

CSTATE 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)

**MOTIONS UNDER V.R.C.P. 52 AND 59 FOR ADDITIONAL FINDINGS AND TO
ALTER OR AMEND, ON BEHALF SANDRA BAIRD, ESQ., JARED CARTER, ESQ.,
DEAN CORREN, STEVEN GOODKIND, SOLVEIG OVERBY, ESQ., AND SHAY
TOTTEN**

Date: March 16, 2019

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Sandra Baird, Esq. et al. (“Intervenors”) respectfully submit these motions for additional findings, and to alter or amend the judgment, pursuant to V.R.C.P. 52(b) and V.R.C.P. 59(e).

1. MOTIONS PURSUANT TO VRCP 52 AND 59

Intervenors move pursuant to V.R.C.P. 52(b) for amended and additional findings about whether the proposed sale to Champlain Broadband (“Champlain” or “Schurz”) would produce the greatest recovery for taxpayers. The Petitioners produced no evidence that the sale to Champlain would produce the greatest recovery - but the Commission concluded that it would do so. Not only was there no evidence in the record to support this conclusion, the only evidence in the record was that that the Champlain bid was not the highest bid. Intervenors’ Proposed Findings 12, 13, 14, 15, 16, 17 (as corrected¹) and 18 were based upon the evidentiary record and summarized this record evidence, but were not ruled upon. After making amended or additional findings, the Commission should amend its judgment pursuant to V.R.C.P. 59(e) by ruling that petitioners had not demonstrated that the sale complies with Charter § 3-438(c)(1) and 24 V.S.A. § 1913 and by denying the Petition.

¹ The correction was filed on October 29, 2018. A motion for permission to file the correction was filed the same day, was unopposed, and was not ruled upon.

Intervenors move pursuant to V.R.C.P. 59(e) for reversal of the Commission's conclusions about claim preclusion. The Commission erroneously held that: i) claim preclusion applies to a claim that was not and could not have been raised before; ii) a person can be precluded from litigating a claim because that person had the opportunity to intervene in earlier litigation but chose not to do so; and iii) in a non-§ 248 case the Department's participation imposes claim preclusion upon non-parties as to an issue that was neither raised nor decided in the earlier litigation.

Intervenors also move pursuant to V.R.C.P. 59(e) to amend the judgment because the Commission erred in holding that it lacks the authority to enforce Charter § 3-438(c)(1) and 24 V.S.A. § 1913 to protect taxpayers when a current CPG-holder owes millions of dollars to taxpayers for unlawfully using taxpayer funds to develop its infrastructure, the current CPG-holder now seeks Commission approval to abandon service and terminate its CPG, and a new entity seeks a CPG to use that infrastructure and continue that service without repaying taxpayers. The Commission should exercise its "broad power" under Rule 59 to issue a corrected ruling that properly applies the law. *In re SP Land Company*, 2011 VT 104 ¶ 16, 190 Vt. 418, 35 A.3d 1007; *Drumheller v. Drumheller*, 2009 VT 23, ¶ 28, 185 Vt. 417, 972 A.2d 176.

2. MEMORANDUM OF LAW

A. Proposed Findings 12-18; Relief Pursuant to V.R.C.P. 52(b) and 59(e)

Proposed Findings 12-18 addressed a critical factual issue that became a foundation of the Commission's conclusions – and yet these Proposed Findings were ignored. This issue is the absence from the record of any evidence that the sale to Champlain Broadband would produce the greatest return to taxpayers. These Proposed Findings asserted, correctly, that there was no evidence of the value of the alternative bids or that Champlain had offered the highest dollar amount, or of the capability of the alternative bidders was unacceptable.

These proposed findings were relevant to whether the Petitioners had demonstrated that the proposed sale should be approved of to comply with, or as the best approximation of complying with, Charter § 3-438(c)(1) and 24 V.S.A. § 1913.

