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 § 109, 231, 504, 47 U.S.C. § 214(e), and Section 438)(c)(1) of the City of Burlington Charter	)))))	Case No. 18-0491-PET

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

Sandra Baird, Esq. et al. ("Intervenors") respond to the opposition filed by the City of Burlington to their motion to intervene pursuant to PUC Rule 2.209(A) and (B).

> ►The City's position fails to recognize the Supreme Court of Vermont's rulings on intervention, and wrongly insists on a "particularized" harm standard outside of § 248 cases.
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> ►The City argues that the "scope" of this proceeding does not include whether the proposed CPG complies with 24A V.S.A. § 3-438(c)(1) – but the statute states that the Commission, when asked to approve of 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…"
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> ►The City objects that the fate of the $16.9 million was discussed in the Commission's 2014 ruling in Docket No. 7044, and therefore cannot be re-visited here – but Intervenors were not parties to Docket No. 7044, and, even if they were, issue preclusion applies only to issues that were actually litigated and decided, not issues that were discussed but not decided.

1. THE PARTICULARIZED HARM STANDARD

The City's objection fails to recognize the precedents of the Vermont Supreme Court. In *In re Vermont Public Power Supply Authority*, 140 Vt. 424, 433-434, 440 A.2d. 140, 1434-144

(1981), the Court ruled that Title 30 sets forth a broad role for citizens in Commission proceedings. The intervention rule at issue was V.R.C.P. 24; Rule 2.209 adopts nearly identical wording.

Section 208 of title 30 states that the Commission may hear any complaint against a regulated corporation "concerning any claimed unlawful act or neglect adversely affecting the complainant, who may be a company or five or more individuals or, if less than five are so affected, then any one of them." The statute explicitly authorizes "five or more individuals" to invoke the Commission's jurisdiction if they are adversely affected.[1] The statute does not limit participation to individuals whose harm is particularized. Even if all of the ratepayers of a utility are similarly affected, then any five of them may initiate the proceeding.

Citing § 208, the Court in *In re Vermont Public Power Supply Authority* ruled that the seven ratepayers in that case had been unlawfully denied the right to intervene. Their interest was substantial, because the project at issue would affect their electric rates. The Commission proceeding was the exclusive forum that would address their concerns. Therefore, they had a right to intervene unless another party affirmatively proved that their interests were being adequately represented by existing parties:

> Any disposition on the merits of the loan by the Board, without prior participation in the hearing, will violate the Seven Ratepayers' right to intervene "unless [their] interest is adequately represented by existing parties." V.R.C.P. 24(a). VPPSA argues that the Seven Ratepayers have failed to prove inadequate representation. However, they bear no burden of proof on this issue. Intervention is to be allowed, once the other conditions have been shown, unless the Board determines that representation will in fact be adequate. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1909, at 521 (1972).

[1] If less than five are affected, then less than five may participate.

> Further, the degree of inadequacy required "should be treated as minimal." *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).

The facts of *In re Vermont Public Power Supply Authority* are not meaningfully distinguishable from the present facts. The six taxpayers in this case, like the seven affected ratepayers in that case, will suffer financial consequences from the loss of the $16.9 million. The harm is not particular to them, just as the harm to the seven ratepayers in *In re Vermont Public Power Supply Authority* was not particular to those ratepayers.

The concept of a "particularized" interest does not appear in the *In re Vermont Public Power Supply Authority* ruling. The Board's rule uses the same language as V.R.C.P. 24, which the Supreme Court was applying. The Vermont Supreme Court has never read into Rule 24 a "particularized" interest criterion.

The need for a "particularized" interest arises, in Vermont Supreme Court precedents, only with regard to whether a party will suffer a sufficient injury to enjoy constitutional standing. See, *e.g.*, *Turner v. Shumlin*, 2017 VT 2, 163 Vt. 173. In taxpayer cases, this standard is satisfied when the taxpayer alleges waste or misuse of public resources, as here. *Taylor v. Town of Cabot*, 2017 VT 92, ¶¶ 9-11. Accord, *Central Vermont Public Service Corp. v. Town of Springfield,* 135 Vt. 436, 438, 379 A.2d 677 (1977) (finding standing where taxpayer alleged waste of municipal assets in violation of municipal charter).

The City hangs its hat on precedents from § 248 cases holding that the interests must be not only substantial but particularized. Section 248, however, is a unique statute. It is a broad delegation of legislative power to review the conceptual justification for large energy projects.

Potentially affected landowners, neighbors and community residents often number in the hundreds or thousands. Affected landowners are guaranteed by statute a right to be heard – but that right arises later, during eminent domain proceedings.[2] It is in this context that the Commission has held that persons who seek to intervene in § 248 proceedings must demonstrate a particularized interest.

