way. Barraclough pf. (3/28/14) at 9.

68. Requiring BT to complete the build-out would adversely impact the overall value of BT as the cost of doing so would result in a negative return on investment from these service areas. Barraclough pf. (3/28/14) at 11.

69. BT intends to build out its network in Burlington in cases where it is able to recoup the value of its investment in a reasonable time frame, as it has continued to do since 2009. Barraclough pf. (3/28/14) at 11.

70. Since 2009, BT has expanded its facilities to pass an additional 301 service addresses located along public rights-of-way. Barraclough pf. (3/28/14) at 9.

71. There is an existing cable provider that can provide service to all 1,913 service addresses located on public rights-of-way that are not currently passed by BT's network. Porter pf. (7/3/14) at 8.

72. The City originally proposed the requirement in the CPG that BT build out its cable network to every address in Burlington. Porter pf. (7/3/14) at 8.

V. DISCUSSION

In the petition at issue in this Order, the City seeks various Board approvals related to the City's efforts to address long-standing problems involving Burlington Telecom. These problems resulted primarily from the funding of investments in Burlington Telecom from 2007 through 2009.

The Board issued a CPG to the City, d/b/a BT, to provide cable television services in Burlington in September 2005. In accordance with a provision of the City Charter,⁴ the Board

4. 24 V.S.A. Appendix § 3-438(c)(1).

imposed conditions in the CPG to ensure, among other things, that any and all losses of BT and any costs of investment in the BT system would ultimately not be borne by the City's taxpayers.

In August 2007, the City obtained financing from an affiliate of Citibank under the CitiCapital Lease. The City entered into this capital lease financing to fund the acquisition of equipment to build out BT's system. Payments under the CitiCapital Lease were subject to annual appropriation by the City.

In late 2009, it emerged that the City had been making monetary advances to BT that had not been repaid within 60 days, as required by the CPG. The outstanding amount of non-reimbursed advances totaled \$16.9 million. On the basis of facts that were undisputed by the City, the Board issued an Order in this Docket on October 8, 2010, granting portions of certain motions for partial summary judgment by determining that certain violations of Conditions 2, 17, 56, and 60 of the CPG by BT had occurred.

Also, in 2010, the CitiCapital Lease terminated in accordance with its terms when the City did not appropriate funds to make such payments for the City's 2011 fiscal year. Citibank filed the Citibank Lawsuit in September 2011, which involves claims against the City for which Citibank seeks more than \$33.5 million of monetary damages and equitable relief.

The City and its finances have now been burdened for more than five years by actions taken by former City officials between 2007 and 2009 in funding the cost of investments in Burlington Telecom. The most significant of these continuing burdens involve the City's potential exposure under the Citibank Lawsuit of more than \$33.5 million related to the CitiCapital Lease financing and the unauthorized \$16.9 million investment by the City in BT that was funded through non-reimbursed short-term advances to BT. Among other consequences of the City's past conduct has been a significant decline in the City's bond rating since March 2010.

Under new leadership, the City took a significant step in late January 2014 to address these problems by entering into the Settlement Agreement with Citibank. In the petition at issue in today's Order, the City requests that the Board approve the Citibank Settlement and authorize the City to take action as necessary to implement the Citibank Settlement. In connection with the implementation of the Citibank Settlement, the City requests approval from the Board, pursuant to 30 V.S.A. §§ 109 and 232, of the sale of BT's Assets to Blue Water and the lease back by Blue

Water to the City of BT's Assets for a maximum five-year lease term under the proposed Blue Water sale and lease financing. The City further requests that the Board amend the CPG under 30 V.S.A. § 231 to reflect Blue Water's ownership of BT's Assets and determine that Blue Water shall be subject to *de minimis* regulation. In addition, the City asks the Board to modify Condition 17 of the CPG to eliminate the requirement to build out BT's network throughout the City. Finally, the City requests that the Board approve a proposed Assurance of Discontinuance between the City and the Department pursuant to 30 V.S.A. § 509(c) to resolve the CPG violations.

Citibank Settlement

The City entered into the Settlement Agreement with Citibank as of January 29, 2014, in connection with the settlement of the Citibank Lawsuit. Under the Citibank Settlement, the City's potential exposure to Citibank will be eliminated in exchange for a settlement payment of \$9.03 million. In addition to eliminating a significant potential monetary exposure of the City, the Citibank Settlement will remove a cloud of uncertainty that has affected financing and other activities of the City in recent years. The implementation of the Citibank Settlement is expected to have a positive effect on the credit rating of the City's bonds and may result in a reduction of future debt service costs.

