



## MEMORANDUM

*This document has been filed via ePUC*

---

**TO:** Vermont Public Utility Commission      **FROM:** Counsel for Citibank, N.A. and CitiCapital Municipal Finance

**RE:** Case No. 18-0491-PET—  
Citibank's Public Comments in  
Support of Transaction Approval      **DATE:** June 22, 2018

---

Citibank, N.A. and CitiCapital Municipal Finance ("Citibank"), through counsel, respectfully submit these public comments for consideration by the Vermont Public Utility Commission (the "PUC"), urging approval of the asset transfer and grant of the related Certificate of Public Good ("CPG") (together, the "Transaction") from Blue Water Holdings LLC ("Blue Water") and the City of Burlington d/b/a Burlington Telecom (the "City") to Champlain Broadband LLC ("Champlain"), as proposed in the Joint Petition.

### **I. The 2014 Citibank Settlement Agreement Set the Terms for This Proceeding.**

#### **a. The City's Lease Agreement with Citibank**

In 2007, the City entered into a Master State and Municipal Lease/Purchase Agreement with Citibank (the "Citibank Lease").<sup>1</sup> The Citibank Lease provided for the City's lease-to-purchase of telecommunications equipment and for the construction and operation of city-wide infrastructure for a fiber optic network for the delivery of voice, data and cable television services by the Burlington Telecom system (alternatively referred to as "BT"). Through the Citibank Lease, the City secured more than \$33,500,000.00 from Citibank for Burlington Telecom's construction and ongoing operations. In return, the City was obligated to make rental payments to Citibank according to a defined payment schedule.<sup>2</sup>

Vermont law provides that while Burlington Telecom is operated by the City, its taxpayer revenues may not be used to cover its operating losses. 24 App. V.S.A. § 3-438(c)(1). Accordingly, as a condition of entering into the Citibank Lease, Citibank sought, and the City provided, express

---

<sup>1</sup> Initially, the City secured approximately \$22 million in funding through Koch Financial. In June 2007, the City sought \$33.5 million from Citibank to refinance the Koch facility and finance its continued build-out of BT.

<sup>2</sup> Although some, including intervenors in this proceeding, speak loosely of "BT" or "Burlington Telecom" as a separate legal entity, it is not; rather it is an enterprise undertaken by the City which alone is legally responsible for its affairs, including its obligations to Citibank and co-petitioners in the current proceeding.

assurances that the City's non-taxpayer revenues were sufficient to fund the required Citibank Lease payments.

b. The City's Multiple Breaches of the Citibank Lease

After securing the funds from Citibank and affirming its ability to make its rental payments for the maximum twenty-year term of the Citibank Lease, the City reneged on its promises later claiming it lacked sufficient funds for payment. The City further elected not to appropriate the funds in its annual budget necessary to support its payment obligations and thereafter also breached its attendant obligation to promptly turn over to Citibank all of the assets constituting BT as it had expressly agreed when it induced Citibank to advance the \$33.5 million financing.

In 2010, the City was declared in default. A forbearance period was negotiated, during which Citibank agreed to allow the City additional time to appropriate funds and make the requisite payments. At the end of that period, however, the City failed to make payments due under the Citibank Lease.

The City's failure to appropriate funds to pay Citibank as agreed constituted a termination of the Citibank Lease. Upon termination, title to all of the telecommunications equipment and other assets that made up BT vested in Citibank. Accordingly, Citibank requested that the City de-install and return the equipment in accordance with the Citibank Lease. Despite due demand by Citibank, the City refused to de-install and return Citibank's leased property.

c. The Citibank Lawsuit Resulted in the 2014 Settlement Agreement

In 2011, as a direct result of the City's multiple breaches of the Citibank Lease, including its multi-million-dollar payment defaults and unexcused refusal to return the Citibank-owned equipment, Citibank was forced to file suit in federal court against the City of Burlington. The Complaint included claims against the City, not limited to Burlington Telecom assets and revenue, seeking in excess of \$33,500,000 in monetary damages as well as equitable relief.<sup>3</sup> After a period of vigorous litigation, that federal court action was stayed when the parties reached a settlement agreement on January 29, 2014 (the "2014 Settlement Agreement").