The Supreme Court's most recent ruling on intervention in a § 248 case was an appeal from the Commission's ruling that Allco lacked standing to intervene in a Green Mountain Power application or a Certificate of Public Good for a solar project. The Court applied the standards for intervention under V.R.C.P 24 without mention that a "particularized" interest must be shown. *In re GMP Solar-Richmond LLC*, 2017 VT 108, ¶¶ 20-21.

As previously noted, the Commission explicitly rejected the argument that a particularized interest was required for intervention in a contested non-§ 248 case, the GMP-CVPS merger case. *Amended Joint Petition of Central Vermont Public Service Corporation…,* Docket No. 7770, Order re Intervention Motions, November 1, 2011, 2011 Vt PUC Lexis 735 pp. 16-25. In doing so, the Commission noted that the utilities acknowledged that this limitation has generally been applied in §248 cases:

> The Petitioners base their opposition to the motion to intervene filed by the Group of 46 Ratepayers on a number of grounds, including the failure of the Group of 46 Ratepayers to demonstrate a 'particularized interest' that will be affected by the proposed transactions. Petitioners note that <u>in the context of Section 248</u> proceedings, the Board has concluded that generalized concerns

[2] Unlike federal eminent domain proceedings for energy projects, in Vermont the utility must prove need as well as the proper level of compensation for each and every affected parcel of land. Again, however, this arises during later eminent domain proceedings.

> as to health or economic impacts that affect the movant and the larger public equally provide an insufficient basis for permissive intervention.

Ibid (emphasis added). *See also Investigation into rates charged by Sprint Communications, LP, for provision of telephone services to the Northwest Correctional Facility in Swanton, VT*, Docket No. 6373, Order re Motions to Intervene, Motions re: Scope, Motion to Dismiss and Notice of Hearing, Aug. 31, 2000, 2000 Vt PUC Lexis 121, pp.2-10 (granting intervenor status over utility objection in rate case, without any showing of particularized harm) and *Investigation into Principles, Authority and Proposals for Reform of Vermont's Electric Power Supply*, Docket No. 6140-A, Order on Motions to Intervene, June 29, 1999, 1999 Vt PUC Lexis 362, pp.1-4 (in investigation proceeding, granting intervenor status over utility objection, without any showing of particularized harm).

The City also cites a Hearing Officer's pretrial ruling in Docket No. 7044 on August 24, 2009 as support for its argument that particularized harm must be shown. The Hearing Officer's ruling addressed a request by the union representing police officers to intervene. The ruling did not consider whether particularized harm needed to be shown. That concept is not mentioned in the ruling. The union had cited the potential impact of the case on the City's collective bargaining position as the basis for its intervention. The Hearing Officer ruled that this impact was insufficient for intervention and would set a troubling precedent:

> To permit someone to intervene in a proceeding on the basis that its negotiations with a municipal government may be affected by the impact of the proceeding on the financial resources of the municipal government would set an unfortunate precedent that could greatly expand the boundaries for permissive interventions in other proceedings. Moreover, the Association has a separate and more appropriate forum, its on-going negotiations, in which it can address its concerns.

The ruling did not address *In re Vermont Public Power Authority*, the cases under Rule 24, or the distinction between cases arising under § 248 and other litigation.

The City's insistence on a showing of particularized harm should be rejected.

2. SCOPE AND TRYBULSKI

The City argues that the "scope" of this proceeding does not include whether the proposed C.P.G. complies with 24A V.S.A. § 3-438(c)(1). There are two flaws with this "scope" argument.

The first is that the Charter states that the Commission, when asked to approve of 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…" Champlain Broadband seeks a C.P.G. to assume operation of the Burlington Telecom business – but without reimbursement of the City's taxpayers for their investment in the business.

Under *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112, Vt. 1 (1941), the Commission lacks authority to issue any Certificate of Public Good without ensuring that all losses and the cost of all investments are borne by investors and "in no event are borne by the City's taxpayers."

> The Public Service [Board] is an administrative body, clothed in some respects with quasi judicial functions, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience and to determine facts upon which existing laws shall operate, and having, in a sense, auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly. It is a body exercising special and statutory powers not according to the course of the common law, *as to which nothing will be presumed in favor of its jurisdiction. It has only such powers as are expressly conferred upon it by the Legislature, together with such incidental*

> *powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation.*

Trybulski, at 7 (emphasis added).

The present proceedings are a request for a Certificate of Public Good. The Charter provisions apply.

3. SCOPE AND ISSUE PRECLUSION

The City also argues that this issue was already decided in the Commission's 2014 ruling. That argument too is flawed.

A ruling by a tribunal is not binding upon individuals who were not parties. *In re Tariff Filing of Central Vermont Public Service Corp.*, 172 Vt. 14, 21, 769 A.2d 668, 674 (2001). None of the six Intervenors were parties to the 2014 ruling.