Finding 97 purports to find that the sale provides the greatest return to taxpayers - but it does not. Citing to Mr. Dorman's testimony on 9/26/18 at p.42 and Ms. Anderson's Prefiled Testimony at p.12, Finding 97 states that the Purchase Agreement was executed and timed to "maximize the City's allocated share" of the net proceeds. The referenced testimony does not refer to evidence that the Champlain bid was the highest, but it actually refers to the timing of the sale. A sale agreement entered into within 36 months of December 31, 2014 provides the city with a 50% share of the net proceeds. This sale agreement was executed within that time frame. Within that context, the sale maximizes the City's share.

The alternative bids, however, also would have met the same 36-month deadline and would have resulted in the same 50% allocation. The bids were all submitted at the same time. There was no evidence offered, and no finding possible, and no finding that was made, that the Champlain bid was the highest of the bids submitted during the 50% allocation window.

The Commission's Order, at p.36, states that it had found that the Champlain sale would provide the greatest recovery, but in fact, there are no such findings anywhere in the Order, and there was no evidence that could support such a finding if one had been made. The Order compares only the Champlain sale with speculative future sales at lower sharing rates (25% or 10%). The Order ignores the proposed findings that BT had failed to demonstrate that this sale, when compared to the other actual bidders at the same time, was the highest bid. The other bidders, within the same time window, were subject to the same 50% sharing. There is no evidence in the record that would support a positive finding to this effect, there is no such finding in the Order,

and yet the Order concludes that such a finding was made. It would be unreasonable to conclude that any deal reached within the 36-month window is automatically in the taxpayer's best interest, but that appears to be the Commission's finding, simply because it was reached during the 36-month window.

The only valid finding possible, on the present record, is that Champlain (Schurz) did not offer the highest bid and did not offer the greatest recovery for taxpayers. Mr. Dorman's prefiled testimony explained that there were initially 8 bidders, that the City Council's expert advisory panel reduced the list to four finalists and then to two finalists -- and that the Champlain (Schurz) bid was not included among the finalists. If Schurz had offered the highest price, it would have been a finalist -- unless there was some other factor, such as lack of competence, that disqualified Schurz (the record shows that was not the case). The City Council deadlocked when trying to select between the two finalists, neither of which was Schurz. Mr. Dorman explained why Schurz was selected -- and his explanation was not that it offered the highest price. Schurz was selected because "Schurz offered the strongest profile and its principals made the strongest presentation." Dorman PFT pp.11-12.

Intervenors therefore request additional or amended findings pursuant to V.R.C.P. 52(b), adopting their Proposed Findings 12-18. Intervenors also seek an amended judgment under V.R.C.P. 59(e) because corrected findings would compel a different conclusion. Petitioners did not prove that the Champlain bid was not the highest bid, did not prove that the proposed sale would lead to the greatest recovery for taxpayers much less provide full repayment, and therefore failed to satisfy Charter § 3-438(c)(1) and 24 V.S.A. § 1913.

B. Errors of Law re Claim Preclusion; Relief under V.R.C.P. 59 (e)

Intervenors respectfully submit that the Commission has committed prejudicial errors of law concerning claim preclusion.

To understand these errors, one must begin with the 2014 Order. The Order mentioned 24A V.S.A. § 3-438(c)(1) only in Finding #2 and Footnote #4. Both mentions were by way of background. They explained why Conditions 56 and 60 were initially imposed on Burlington's CPG. This discussion of the reason why Conditions 56 and 60 were adopted did not determine, and could not have determined, whether the terms of the future sale to Champlain, or any other sale on any terms, would satisfy the Charter.

These issue of whether the as-yet unknown Champlain sale, or of any other sale, would comply with Charter § 3-438(c)(1) was not litigated or determined because the parties and the Commission had no practical or legal ability, at that time, to do so. The order contemplated a potential future sale of the assets to a new entity with a new CPG, at which time the net proceeds to the City would be ascertainable² and at which time the Commission would be asked to approve of the sale and the new CPG under Charter § 3-438(c)(1).

The 2014 Order did resolve all issues pertaining to the City's violation of its Certificate of Public Good, as the Order says,³ but the 2014 Order did not mention, much less decide, whether

² Finding 43 of the 2014 Order determined that 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..." Finding 48 of the 2014 Order stated that "Upon a future sale of BT's Assets," the proceeds would be known. Finding 53 stated that "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" and "The City is also unable to estimate the possible recovery to the City of its investment upon a future sale of BT's Assets..."