The 2014 Settlement Agreement was expressly conditioned on the City's commitment that an arm's-length sale of the Burlington Telecom assets to a private entity would occur and that one-half of the recovery from that sale would be paid to Citibank. This plan was ratified by the City Council and the PUC's predecessor, the Public Service Board ("PSB"), because of its material beneficial impacts. The 2014 Settlement Agreement shielded the City's taxpayers from substantial liability for the City's breaches, and allowed the City to continue to operate Burlington Telecom to rebuild its enterprise value, so it might then direct its arm's-length, commercially reasonable sale to a third party. In return, the 2014 Settlement Agreement imposed two essential obligations on the City: (1) to make an approximately \$10.5 million payment to Citibank, of which \$6 million would be funded via financing

---

<sup>3</sup> *Citibank, N.A., as assignee of CitiCapital Municipal Finance v. City of Burlington, et al.*, No. 2:11-cv-214 (D. Vt. Sep. 2, 2011).

secured by the City; and (2) to complete the arm's-length sale of Burlington Telecom to a third party and deliver 50% of its sale proceeds to Citibank.

In December 2014, to finance its obligations under the 2014 Settlement Agreement, the City entered into a sale and lease financing agreement with Blue Water (the "Blue Water Lease"), through which Blue Water purchased Burlington Telecom's assets from Citibank and leased them back to the City. Consistent with the requirements of the 2014 Settlement Agreement, the Blue Water Lease expressly required the City to exercise "commercially reasonable efforts" to "maximize the value" of the telecommunications system so as to "increase [the] potential sales price." The Blue Water Lease further required the City to sell the telecommunications system to a "qualified purchaser," defined as a person or entity that "has the capability of operating a telecommunications company of size and service similar to Burlington Telecom and reasonably expected to satisfy any statutory criteria in order to obtain a certificate of public good" from the PUC. As described more fully below, the Blue Water Lease, with these express conditions, was approved by the PSB as in the public good.

## **II. The PUC's Jurisdiction is Limited to Approval or Denial of the Transaction.**

Under 30 V.S.A. §§ 109, 231 and 232, the PUC's "jurisdiction is limited to the express powers conferred upon it by the Legislature, as well as incidental powers necessary to the exercise of expressed powers."<sup>4</sup> Its jurisdiction over regulated companies is further limited by statute. The Joint Petition asks the PUC to approve the Transaction, and to issue such certifications, consents and designations as will allow Champlain to operate Burlington Telecom as a Vermont telecommunications network and cable television system, and to revoke the current certifications and designations that have permitted the City and Blue Water to operate the network.

In these proceedings, the PUC is limited to approving or denying the Transaction based upon the applicable public good standard, and to making the enumerated findings required for issuance of a CPG. *See* 30 V.S.A. §§ 109, 231 and 504; PUC Rule 8.214(B) (listing EMCO criteria).

The City's Charter provides 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, the State of Vermont, or are recovered in rates from electric ratepayers.

24 App. V.S.A. § 3-438(c)(1).

---

<sup>4</sup> *See In re Doolittle Mountain Lots, Inc.*, 182 Vt. 617 (2007) (citing *Green Mountain Power Corp. v. Sprint Comm'ns*, 172 Vt. 416, 419 (2001)).

Here, however, where a private party (Champlain), and not the City, is the CPG applicant and there are neither investors nor investments at issue, the City Charter provision is inapposite. In considering whether to issue a new CPG to Champlain, the PUC is limited to consideration of the factors enumerated by statute and PUC Rules. Here, the PUC is not required to—indeed, has no authority to—engage in the investment cost analysis under § 438(c)(1) relating to its previous grant of a CPG to Burlington. Moreover, there is no proposal to abandon or curtail service, and there are no “investors” to bear theoretical municipal “investment” losses or costs contemplated in § 438(c)(1).<sup>5</sup> Instead, the Transaction involves the continuation of services by Champlain—a private buyer, not an investor. Neither Citibank nor Blue Water can reasonably be classified as investors—they are lessors. Further, the City is a mere conditional lessee for a limited term whose right to involve itself in this Transaction exists only at sufferance, subject to the terms and conditions of the 2014 Settlement Agreement and the Blue Water Lease.<sup>6</sup>

### **III. The PSB Approved the 2014 Settlement Agreement and Resolved All Existing Regulatory Violations.**

An unrelated issue has been inappropriately raised during these proceedings by intervenors regarding use of \$16.9 million<sup>7</sup> of City funds by former City officials ostensibly to provide short-term financing to Burlington Telecom between 2007 and 2009. This decade-old issue is both factually and legally irrelevant, outside the scope of these proceedings and beyond the PUC's jurisdiction to consider.