Payments by the City to settle the Citibank Lawsuit will protect the City against a significant potential exposure to the Citibank Lawsuit, an exposure that is not limited to BT's revenue and assets. The Citibank Settlement will not involve an additional investment in BT by the City or, given the termination of the CitiCapital Lease in 2010, the assumption by the City of a liability of BT.

Although the Citibank Settlement contemplates the use of a limited amount of City funds, the settlement was structured to limit as much as possible the amount of non-BT assets and revenue used by the City in the settlement. The City's desire to limit further expenditures of City funds related to BT is understandable given that the Citibank Lawsuit resulted from the actions of former City officials with respect to BT and given the amount of City resources already expended on BT.

The Citibank Settlement was premised on the need for Board authorization to make payments from the general fund to settle the Citibank Lawsuit. Section 5.4(a) of the Settlement Agreement specifically requires the City to seek approval from the Board of payments to Citibank from non-Burlington Telecom assets to settle the claims against the City.⁵ Accordingly, in this Order the Board approves the Citibank Settlement and authorizes such payments by the City to Citibank from non-BT assets.

Proposed Blue Water Sale and Lease Financing

As proposed, the largest component of the City's \$9.03 million settlement payment will consist of the \$6 million Blue Water will pay to the City upon the sale by the City of BT's Assets to Blue Water under a proposed sale and operating lease financing. Blue Water will lease BT's Assets back to the City for a maximum five-year lease term and will retain ownership of BT's Assets during and after the term of the Lease unless there is a sale of BT's Assets to another private entity. During the Lease term, monthly rental payments of \$46,500 (\$558,000 a year) will be made to Blue Water from BT's net cash flow. The rental payment amount reflects a 7% interest rate and a 20-year schedule of amortization on \$6 million. Under the proposed financing, the City will have the right to direct a subsequent sale of BT's Assets during the first four years of the operating lease. If an agreement for sale is entered into within three years, the City will ultimately receive 25% of the net proceeds of the sale (after payment to Blue Water of the remaining unamortized balance of \$6 million and other deductions) or 17.5% of such proceeds if an agreement for sale is entered into within four years. There is no assurance there will be any future sale of BT's Assets (or any recovery of the City's investment in BT) if the City is unable to direct a sale of BT's Assets within four years at or above a pre-approved price.

Alternatives to Blue Water Financing

In a procedural order issued on April 4, 2014 ("April 4 Procedural Order"), the Board indicated a receptivity to the use of alternative sources of funds to make the City's settlement payment to Citibank, including sources directly or indirectly funded by City taxpayers. The Board requested that the parties address in this proceeding possible alternatives to the Blue Water

5. Exh RR-1 at 4. The City contemplates that some general fund revenue will be used in connection with the Citibank Settlement even with the Blue Water financing. Rusten pf. (3/28/14) at 9; exh. RR-1 at 3; City's PFD at 8.

sale and lease financing to make the \$6 million payment to Citibank and any additional payment that might be required to obtain Citibank's consent under Section 8 of the Settlement Agreement.⁶ The April 4 Procedural Order was prompted in part by the Board's concern that the Blue Water financing may have been chosen by the City largely or solely because of a belief that the Board would view City funding of the Citibank Settlement as prohibited or restricted under the CPG, prior Board Orders, or the City Charter.

The Board's inquiry about possible alternatives to the Blue Water financing was also prompted by BT's improved financial condition and the significant effect the proposed sale of BT's Assets to Blue Water would have in reducing the ability of the City and its taxpayers to recover a substantial portion of the City's unauthorized \$16.9 million investment in Burlington Telecom. Among the possible alternatives addressed by the parties were a BT revenue bond issuance, payments by the City either directly from the general fund or through the City's existing short-term credit facilities, or a longer-term financing.

