

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	Hearings at Montpelier, Vermont September 26, 2018
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Order entered: 02/19/2019

PRESENT: Anthony Z. Roisman, Chairman
Margaret Cheney, Commissioner
Sarah Hofmann, Commissioner

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I. INTRODUCTION

In this case 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”) seek approval from the Vermont Public Utility Commission (“Commission”) of a transaction in which Champlain will 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. In today’s Order, the Commission finds that the proposed transaction will promote the public good of the State of Vermont and we approve it pursuant to 30 V.S.A. §§ 109 and 231.

We find that Champlain has met the criteria set forth in 30 V.S.A. § 504(b) and (c) and Commission Rule 8.214 and hereby grant a certificate of public good (“CPG”) to Champlain to own and operate a cable television system in the State of Vermont. In addition, we find that issuance of a CPG to Champlain to own and operate a company offering telecommunications services will promote the general good of the State pursuant to 30 V.S.A. § 231. We grant a CPG to Champlain to own and operate telecommunications services in the State. We further find that designation of Champlain as an eligible telecommunications carrier (“ETC”) for Lifeline purposes pursuant to 47 U.S.C. § 214(e) is consistent with the public interest. Champlain agrees to abide by all applicable CPG conditions incorporated into the existing CPGs held by the City and Blue Water. Given the issuance of new CPGs to Champlain to continue operation of Burlington Telecom, we find good cause pursuant to 30 V.S.A. §§ 231(a) and 509(a) to revoke the CPGs currently held by the City and Blue Water related to the provision of cable television and telecommunications services.

Under the terms of the Asset Purchase Agreement (“Purchase Agreement”), Champlain will pay the purchase price of \$30.8 million to Blue Water for Burlington Telecom’s assets and the City has the option to purchase up to 33% of the membership interests in Champlain. The City expects to receive net sales proceeds of approximately \$6.3 million. In today’s Order, we find that the use of the City’s share of net proceeds to purchase membership interests in Champlain is not barred by Section 438(c)(1) of the City of Burlington Municipal Charter.

II. PROCEDURAL HISTORY

On February 26, 2018, the Joint Petitioners filed a petition with the Commission, together with prefiled testimony and exhibits requesting approvals, pursuant to 30 V.S.A. §§ 109, 231, and 504; 47 U.S.C. § 214(e); and 24 App. V.S.A. c. 3 § 438(c)(1). The witnesses for Champlain were Todd Schurz and Gesumino (Jessie) Agostino. The witness for Blue Water was Dale Arango.

Also, on February 26, 2018, Champlain filed a motion for confidential treatment regarding two of its prefiled exhibits.

On February 27, 2018, the City submitted its own prefiled testimony and exhibits. The City's witnesses were Beth Anderson and Terry Dorman.

On March 5, 2018, Champlain filed a stipulated motion for approval of a protective agreement entered into by and among the Joint Petitioners and the Vermont Department of Public Service ("Department").

On March 27, 2018, Champlain filed two proposed schedules for this proceeding that were developed in coordination with the other Joint Petitioners, the Department, and the Burlington Access Management Organizations ("BAMOs").

On March 28, 2018, the BAMOs filed a motion to intervene, and the Department filed a response supporting the BAMOs' request to intervene.

Also, on March 28, 2018, Sandra Baird, Esq., Jared Carter, Esq., Dean Corren, Steven Goodkind, Solveig Overby, Esq., and Shay Totten (collectively the "Citizen Intervenors") filed a motion to intervene.

Additionally, on March 28, 2018, the Commission held a prehearing conference in Montpelier, Vermont.

On March 29, 2018, the Department filed a response to Champlain's motion for confidential treatment stating that the Department did not oppose Champlain's motion.

On March 30, 2018, the Department responded to the Citizens Intervenors' motion to intervene stating that it did not oppose the Citizen Intervenors' request to intervene.

On April 3, 2018, the Joint Petitioners proposed public hearing dates and informed the Commission of the Joint Petitioners' proposed plan for providing notice of the public hearing.

On April 11, 2018, the Commission issued a prehearing conference order granting the BAMOs' motion to intervene and setting a schedule for the proceeding.

Also, on April 11, 2018, the City filed a response opposing the Citizen Intervenors' motion to intervene.

