

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 18-0491

Joint petition of Champlain Broadband, LLC, City of Burlington d/b/a Burlington Telecom, and Blue Water Holdings LLC for approvals, pursuant to 30 V.S.A. §109, 231, 504, 47 U.S.C. §214(e), and Section 438(c)(1) of the City of Burlington Charter	
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**JOINT MEMORANDUM IN OPPOSITION TO INTERVENORS’ RULE 52 AND 59
MOTION FOR ADDITIONAL FINDINGS AND RECONSIDERATION**
(This document was filed via ePUC)

Champlain Broadband, LLC (“Champlain”), City of Burlington d/b/a Burlington Telecom (the “City”), and Blue Water Holdings LLC (“Blue Water”) hereby oppose the Baird, et al. (“Intervenors”) motion for additional findings and reconsideration of the Vermont Public Utility Commission’s (“Commission”) final order in the above-captioned matter (“Final Order”). The Motion should be denied for several reasons.

First, Intervenors erroneously claim the Commission “ignored” proposed findings regarding alternative bids. In fact, the Commission expressly rejected the legal basis for making those findings. The Commission is not required under V.R.C.P. 52 to address proposed findings that are—like those urged by Intervenors’ motion—immaterial and unnecessary to support the Commission’s conclusions. Furthermore, through the applicable “public good” standard of 30 V.S.A. § 109, the Commission carefully considered and made findings and conclusions on both the benefits to City taxpayers of approving the sale proposed *by the Joint Petition* as well as the risk of denying that sale. The Commission thus fulfilled its obligations under Rule 52 when it issued the Final Order.

Second, Intervenor's Rule 59 motion attempts to relitigate issues the Commission already carefully considered and correctly decided. Because the Commission expressly addressed each of the arguments expressed in Intervenor's Motion, and because the Motion fails to identify any newly discovered, material facts appropriate for reconsideration under V.R.C.P. 59, the Commission should deny the Motion.

Third, Intervenor has shown no errors of law in the Commission's conclusions regarding (1) claim preclusion, (2) the scope of its enforcement obligations under the City Charter, or (3) the applicability of 24 V.S.A. § 1913 to the transaction presented in the Joint Petition. The Commission's legal conclusions on these points are consistent with Vermont Supreme Court precedent and the plain language of the applicable statutes.

Accordingly, Intervenor has failed to carry their respective burdens under Rule 52(b) and 59(e).

I. Rule 52: The Commission Should Deny Intervenor's Motion For Additional Findings Because The Findings Proposed Were Rejected By the Commission And Are Immaterial to the Commission's Section 109 Analysis.

Under V.R.C.P. 52,¹ the Commission need only make factual findings that identify what it decided and how it reached its decision.² In other words, the Commission's findings should "report the factual ingredients essential to the disposition."³ The Commission is not required to make findings that are immaterial to the issues raised by the legal standards applicable to the Joint Petition.⁴

¹ V.R.C.P. is applicable to Commission proceedings by Commission Rules 2.103 and 2.105.

² See *Prevo v. Evarts*, 146 Vt. 216, 218 (1985) ("The purpose of findings is to make a concise statement to the parties, and to the [Supreme] Court if an appeal is taken, of what was decided and how the decision was reached.").

³ *New England Partnership, Inc. v. Rutland City School Dist.*, 173 Vt. 69, 74 (2001) ("[The Commission] has a fundamental duty to make all findings necessary to support its conclusions, resolve the issues before it, and provide an adequate basis for appellate review.").

⁴ *Prevo*, 146 Vt. at 219 ("The court having made findings and conclusions upon essential issues, it did all the law requires of it.").