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

any Certificate of Public Good should, or legally could, be issued to whatever entity in the future might seek to operate BT's franchise, on then-unknown terms under 24A V.S.A. § 3-438(c)(1).

The Commission lacks authority to pre-approve Certificates of Public Good on unknown terms to unknown entities, and did not do so in 2014 under Charter § 3-438(c)(1) and 24 V.S.A. § 1913. For example, the 2014 Order could not and did not address whether the future sale should be rejected because in the future case there was no evidence that the highest bid had been accepted, maximizing the recovery owed to taxpayers.

The Commission's May 9, 2018 Order reached this same conclusion -- that the Commission's earlier proceedings had not encompassed whether the sale to Champlain, and only partial repayment of the \$16.9 million debt to taxpayers, satisfied Charter § 3-438(c)(1).

The City asserts that the Commission previously resolved the issues surrounding Burlington Telecom's prior use of City funds for its operations. While the Commission made certain determinations regarding Burlington Telecom's CPG violations, the Commission did not specifically address whether, how, and when the \$16.9 million would be reimbursed to the City and its taxpayers.

Order Granting Motion to Intervene, May 9, 2018, p.3.

While the Commission did approve certain structural elements of a future sale, the Commission did not resolve all issues related to the \$16.9 million loss and any recovery of such losses at that time. Issues related to the recovery of the \$16.9 million loss that occurred due to Burlington Telecom's CPG violations may be raised in the current proceeding.

Order Granting Motion to Intervene, May 9, 2018, p.4.

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." 2014 Vt PUC Lexis 517 at 5.

In its February 19, 2019 ruling, the Commission did not retreat from its May 9, 2018 holding that these questions had never been decided. To the contrary, the Commission held on February 19 that it lacks the statutory authority to determine these questions. The Commission's position, as of February 19, 2019, is that it lacks the authority to decide these questions and has never done so. The Commission certainly was not saying that while it lacks the authority to decide these questions, it had already done so in 2010 or 2014.

In the February 19, 2019 ruling, however, the Commission also ruled that claim preclusion bars Intervenors from litigating now the same issues that the Commission ruled that its prior proceedings could not have addressed and did not address.

This was an error of law. Under Vermont's claim-preclusion doctrine, "a final judgment in previous litigation bars subsequent litigation if the parties, subject matter, and cause(s) of action in both matters are the same or substantially identical." *Citimortgage, Inc. v. Dusablon*, 2015 VT 68, ¶ 13, 122 A.3d 1202 (quoting *Faulkner v. Caledonia Cnty. Fair Ass'n*, 178 Vt. 51, 2004 VT 123, ¶ 8, 869 A.2d 103). "The doctrine 'bars parties from relitigating, not only those claims and issues that were previously litigated, but also those that could have been litigated in a prior action.'" *Natural Res. Bd. Land Use Panel v. Dorr*, 198 Vt. 226, 2015 VT 1, ¶ 10, 113 A.3d 400 (quoting *Carlson v. Clark*, 2009 VT 17, ¶ 13, 185 Vt. 324, 970 A.2d 1269). In short, "[c]laim preclusion is found where (1) a previous final judgment on the merits exists, (2) the case was between the same parties or parties in privity, and (3) the claim has been or could have been fully litigated in the prior proceeding." *Breslin v. Synnott*, 2012 VT 57, ¶ 8, 192 Vt. 79, 54 A.3d 525 (internal quotation marks omitted).

The issue of whether the sale to Champlain complies with the City Charter and 24 V.S.A. § 1913 "has [not] been or could [not] have been fully litigated in the prior proceeding." *Breslin v.*

Synnott, 2012 VT 57, ¶ 8, 192 Vt. 79, 54 A.3d 525. The identity and competence of the buyer, the amount of the bid that was accepted, the amounts of the competing bids, and the amounts to be repaid to taxpayers under the accepted bids and under the competing bids, were unknown and unknowable in 2010 and 2014.

