

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Joint Petition of Champlain Broadband LLC, City)
of Burlington d/b/a Burlington Telecom, Blue)
Water Holdings LLC for approvals, pursuant to 30) Case No. 18-0491-PET
§ 109, 231, 504, 47 U.S.C. § 214(e), and Section)
438)(c)(1) of the City of Burlington Charter)

MOTION TO INTERVENE OF SANDRA BAIRD, ESQ., JARED CARTER, ESQ., DEAN
CORREN, STEVEN GOODKIND, SOLVEIG OVERBY, ESQ., AND SHAY TOTTEN

Sandra Baird, Esq., Jared Carter, Esq., Dean Corren, Steven Goodkind, Solveig Overby, Esq., and Shay Totten move to intervene pursuant to PUC Rule 2.209(A) and (B).

1. THE FACTS

Sandra Baird, Esq., Jared Carter, Esq., Dean Corren, Steven Goodkind, Solveig Overby, Esq., and Shay Totten are residents of the City of Burlington. They are each Burlington taxpayers. Ms. Baird, Mr. Corren, Mr. Goodkind, Ms. Overby and Mr. Totten have been Burlington taxpayers from 2005 to the present; Mr. Carter has been a Burlington taxpayer since 2014.

The taxpayers of the City of Burlington are owed at least \$16.9 million from the investor or investors who have owned, own or will own Burlington Telecom’s assets. Burlington City Charter § 3-438(c)(1); *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 (In re: Petition to Effectuate a Settlement and Resolve Outstanding C.P.G. Violations, and Request for Associated Approvals)* Docket No. 7044, Order Issued October 10, 2010, 2010 Vt PUC Lexis 314, Discussion at 2010 Vt PUC Lexis 314 pp. 28-29 (“The charter provision appears to anticipate that the significant costs of investment in the network and facilities of the business would be financed by

private investors, and is directed at ensuring that taxpayers do not ultimately bear the cost of investments funded by private investors if the enterprise should fail.”)

The Commission’s latest order in this matter made clear that the \$16.9 million debt must be repaid. *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 (In re: Petition to Effectuate a Settlement and Resolve Outstanding C.P.G. Violations, and Request for Associated Approvals)* Docket No. 7044, Order Issued November 3, 2014, 2014 Vt PUC Lexis 517, Findings 3, 10, 54, 57, Discussion at 2014 Vt PUC Lexis pp. 44-46, 53, and Order ¶ 1 (\$16.9 million owed).

The City Council, too, has acknowledged the debt. See, *e.g.*, Comments of Councilor Jane Knodell at the Burlington City Council meeting held on February 9, 2015 (“ Beyond accounting practices, we need to keep in mind that our ultimate overarching goal in all of our decisions about Burlington Telecom should be what’s going to move us in the direction of permanent, local control and ownership of this telecommunications network, because this is what’s going to drive our long-term, economic vitality, the creation of good jobs, which will in the long run be the basis for strong credit ratings. And this is what is going to insure the eventual repayment, over time, of the \$16.9 million.”)

The Petition in this matter and the prefiled testimony supporting the Petition propose to transfer ownership of all of the assets of the Burlington Telecom system to Champlain Broadband LLC – **but the Petition and prefiled testimony do not propose imposition of conditions ensuring repayment to City taxpayers of the \$16.9 million they are owed.** To the contrary, the terms of the proposed new Certificate of Public Good and sale would transfer all assets to Champlain Broadband, LLC free of any lien, mortgage or other security or condition to ensure repayment to taxpayers of the \$16.9 million. The debt to taxpayers would, as a practical matter,

be wiped out. The assets will be transferred to Champlain Broadband, LLC, without any obligation to repay the taxpayers.

The Petition does **not** ask that the Commission find, under the authority granted to the PUC by Section 438(c)(1) of the City's Charter, that the \$16.9 million the Commission has already found are owed to taxpayers will be repaid. No such finding could be made, based on the prefiled testimony and attachments. Without such a finding, the PUC lacks authority to approve of a CPG. Section 438(c)(1) states that the PUC, "in considering *any application for a certificate of public good, shall* ensure that any and all losses from these businesses, and, in the event these businesses are abandoned or curtailed, any and all costs associated with investment in cable television, fiber optic, and telecommunications network and telecommunications business-related facilities, are borne by the investors in such business, and in no event are borne by the City's taxpayers..." Approval without such a finding also would contravene 30 V.S.A. §§ 109 (general good), 231 (general good) and 504(c)(2) (compliance with all state laws).