Intervenors' Rule 52(b) Motion asks the Commission to adopt certain findings of fact that they first proposed in their initial brief.⁵ Intervenors erroneously contend that the Commission ignored these Proposed Findings. They contend the Commission is required under the City Charter to conclude that Champlain's bid was "the highest dollar amount" and that the capability of other bidders was "unacceptable" before approving the sale to Champlain.⁶ In the Final Order, however, the Commission did not adopt Intervenors' Proposed Findings because it expressly rejected the legal basis for Intervenors' "highest bidder" claim. Rather, in support of its ultimate conclusion that the sale to Champlain will promote the "public good," the Commission appropriately made findings related to taxpayer recovery on the misappropriated \$16.9 million that aided the Commission's weighing of the benefits of approving the proposed sale versus the risks of denying the sale.⁷

First, the Commission appropriately rejected Intervenors' legal contention that the Commission would be ignoring the City Charter if it approved this sale, stating, "[T]he charter is not being 'ignored' here. Rather, the charter simply does not apply in the way the Citizen Intervenors claim it does."⁸

Second, the Proposed Findings are immaterial under 30 V.S.A. § 109, which requires the Commission to determine whether the sale of the telecom assets by one company to another company that *is party to the pending petition* "will promote the general good of the State." No language in Section 109 requires the Commission to consider whether bids to purchase Burlington Telecom's assets made by other companies not before the Commission were higher than the Champlain bid that the City selected. In contrast to Section 109's plain language, the

⁵ See Proposed Findings of Fact and Conclusions of Law Submitted by Sandra Baird, Esq., et al. (Oct. 22, 2018), Proposed Findings #12 through 18, at 14-15 (the "Proposed Findings").

⁶ Int. Mot. at 2.

⁷ Final Order at 29, Findings ¶ 89-106.

⁸ *Id.* at 41.

Motion invites the Commission to stand in the City's shoes and select a different bidder to purchase Burlington Telecom. Worse still, it asks the Commission to assume that, if the Joint Petition were denied, new bidders would emerge who would pay a substantially higher price than Champlain has paid, would be equally as qualified as Champlain, and would be willing to take the risk that Intervenors would not mount the same costly legal challenge to their joint petition as they have to Champlain's. The Joint Petition's request for Section 109 approval, however, presented the Commission with a binary choice that did not include the option to substitute one of the alternative bidders for Champlain. The Commission could have either granted the petition, thereby ensuring the City's recoupment of the maximum allocation available under the controlling Blue Water Management and Sale Agreement, or denied the petition outright, thereby forfeiting substantial rights that the City had under that Agreement.

Notwithstanding the Commission's rejection of Intervenors' interpretations of the City Charter and 24 V.S.A. § 1913 (and related proposed findings), and the immateriality of alternative bids by nonparty bidders under applicable Title 30 provisions, the Final Order demonstrates the Commission's ongoing concern for the eventual recovery of taxpayer funds. The Commission considered whether it was in the public good to deny the sale "solely on the basis that it would not make the City whole for the misappropriated \$16.9 million," and concluded that it would be contrary to its public good mandate under Title 30 to "establish a regulatory barrier that would effectively prohibit the sale of Burlington Telecom assets."⁹ Instead, the Commission concluded that approval of the sale satisfied the forward-looking standards of Sections 109, 231(a) and 504 and presented the best available opportunity to achieve the Intervenors' stated goal of eventually recovering the City's unreimbursed investment in Burlington Telecom. In particular, the Final Order stated:

⁹ Final Order at 36.

The sale to Champlain satisfies the applicable statutory and regulatory criteria, as described in the findings above; ensures that the City will recoup the maximum share of net sale proceeds (50%) under the previously approved Blue Water Management and Sale Agreement; and provides the City with the option to purchase a membership interest in Champlain, which could allow the City to recover previously written-off losses through the receipt of future profits.¹⁰

Findings 89-106 amply explain the basis of, and provide support for, the Commission's conclusion. No further findings are required by Rule 52.

II. Rule 59: Intervenors' Motion to Alter or Amend Fails Because It Seeks To Relitigate Arguments the Commission Fully Considered and Rejected In The Final Order.

The disposition of a motion to alter or amend a judgment rests with the discretion of the Commission.¹¹ Rule 59(e) gives the Commission "broad power to alter or amend a judgment."¹² In addressing a Rule 59(e) motion, the Commission "may reconsider issues previously before it, and generally may examine the correctness of the judgment."¹³ The purpose of Rule 59(e) is to avoid an unjust result due to mistake or inadvertence of the Commission, as opposed to that of a party.¹⁴ The rule is not intended to permit parties to relitigate issues or correct previous tactical decisions.¹⁵ The motion must "present facts which could not, with the exercise of due diligence by counsel, have been placed before the [Commission] before the order complained of was issued."¹⁶ "A party's mere disagreement with the Commission's decision is not grounds for reconsideration."¹⁷

¹⁰ *Id.* at 40.

