

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-0491-PET

Joint petition of Champlain Broadband, LLC, City of Burlington doing business as Burlington Telecom, and Blue Water Holdings LLC for approvals, pursuant to 30 V.S.A. §§ 109, 231, and 504; 47 U.S.C. § 214(e); and Section 438(c)(1) of the City of Burlington Charter	
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Order entered: 04/12/2019

ORDER DENYING MOTIONS FOR ADDITIONAL FINDINGS AND TO ALTER OR AMEND

I. INTRODUCTION

This case concerns a petition filed by Champlain Broadband, LLC (“Champlain”), the City of Burlington, doing business as Burlington Telecom (“City”), and Blue Water Holdings LLC (“Blue Water”) (collectively the “Joint Petitioners”) requesting approval from the Vermont Public Utility Commission (“Commission”) of a transaction in which Champlain would acquire the Burlington Telecom assets and continue operating the system providing cable television, broadband internet access, and telecommunications services to residential and business customers in the greater Burlington area. On February 19, 2019, the Commission issued an order (the “February 2019 Order”) approving the transaction and granting Champlain certificates of public good to own and operate a cable television system and to provide telecommunications services in the State of Vermont.

On March 18, 2019, Sandra Baird, Esq., Jared Carter, Esq., Dean Corren, Steven Goodkind, Solveig Overby, Esq., and Shay Totten (collectively the “Citizen Intervenors”) filed motions for additional findings and to alter or amend. In this Order, we deny the Citizen Intervenors’ motions.

II. PROCEDURAL HISTORY RELATED TO THE MOTIONS

On February 19, 2019, the Commission issued the February 2019 Order approving the transaction and granting Champlain certificates of public good to own and operate a cable television system and to provide telecommunications services in the State of Vermont.¹

On March 18, 2019, the Citizen Intervenors filed motions for additional findings and to alter or amend (commonly referred to as a motion for reconsideration) the February 2019 Order, pursuant to Vermont Rules of Civil Procedure (“V.R.C.P.”) 52(b) and 59(e) (the “March 2019 Motions”).

On April 1, 2019, the Joint Petitioners filed a memorandum in opposition to the Intervenors’ March 2019 Motions.

Also, on April 1, 2019, the Vermont Department of Public Service (“Department”) filed a response to the Citizen Intervenors’ March 2019 Motions in which it recommended that the Intervenors’ Motions be denied. The Department concluded that the Citizen Intervenors’ March 2019 Motions largely restate arguments previously addressed and resolved by the Commission in the February 2019 Order and do not present factual or legal arguments that justify altering or amending that Order.

III. MOTION FOR ADDITIONAL FINDINGS

The Citizen Intervenors move, pursuant to V.R.C.P. 52(b), for amended and additional findings regarding whether the proposed sale to Champlain would produce the greatest recovery for taxpayers.

Legal Standard

Vermont Rule of Civil Procedure 52(b) provides that after entry of a judgment and upon the motion of a party, “a court may amend its findings or make additional findings and may amend the judgment accordingly.”² Under V.R.C.P. 52, the Commission need only make factual findings that identify what it decided and how it reached its decision.³ In other words, the

¹ The February 2019 Order was issued pursuant to 30 V.S.A. §§ 109, 231, 504, and 509; Commission Rule 8.200; 47 U.S.C. § 214(e); and 24 App. V.S.A. ch. 3 § 438(c)(1).

² Vermont Rule of Civil Procedure 52 is applicable to Commission proceedings. Commission Rule 2.103 and 2.105.

³ 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.”).