It appears that the City will receive *some* payment from the transaction, but not the \$16.9 million owed – it appears the payment will be \$5,000,054.00. The Petition and supporting testimony do not purport to ensure that even that \$5 million will be repaid.

Waste and misuse of the City's resources will result if the Petition is granted. Movants can demonstrate that the \$16.9 million loss is entirely avoidable. Essentially the same projections of revenue increase that Champlain Broadband has relied upon (and presented to the public) would be garnered by Burlington Telecom if it retained its CPG and continued to operate the system, subject to existing CPG conditions 56 and 60 -- which ensure repayment. Movants make an offer of proof to this effect.

Each Movant will directly suffer harm if the Petition is granted. Their taxes will be directly affected, because they will have to pay more taxes than would otherwise be necessary if the \$16.9 million were repaid.

Movants also hereby submit an offer of proof that Ms. Overby, Mr. Corren, Mr. Goodkind and Mr. Totten have been actively involved in City proceedings in order to protect taxpayer interests in this matter, and can assist the PUC in understanding the factual and legal background for the Petition and why it should be rejected.

2. THE LEGAL STANDARDS FOR INTERVENTION

Board Rule 2.209 governs intervention.

2.209 Intervention

(A) Intervention as of right. Upon timely application, a person shall be permitted to intervene in any proceeding (1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

(B) Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

(C) Conditions. Where a party has been granted intervention, the Board may restrict such party's participation to only those issues in which the party has demonstrated an interest, may require such party to join with other parties with respect to appearance by counsel, presentation of evidence or other matters, or may otherwise limit such party's participation, all as the interests of justice and economy of adjudication require.

The rule tracks Vermont Rule of Civil Procedure 24.

The Commission has ruled that in considering requests for permissive intervention status in an investigation, permission should be granted where party may be able to assist the Commission in determining the facts or the appropriate remedy. *Investigation pursuant to 30 V.S.A. § 30 and 209 concerning the construction and operation of a meteorological tower in Swanton, VT*, Docket No. 8561, Order issued June 9, 2016.

The Board also has rejected the argument that a substantial, particularized interest is required for intervention. *Amended Joint Petition of Central Vermont Public Service Corporation...*, Docket No. 7770, Order re Intervention Motions, November 1, 2011, 201 Vt PUC Lexis 735 pp. 16-25.

3. APPLICATION OF THE LAW TO THE FACTS

Each Movant should be granted intervenor status under Rule 2.209(A)(3), because they have “demonstrate[d] a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.” The only other possible tribunal that would have jurisdiction to hear the Movants’ objections would be the Chittenden Superior Court. However, it is likely that a motion to dismiss would be granted under the doctrine of primary jurisdiction. *Traveler’s Indemnification Co. v. Wallis*, 2003 VT 103 ¶¶ 9-20, 176 Vt. 167, 845 A.2d 316. The City manifestly does not adequately represent movants’ interests. It is not known at this juncture whether the Department will challenge the Petition on the grounds that it violates the City Charter

Movants also meet the standards of Rule 2.209(B), governing intervention by permission. They have articulated a “substantial interest” which may be affected by the outcome of these proceedings – their harm as City taxpayers. The proceedings afford “the exclusive means” by

which they can protect that interest, because, as stated above, it is likely that the doctrine of primary jurisdiction would bar suit in Superior Court. The City's position is contrary to those of movants. The Department's position is not yet known. Movants commit to not to unduly delay the proceedings, but they will seek to ensure that the statutory factors are addressed. They will assist the Commission in determining the facts or the appropriate remedy. *Investigation pursuant to 30 V.S.A. § 30 and 209 concerning the construction and operation of a meteorological tower in Swanton, VT*, Docket No. 8561, Order issued June 9, 2016.

CONCLUSION

Sandra Baird, Esq., Jared Carter, Esq., Dean Corren, Steven Goodkind, Solveig Overby, Esq., and Shay Totten should be granted intervenor status.

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