¹¹ *Petition of Vermont Transco LLC, et al., for a certificate of public good pursuant to 30 V.S.A. Section 248*, Case No. 17-3808-PET, Order Re: Motion to Amend (Vt. Pub. Util. Comm'n, May 9, 2018), slip op., at 3

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Investigation to consider revising maximum and minimum water levels at Great Averill Pond, Little Averill Pond, and Norton Lake in the towns of Averill, Norton, and Warren's Gore, Vermont*, Docket No. 8429, Order Re: ANR Motion for Reconsideration (Vt. Pub. Util. Comm'n, Dec. 21, 2017), slip op., at 6.

In this case, the Commission should decline to exercise its Rule 59(e) discretion because it has already fully considered and rejected Intervenors' claims that (1) claim preclusion does not apply in this case because Intervenors were not a party to the 2014 proceeding approving the sale of Burlington Telecom to Blue Water, (2) the City Charter mandates full and immediate repayment of misappropriated City funds as a precondition to any sale, and (3) 24 V.S.A. § 1913 compels the Commission to deny any petition for sale of BT that does not fully and immediately repay previously misappropriated City funds. In particular:

- The Commission carefully analyzed and applied the Vermont Supreme Court's ruling in *Daiello v. Town of Vernon*, 2018 VT 17, 184 A.3d 1992 (2018), regarding the substantial identity of parties for purposes of claim preclusion. *See* Final Order, at 36-38. The Commission squarely rejected the arguments Intervenors renew in their Rule 59(e) Motion.
- The Commission fully considered and rejected the Intervenors' arguments interpretation of the Commission's authority under Section 438(c)(1) of the Burlington Charter. *See* Final Order, at 33-35. The Intervenors now repeat their argument in their Rule 59(e) Motion.
- The Commission considered and rejected the Intervenors' similar arguments regarding the proper interpretation of 24 V.S.A. § 1913. *See* Final Order, at 38-39. The Intervenors raise the same arguments in the Rule 59(e) Motion.

III. The Commission's Legal Conclusions Regarding (1) Claim Preclusion (2) the City Charter, and (3) 24 V.S.A. § 1913 Are Sound.

Intervenors' contention that the Final Order must be altered or amended to correct purported errors of law fails for two reasons. First, the Commission's legal conclusions were not erroneous. Second, the Intervenors ignore or mischaracterize the Commission's conduct of the case in arriving at its properly-supported conclusions. While the Commission ruled that the Intervenors are precluded from relitigating issues that the Commission previously decided in 2014, it did so only after it also carefully considered and rejected the merits of their arguments at the conclusion of a case in which Intervenors were granted unrestricted intervention, including

an opportunity to conduct discovery, cross-examine witnesses, enter exhibits into evidence, and present witnesses of their own. In rejecting Intervenors' claim that the City Charter applied to this case, the Commission clearly explained how and when the Commission had previously exercised its authority under the Charter. Finally, even though the Commission rejected Intervenors' contention that 24 V.S.A. § 1913 compels any specific action by the Commission, the Commission's conclusions on the extent to which the sale to Champlain will promote the general good under 30 V.S.A. § 109 appropriately account for § 1913's underlying purpose and its similarity to the City Charter provision.

Claim Preclusion

The Commission properly analyzed its 2014 Order's preclusive effect on Intervenors. The Commission concluded that the *Daiello* exception to the claim preclusion rule does not apply because "the issue raised by the Citizen Intervenors – the recovery of the \$16.9 million – was foremost in the Commission's thinking from the very beginning of the 2014 proceeding and was squarely addressed in orders issued prior to the deadline to intervene [in that case]."¹⁸ Furthermore, the Commission reached that conclusion only after examining the evidence, including Intervenors' proposed findings, and considering the merits of their arguments. In so doing, it recognized that the "City and other Joint Petitioners have reasonably relied on the finality of the Commission's 2014 Order as the basis for transactions proposed in the petition."¹⁹ Champlain negotiated and executed a contract with the City and Blue Water in good faith, justifiably believing that it proceeded through a "sale structure" that the Commission had previously approved and that the Commission had previously exercised its authority to resolve the City's charter-based CPG violations. Despite the Commission's solicitousness toward

¹⁸ Final Order at 38.