On April 25, 2018, the Citizen Intervenors filed a reply to the City's response opposing their motion to intervene.

On May 9, 2018, the Commission issued an order granting the Citizen Intervenors' motion to intervene.

Also, on May 9, 2018, the Commission held a public hearing in Burlington, Vermont.

On June 29, 2018, the Commission issued an order approving the protective agreement among the Joint Petitioners and the Department.

On July 11, 2018, the Department and the BAMOs filed direct prefiled testimony and exhibits. Witnesses for the Department were Corey Chase, Carol Flint, Clay Purvis, and Brian Winn. The witness for the BAMOs was Lauren Glenn Davitian.

On August 1, 2018, the Commission issued an order granting in part and denying in part Champlain's motion for confidential treatment.

On August 17, 2018, Champlain filed a motion for partial reconsideration of the Commission's order denying in part Champlain's motion for confidential treatment.

On August 22, 2018, Champlain submitted the prefiled rebuttal testimony of Todd Schurz and the City submitted the prefiled rebuttal testimony of Beth Anderson and Stephen Barraclough. Mr. Schurz's testimony included as an exhibit a memorandum of understanding dated August 20, 2018, between Champlain and the BAMOs (the "BAMO MOU").

On September 12, 2018, the Citizen Intervenors filed an objection to the admissibility of certain portions of the prefiled rebuttal testimony of Beth Anderson.

On September 18, 2018, the Commission issued an order granting confidential treatment of certain information in Champlain's exhibit GA-2.

On September 21, 2018, the City filed its opposition to the Citizen Intervenors' objection to the admissibility of certain portions of Beth Anderson's prefiled rebuttal testimony.

On September 26, 2018, the Commission held a technical hearing in Montpelier, Vermont. At the hearing, the Commission orally denied the Citizen Intervenors' objection to

certain portions of Beth Anderson's prefiled rebuttal testimony and modified the post-hearing briefing schedule from the schedule previously established in the Commission's order of April 11, 2018.

Also, on September 26, 2018, Champlain filed a revised version of the BAMO MOU.

On October 22, 2018:

- The Joint Petitioners filed a proposal for decision and proposed CPGs. In support of the Joint Petitioners' joint filing, the City filed additional proposed findings and a legal brief and Blue Water filed a legal brief.
- The Department filed a legal brief recommending that the Commission approve the transaction through which Champlain will acquire the assets of Burlington Telecom; issue Champlain CPGs to provide cable television and telecommunications services; designate Champlain as an ETC; and deny without prejudice the City's request for a finding under Section 438(c)(1) of the Burlington Municipal Charter.
- The BAMOs filed a legal brief in support of the BAMO MOU, proposed findings, and proposed CPG conditions agreed to by Champlain.
- The Citizen Intervenors filed proposed findings of fact and conclusions of law and a legal brief arguing that the Commission must deny the Joint Petitioners' petition because the requested relief is unlawful under state statute and the Burlington Municipal Charter.

On October 29, 2018, the Citizen Intervenors filed a motion for permission to correct an error in their filings submitted on October 22, 2018, as well as corrected versions of each filing.¹

On November 2, 2018, reply briefs were filed by Champlain, the City, Blue Water, the Department, the BAMOs, and the Citizen Intervenors.

¹ The motion is granted.

III. POSITIONS OF THE PARTIES

Joint Petitioners

The Joint Petitioners, namely Champlain, the City, and Blue Water, request that the Commission: (a) approve Champlain's acquisition of the assets of Burlington Telecom, (b) issue two CPGs to Champlain authorizing it (i) to own and operate a cable television system and (ii) to offer intrastate telecommunications services on a common carrier basis in Vermont, (c) designate Champlain as an ETC for Lifeline Purposes, and (d) revoke the existing CPGs held by Blue Water and the City regarding the ownership and operation of Burlington Telecom. In addition, the Joint Petitioners request in their petition that the Commission make a finding, pursuant to a provision in the City's municipal charter, that the costs and any losses resulting from a proposed investment by the City in Champlain will not be borne by the City's taxpayers. The Joint Petitioners maintain in their briefs that the evidence supports all the Commission actions requested by them and that all applicable legal requirements for such actions have been satisfied.