This error is the type of error that motions under Rule 59(e) are appropriate to address. In *SP Land Company, supra*, a land developer was granted an administrative amendment to its master plan, authorizing the creation of fifteen subdivided lots under Act 250 Rule 34(D). An adjoining landowner, Mountainside Properties, appealed to the Environmental Division of the Superior Court, challenging the amendment on various grounds. The developer moved for summary judgment, which the Court granted. Mountainside then filed a Rule 59(e) motion to alter or amend arguing, for the first time, that because SP had not yet been granted an Act 250 permit, Rule 34(D) didn't apply and the Rule 34(D) amendment was improperly granted. The Court considered this new argument, seeking guidance from the Natural Resources Board's Land Use Panel. The Panel agreed with Mountainside that there could be no amendment under Rule 34(B) without an underlying permit. This Court nevertheless denied Mountainside's Rule 59(e) motion and Mountainside appealed again to the Supreme Court.

In the Supreme Court SP argued that the Superior Court lacked jurisdiction even to consider the new Rule 34(D) argument on a Rule 59(e) motion. The Supreme Court disagreed, with vehemence.

Co-applicants contend that this argument was improperly raised for the first time in Mountainside's Rule 59(e) motion to alter or amend and should not have been addressed by the Environmental Court. We disagree. Whether or not this issue was expressed for the first time in Mountainside's Rule 59(e) motion, it was a question of law intrinsic to the Environmental Court's summary judgment ruling and therefore well within the court's discretion to reconsider on Mountainside's Rule 59(e) motion.

Contrary to the dissent's narrow interpretation, Rule 59(e) "gives the court

broad power to alter or amend a judgment." Reporter's Notes, V.R.C.P. 59. We have stated that Rule 59(e), largely identical to Federal Rule of Civil Procedure 59(e), is invoked "'to support reconsideration of matters properly encompassed in a decision on the merits.'" *In re Robinson/Keir P'ship*, 154 Vt. 50, 54, 573 A.2d 1188, 1190 (1990) (quoting *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 451, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982)). Under this rule, "the court may reconsider issues previously before it, and generally may examine the correctness of the judgment itself." *Id.* (quotation omitted). That is, Rule 59(e) "codified the trial court's inherent power to open and correct, modify, or vacate its judgments."

Id. At ¶ 16. quoting *Drumheller v. Drumheller*, *supra*, 2009 VT 23, ¶ 28, and citing 11 C. Wright et al., Federal Practice and Procedure § 2810.1, at 124-25 (2d ed. 1995). "It was thus well within the Environmental Court's discretion to fully reconsider this question of law on the merits upon Mountainside's Rule 59(e) motion" – including the new argument Mountainside had raised in the motion for reconsideration. *Id.* at ¶ 18

Assuming for purposes of argument that the subject matter is the same and could have been decided in the prior proceedings, the Commission also prejudicially erred in concluding that claim preclusion arises where a party had the opportunity to intervene but chose not to. Order, p.37. *Daiello v. Town of Vernon*, 2018 VT 17, 184 A.3d 192 rejected this very argument. In *Daiello*, the plaintiffs argued that the same factual dispute that it was raising against the Town had been decided in the plaintiffs' favor in the prior litigation. The Town had the opportunity to enter into that prior litigation but had not done so. The Supreme Court ruled, however, that claim preclusion did not apply to the Town:

The Town is correct that because it was not a party in *Merritt v. Daiello*, it is not precluded from arguing that Stebbins Road was properly laid out as a public road. See 18A Miller, *supra*, § 4448, at 315 ("The central proposition that a party is bound is balanced by the rule that ordinarily nonparties are not bound."). There is no suggestion in the record that the Town declined to take part in the prior suit brought by the Merritts or even that it was aware of that suit. See *id.* § 4452, at 381, 397 (noting that most courts have held that "a nonparty is not precluded from relitigating matters decided in a prior action simply because it passed by an opportunity to intervene" but "some thoughtful commentators have suggested that

courts should develop a new procedure to foreclose nonparties who have deliberately bypassed the opportunity to intervene”).