Vermont law authorizes revenue bond financing for Burlington Telecom provided such bonds are paid from net revenue derived from BT's operations.⁷ BT would seem to have the ability to support a revenue bond issuance through its net revenue and cash flow.⁸ However, the process to issue a revenue bond would apparently take between six and eight months from start to finish and would require the approval of a majority of Burlington voters. The evidence shows that the City did not extensively explore with financial institutions the possibility of a BT revenue bond issuance to fund a portion of the settlement. Nonetheless, the conclusion of witnesses for the City that Citibank would have been reluctant to accept a source of funding in the Settlement Agreement that was dependent on voter approval is reasonable.⁹ As stated in the City's Memorandum of Law of May 29:

A revenue bond financing to settle the Citibank litigation would not have been feasible given the status of the litigation, the demands of Citibank, the time

6. Procedural Order of 4/4/14 at 2.

7. City's Memorandum of Law of 5/29/14 at 7-8; 24 V.S.A. § 1913(c).

8. Based on its net cash flow before debt service in FY 2014, BT's debt service coverage ratio for the rental payments under the Blue Water Lease (at a 7% interest rate) would be 1.86 to 1. Dorman pf. supp. (7/16/14) at 12.

9. Finding 63.

needed to seek voter approval and the uncertainty as to whether such approval could be obtained.¹⁰

Accordingly, it does not seem likely that the closing of the Citibank Settlement could have been conditioned in the Settlement Agreement on a revenue bond financing for a portion of the settlement payment. It is conceivable that timing considerations associated with a revenue bond issuance could have been addressed by the City's use of its own funds or short-term borrowing¹¹ to fund the settlement, followed some time later by a BT revenue bond issuance to replace, in effect, such direct City funding.

However, even if direct payments to Citibank followed by a BT revenue bond issuance were feasible, the testimony of City officials and other filings by the City provided after the April 4 Procedural Order indicate the City officials' clear preference for the Blue Water financing proposal over any alternative that would involve any significant use of taxpayer funds or require voter approval.¹² The City's position on the use of taxpayer funds even on a short-term basis is understandable given the City's history with financing initiatives involving BT, the magnitude of the direct payment that the City would have to make at the closing of the Citibank Settlement, and uncertainties associated with a subsequent BT revenue bond issuance.

Furthermore, no party presented evidence opposing the proposed Blue Water sale and lease financing. In fact, all parties to this proceeding support the Board's approval of the proposed Blue Water sale and lease financing.¹³

Although alternatives to the Blue Water sale and lease financing to fund the Citibank settlement may have been possible, the Board concludes it is in the general good of the state to allow the City administration and the City Council to make the funding and financing decisions with respect to the Citibank Settlement that they believe best serve the interests of the City and its taxpayers. On this basis, the Board approves the Blue Water sale and lease financing.

10. City's Memorandum of Law of 5/29/14 at 8.

11. The City has tax anticipation borrowing capacity of up to about \$22.5 million in FY 2015. Rusten pf. supp. (7/16/14) at 13.

12. *See, e.g.* Weinberger pf. (5/29/14) at 3-4.

13. The BAMOs support approval of the sale of BT's Assets to Blue Water but propose certain conditions related to a subsequent sale of BT's Assets during the term of the Lease. BAMOs' Brief (8/14/14) at 16.

CPG Amendment

In the Petition at issue in this Order, the City requests that the CPG be amended to reflect Blue Water's ownership of BT's Assets following their sale to Blue Water at the closing. In our view, the existing evidentiary record in this proceeding is sufficient to support a determination that, under the circumstances of this case, the public good will be promoted by amending BT's CPG to reflect Blue Water's ownership of BT's Assets. However, to date, Blue Water has not entered an appearance in this proceeding, nor have the City's attorneys filed a notice of appearance on behalf of Blue Water or otherwise demonstrated that they are legally authorized to represent Blue Water in this Docket. Nor is there any direct representation in the record from Blue Water itself assenting to the City's request to add Blue Water to BT's CPG. Accordingly, at this time it is not clear that the Board has the requisite personal jurisdiction over Blue Water for purposes of ruling on the request to amend BT's CPG to reflect Blue Water's ownership of BT's Assets. Thus, in today's Order we conditionally approve the request to amend BT's CPG to reflect Blue Water's ownership of BT's assets, subject to the following requirements: either (1) Blue Water must file a motion to intervene in this proceeding and join in the requests the City has made in this proceeding that affect Blue Water (i.e., the City's request to amend BT's CPG and for *de minimis* regulation of Blue Water); or (2) the City's attorneys must make a compliance filing demonstrating unambiguously that they are legally empowered to jointly represent the City and Blue Water in this proceeding and therefore have the power to bind Blue Water to the Board's approval of the CPG amendment request in this Docket. The other parties shall have ten days from the date of any such filing by the City's attorneys or by Blue Water to respond to such filing.