Department

The Department supports the grant by the Commission of all the relief requested by the Joint Petitioners except for the requested finding related to the municipal charter provision. The Department recommends that the Commission deny this request without prejudice because the evidentiary record does not contain sufficient evidence to determine whether the City's proposed equity investment in Champlain meets the requirements of the municipal charter provision.

Citizen Intervenors

The Citizen Intervenors oppose the sale of assets to Champlain, the issuance of CPGs to Champlain, and the other proposed actions. They argue that the requested relief is unlawful because the proposed transactions do not provide for the repayment of most of the \$16.9 million of taxpayer funds that is owed to the City's taxpayers. The Citizen Intervenors maintain that a provision of the City's municipal charter and another State statute require the City and the Commission to ensure in connection with the proposed transactions that any losses incurred by the City through the provision of telecommunications or cable television services are not borne by the City's taxpayers. They contend that these laws would be violated if the proposed

transactions were approved and completed because the proposed transactions do not provide for the repayment of most of the funds owed to the City's taxpayers.

BAMOs

The BAMOs intervened in this proceeding to ensure the continuation and updating, as necessary, in any cable television CPG issued to Champlain, of the conditions in Burlington Telecom's existing cable television CPG related to public, educational, and governmental ("PEG") access matters and of the terms of the existing contracts between Burlington Telecom and the BAMOs. Champlain and the BAMOs have entered into a memorandum of understanding in this case, which includes proposed CPG conditions and a new PEG access agreement between the BAMOs and Champlain. The BAMOs request that the CPG conditions agreed to by Champlain and the BAMOs be included in any cable television CPG issued to Champlain in this proceeding.

IV. PUBLIC COMMENTS

The Commission received many comments from members of the public regarding this case. The Commission heard from six members of the public at a public hearing held in Burlington, Vermont, on May 9, 2018, and received over 40 written comments. The Commission considered the comments that it received before the evidentiary hearing in developing its questions to ask the witnesses testifying at the hearing. Additionally, the Commission considered all the comments while reviewing the record to make its final decision in this case.

All the comments opposed or expressed concerns regarding the proposed sale of Burlington Telecom to Champlain, except for one comment filed by Citibank in support of the petition. Comments fell into the following categories and are addressed below:

- Concerns about the sale to a private out-of-state company and the loss of local control, and what that would mean for service quality, cost of service, and issues of net neutrality;
- Concerns that the sale would not result in the return of \$16.9 million owed to Burlington taxpayers;

- Concerns about the process by which the Burlington City Council decided to move forward with the sale of Burlington Telecom to Champlain and a desire for greater public input in that process (e.g. by seeking voter approval);
- Concerns that Blue Water would reap greater profits from the sale than the City would; and
- A desire for more information about Burlington Telecom's current value and potential value.

Loss of Local Control

The Commission acknowledges the importance that many commenters attributed to retaining local control of Burlington Telecom and commenters' current satisfaction with the quality of service provided and the costs for those services. As reflected in the findings in this order, Champlain has committed to continue providing the same quality of service that Burlington Telecom's customers have come to expect at reasonable rates and has committed to adhere to net neutrality principles. The conditions of the CPGs provide requirements and oversight to ensure Champlain continues to operate Burlington Telecom in a manner that complies with Vermont law and satisfies the commitments Champlain has made.

\$16.9 Million

The Commission acknowledges the anger, frustration, and concern felt by many Burlington citizens regarding the \$16.9 million of non-reimbursed short-term advances made to Burlington Telecom from the City's general fund. As explained in greater detail in the Discussion section below, the Commission does not have the enforcement authority to require the City to reimburse its taxpayers, and in November 2014, the Commission issued an order resolving the City's violations of its certificate of public good related to the \$16.9 million. However, 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.

City Council Process

The process by which the City decided to enter into an asset purchase agreement with Champlain for the sale of Burlington Telecom is largely within the purview of the Mayor and City Council. The Commission's jurisdiction in the present case is limited to reviewing the petition before it and determining whether the petition satisfies the applicable legal criteria.