2018 VT 17, ¶ 21 (emphasis added). The “thoughtful procedure to foreclose nonparties who have deliberately bypassed the opportunity to intervene” is discussed at length by the Honorable Jack Weinstein in *N.A.A.C.P. v. A. A. Arms, Inc.*, 2003 U.S. Dist. Lexis 8238 (E.D.N.Y. 2003) at pp.59-70. It has no bearing on this case. It requires that the nonparty have been given an opportunity both to intervene and to control the defense of the claim in indemnity cases which this is not, or that in the prior case an issue was actually raised and decided and for compelling public policy reasons needs to be applied to nonparties (2003 U.S. District Lexis 8238 at p. 64). As the Commission held on May 9, 2018, the present issues were not raised and decided in the 2014 proceedings. (The Commission ruled on February 19, 2019 that it was not going to decide those issues in this proceeding either.)

The Commission also wrongly held that because the Department was a party to the earlier cases, and because there has been no showing of “barriers” to the Department representing their interests, the Department’s involvement means that Intervenors were represented and are bound by claim preclusion. Order pp.36-37. This theory is essentially the approach that Judge Weinstein addressed – when is it necessary to preclude litigants who were not parties to earlier proceedings, because in some extraordinary cases public policy compels reliance on past rulings? The theory behind this unusual approach is that the prior litigants already represented, *de facto*, the interests of the absent parties, and already thoroughly litigated the issues, and that public policy requires that the issues not be revisited. This unusual (and, in Vermont, unprecedented) approach requires that the issues that the litigants wish to raise now were already raised and decided. That did not occur here, as the Commission’s May 9, 2018 Order agreed.

The “no barrier” argument has no precedent in Vermont, and appears to be shorthand for the Commission’s many “particularized interest” precedents -- but it conflicts with those precedents. A particularized interest, separate from that of the Department, must be shown only in order to intervene in § 248 cases. See *Petition of Green Mountain Power Corp.*, 2018 VT 97. In that case, the Supreme Court recognized that the Commission’s insistence on a showing of a particularized interest that is separate from that of the Department is unique to § 248 proceedings:

... it has been the PUC's consistent position that “[p]ursuant to Board Rule 2.209 in Vermont, ... a would-be intervenor before the Board must demonstrate a substantial and particularized interest in a Section 248 proceeding to gain party status.” *Petition of GMPSolar-Williamstown, LLC*, No. 8682, 2016 WL 3549296, at *6 (Vt. Pub. Serv. Bd. June 20, 2016); see also *Application of Seneca Mountain Wind, LLC*, No. 7867, 2012 WL 4846242, at *2 (Vt. Pub. Serv. Bd. Oct. 5, 2012) (“Simply raising generalized concerns is not sufficient to support intervention.”); *Tariff Filing of Green Mountain Power Corp.*, No. 5532, 1991 WL 736201 (Vt. Pub. Serv. Bd. Nov. 21, 1991) (denying right to intervene because petitioner “had not demonstrated that his interest as a ratepayer differed in any way from the general interests of other retail ratepayers represented by the Department”).

On the basis of this consistent application, we defer to the PUC's interpretation of its own rule to require that a “substantial” interest be a sufficiently “particularized” one and to its determination that Allco did not meet this standard. The concerns that Allco raised about GMP's compliance with the relevant criteria in 30 V.S.A. § 248(b) are purely generalized ones that are theoretically shared by every ratepayer in Vermont.

Ibid at ¶¶17-18.

Section 248 is a unique statute, and its limitations on standing have never been applied to non-§ 248 cases. Section 248 is a broad delegation of legislative power to review the conceptual justification for large energy projects. Potentially affected landowners, neighbors and community residents may number in the hundreds, thousands or hundreds of thousands. The Department is charged with representing the interests of this general public. It is in this context that the Commission has held that persons who seek to intervene in § 248 proceedings must demonstrate

a particularized interest that differs from that of the general public that the Department represents. The prior proceedings involving BT were not § 248 cases, so no showing of a barrier or of a particularized interest different from that of the general public would have needed to be shown in 2010 or 2014.

Even if the “particularized interest” standard applied, Intervenors would have satisfied the standard. The Department’s duty is to represent the general public, not any particular subset of it. Intervenors would not have intervened as members of the general public. They would have intervened as taxpayers to defend their interests in protecting taxpayer funds under Charter § 3-438(c)(1) and 24 V.S.A. § 1913, as they are doing now.