Commission's findings should "report the factual ingredients essential to the disposition."⁴ The Commission is not required to make findings that are immaterial to the issues raised by the legal standards applicable to the Joint Petition.⁵

Discussion

The Citizen Intervenors contend that the Commission ignored their proposed findings of fact 12-18, which asserted there was no evidence: of the value of the alternative bids the City received for Burlington Telecom, that Champlain's bid was the highest dollar amount, and that the capability of the alternative bidders was unacceptable.⁶ The Citizen Intervenors' maintain their proposed findings were relevant to whether the Joint Petitioners demonstrated that the proposed sale should be approved under Section 3-438(c)(1) of the Burlington City Charter ("Section 438(c)(1)" or the "municipal charter") and 24 V.S.A. § 1913.⁷ Finally, the Citizen Intervenors argue that due to the absence from the record of any evidence that the sale to Champlain would produce the greatest return to taxpayers, the Joint Petition must be denied.⁸

In our February 2019 Order, we expressly rejected the Citizen Intervenors' legal basis for their claim that the municipal charter requires that for the Commission to approve the sale it must find that Champlain's bid to purchase Burlington Telecom was the highest dollar amount and the other bidders were unacceptable.⁹ As discussed in greater detail in Section IV of this Order, we affirm our previous conclusions in the February 2019 Order that neither the municipal charter nor 24 V.S.A. § 1913 applies as the Citizen Intervenors claim. The standard under which the Commission must review a petition for the sale of telecom assets by one company to another company is provided in 30 V.S.A. § 109, which requires the Commission to determine whether the sale "will promote the general good of the State." Within the context of this proceeding, the Commission's review of the general good included a review of the transaction to ensure it

⁴ *New England Partnership, Inc. v. Rutland City School Dist.*, 173 Vt. 69, 74 (2001) ("The trial court 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.").

⁵ *Prevo*, 146 Vt. at 219 ("The court having made findings and conclusions upon essential issues, it did all the law requires of it.").

⁶ March 2019 Motion at 2-4.

⁷ *Id.*

⁸ *Id.*

⁹ February 2019 Order at 33-35, 38-39.

allowed the City and its taxpayers to recover as much of the City's unreimbursed advances to Burlington Telecom as reasonably possible.

The Citizen Intervenors' proposed findings of fact 12-18 are immaterial under 30 V.S.A. § 109. 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 bid that the City selected, whether Champlain offered the highest dollar amount in comparison to other bidders, or the capability of alternative bidders.

The Citizen Intervenors urge the Commission to "stand in the City's shoes" and select a different bidder to purchase Burlington Telecom. The Citizen Intervenors would have the Commission assume that, if the Joint Petition were denied, other bidders would offer to pay a substantially higher price than Champlain has paid and would be equally as qualified as Champlain. However, Section 109 does not permit the Commission to select a different bidder to purchase Burlington Telecom.

In our February 2019 Order, we concluded that the proposed sale of Burlington Telecom to Champlain was in the general good:

We conclude that the petition will promote the general good of the State because it will ensure that the City recoups 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 that could allow the City to recover previously written-off losses through the receipt of future profits from Burlington Telecom.

If we deny the sale, under the Blue Water Management and Sale Agreement, the maximum amount the City could recoup from a future sale would be 25% of the net sale proceeds if the sale agreement were executed by December 31, 2019, or 10% of the net sale proceeds if the sale agreement were executed after December 31, 2019. While there is no way to guarantee that a different future sale arrangement would not result in the City recouping a greater amount of money than it will recoup in the present transaction, it is very difficult to imagine a subsequent round of bids resulting in such a substantial increase in the purchase price that the City would be made whole.¹⁰

We affirm the legal analysis and conclusions in the February 2019 Order, and therefore we decline to modify the Order to include the additional findings cited by Intervenors.

¹⁰ February 2019 Order at 36.

IV. MOTION TO ALTER OR AMEND

The Citizen Intervenors move, pursuant to V.R.C.P. 59(e): (1) for reversal of the Commission's conclusions about claim preclusion, and (2) to amend the judgment because the Citizen Intervenors claim the Commission erred in holding that it lacks the authority to address whether the Joint Petition satisfies the municipal charter and 24 V.S.A. § 1913.