Blue Water

The terms by which Blue Water will receive its portion of the proceeds from the sale of Burlington Telecom were previously determined when the City sold Burlington Telecom's assets to Blue Water in 2014. Under the terms of the 2014 Burlington Telecom Management and Sale Agreement between Blue Water and the City, the entities agreed that if a purchase and sale agreement were entered into before December 31, 2017,² the City would receive 50% of the net sale proceeds after payment to Blue Water of the unamortized balance of \$6 million and other deductions, with the City's proceeds subject to a further 50% split with Citibank.³ If a purchase and sale agreement were entered into later, the City's percentage of the sale proceeds would be less (purchase and sale agreement by December 31, 2018 – 35%; by December 31, 2019 – 25%; after December 31, 2019 – 10%).⁴

Burlington Telecom's Value

There are two exhibits in the record of this case related to Burlington Telecom's financial value – Exhibit Champlain-GA-2 ("GA-2") and Exhibit Champlain-GA-3 ("GA-3"). GA-3 contains information regarding Burlington Telecom's past financial value and is publicly available through ePUC.⁵ GA-2 contains projections regarding Burlington Telecom's financial value over the next 11 years.

When Champlain filed GA-2 it concurrently filed a motion for confidential treatment of the exhibit, claiming that the exhibit contained proprietary and commercially sensitive financial

² The Joint Petitioners entered into their asset purchase agreement on December 29, 2017.

³ Exh. City-BA-2 at 11.

⁴ Exh. City BA-2 at 11.

⁵ ePUC is the Commission's electronic case management system and can be accessed at <https://epuc.vermont.gov>.

information that, if publicly disclosed, would give Burlington Telecom's competitors a substantial unfair advantage. On August 1, 2018, and September 18, 2018, the Commission issued orders in this case finding that Champlain had met its burden for treating certain information in GA-2 as confidential. Therefore, a redacted version of GA-2 is publicly available.

V. LEGAL STANDARD

The transactions proposed by the Joint Petitioners require approval from the Commission under 30 V.S.A. §§ 109(a), 231(a), 504, and 509(a); Commission Rule 8.200; 47 U.S.C. § 214(e); and 24 App. V.S.A. ch. 3 § 438(c)(1).

1. *Review of the Proposed Sale*

The sale of a utility's corporate property "constituting 10 percent or more of the company's property located within this State and actually used in or required for public service operations" requires prior approval by the Commission.⁶ For the Commission to approve such a sale, the Commission must find that the sale "will promote the general good of the State."⁷ In evaluating the sale of a utility's assets, the Commission typically assesses the purchaser's technical and managerial competence, its financial resources, its reputation, and the competitive effect of the sale.

2. *Issuance of a Cable Television Certificate of Public Good*

To grant a CPG for the ownership and operation of a cable television system, the Commission must find that the applicant complies with the criteria set forth in 30 V.S.A. § 504(b) and (c), and the Commission must consider the so-called "EMCO criteria" set forth in Commission Rule 8.214. The issuance of a cable television CPG by the Commission also constitutes the award of a cable television franchise to Champlain by the Commission pursuant to 47 U.S.C. § 541.

⁶ 30 V.S.A. § 109(a).

⁷ *Id.*

Section 504(b) requires findings by the Commission that the applicant has complied with or will comply with requirements adopted by the Commission to ensure that the cable television system provides:

- (1) designation of adequate channel capacity and appropriate facilities for public, educational, or governmental use;
- (2) adequate and technically sound facilities and equipment, and signal quality;
- (3) a reasonably broad range of public, educational, and governmental programming;
- (4) the prohibition of discrimination among customers of basic service; and
- (5) basic service in a competitive market, and if a competitive market does not exist, that the system provides basic service at reasonable rates determined in accordance with section 218 of this title.

Section 504(c) requires that the Commission ensure the cable television system provides or uses:

- (1) a reasonable quality of service for basic, premium, or otherwise, having regard to available technology, subscriber interest, and cost;
- (2) construction, including installation, which conforms to all applicable State and federal laws and regulations and the National Electrical Safety Code;
- (3) a competent staff sufficient to provide adequate and prompt service and to respond quickly and comprehensively to customer and Department complaints and problems;
- (4) unless waived by the Commission, an office that shall be open during usual business hours, and a listed, toll-free telephone number so that complaints and requests for repairs or adjustments may be received; and
- (5) reasonable rules and policies for line extensions, disconnections, customer deposits, and billing practices.