For the same reason, over the utilities’ objections, in Docket No. 7770, *In re: Central Vermont Public Service (Gaz Metro)*, Order re Intervention Motions (Nov. 1, 2011), the Commission allowed an association of 46 ratepayers to intervene. Their interests were a subset of the interests of the general public, so the Department’s role did not foreclose them from intervening. The Department’s participation in 2010 and 2014, likewise, does not impose preclusion upon Intervenors in this case, even if the subject matter of the litigation is the same and could have been decided in the prior proceedings (and it was not the same and could not have been decided).

The Commission erred as a matter of law in concluding that claim preclusion bars Intervenors from challenging whether the sale to Champlain complies with Charter § 3-438(c)(1) and 24 V.S.A. § 1913. Intervenors ask that the Commission exercise its authority under Rule 59 to correct these errors.

C. Errors of Law re the Commission’s Authority; Relief under V.R.C.P. 59 (e)

Intervenors also submit, with respect, that the Commission erred in ruling that it lacks statutory authority to address whether the petition satisfies Charter § 3-438(c)(1) and 24 V.S.A. § 1913.

i. The Commission’s Statutory Authority Changed After Trybulski

Sections 203 and 209 of title 30 grant the Commission plenary authority over all regulated utilities. Section 203 states that the Commission and the Department of Public Service “shall have jurisdiction over the following described companies within the State” and lists telecommunications companies. It states that the Commission has jurisdiction over their directors, receivers, and trustees and even their “lessees.” It grants the Commission jurisdiction over all “persons or companies owning or operating such companies” and jurisdiction over all “plants, lines, exchanges, and equipment” of such companies.

Section 209 explicitly authorizes the Commission to regulate the manner in which any business subject to its jurisdiction is conducted, and explicitly grants the authority to restrain a utility from violating any law. It says, in relevant part (emphasis added):

(a) General jurisdiction. -- On due notice, the Commission shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of any corporation owning or operating any plant, line, or property subject to supervision under this chapter, and shall have like jurisdiction in all matters respecting:

. . .

(3) the manner of operating and conducting any business subject to supervision under this chapter, so as to be reasonable and expedient, and to promote the safety, convenience, and accommodation of the public;

. . .

(6) to restrain any company subject to supervision under this chapter from violations of law, unjust discriminations, usurpation, or extortion;

Section 9 grants the Commission all of the powers of a court: “The Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State.”

Section 231 also constitutes a broad grant of authority. Subsection (a) requires a certificate from the Commission to engage in a public utility business. The Commission must find that the operation would “promote the general good.” Subsection (b) requires a certificate from the Commission to cease engaging in that business. The Commission must find that abandonment or curtailment would be “consistent with the “public interest.”

Charter § 3-438 states:

- (a) The Public Utility Commission shall exercise its regulatory powers in such a manner as to permit the City to fulfill all of its obligations, including its obligations to the holders of the bonds issued hereunder.
- (b) The Public Utility Commission shall not be empowered to suspend the effective date of any change in the rates and charges of the City's electric plant pending final determination as to the justness or reasonableness of such change, but the Commission may require that the City undertake to refund rates and charges collected in excess of those that are finally determined just and reasonable. Any increase in the rates and charges of the City's electric plant shall be implemented by means of an identical percentage increase to each class or division of electric plant ratepayers under rate design tariffs previously approved by the Public Utility Commission until such time as the Public Utility Commission shall specifically approve an alteration in such rate design and corresponding tariffs.
- (c)
 - (1) If the City exercises its authority under subdivision 431(4) or section 449 of this title, the Public Utility Commission, 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.
 - (2) Any certificate of public good issued shall contain terms or conditions that are consistent with both the statutory requirements of 30 V.S.A. chapter 13 and

the establishment of competitive neutrality between incumbents and new entrants, after the evaluation of factors that include the payment of pole attachment rental fees, and the provision of public access channels, equipment, and facilities.

