

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7044

Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good to operate a cable television system in the City of Burlington, Vermont (In Re: Amended Petition to amend Condition No. 17 of CPG related to completion of system build-out and to grant temporary relief from limitation in Condition No. 60 of CPG on financing operations))

Order entered: 2/16/2010

RULING ON MOTION FOR TEMPORARY RELIEF

On January 29, 2010, the City of Burlington, d/b/a Burlington Telecom ("BT"), filed a motion in this docket for temporary relief from the requirements of Condition 60 of its Certificate of Public Good ("CPG"). BT asked the Public Service Board ("Board") to permit BT to borrow up to \$386,673.75 from the City of Burlington's pooled cash management system to the extent necessary to meet a scheduled interest payment due February 17, 2010, with the understanding that such borrowed amount will be repaid within 60 days. The scheduled interest payment is due to CitiCapital Municipal Finance ("CitiCapital") pursuant to a Master Lease Purchase Agreement that the City of Burlington entered into on August 9, 2007, to provide funding for BT's city-wide fiber optic network.

In this Order, we deny the motion of BT for temporary relief from Condition 60 of its CPG to participate in the City of Burlington's pooled cash management system to the extent necessary to meet the scheduled interest payment. As more fully explained below, we are denying this motion for two fundamental reasons: (1) BT's failure to present sufficient reliable information to provide a basis for granting the motion; and (2) the late filing of this motion by BT, which precluded any realistic possibility of conducting a full and fair evidentiary hearing on BT's motion. As we indicated last November, the Board seeks to play as constructive a role as

possible in helping to resolve this situation consistent with its statutory responsibilities.¹ Unfortunately, by not making its request for relief with respect to this long-scheduled interest payment until January 29, BT effectively limited the opportunity to establish the strong evidentiary record that would be necessary for Board action in view of existing statutory requirements.

After receipt of BT's motion on January 29, the Board requested, by memorandum dated February 2, 2010, additional information from BT with respect to the motion. BT filed a response to the Board's request on February 8. The Department of Public Service ("Department") filed a memorandum in opposition to the motion for temporary relief on February 8. Comcast of Connecticut/Georgia/Massachusetts/New Hampshire/New York/North Carolina/Virginia/Vermont, LLC, d/b/a Comcast, also made a filing on February 8 in which it raised concerns about the requested relief. The Board heard oral argument on the motion on February 11, 2010.

Condition 60 of the CPG provides as follows:

60. The City shall make payments on behalf of Phase III only when and to the extent that Phase III has cash reserves, revenues receivable, or other payments receivable that, collectively, equal or exceed the sum of the payments to be made by the City plus the balance of any other current payments owed to the City. BT may participate in the City's pooled cash management system provided, however, that BT shall reimburse the City within two months of the City's expenditure for any expenses incurred or payments made by the City in support of services that BT provides to non-City entities. The City shall obtain Board approval prior to appropriating any funds other than as described above in the support of BT's Phase III activities.²

1. Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good to operate a cable television system in the City of Burlington, Vermont (In Re: Amended Petition to amend Condition No. 17 of CPG related to completion of system build-out and to grant temporary relief from limitation in Condition No. 60 of CPG on financing operations), Docket 7044, Scheduling Order, Ruling on Motion to Intervene and Request for Comments of 11/24/09 at 5.

2. Certificate of Public Good, issued on 9/13/05, in connection with the Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good to operate a cable television system in the City of Burlington, Vermont, Docket 7044 at 14.

BT is currently in Phase III of the project.³ By its own admission, BT has violated, and remains in violation of, Condition 60 as it has used funds from the City's pooled cash management system to meet its expenses without reimbursement to the City within two months. The aggregate amount of such unreimbursed amounts is currently at least \$16.95 million.

The Board's consideration of this request for temporary relief cannot be assessed solely in terms of the policy, legal and practical considerations that would typically guide the Board's decision-making process. Regardless of the City's or our own views as to the policy merits of applicable City Charter provisions⁴ and state statutes,⁵ both the City and the Board are bound by legislative directives that essentially require that the costs of any investment in BT and any losses of BT not be borne by the City's taxpayers. To the extent the City or BT wishes to find relief from this directive, it must be provided by the state legislature and not by the Board.

The proposed additional borrowing would represent a violation of Condition 60 even if BT were to reimburse the City's cash pool within two months because Phase III does not have "cash reserves, revenues receivable, or other payments receivable that, collectively, equal or exceed the sum of the payments to be made by the City plus the balance of any other current payments owed to the City." Nevertheless, if there were a sufficient evidentiary record or other information available to the Board that would allow the Board to conclude that the risks to, and ultimate unfavorable consequences for, the City's taxpayers, in light of the existing violations of Condition 60, would be reduced by granting the requested temporary relief from Condition 60, the Board would give serious consideration to the motion despite the violation of Condition 60. Unfortunately, because of the timing of BT's motion (which was not filed with the Board until

3. The scope of Phase III activities are described in the Board's Order related to the CPG:

Phase III of the BT telecommunications project refers to the new facilities that BT intends to construct in order to offer CATV services, as well as telecommunications and high-speed internet services. In Phase III, BT will construct a fiber-to-the-premise ("FTTP") open access network that will pass every residence, business, and institution located within the City by summer 2006. The system will have the capability to allow BT to offer telephone service, high-speed internet access service, cable television service, and transport services to other service providers on an open access basis.

Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good to operate a cable television system in the City of Burlington, Vermont, Docket 7044, Order of 9/13/05 at 6.

4. 24 V.S.A. App. § 3-438(c).

5. 24 V.S.A. § 1913(e) (eff. June 9, 2007).

the afternoon of Friday, January 29) and the absence of sufficient reliable evidence filed or otherwise provided by BT in support of its motion, there is not a sufficient basis under the circumstances for the Board to reach any such conclusion.

From at least the time BT filed its amended petition on September 30, 2009, requesting temporary relief from Condition 60, BT has no doubt been aware that it would be unlikely to be able to fund future rental payments under its Master Lease Purchase Agreement without access to the City's pooled cash management system during the period that its amended petition was pending. Yet BT did not file its request for relief from Condition 60 to make the scheduled interest payment until twelve business days before such interest payment was due. Despite the lateness of its filing, BT did not include with its request supporting financial information sufficient to demonstrate that the relief requested would promote, rather than further endanger, the interests of City taxpayers. Furthermore, by failing to file its motion on a timely basis, BT foreclosed any realistic possibility for holding a full and fair evidentiary hearing to develop a more complete factual foundation for making independent judgments about the consequences of BT's proposed action in utilizing the City's pooled cash management system to fund the scheduled interest payment on February 17.

In order for the Board to consider granting BT's motion for temporary relief, BT must establish that (i) it would be able to reimburse the City's pooled cash management system within 60 days for any borrowing needed to meet the interest payment without increasing the aggregate indebtedness of BT to such cash pool, and (ii) the consequences for the City's taxpayers of not permitting such additional borrowing would be demonstrably worse than the consequences of permitting such borrowing. In support of its motion, BT filed an affidavit of Jonathan P.A. Leopold, Jr., the City's Chief Administrative Officer, who is responsible for the oversight and management of financial and administrative affairs for the City, including BT. Mr. Leopold stated that BT will have "sufficient receivables to repay pooled cash within 60 days." However, neither Mr. Leopold nor BT provided any substantive support for this assertion in the January 29 filing. Mr. Leopold also stated that, "based on his experience with municipal finance, creation of an 'event of default' [under the Master Lease Purchase Agreement] will effectively foreclose the possibility of any refinancing of BT's present indebtedness."

In the memorandum of February 2 from the Deputy Clerk of the Board, BT was requested to provide specific cash flow, receivable and payable information and also was invited to present any other information it believed would support an independent judgment that BT would have sufficient receivables and would be able to reimburse the City's pooled cash management system for any additional borrowing within 60 days. BT's filing on February 8 was not fully responsive to the Board's request, and, in fact, the additional information provided to the Board in BT's Exhibit A appeared to undermine any conclusion that BT would be able to reimburse the City's pooled cash management system without an increase in BT's aggregate indebtedness to the City's pooled cash management system from its current amount. In order to reimburse the City's pooled cash management system within 60 days of the proposed additional borrowing, BT would have to generate sufficient net cash by April 18 to meet this obligation. Yet, from a starting cash position of \$92,000 on January 4, 2010, BT forecasts cumulative cash deficits from January through April 2010 of \$115,000 without taking into account funds needed either to meet the scheduled interest payment of approximately \$387,000 or to reimburse the City's pooled cash management system by April 18 for any borrowing necessary to meet such scheduled interest payment.⁶ In addition, BT has another scheduled interest payment of approximately \$387,000 due on May 17, 2010, and a principal and interest payment of approximately \$706,000 due on August 17, 2010. At oral argument, counsel for BT indicated that the timing of receivables and payables could be adjusted in a manner that would permit reimbursement within 60 days, but it remains unclear to the Board how this would be accomplished without ultimately increasing BT's aggregate indebtedness to the City's pooled cash management system from its current amount.⁷ Accordingly, the Board does not have a sufficient basis to conclude that "the violation of

6. Exhibit A to BT's response filed on February 8, 2010, to the Board's memorandum of February 2, 2010. It should also be noted that the cash forecasts provided by BT assume an increase in anticipated cash revenue receipts (the majority, contrary to statements made at oral argument, from residential customers) from \$600,027 in December 2009 to \$659,423 in April 2010.

7. The Board also notes the Department's conclusion that "additional expenditures from the cash pool are likely to put additional taxpayer dollars at risk, and that BT's representations regarding repayment of the additional expenditures are unreliable." Department's Opposition to Motion for Temporary Relief, 2/8/10 at 3.