Even if the taxpayers were, or are deemed to have been, parties, issue preclusion applies only to issues that were actually litigated, actually determined, and essential to the decision the Commission issued. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Daiello v. Town of Vernon*, 2018 VT 17 ¶ 13 (quoting Restatement of Judgments, 2d § 27).

The City has not argued, and cannot argue, that it actually litigated whether the Commission had the authority to rule, and was ruling, that Burlington Telecom's assets could be transferred to Champlain Broadband and a C.P.G. awarded to Champlain Broadband

without a condition or security to "ensure" that the $16.9 million owed to the City for its investment in the business would not be "borne by taxpayers." The publicly available record (the documents on the EPUC website) in Docket No. 7044 shows that no party raised this issue.

The City also has not argued, and cannot argue, that the Commission's prior ruling actually determined this issue, and that the issue was essential to its ruling. The ruling is silent on this issue.

The order mentions 24A V.S.A. § 3-438(c)(1) in Finding #2 and Footnote #4. Both mentions are by way of background, explaining why Conditions 56 and 60 were initially imposed on Burlington's C.P.G. The order does <u>not</u> address whether the Commission had the authority to rule, and was ruling, that all of Burlington Telecom's assets could be transferred to another entity, and that entity could then be awarded a C.P.G., without a condition or security to "ensure" that the $16.9 million owed to the City for its investment in the business would not be "borne by taxpayers."

The issue was not litigated or determined because the parties and the Commission had no reason, at that time, to address it. They had no reason to do so because the order contemplated a potential future sale of the assets to a new entity with a new C.P.G., at which time the net proceeds to the City would be ascertainable and the Commission would be asked to approve of the sale and the new C.P.G.

Findings 48-54 made this explicit (emphasis added):

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 [***31**] 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).

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Having found that the City did not know "whether" or "to what extent" the $16.9 million might not be recovered, the Commission's Discussion of these findings reiterated its understanding that it remained possible that the City's $16.9 million could be recovered -- particularly if the sale were to occur within the following four years.

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.**

The issue of compliance with the Charter by ensuring recovery of the $16.9 million was not actually litigated, not actually determined, and not essential to the 2014 decision, therefore, for two reasons. One was that there was no evidence of "whether and to what extent" the sale price would be large enough to reimburse the $16.9 million. The second was that Vermont law was going to require future Commission approval of both the sale of the assets and the award of a new C.P.G. – which the City and Champlain Broadband now seek. This case, therefore, calls upon the Commission to determine whether a C.P.G. should be awarded to Champlain Broadband without a condition or security to "ensure" that the $16.9 million owed to the City for its investment in the business would not be "borne by taxpayers."

The City argues (memorandum p.9) that the 2014 order "fully resolved the regulatory issue of the City's unauthorized advance of $16.9 million in general funds to Burlington Telecom." The order did resolve all issues pertaining to the City's violation of its Certificate

of Public Good, as the order says.[3] The order did not mention, much less decide, whether any Certificate of Public Good should, or legally could, be issued to whatever entity in the future might seek to purchase, on then-unknown terms, assets from Blue Water and the City under 24A V.S.A. § 3-438(c)(1). The Commission does not pre-approve Certificates of Public Good on unknown terms to unknown entities, did not do so in 2014, and did not approve of that potential C.P.G. under 24A V.S.A. § 3-438(c)(1).

4. SCOPE, ISSUE PRECLUSION AND FAIRNESS

If the Commission determines that Intervenors were or are deemed to have been parties to the 2014 ruling, and that this issue was actually litigated, actually determined and essential to the 2014 decision, Intervenors ask that issue preclusion not be applied nonetheless. They seek relief under the fourth and fifth parts of the issue preclusion doctrine.

> The elements of issue preclusion are:
>
> (1) preclusion is asserted against one who was a party or in privity with a party in an earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Daiello v. Town of Vernon, *supra*, ¶ 13. See also the Restatement of Judgments, 2d, §§ 28(5)(c) and 75.

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[3] "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 [*7] on other evidence and considerations." 2014 Vt PUC Lexis 517 at 5.

The 2014 proceedings did not present a full and fair opportunity to litigate this issue, and applying preclusion would be unfair. The Petition in that case did not seek a ruling that the Commission had the authority to rule, and should rule, that all of Burlington Telecom's assets could be transferred to Champlain Broadband without security to "ensure" that the $16.9 million owed to the City would not be "borne by taxpayers." Intervenors had no notice, at that time, that the City would adopt the position in the future that this issue had been decided in the 2014 proceedings. They had no cause to seek to intervene.

CONCLUSION

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

They agree to work diligently so as to avoid any delay of these proceedings. They agree to be joined pursuant to Rule 2.209(C).

Date: April 24, 2018

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