The City further requests that Blue Water be subject only to *de minimis* regulation "due to its limited role in connection with BT's ongoing operations."¹⁴ However, neither Blue Water nor the City has substantively delineated the scope of *de minimis* regulation requested, or what this term is intended to mean as applied to Blue Water. In other cases where we have granted

14. City's PFD (8/12/14) at 34.

requests for *de minimis* regulation, there have been facts or circumstances that have served to define and clarify the scope of such regulation.¹⁵

After the sale of BT's Assets to Blue Water, the City will continue to be the licensed operator of Burlington Telecom and intends to continue to assume responsibility for compliance with the CPG and other regulatory requirements. The Board agrees with the City and the Department that the City, as BT's licensed operator, remains the appropriate entity to be held primarily responsible for compliance with the CPG and other regulatory requirements so long as the City remains the holder of the CPG to operate Burlington Telecom. As the Department suggests in its brief: "Board oversight over Blue Water, as owner of the BT Assets, should be less than that of the City, as the operator of BT."¹⁶

Nevertheless, it is unclear whether the Board's determination that the City shall remain the entity primarily responsible for compliance with the CPG and other regulatory requirements meets the requirements for *de minimis* regulation of Blue Water as requested by the City in the March 28 petition. Therefore, to the extent Blue Water seeks to be subject to a different form of regulation than that determined by the Board in this Order, Blue Water may ask for further clarification.

Requirement for Filing by Blue Water related to Acquisition of Controlling Interest

In general, a company seeking to acquire a controlling interest in a regulated utility subject to the jurisdiction of the Board is required to file a petition with the Board pursuant to

15. See, e.g., Docket 6415, *Petition of Gleb Glinka, Chapter 7 Trustee in Bankruptcy of Vermont Electric Generation & Transmission Cooperative, Inc., for a certificate of consent, pursuant to 30 V.S.A. § 109, to transfer a hydroelectric generation facility located in Hartland, Vermont, to North Hartland, LLC and Petition of North Hartland, LLC for a certificate of public good, pursuant to 30 V.S.A. § 231, to own and operate the North Hartland Hydroelectric Plant and for de minimis regulation*, Order dated 02/11/03 at 17-18 and 22 (granting Section 109 and 231 approvals for owner-operator of FERC-licensed dam and approving request for *de minimis* Title 30 regulation on terms specified in stipulation between Department and Petitioner); Docket 6833, *Petition of Dalton Hydro, LLC, for a certificate of public good to own and operate certain hydroelectric generating facilities located at the Gilman Dam in the Town of Gilman, Vermont, and for de minimis regulation*, Order dated 07/17/03 at 6-7 and 9 (full Title 30 regulation not necessary as FERC-regulated dam was sole electric facility to be owned and operated by petitioner in Vermont, the power generated would be sold only at wholesale at market-based rates, and petitioner would not look to Vermont ratepayers to receive any recovery of its costs.)

16. Department Brief (8/14/14) at 4.

30 V.S.A. § 107(b). A controlling interest is defined as ten percent or more of the outstanding voting securities or such other interest as constitutes the means to direct or cause the direction of the management or policies of a company.¹⁷

The City maintains that no filing by Blue Water under Section 107 is needed. In the City's view, Blue Water will not be acquiring a controlling interest in Burlington Telecom because control over BT's operation and management will remain with the City until a future sale to another entity or the termination of the Lease.¹⁸ In its brief, the Department concludes that under the terms of the proposed Blue Water sale and lease financing, Blue Water will acquire a controlling interest in BT and have the means to direct or cause the direction of the management or policies of BT.¹⁹ Accordingly, the Department suggests that a petition from Blue Water pursuant to 30 V.S.A. §107 is an appropriate requirement.²⁰

Under the sale and lease financing agreements, BT's annual budgets as well as any material additions or improvements to BT's system will be subject to Blue Water's review and approval. In addition, any amendment or termination of D&F's contract as BT's manager will be subject to Blue Water's prior written approval. Furthermore, any sale of BT's Assets directed by the City at a price less than the pre-approval price will require Blue Water's consent, and Blue Water will have complete discretion to make a sale of BT's Assets after the fourth year of the Lease term. Such rights provide Blue Water with the means to direct or cause the direction of the management or policies of BT.