Condition 60 that existed as of October 2, 2009, will not be worsened by allowing the City to utilize the pooled cash" to make the scheduled interest payment.⁸

Based on the information provided to the Board, the Board also concludes that BT has not provided sufficient information to assess the seriousness of the consequences of a default under the Master Lease Purchase Agreement relative to the consequences of permitting further violations of the CPG. In his affidavit, Mr. Leopold asserts only that a default "will effectively foreclose the possibility of any refinancing of BT's present indebtedness."⁹ However, little in the record suggests that refinancing BT's present debt is a viable or desirable option for BT. In its opposition to the motion for temporary relief, the Department argues that BT's present debt load is unsustainable and does not support the refinancing proposed by BT which will add to BT's current debt load.¹⁰ In addition, the Blue Ribbon Report on Burlington Telecom, referred to by both BT and the Department at oral argument and filed by the Department with BT's consent on February 12, determined that "BT is not viable in relationship to its current debt load of \$51 million and its ability to generate earnings to pay off its debts."¹¹

In its filing in support of its motion for temporary relief, BT noted the existence of a \$1 million reserve fund which would be available to CitiCapital in the event that BT fails to meet the scheduled interest payment.¹² Although the Board recognizes that accessing the reserve fund to satisfy the February 17 interest payment would constitute a technical default under the CitiCapital lease agreements, it would apparently not constitute a more serious payment default. The Escrow Agreement with CitiCapital specifically provides that "the Reserve Fund shall be used to prevent any default in the payment of Rental Payments . . . , if Lessee does not timely

8. BT's Memorandum of Law in Support of Motion for Temporary Relief (1/29/10) at 6.

9. Leopold Affidavit at 2.

10. In Exhibit 2 to BT's Motion for Temporary Relief, BT provided a term sheet for the proposed refinancing.

11. Blue Ribbon Report on Burlington Telecom to the City Council, dated February 11, 2010, at 6. On December 14, 2009, the Burlington City Council passed a resolution to create the Blue Ribbon Committee on Burlington Telecom to assess, among other things, the viability of BT in terms of its current debt load.

12. See BT's Memorandum of Law in Support of Motion for Temporary Relief at 5 and Leopold Affidavit at 2 filed with the Motion for Temporary Relief on January 29.

make Rental Payments to Lessor on each Payment Date."¹³ It appears that accessing the Reserve Fund would neither worsen the degree of noncompliance with Condition 60 of the CPG, nor increase the financial risks posed to the City's taxpayers by borrowing additional funds from the cash pool.¹⁴ While the Board is not unmindful of the potential consequences of any default under the CitiCapital agreement, BT has not provided a sufficient basis for the Board to conclude that there exists any viable alternative to such a default that could be accomplished in a manner consistent with the requirements of the City Charter and state law.

In its opposition to BT's motion, the Department expresses the view that the City should be in discussions with CitiCapital Municipal Finance regarding a restructuring of BT's debt. The Board similarly encourages such discussion with the caveat that the Board, in view of the existing statutory mandates, would find it difficult to endorse any restructuring of the indebtedness to CitiCapital that would cause any portion of the existing or restructured indebtedness to be borne directly or indirectly by taxpayers. The Board also appreciates the efforts of the Blue Ribbon Committee appointed by the Burlington City Council to find a practical and viable option to ensure the future and value of the City's fiber optic network for the City, its residents and its businesses.

Finally, we note that late in the afternoon of February 12, 2010, BT submitted by electronic mail a letter reporting on the status of a related proceeding in Chittenden Superior Court. In its letter, BT states that the parties to the Court proceeding, including BT, had stipulated to entry of an order by the Court that "precludes the City from using its pooled cash management system or any other City monies to make any payments to CitiCapital unless authorized by order of the Board."¹⁵ BT's February 12 letter does not rectify the insufficiency of

13. Escrow Trust Agreement dated August 9, 2007, at 3, included as part of Exhibit D to BT's filing of February 8 in response to the Board's memorandum of February 2.

14. The Board's understanding of the sale/lease-back transaction between BT and CitiCapital in August 2007 is that the Reserve Fund represents a portion of the sale proceeds originally payable to BT at the time of the sale, but earmarked for the purposes described above. Although held in trust for the benefit of CitiCapital, BT retains ownership of the Reserve Fund and has been entitled to apply any net investment earnings on the Reserve Fund to meet scheduled payments under the CitiCapital Agreement. *See Escrow Trust Agreement at 2.*

15. Letter from William F. Ellis, Esq., to Susan M. Hudson, Clerk of the Board, dated February 12, 2010, at 1-2.

support that it has provided for its motion for relief from Condition 60, and thus does not lead us to change the conclusions we reach above.

In summary, BT has provided the Board with an insufficient basis to grant its motion for temporary relief from the requirements of Condition 60, and did not seek that relief on a timely enough basis to allow for a full and fair evidentiary hearing on BT's motion. Accordingly, the motion is denied.

So ORDERED.

Dated at Montpelier, Vermont, this 16th day of February, 2010.

<u>s/ James Volz</u>)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
<u>s/ John D. Burke</u>)	OF VERMONT

OFFICE OF THE CLERK

FILED: February 16, 2010

ATTEST: s/ Susan M. Hudson

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)