Legal Standard

The disposition of a motion to alter or amend a judgment rests with the discretion of the trial court or, in this case, the Commission.¹¹ Vermont Rule of Civil Procedure 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 the rule 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 A party's mere disagreement with the Commission's decision is not grounds for reconsideration.¹⁶

Discussion: Claim Preclusion

The Citizen Intervenors argue that the Commission erroneously held that: (1) claim preclusion applies to a claim that *was not and could not have been raised before*; (2) 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 (3) in a non-Section 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*.¹⁷ The Citizen Intervenors maintain that the Commission's November 2014 Order resolved all issues pertaining to the City's violation of its certificate of public good, but that it did not mention, much less decide, whether any certificate of public good

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 of 5/9/18 at 3 (citing *Alden v. Alden*, 187 Vt. 591, 592 (2010)).

¹² Vermont Rule of Civil Procedure 59 is applicable to Commission proceedings. Commission Rule 2.103 and 2.105. *Petition of Vermont Transco LLC* at 3 (citing V.R.C.P. 59(e) Reporter's Notes).

¹³ *Petition of Vermont Transco LLC* at 3 (citing *Drumheller v. Drumheller*, 185 Vt. 417, 432 (2009)).

¹⁴ *Id.* (citing *Osborn v. Osborn*, 147 Vt. 432, 433 (1986)).

¹⁵ *Id.* (citing *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3).

¹⁶ *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 of 12/21/17 at 6.

¹⁷ March 2019 Motions at 5-12.

should, or legally could, be issued under the municipal charter to whatever entity in the future might seek to operate Burlington Telecom's franchise, on then-unknown terms.¹⁸

The Citizen Intervenors' arguments are all based on the premise that the Commission's February 2019 Order found there was claim preclusion regarding claims that were not and could not have been raised during the proceeding that led to the November 2014 Order. We agree with the Citizen Intervenors' position that "[t]he [November] 2014 Order resolved all issues pertaining to the City's violation of its certificate of public good ... but the 2014 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 operate Burlington Telecom's franchise."¹⁹ The conclusion in the February 2019 Order was that the Citizen Intervenors were precluded from relitigating the rulings contained in the *November 2014 Order*, which included the Commission's rulings resolving the City's violations of Conditions 2, 17, 56, and 60 of its certificate of public good, and approving the Blue Water Management and Sale Agreement.²⁰ The February 2019 Order did not conclude that the Citizen Intervenors were precluded from litigating the merits of whether the Commission should approve the sale of Burlington Telecom and the issuance of a certificate of public good to Champlain.²¹ Rather, we granted unrestricted intervention to the Citizen Intervenors,²² affording them the opportunity to conduct discovery, cross-examine witnesses, enter exhibits into evidence, and present witnesses of their own,²³ and then gave careful consideration to the merits of their arguments regarding whether to approve the transaction. While the Citizen Intervenors may not agree with the Commission's legal analysis regarding the municipal charter and 24 V.S.A. § 1913, as discussed below, a party's mere disagreement with the Commission's decision is not grounds for reconsideration. Therefore, we decline to reverse our decision in the February 2019 Order regarding claim preclusion.

¹⁸ March 2019 Motions at 5-6.

¹⁹ *Id.*

²⁰ February 2019 Order at 36-38.

²¹ Additionally, the Citizen Intervenors mischaracterize the Commission's conclusion in the February 2019 Order regarding the Department and claim preclusion. The Commission did not hold that the Department's participation precluded the Citizen Intervenors from raising issues that *were neither raised nor decided in the earlier litigation*. Rather, the Commission concluded that the Citizen Intervenors were precluded from relitigating the rulings of the November 2014 Order. While the Intervenors were not party to the proceeding resulting in the November 2014 Order, the Commission issued its decision based not just on the interests presented by the parties to that proceeding but based upon its determination of what was in the general good.

²² Case No. 18-0491-PET, Order of 5/9/18.

²³ The Citizen Intervenors chose not to present any of their own testimony in this proceeding.