¹⁹ *Id.* at 37.

Intervenors, the Commission rightly concluded that “reopening issues previously resolved with finality would undermine the Commission’s jurisprudence.”²⁰ Just as the Intervenors’ Post-Hearing Memoranda did not justify amendment of the Commission’s 2014 Order —on which the Joint Petitioners have relied and from which City taxpayers have benefitted and stand to benefit in the future²¹ —nothing in the Intervenors’ Rule 59(e) motion justifies reconsideration of the Final Order in this proceeding.

Moreover, the Commission did address Intervenors’ underlying concerns regarding ultimate recovery of the \$16.9 million. The Final Order expressly acknowledges that “the Commission has a statutory responsibility to ensure the proposed transaction is in the public good, *which includes a review of the transaction to ensure it will allow the City and its taxpayers to recover as much of the City’s unreimbursed advances to Burlington Telecom as reasonably possible.*”²² The Commission took up that review and, after considering whether approval or denial of the proposed sale would better position the City to recoup funds, reasonably concluded that granting the Joint Petition favored the City’s chances of recouping as much of the \$16.9 million as reasonably possible under the circumstances.

The City Charter

The Commission correctly concluded that the City Charter does not apply to the transaction. Read in its overall context,²³ Section 438(c)(1) addresses the City’s exercise of authority under Section 449 of the Charter, which authorizes the City to “establish a joint venture or any other business relationship with one or more third parties to provide telecommunications

²⁰ *Id.*

²¹ Final Order, Findings ¶¶ 89-106, at 29-31.

²² *Id.* at 9 (emphasis added).

²³ See *Brown v. W.T. Martin Plumbing & Heating, Inc.*, 2013 VT 38, ¶ 20 (recognizing that to correctly interpret a statute, a court “must examine and consider fairly, not just isolated sentences or phrases, but the whole and every part of the statute, . . . together with other statutes standing in *pari materia* with it, as parts of a unified statutory system.” (internal quotation and citation omitted)).

or cable television services within or without the corporate limits of the City.”²⁴ Under Section 438(c)(1), the City must “obtain whatever regulatory approvals are necessary” prior to exercising its Section 449 authority. The Commission correctly concluded that Sections 438(c)(1) and 449, when read together, are only triggered when the City seeks to obtain a CPG—they do not apply in the present proceeding, where the City is not seeking a CPG. This comports with the plain language of the statute when read as a whole, which implicates the Commission’s authority only when the Commission is “considering any application for a certificate of public good” that is prerequisite to the City’s exercise of its Section 449 authority.

Contrary to the Intervenor’s Motion, the Commission did not conclude that it lacked authority to enforce the City Charter. Instead, the Commission concluded that it previously enforced the City Charter when it granted the City a Section 231 CPG in 2005 with conditions intended to implement the Charter’s prohibitions on loss of taxpayer funds.²⁵ It also enforced the Charter in 2014 when it resolved the City’s CPG violations and “knowingly” approved a future “sale structure that would reduce the ability of the City and its taxpayers to recover a substantial portion of the City’s \$16.9 million investment.”²⁶

Nonetheless, even without an exercise of further authority under the Charter, the Commission still had the power under Section 109 to grant the same relief the Intervenor seeks under the Charter—denial of the Joint Petition. The Commission could have denied the sale to Champlain, thereby cutting off the City’s immediate recovery of millions in post-closing net sale proceeds. Such a denial would also have foreclosed the opportunity for the City to recover even

²⁴ 24 V.S.A. Appendix § 3-449.

²⁵ To the extent the Final Order in this case does not already do so, the Commission should clarify that it has ample jurisdiction to enforce—and has over time actually enforced—the Charter in a manner consistent with its review of the public good and has not ceded any of its equitable remedial jurisdiction to the Superior Court Civil Division for additional review.