In 2010, the PSB determined that the City's inappropriate utilization of these funds violated Conditions 56 and 60 of the City's CPG. In 2014, the PSB issued its Order approving the 2014 Settlement Agreement and the transaction with Blue Water that allowed the City to restructure its obligations and resolve all existing regulatory violations—including its violations of CPG Conditions 56 and 60. *Petition of City of Burlington d/b/a Burlington Telecom*, Docket No. 7044, Final Order (Nov. 3, 2014) (the “2014 Final Order”). By its express terms, the 2014 Final Order completely resolved the CPG violations pertaining to the City officials' misappropriation of funds, finding conclusively that the Blue Water Lease was necessary to provide for the cash payment and sale process as required by the 2014 Settlement Agreement and to promote the general good of the state. The 2014 Final Order also expressly acknowledged it was within the City's authority to make a determination whether, and to what extent, it would write off the \$16.9 million in advances and record a loss. With due respect to the PUC, its order allowing the so-called “Six Taxpayers<sup>8</sup>” to intervene, implying that the 2014 Final Order was in some sense nevertheless not final and the matters adjudicated therein were open for relitigation in the pending proceeding, is plain error.

---

<sup>5</sup> See generally Joint Petition; see also Joint Petitioners' Response to DPS Information Request No. Q.DPS:CB.1.2.

<sup>6</sup> Indeed as noted above, the generalized notion that the City in any way “owns” the telecommunications equipment or the network fails to comport with the indisputable fact that legal ownership of the property constituting the Burlington Telecom network has never been vested in the City.

<sup>7</sup> Assuming *arguendo* the PUC could lawfully require funds be repaid to the City in derogation of the Citibank Settlement and the Blue Water Lease, in preference to its creditors including Citibank, Citibank would immediately seek to acquire a security interest in that amount as partial repayment of the City's outstanding obligations to Citibank.

<sup>8</sup> Sandra Baird, Jared Carter, Dean Corren, Steven Goodkind, Solveig Overby, and Shay Totten.

Even in 2014, the PSB's jurisdictional authority over the City's prior inappropriate advancement of funds to Burlington Telecom was limited to a determination of whether the City violated any material provision of its CPG. *See* 30 V.S.A. § 509. Under that statute, if a violation is found, the PUC could either revoke the offender's CPG, or accept an assurance of discontinuation of the violating practice. *Id.* The PUC was and is not authorized to impose additional conditions in the pending proceeding, most conspicuously as to matters it has already expressly deemed finally resolved. Here, the PSB determined in 2010 the City had violated its CPG and its 2014 Final Order then definitively and completely resolved those CPG violations, specifically including those pertaining to the City's misuse of funds. In so doing, the PSB conclusively found the Blue Water Lease and the related conditions, including this arms-length sale process integral to the 2014 Settlement Agreement, were within the general good of the state.<sup>9</sup> Having disposed of these issues, its 2014 Final Order is *res judicata*, and the PUC has no present authority under § 509 or otherwise to decline to approve the Transaction on the same basis, to revoke Burlington's CPG or to require that Burlington take any further action to address those violations, including by placing related conditions on approval of this Transaction.

#### **IV. The PUC Should Approve the Transaction as the City's Only Legitimate Path Forward.**

Should the PUC fail to approve the Transaction, it will deprive the City and its taxpayers of substantial financial benefit. The Blue Water Lease approved by the 2014 Final Order temporarily allows the City to direct the sale of Burlington Telecom's assets for a period of four (4) years that expires on December 31, 2018. Accordingly, if the Transaction is not approved, Blue Water will direct any sale after that date. More importantly, the City's right to participate in the net proceeds of a future sale has dropped precipitously, and will continue to decrease as time passes.<sup>10</sup> Put another way, losing the Transaction will harm the City (and its taxpayers), not help it by rejecting the only sale under which it may maximize its financial recovery. And in the process, it will also substantially harm Citibank, cause the failure of essential consideration supporting the 2014 Settlement Agreement and, therefore, threaten the settlement itself.

The Transaction strikes a necessary balance. It maximizes financial benefit to the City through preservation of benefits and obligations under the 2014 Settlement Agreement and the Blue Water Lease, while allowing the public to continue to enjoy the service and contributions of the Burlington Telecom utility. Critically, the Transaction is the only option before the PUC. It is fundamentally inaccurate and misleading to construe the Joint Petition and its proposed Transaction as one of several potential alternatives. It is the only proposal, and the only transaction pursuant to which the City will

---

<sup>9</sup> The 2014 Settlement Agreement expressly required the City to pursue and obtain the necessary approvals from the PSB to cure any violations of the CPG for Burlington Telecom for, inter alia, precisely the reason that it not be susceptible to resurrection as now attempted by the Six Taxpayer intervenors. Citibank, along with all parties to the proposed Transaction, have reasonably relied upon the PSB's 2014 Final Order deeming Burlington Telecom's violations cured.