Discussion: The Commission's Authority Under the Municipal Charter and Section 1913

The Citizen Intervenors maintain that the Commission erred in holding that it lacks the authority to address whether the Joint Petition satisfies the municipal charter and 24 V.S.A. § 1913. The Citizen Intervenors further contend that 30 V.S.A. §§ 203 and 209 grant the Commission plenary authority to ensure that regulated entities comply with the general law of Vermont, including the municipal charter and Section 1913.²⁴

Contrary to the Citizen Intervenors' March 2019 Motions, we did not conclude that we lacked authority to enforce the municipal charter; rather we concluded it applied differently than the Citizen Intervenors argue it does. Additionally, we did not cede any of our remedial jurisdiction to the Civil Division of the Superior Court. The Commission previously acted in accordance with the municipal charter when it granted the City a certificate of public good in 2005 with conditions to implement the municipal charter's prohibitions on loss of taxpayer funds. The Commission referenced the municipal charter in its November 2014 Order when it resolved the City's certificate of public good violations, determined that revoking the City's certificate of public good or imposing monetary penalties would serve "no constructive regulatory purpose," 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."²⁵

The municipal charter does not apply to the present transaction as Intervenors contend. Section 438(c)(1) addresses the City's exercise of authority under Section 449 of the municipal charter, which authorizes the City to "establish a joint venture or any other business relationship with one or more third parties to provide telecommunications or cable television services within or without the corporate limits of the City."²⁶ Under Section 438(c)(1), the City must "obtain whatever regulatory approvals are necessary" before exercising its Section 449 authority. The Commission previously concluded in its February 2019 Order that Sections 438(c)(1) and 449, when read together, are only triggered when the City seeks to obtain a certificate of public good—they do not apply in the present proceeding in which the City is not seeking a certificate

²⁴ March 2019 Motions at 13-19.

²⁵ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 11/3/14 at 17-19, 32.

²⁶ 24 V.S.A. Appendix § 3-449.

of public good. This comports with the plain language of the statute when read as a whole, and 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.

As to 24 V.S.A. § 1913, we maintain our previous conclusion that Section 1913 does not apply to the Commission based on the plain language of the statute. This interpretation is consistent with well-established rules of statutory construction.²⁷ Moreover, even if the Commission had the requisite subject matter jurisdiction to enforce Section 1913, it would not change our general good determination or decision in this proceeding. In its substance, Section 1913 is largely identical to the municipal charter provision addressed by the Commission's 2005 Order and certificate of public good.²⁸ The City's previous conduct with respect to the funding of Burlington Telecom was considered and addressed in the November 2014 Order and previous Commission decisions. Neither of the general jurisdictional grants cited by the Citizen Intervenors at 30 V.S.A. §§ 9 and 209 compels the Commission to order the ultimate relief the Citizen Intervenors seek under Section 1913—denial of the Joint Petition. This is especially true considering the Commission's conclusion under 30 V.S.A. § 109 that the transaction satisfies the general good standard.

V. CONCLUSION

For these reasons, we decline to alter or amend our February 2019 Order.

SO ORDERED.

²⁷ *In re Petition of GMP Solar-Richmond, LLC*, 2017 VT 108, ¶ 16 (affirming the Commission's implementation of plain language of statutes according to their terms).

²⁸ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 9/13/05.

Dated at Montpelier, Vermont this 12th day of April, 2019.



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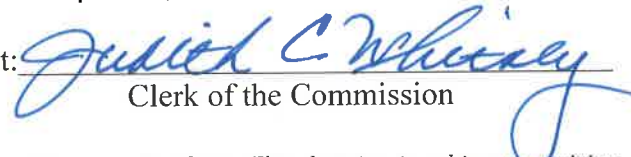


Sarah Hofmann)

OF VERMONT

OFFICE OF THE CLERK

Filed: April 12, 2019

Attest: 
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 18-0491-PET - SERVICE LIST

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