Accordingly, the Board agrees with the Department that Blue Water will acquire a controlling interest in BT and that Blue Water therefore is subject to the requirements of Section 107. We further agree with the Department that the existing evidentiary record in this proceeding is sufficient to support a determination that, under the circumstances of this case, the public good will be promoted by approving a request to transfer this controlling interest in BT to Blue Water pursuant to Section 107.²¹ The filing requirements applicable to Blue Water may be addressed

17. 30 V.S.A. § 107(e)(1).

18. City's PFD (8/12/14) at 46-48.

19. Department Brief (8/14/14) at 6 & 8.

20. Department Brief (8/14/14) at 10.

21. Department Brief (8/14/14) at 8.

as follows (at the option of Blue Water and the City): (1) Blue Water must file a Section 107 petition for the acquisition of a controlling interest in BT; or (2) Blue Water and the City must jointly file a motion to amend the March 28 petition under Rule 15 of the Vermont Rules of Civil Procedure to request approval of Blue Water's acquisition of a controlling interest in BT. If Blue Water and the City elect to file a Rule 15 motion, this request may be made in conjunction with Blue Water's intervention motion, or, in the alternative, with a filing by the City's attorneys demonstrating unambiguously that they are legally empowered to jointly represent the City and Blue Water in this proceeding. The other parties shall have ten days from the date of any such filing by the City's attorneys or by Blue Water to respond to such filing.

Proposed Conditions of BAMOs

In their brief, the BAMOs support approval of the sale of BT's Assets to Blue Water. However, they request that the Board impose certain conditions related to the establishment of a process to guide any future sale of BT's Assets during the Lease term. The BAMOs have particular concerns about the proposed change in ownership of BT from a public to a private entity and the effect on "Burlington's larger community and economic development goals, rates and the extent of community access services."²² They seek a process of broad public engagement over the next six months to help ensure a meaningful public ownership interest in BT to influence BT's management, policy, and decisions in the future. The BAMOs ask that the Board establish conditions for this public process that will determine goals and criteria related to a future sale. Specifically, the BAMOs request that the Board require the City to expand the Burlington Telecom Advisory Board by between three and five new members with particular experience in telecommunications, alternative corporate structures, and public engagement and direct the City to engage the public in a process with meaningful and open deliberations to make determinations related to the future ownership of BT.²³

The BAMOs serve an important role in providing and managing access to public, educational, and governmental programming ("PEG Access") to cable television customers. Given the strong relationship that the BAMOs have developed with BT and the benefits that BT

22. BAMO's Brief (8/14/14) at 3.

23. BAMO's Brief (8/14/14) at 10-11.

customers have apparently received from that relationship,²⁴ the Board appreciates their concerns about how that relationship might change upon a future sale of BT to a private entity. While the conditions requested by BAMOs may provide a useful mechanism to explore issues in connection with a prospective future sale of BT's Assets, the Board declines to impose such conditions. The Board agrees with the City that it would be premature to impose conditions with respect to the prospective future sale.²⁵ The Board also observes that any future owner of BT's Assets will be expected to comply with the same PEG Access obligations that are currently applicable to the City, d/b/a BT.

Proposed Modification of Condition 17 of CPG

Condition 17 of the CPG required the City to build out the BT network to serve every building in Burlington by September 13, 2008. The City requests that the Board modify this condition to remove the requirement that the BT network be extended throughout the City. In previous petitions in this Docket related to the amendment of Condition 17, the City requested an unspecified extension of the completion date to meet this requirement.²⁶ The Department supports the City's requested modification to Condition 17 and requests (with the City's agreement) that the Order further state that BT shall comply with Board Rules applicable to cable television companies (Board Rule 8.000 *et. seq.*), including the line extension provisions.

There are 18,882 service addresses within Burlington, and the BT network does not pass within 300 feet of 3,257 service addresses. Of these 3,257 service addresses, 1,913 are located on public rights-of-way. BT estimates that it would cost \$3,661,621 to build out the BT network to pass all the service addresses located along public rights-of-way.²⁷

In support of its request to eliminate the build-out requirement, the City states that Burlington Telecom does not have sufficient revenue and resources to build out its network to the remaining 1,913 service addresses located on public rights-of-way that are not currently passed by its network and that BT cannot sustain an investment of \$3.7 million and remain