The so-called “EMCO criteria,” established under Commission Rule 8.214, require that the Commission consider the following factors when deciding whether to approve a request for a CPG for a cable television system:

- (1) financial soundness and stability, both of the applicant generally and the particular proposal;

(2) the present proposed service offerings to customers, including the number of channels and the ability and capacity of the system to offer additional varied services in the future, and the ability to provide public access;

(3) the commitment to a construction and in-service schedule;

(4) the experience and ability of the applicant to run and manage a cable tv system;

(5) the rates proposed to be charged to customers;

(6) consumer policies, particularly regarding complaints and problems;

(7) availability of service to maximum number of residences;

(8) the quality of the engineering and materials used in the system; and

(9) logical fit with neighboring systems.

3. Issuance of a Telecommunications Certificate of Public Good

To grant a CPG for the ownership and operation of a company offering telecommunications service, the Commission must find that “the operation of such business will promote the general good of the State.”⁸ In reviewing a petition for a telecommunications CPG the Commission has generally been guided by its assessment of the following criteria: (1) technical expertise, (2) adequate service, (3) facility maintenance, (4) balance between customer and shareholder interests, (5) financial stability, (6) the company’s ability to obtain financing, (7) business reputation, and (8) customer relations.⁹ These criteria are guidelines only.¹⁰ The Commission may exercise its jurisdiction “so far as may be necessary to enable [it] to perform [its] duties and exercise the powers conferred upon [it] by law” and tailor conditions appropriate to the planned activities of the petitioner.¹¹

⁸ 30 V.S.A. § 231(a).

⁹ *Joint Petition of Consolidated Communications*, Docket No. 8881, Order of 6/26/17 at 13 (citing *Petition of Verizon New England d/b/a Verizon Vermont*, Docket No. 7270, Order of 12/21/07 at 23).

¹⁰ *Id.*

¹¹ *Id.*; 30 V.S.A. § 203.

4. Designation of a Lifeline Eligible Telecommunications Carrier

To be eligible for federal universal service support, a telecommunications carrier must be designated an ETC.¹² Under federal law, the Commission is responsible for designating ETCs in Vermont, based upon standards established by federal law.¹³

A telecommunications carrier seeking ETC designation for Lifeline purposes only must provide, using either its own facilities or a combination of its own facilities and resale of another carrier's services: (1) voice grade access to the public switched network or its functional equivalent; (2) minutes of use for local service provided at no additional charge to end users; (3) access to the emergency services provided by local government or other public safety organizations (e.g., 911), and (4) toll limitations services to qualifying low-income consumers as provided in 47 C.F.R. Part 54, Subpart E.¹⁴ Additionally, the telecommunications carrier must advertise the availability of the foregoing services and the charges for such services using media of general distribution.¹⁵

A telecommunications carrier seeking ETC designation for Lifeline purposes only shall also demonstrate that: (1) it is able to remain functional in emergency situations, (2) it will satisfy applicable consumer protection and service quality standards, (3) it is financially and technically capable of providing Lifeline service; and (4) it has submitted to the Commission information describing the terms and conditions of any voice telephony service plans offered to Lifeline subscribers.¹⁶

Finally, to designate a telecommunications carrier as an ETC for Lifeline purposes only, the Commission must find that the designation is "consistent with the public interest, convenience[,] and necessity."¹⁷ The Commission's assessment of the designation's consistency with the public interest may examine various factors, including potential benefits from increased

¹² 47 U.S.C. §§ 214(e)(1); 47 C.F.R. § 54.201(a).

¹³ 47 U.S.C. § 214(e)(2); 47 C.F.R. § 54.201(b).

¹⁴ 47 U.S.C. § 214(e)(1)(A); 47 C.F.R. §§ 54.101(a)(1) and (b).

¹⁵ 47 U.S.C. § 214(e)(1)(B).

¹⁶ See *Petition of the City of Burlington, Vermont d/b/a Burlington Telecom, for designation as an Eligible Telecommunications Carrier*, Docket No. 8883, Order of 5/22/17 at 3-4, and *Petition of IM Telecom, LLC d/b/a Infiniti Mobile, for designation as an eligible telecommunications carrier*, Docket No. 8687, Order of 8/5/16 at 8 (applying standards under 47 C.F.R. § 54.202(a)(2)-(5) used by the Federal Communications Commission to designate ETCs).