<sup>10</sup> Section 3.2 of the Burlington Telecom Management and Sale Agreement between Blue Water and the City approved by the PSB's 2014 Final Order provides the City's participation in the net sale proceeds shall be 50% for a buyer produced by the City within three (3) years after the Commencement Date of the Blue Water Lease (*i.e.*, by December 31, 2017). The Transaction with Champlain is such a sale. In the fourth, fifth and sixth years after the Commencement Date (*i.e.*, after December 31, 2017, 2018 and 2019) the City's participation in the net sale proceeds drops to 35%, 25% and 10%, respectively.

participate and profit at the maximum level permitted under the terms of the Blue Water Lease and the 2014 Settlement Agreement.

Although the pursuit of a “local” option remains an obscure philosophical preference championed by certain community members including the Six Taxpayer intervenors, the mirage inherent in this approach has been explicitly acknowledged and rejected by the City itself. The Keep Burlington Telecom Local (“KBTL”) proposal was, at all times, fundamentally non-viable. It would have neither satisfied the City’s contractual duties under the 2014 Settlement Agreement and the Blue Water Lease, nor survived regulatory scrutiny before the PUC. KBTL’s over-reliance on debt subject to usurious interest rates, its patent lack of capital, its lack of managerial capacity, and its low overall value—more than \$20 million less than demonstrated market value—meant it could not present a legitimate path forward for the City. Still, the advocacy of KBTL’s supporters was not wasted as it no doubt helped shape the sale process to include a focus on local goals and to improve the overall public benefit that will be obtained through this Transaction.

#### **V. The PUC Erred in Allowing the Six Taxpayers to Intervene.**

As discussed, the PUC’s May 9, 2018 decision to allow the so-called Six Taxpayers to intervene was error. The Six Taxpayers failed to articulate any injury or interest that would warrant their intervention. Further, as set forth above, the relief they purport to seek is unavailable in these proceedings and cannot lawfully be granted by the PUC. Lastly, it bears repeating that the Six Taxpayers are not disinterested taxpayers in any sense fairly representative of the City’s taxpayers generally or their financial interests. On the contrary, they count among their ranks former KBTL stakeholders, and each spoke in support of KBTL’s bid asking the City Council to reject competing offers including the Transaction that were \$20+ million higher, in favor of their loosely-formed and private KBTL “cooperative” which stood no chance of approval. The late-arising claim in their intervention papers to having the City’s financial interests at heart, therefore, is unpersuasive. Indeed, by their intervention, these supporters of a losing inferior bid instead seek to achieve through the proverbial “back door<sup>11</sup>” what they could not through the front when they failed to make a superior financial offer themselves. Accordingly, having committed the error of allowing the Six Taxpayers’ intervention, the PUC should rigorously evaluate the propositions they offer, particularly with regard to whether the result they advocate and the peril that accompanies it, on the one hand, or the Transaction, on the other, better serves the legal and economic interests of the City and its disinterested taxpayers.

#### **VI. Citibank Recommends the Transaction’s Approval.**

Citibank strongly recommends the PUC approve the Transaction as proposed in the Joint Petition. The PUC’s approval of the Transaction will bring a permanent resolution to Citibank’s claims arising from the City’s breaches of its Lease Agreement with Citibank, which effectively torpedoed the City’s credit rating and exposed its citizens to potentially catastrophic financial liability. The Transaction will provide a substantial and immediate multi-million-dollar recovery for the City and public benefits

---

<sup>11</sup> The Six Taxpayers and KBTL’s other supporters have not offered—because they cannot—an explanation of how the City would in any event be lawfully permitted to reject superior offers and effectively gift more than \$20 million of BT’s enterprise value to KBTL in furtherance of its vision and how such a notion is in the economic interests of the City and its taxpayers.

flowing from Champlain's well-financed, well-staffed and expert commitment to local interests, community initiatives and state of the art technology.

The PUC's denial of the Transaction would, by contrast, constitute plain error, and a total failure of consideration under the 2014 Settlement Agreement. Such an outcome would force Citibank to entertain prompt action to preserve and protect its contractual, legal and equitable rights. Should approval be withheld, Citibank must reserve all of its rights to pursue every available avenue of legal and equitable relief.

Respectfully submitted,

NIXON PEABODY LLP  
Counsel to Citibank, N.A., et al.

By: 

Kevin M. Fitzgerald, Esq.  
Kierstan E. Schultz, Esq.  
900 Elm Street  
Manchester, NH 03101  
Tel. (603) 628-4000