24. Davitian pf. (7/3/14) at 3-7.

25. City's Reply Brief (8/22/14) at 3.

26. Petition for Amendment of Condition 17 of 9/10/08; Amended Petition of 9/30/09.

27. Barraclough pf. (3/28/14) at 9; exh. SB-4.

viable.²⁸ The City maintains that the retention of the requirement that BT complete the build-out throughout Burlington would result in a negative return on the investment for such a build-out and would adversely impact the overall value of BT.²⁹

Accordingly, the City argues that the retention of the build-out requirement would only do more financial harm and that the Board should eliminate the build-out requirement on the basis that it would affect the future sale price of the BT system and any recovery of the \$16.9 million investment in BT funded by taxpayers. In supporting the elimination of the build-out requirement, the Department observes that there is another cable television provider that can provide service to all 1,913 service addresses located on public rights-of-way that are not currently passed by BT's network.³⁰

The Board approves the proposed amendment to Condition 17 for the reasons presented by the City and the Department. In approving the proposed modification, the Board observes that BT plans to continue the build-out of its network in cases where it is able to recoup the value of its investment in a reasonable time frame.³¹

Assurance of Discontinuance

On July 3, 2014, the Department filed with the Board the proposed AOD between the Department and the City pursuant to 30 V.S.A. § 509(c).³² In the AOD, the Department and the City agree that an order of the Board approving the AOD will fully resolve all existing and ongoing violations of Conditions 2, 17, 56, and 60 of the CPG and request that the Board issue an order to that effect.³³ BT's ongoing CPG violations create a risk to the City's future ability to

28. Barraclough pf. (3/28/14) at 9.

29. Petition (3/28/14) at 10; Barraclough pf. (3/28/14) at 10-11.

30. Porter pf. (7/3/14) at 8; *see, also*, Petition (3/28/14) at 9.

31. Barraclough pf. (3/28/14) at 11.

32. The Board may accept an assurance of discontinuance in any case in which it may revoke a certificate of public good issued under 30 V.S.A. § 503 in lieu of such revocation.

Such assurance may include a stipulation for affirmative action by such company, payment of the costs of investigation, or of an amount to be held in escrow pending the outcome of an action or as restitution to aggrieved consumers, or any of the above. Any such assurance of discontinuance shall be in writing and may be sought and negotiated by the department of public service, subject to the approval of the board.

30 V.S.A. § 509(c).

33. Porter pf. (7/3/14) at 9-11; exh. Joint-1 at 12.

direct a sale of BT's Assets, as potential purchasers might be reluctant to purchase a cable and telecommunications system with ongoing CPG violations.³⁴

Based on the record in this case and other considerations, we conclude that all existing and ongoing violations of Conditions 2, 17, 56, and 60 of the CPG, as found and described in the Board's Order of October 8, 2010, are resolved. Therefore, while we appreciate the initiative taken by the City and the Department to present the Board with a clear procedural path toward conclusively resolving the regulatory consequences for BT's CPG violations, we do not find it necessary to accept or approve the AOD in lieu of revoking BT's CPG as contemplated by Section 509(c) and decline to do so. Instead, the Board's decision to treat these violations as resolved is based on the following evidence and considerations: (i) the amount of non-reimbursed advances to BT from the general fund has not increased since 2009, and BT has consistently operated on a positive net cash flow basis since at least October 2010;³⁵ (ii) the City has elected a new mayor, and the City's chief administrative officer, BT's general manager, and most of the BT executive staff, who were in place at the time of the conduct that led to the CPG violations, have long since been replaced;³⁶ and (iii) if the CPG were to be revoked or monetary penalties were to be imposed, City taxpayers and BT customers would bear additional consequences from the imposition of such penalties. In our judgment, no constructive regulatory purpose would be served by revoking BT's CPG or imposing monetary penalties that effectively would be visited upon City taxpayers and BT customers.

VI. CONCLUSIONS

For the reasons discussed above, we find that approval of the Settlement Agreement and the transactions and actions to implement the Settlement Agreement set out in the petition at issue in today's Order, and as modified herein, will promote the general good of the state. Specifically, in this Order, the Board:

34. Rusten pf. (3/28/14) at 15-16.

35. Finding 8, above.

36. Finding 4, above.

(i) approves the Settlement Agreement and authorizes the City to take action to implement the Settlement Agreement, including through payments to Citibank from non-Burlington Telecom assets;

(ii) approves, pursuant to 30 V.S.A. §§ 109 and 232, a sale by the City of substantially all the assets of Burlington Telecom to Blue Water and a lease of BT's Assets by Blue Water back to the City;