¹⁷ 47 U.S.C. § 214(e)(2); 47 C.F.R. § 54.201(c).

customer choice and the unique advantage and disadvantages of the applicant's service offerings.¹⁸

5. Revocation of Existing Certificates of Public Good

The Commission may revoke certificates of public good for cable television systems and telecommunications services for good cause.¹⁹

6. Review under the Municipal Charter

Under the municipal charter for the City of Burlington, if the City establishes a business relationship to provide telecommunications or cable television services, the 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 from electric ratepayers."²⁰

VI. FINDINGS

Based upon the Petition and the accompanying record in this proceeding, the Commission makes the following findings of fact.

Background

1. Champlain is a Vermont limited liability company organized in December 2017 to acquire the assets used to operate Burlington Telecom and to operate the Burlington Telecom system providing cable television, internet, and telephone services to customers in Burlington Telecom's existing service territory. Champlain's business address is 200 Church Street,

¹⁸ See *Petition of the City of Burlington, Vermont d/b/a Burlington Telecom, for designation as an Eligible Telecommunications Carrier*, Case No. 8883, Order of 5/22/17 at 3, and *Petition of IM Telecom, LLC d/b/a Infiniti Mobile, for designation as an eligible telecommunications carrier*, Docket No. 8687, Order of 8/5/16 at 10 (applying standards adopted by the Federal Communications Commission for conducting public interest analyses in *In the Matter of Federal-State Joint Board on Universal Service*, FCC Docket No. 96-45, Report and Order, FCC 05-46 (rel. Mar. 17, 2005) at ¶¶ 18 and 19).

¹⁹ 30 V.S.A. §§ 231(a) and 509(a).

²⁰ 24 App. V.S.A. c. 3 §§ 438(c)(1) and 449.

Burlington, Vermont. Gesumino A. Agostino, Champlain, (“Agostino”) pf. at 3-4; Joint Petition at 2.

2. Blue Water is a Vermont limited liability company with its principal office located at Lake Champlain Transportation Company, King Street Dock, Burlington, Vermont. Dale C. Arango, Blue Water, (“Arango”) pf. at 2.

3. The City is a political subdivision of the State of Vermont with its municipal offices located at City Hall, 149 Church Street, Burlington, Vermont. Beth Anderson, the City, (“Anderson”) pf. at 1.

4. On June 18, 2003, the Commission issued CPG No. 743-C under 30 V.S.A. § 231 authorizing the City to offer telecommunications services in Vermont, including service to the local exchange, under the name “Burlington Telecom.” Joint Petition at 3.

5. On September 13, 2005, in Docket No. 7044, the Commission issued a CPG to Burlington Telecom, pursuant to 30 V.S.A. §§ 231 and 503, to own and operate a cable television system within the City of Burlington, Vermont. Joint Petition at 3.

6. Burlington Telecom has not been owned or operated as a legal entity distinct from the City but has been separately accounted for as an enterprise fund of the City. Joint Petition at 3.

7. On November 3, 2014, in Docket No. 7044, the Commission approved the sale of substantially all the assets of Burlington Telecom to Blue Water and an operating lease of Burlington Telecom’s assets from Blue Water back to the City. Joint Petition at 3.

8. On December 18, 2014, in Docket No. 7044, the Commission amended the 2005 CPG to reflect Blue Water’s ownership of Burlington Telecom’s assets and Blue Water’s ownership of a controlling interest in Burlington Telecom. Joint Petition at 3.

9. On March 17, 2017, in Docket No. 8719, the Commission issued a renewed CPG under 30 V.S.A. §§ 231 and 506 to Blue Water and the City to operate a cable television system in Burlington, Vermont. Joint Petition at 3.

10. On May 22, 2017, in Case No. 8883, the Commission designated the City as an ETC under 47 U.S.C. § 214(e), solely for the purpose of offering Lifeline service to low-income residential customers in the City of Burlington, Vermont. Joint Petition at 4.

11. Blue Water seeks approval under 30 V.S.A. § 109 to sell to Champlain the assets the City currently leases from Blue Water for purposes of operating Burlington Telecom and to

relinquish any control over and responsibility for the operation of Burlington Telecom that Blue Water currently possesses. After the asset sale, Blue Water will no longer have any role in any regulated activity connected with Burlington Telecom. Todd F. Schurz, Champlain, (“Schurz”) pf. at 34-35; Arango pf. at 4-5.