Subsection (a) mandates that the Commission exercise its “regulatory powers” – such as those set forth in 30 V.S. A. §§ 9, 203, 209 and 231 -- in such a manner as to permit the City to fulfill “all of its obligations.” Subsection (c)(1) states that the Commission, “in considering any application” for a CPG, “shall ensure” that any and all losses from a municipal telecommunications business, and, in the event that business is “abandoned or curtailed,” any and all costs associated with investment in that business’s facilities, “are borne by . the investors in such business, and in no event are borne by the City's taxpayers...”

The language in 24 V.S.A. § 1913(e) is more direct than the Charter. It states that to the extent that a municipality constructs communication infrastructure with the intent of providing communications services, whether wholesale or retail, “the municipality shall ensure that any and all losses from these businesses, or in the event these businesses are abandoned or curtailed, any and all costs associated with the investment in communications infrastructure, are not borne by the municipality's taxpayers.”

In re Bloch, 133 Vt. 326, 327, 340 A.2d 51, 52 (1975) controls this case. In that case, Mr. Bloch believed that his electric cooperative’s by-laws did not satisfy statutory requirements for by-laws. He asked the Commission for a ruling. The electric cooperative argued that no statutes explicitly granted the Commission authority to enforce the statutes governing an electric cooperative’s by-laws and therefore, under *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1 (1941) the Commission lacked authority to do so. The Supreme Court rejected the cooperative’s argument. Citing 30 V.S.A. §§ 2 and 203, the Court held “The Public Service Board

has general superintendence of laws relating to public service corporations.” The Commission therefore had the authority to enforce the general statutes governing a cooperative’s by-laws.

Trybulski v. Bellows Falls Hydro-Electric Corp., which limits the Commission to those powers expressly granted to it and those necessarily implied, was decided prior to adoption of 30 V.S.A. § 203 and § 209, both of which were adopted in 1959. Now, unlike 1941, two statutes explicitly grant the Commission plenary authority to ensure that regulated entities comply with the general law of Vermont -- including the laws governing electric cooperative by-laws, the City Charter and 24 V.S.A. § 1913.

A quarter century after *In re Bloch* was decided, the Commission applied its holding to similar question. In *Petition of certain ratepayers of Vermont Electric Cooperative, Inc. (VEC), requesting an investigation into VEC's alleged violation of its bylaws*, Docket No.5806, Findings and Board Order, June 9, 1999, p. 2, the Commission responded to an objection that the Commission could not review compliance with an electric cooperative’s charter. Citing *In re Bloch*, The Commission ruled that it “has general superintendence of laws relating to public service corporations, including electric cooperatives. It has jurisdiction to hear and make orders in all matters provided for in the charter or articles of any electric cooperative.”

More recently, in *Petition of Vermont Department of Public Service for an investigation into alleged unlawful customer records disclosure by AT&T Communications of New England, Inc.*, Docket No. 7193, Order On Motion to Dismiss, Sept. 18, 2006, the Commission rejected the argument that it lacked authority to enforce state privacy laws.

As a matter of state law, the Board has jurisdiction over the claims asserted in the petitions. AT&T is a company offering telecommunications services on a common carrier basis in Vermont, and it therefore is a utility subject to the Board's jurisdiction. That jurisdiction extends to the manner of operating and conducting that business, so as to ensure that the service is reasonable and expedient, and to "promote the safety, convenience and accommodation of the public. The Board has

broad supervisory jurisdiction over AT&T's operations in Vermont. As to matters within its jurisdiction, the Board has the same authority as a court of record.

The Commission's authority is far broader now than it was in 1941. Statutes explicitly grant the Commission plenary authority to ensure that regulated entities comply with the general law of Vermont -- including the laws governing electric cooperative by-laws and citizen privacy and also Burlington City Charter § 3-438 and 24 V.S.A. § 1913.

ii. ***The Commission Has the Duty to Enforce 24 V.S.A. § 1913; Its Justification for Nonenforcement Was Erroneous***

The Commission possesses the authority under 30 V.S.A. under §§ 9, 203, 209 and 231 to enforce the statutes governing the contents of an electric cooperative's by-laws, to compel compliance with by-laws, and to compel compliance with state privacy laws -- and the authority to enforce 24 V.S.A. § 1913. Section 1913 imposes a nondiscretionary duty upon municipal utilities. A municipality "shall ensure that any and all losses" from its telecommunications business, and "in the event these businesses are abandoned or curtailed, any and all costs associated with the investment" in that business in communications infrastructure, "are not borne by the municipality's taxpayers."