(iii) conditionally approves an amendment to BT's CPG to reflect Blue Water's ownership of BT's Assets and conditionally approves Blue Water's acquisition of a controlling interest in Burlington Telecom under 30 V.S.A. § 107 upon the closing of the sale and lease financing, subject to a compliance filing establishing the Board's personal jurisdiction over Blue Water and demonstrating Blue Water's assent to the Board's issuance of these approvals as detailed in this Order;

(iv) amends Condition 17 of BT's CPG to remove the requirement that BT build out its network to serve every address in Burlington; and

(v) determines that all existing and ongoing violations of Conditions 2, 17, 56, and 60 of BT's CPG, as found and described in the Board's Order of October 8, 2010, are resolved.

VII. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The Mediated Settlement Agreement dated as of January 29, 2014, between Citibank, N.A. ("Citibank") and the City of Burlington ("City") and McNeil, Leddy & Sheehan, P.C. (the "Settlement Agreement") is approved and the City is authorized to take action to implement the terms of the Settlement Agreement, including payments to Citibank from assets that are not accounted for by the City as assets of the enterprise fund of the City, d/b/a Burlington Telecom ("Burlington Telecom" or "BT").

2. A sale of Burlington Telecom assets to Blue Water Holdings LLC ("Blue Water") and a lease by Blue Water of BT assets to the City as part of a sale and lease financing with Blue

Water will promote the general good of the state pursuant to 30 V.S.A. §§ 109 and 232 and are approved.

3. The issuance of an amendment to the Certificate of Public Good ("CPG") of Burlington Telecom to reflect Blue Water's ownership of BT will promote the public good and is conditionally approved subject to a compliance filing to establish the Board's personal jurisdiction over Blue Water. At the option of Blue Water and the City, such compliance filing shall consist of either:

(A) a filing by the City's attorneys demonstrating unambiguously that they are legally empowered to jointly represent the City and Blue Water in this proceeding and, therefore, have the power to bind Blue Water to the Board's approval of the CPG amendment request; or

(B) a filing by Blue Water of a motion to intervene in this proceeding and to join in the City's CPG amendment request.

The other parties shall have ten days from the date of any such filing to respond to such filing.

4. Condition No. 17 of the CPG issued to Burlington Telecom on September 13, 2005, shall be amended to read in its entirety as follows:

Burlington shall file a line extension report with the Department by April 15 of each year that provides the following information relative to line extensions completed during the preceding calendar year:

- a. Location of line segment, including location of line segment by reference to nearest road(s);
- b. Length of strand, in feet or miles;
- c. Number of dwellings and multiple-unit business establishments passed, without discounting season dwellings or dwellings with a satellite dish;
- d. Date on which line was placed in service;
- e. A street map and description of the streets and areas of the City to which BT does not yet provide service.

5. Burlington Telecom shall comply with Board Rules applicable to cable television companies (Board Rule 8.000, *et. seq.*), including the line extension provisions.

6. Blue Water will acquire a controlling interest in Burlington Telecom upon the closing of the sale and lease financing and is subject to the requirements of 30 V.S.A. § 107. The filing requirements as set forth in (A) or (B) below (at the option of Blue Water and the City) shall be applicable with respect to such acquisition of a controlling interest:

(A) Blue Water shall file a petition related to its acquisition of a controlling interest in Burlington Telecom pursuant to 30 V.S.A. § 107; or

(B) Blue Water and the City shall jointly file a motion to amend the March 28 petition under Rule 15 of the Vermont Rules of Civil Procedure to request approval of Blue Water's acquisition of a controlling interest in BT and

(i) Blue Water shall file a motion to intervene in this proceeding to request approval of its acquisition of a controlling interest in BT, or

(ii) the City's attorneys shall make a filing demonstrating unambiguously that they are legally empowered to jointly represent the City and Blue Water in this proceeding.

The other parties shall have ten days from the date of any such filings to respond to such filing.

7. All existing and ongoing violations of Conditions 2, 17, 56, and 60 of the CPG, as found and described in the Board's Order of October 8, 2010, are resolved.

Dated at Montpelier, Vermont, this 3rd day of November, 2014.

s/James Volz)

) PUBLIC SERVICE

s/John D. Burke)

) BOARD

s/Margaret R. Cheney)

) OF VERMONT

OFFICE OF THE CLERK

FILED: November 3, 2014

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.