²⁶ Final Order at 35.

more of its previously written-off losses by purchasing a membership share in Champlain with rights to future Burlington Telecom profits and equity gains. The Commission realized, however, that such a denial would risk greater harm to the City’s taxpayers in contravention of the public good.

The reality Intervenor’s fail to face is that—regardless of which statutory standard the Commission applies—it has no power to compel a subsequent prospective buyer to come forward at all, much less one with the means to pay the substantially higher price needed to immediately make City taxpayers whole without saddling Burlington Telecom with levels of unsustainable debt and thereby imperiling the telecom system’s future operation altogether.

24 V.S.A. § 1913

Intervenor’s argue that the Commission “has the duty to enforce 24 V.S.A. § 1913.”²⁷ This argument has no support in the statute or in any other Title 30 sections that Intervenor’s rely on. The Commission correctly observed that “[a]ccording to the plain language of 24 V.S.A. § 1913, the section applies to a *municipality*, not the Commission or any other entity.”²⁸ The Commission’s reliance on the statute’s plain language is consistent with well-established rules of statutory construction.²⁹ In fact, the Intervenor’s themselves concede that § 1913 applies to only municipal utilities when they state: “Section 1913 imposes a nondiscretionary duty *upon municipal utilities*.”³⁰ Moreover, neither of the general jurisdictional grants cited by Intervenor’s at 30 V.S.A. §§ 9 and 209 compels the Commission to order the ultimate relief Intervenor’s seek under § 1913—denial of the Joint Petition.³¹ This is especially true in light of the Commission’s

²⁷ Mot. at 19.

²⁸ Final Order at 39 (emphasis in original).

²⁹ *In re Petition of GMP Solar-Richmond, LLC*, 2017 VT 108 ¶16 (2017) (affirming Commission’s implementation of plain language of statutes according to their terms).

³⁰ Mot. at 19 (emphasis added).

³¹ See Int. Reply Br. at 5 (claiming that § 1913 grants the Commission “authority to approve or reject the Joint Petition.”).

conclusion under § 109’s inarguably applicable “public good” standard, “which includes a review of the transaction to ensure it will allow the City and its taxpayers to recover as much of the City’s unreimbursed advances to Burlington Telecom as reasonably possible.”³² Even if the Commission determined that § 1913 applied to this Joint Petition, nothing in the record would support a contrary conclusion to the one reflected in the Final Order: that approving the Joint Petition will promote the general good of the State because denial presents a significant risk of a *lesser*—not greater—ultimate recovery by the City’s taxpayers.

Furthermore, while the City Charter differs from § 1913 in expressly imposing a duty on the Commission, the substantive standards of § 1913 and the City Charter—intended to guard taxpayers against losses from a municipality’s engagement in regulated businesses—are indistinguishable. As noted above, the Commission correctly concluded that the City Charter is enforced through imposition of appropriate CPG conditions at the time the City first undertakes a regulated telecommunications business and in subsequent proceedings to address violations of those conditions, such as in the 2014 Commission Order. To the extent that the Commission has discretion to enforce § 1913, the Commission’s regulatory rationale concerning how and when to enforce the City Charter applies equally to the identical substantive standards of § 1913. While the CPG conditions based on the City Charter proved unavailing in the case of the City’s unauthorized advancements of \$16.9 million, the Commission has already concluded that no good would have come from imposing civil penalties or other more drastic remedies on the City in 2014. Similarly, the Commission has concluded that approving the sale of Burlington Telecom assets to Champlain would promote the general good of the State. Intervenors’ Motion—which repeats its main arguments from earlier in the case without providing any newly-discovered factual support—fails to show otherwise.

³² Final Order at 9.

Conclusion

Intervenors' motion should be denied because (1) its proposed findings were expressly rejected by the Commission and are immaterial to the Commission's conclusions, (2) it has failed to raise new arguments based on newly discovered—and previously undiscoverable—facts, and (3) has not shown any error in the Commission's order.

DATED this 1st day of April, 2019.

Respectfully submitted,

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