There exists no reason that the Commission would have authority to enforce statutes on by-laws, and privacy statutes, but not a statute mandating that a municipality hold its taxpayers harmless upon abandonment of a telecommunications enterprise.

The Commission declined to enforce § 1913 because the statute "applies only to a *municipality*, not the Commission." (emphasis in the original, p.39).

By this logic, a violation by Green Mountain Power of the statute requiring utilities to report accidents, 30 V.S.A. § 207, for example, also is unenforceable. It applies only to the utility. The Commission is powerless to enforce it.

This reasoning cannot be reconciled with §§ 9, 203, 209, 231 and *In re Bloch*. This reasoning is particularly troubling because, under §231(b), a utility seeking to abandon service must demonstrate that abandonment would be consistent with the public interest. A utility decision to abandon its service by violating § 1913 surely lies within the Commission’s authority to address under §§ 9, 203, 209, 231 and *In re Bloch*.

iii. The Commission Has the Duty to Enforce the Charter; Its Justification for Nonenforcement Was Erroneous

The Commission also has the duty under §§ 9, 203, 209 and 231 to enforce Charter § 3-438 -- because Champlain is seeking a CPG. The Commission therefore is “considering any application for a certificate of public good.”

The Commission declined to enforce the charter because, it ruled, under the charter “the Commission’s review is prospective in nature and is meant to prevent the City from making imprudent or improper investments in future telecommunications and cable ventures.” (p.33). The Commission also ruled that no “other provision in the Charter establishes remedies for violations of a CPG, and the Commission does not have authority independent of its Title 30 powers to enforce Section 438(c)(1).” (Order p.34)

The Commission’s reasoning was erroneous.

First, the Charter applies to any consideration by the Commission of an application for a CPG. Champlain applied for a CPG. The Charter applies.

Second, the purpose of the Charter is not to avoid imprudent expenditures. The purpose is what it says is its purpose: to 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 the business, are borne by the investors and not by the City's taxpayers.

Third, the issue before the Commission is not whether BT violated its CPG. That was decided in prior proceedings. The issue is whether the proposed sale complies with the Charter.

Fourth, it is beside the point that “the Commission does not have authority independent of its Title 30 powers to enforce Section 438(c)(1).” It is the Commission’s powers under Title 30 that provide the requisite authority -- §§ 9, 203, 209 and 231.

D. The Commission, Not the Superior Court, Should Enforce the Charter and the Statute

If the Commission has no jurisdiction or authority to act, then the doctrine of primary jurisdiction will not apply. *Traveler’s Indemnification Co. v. Wallis*, 2003 VT 103 ¶¶ 9-20, 176 Vt. 167, 845 A.2d 316. In any case in which taxpayer funds have been misused to fund a municipal telecommunications utility, and the utility’s CPG and assets are about to be transferred to a private utility without repayment to the taxpayer, the only tribunal that will have jurisdiction and authority to enforce a charter or § 1913 will be the Superior Court.

Intervenors submit that it is not in the public interest to compel these or any other taxpayers to seek relief outside the Commission for matters that are so closely connected with Commission expertise. It is also unnecessary -- because of the breadth of 30 V.S.A. §§ 9, 203, 209 and 231.

CONCLUSION

Under the Commission’s analysis, it is powerless to stop a municipal utility from developing its infrastructure using taxpayer funds and then abandoning its service and transferring the assets to a private utility without reimbursement to taxpayers. The municipal utility can be subjected to fines, but, so long as the private utility is competent to provide the service, the

Commission's hands are tied. The Commission can only issue a new CPG. A taxpayer seeking to enforce the law will have to file suit in Superior Court.

The legislature should not be deemed to have intended such a bizarre result absent explicit language commanding this outcome.

The Intervenors' motions under V.R.C.P. 52 and 59 should be granted. Intervenors request that the Commission issue an amended order that that rejects the sale because of failure to demonstrate compliance with Charter § 3-438(c)(1) and 24 V.S.A. § 1913.

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