12. The City seeks approval under 30 V.S.A. § 109 to sell to Champlain the assets of Burlington Telecom that it owns and to relinquish any rights to assets it leases from Blue Water for the purposes of operating Burlington Telecom. Schurz pf. at 35; exh. Champlain-TS-5 at 13-14; Terry Dorman, the City, (“Dorman”) pf. at 3; Anderson pf. at 4-5.

Description of the Transaction

13. On December 29, 2017, Blue Water and the City entered into an Asset Purchase Agreement (“Purchase Agreement”) with Champlain and, to a limited extent, with Schurz Communications, Inc. (“Schurz Communications”), as guarantor of certain Champlain commitments related to the purchase under the Purchase Agreement. Schurz pf. at 15.

14. Schurz Communications, an Indiana corporation, is the sole member of Champlain Broadband. Schurz Communications is a diversified, privately owned, nationwide communications company incorporated in 1873. Schurz Communications has been engaged in publishing daily and weekly newspapers in various communities since its inception, and over the years Schurz Communications has acquired and currently operates radio, digital media, cable television, and broadband facilities. Schurz pf. at 3-4.

15. Subject to certain adjustments set forth in the Purchase Agreement, Champlain will pay the purchase price of \$30.8 million to Blue Water and the City for the assets specified in the Purchase Agreement. The Purchase Agreement sets forth terms under which Champlain purchases Burlington Telecom as a turn-key operation. Schurz pf. at 15; exh. Champlain-TS-5.

16. The Purchase Agreement provides that when the transactions under it close, Champlain will own and control the assets of Burlington Telecom and will continue operations consistent with the terms and conditions of the existing CPGs held by the City and Blue Water. Schurz pf. at 15-16.

17. Under the Purchase Agreement, Champlain has committed to abide by all existing CPG conditions. Schurz pf. at 27.

18. Conditions 44(a) and (b) of the Docket 8719 CPG relate to the City's relationship with the City of Burlington Electric Department ("BED"). These conditions are not applicable to Champlain because it has no business relationship with BED (other than as an electric customer), and no access to BED information. Schurz reb. pf. at 6.

19. Champlain will continue to use the name "Burlington Telecom." Schurz pf. at 18.

20. Under the Purchase Agreement, within the later of (i) one year following the closing or (ii) 60 days following Champlain's receipt of the CPGs requested in the petition, the City and Champlain may enter into a membership interest purchase agreement for the City to purchase up to 33% of the membership interests in Champlain, subject to certain governance, redemption, and non-dilution rights. Exh. Champlain-TS-5 at 41-42.

21. Currently, Champlain is managed by a three-member board (the "Champlain Board"). When the transactions under the Purchase Agreement close, the Champlain Board will expand to seven members. Schurz pf. at 17; exh. Champlain-TS-5 at 39-40.

22. If the City elects to purchase at least a 7.5% membership interest in Champlain under the Purchase Agreement, it will have the power to appoint at least one member to the Champlain Board. If the City exercises its maximum purchase rights, as set forth in the Purchase Agreement, it will have the option to appoint two members of the Board. The member or members must have a strong background in telecommunications, business, or finance. Schurz pf. at 19; exh. Champlain-TS-5 at 39-40.

23. Upon closing, Champlain will offer employment to Burlington Telecom's existing workforce at the salaries they currently receive and with other benefits generally consistent with plans offered to other employees of subsidiaries of Schurz Communications. Exh. Champlain-TS-5 at 38-39.

24. Champlain will contribute \$250,000 annually for 10 years to local technology incubator BTV Ignite or to another suitable community/economic development investment to be determined, and \$50,000 annually for technology programs in Burlington schools. Schurz pf. at 16-17; exh. Champlain-TS-5 at 40-41.

Service Facilities

**[30 V.S.A. §§ 231(a), and 504(b)(2) and (c)(2);
Commission Rule 8.214(B)(3), (7), (8), and (9); and 47 U.S.C. §§ 214(e) and 541(a)(4)]**

25. Burlington Telecom's headend (the facility that originates and communicates services) currently hosts internet, video, and telephone service for residential and business customers with backup systems in case of outages. Burlington Telecom's current system operates the video internet protocol television with a limitless number of standard and high-definition channels. The system allows closed captioning to pass through to its customers. Based on customer feedback received by Burlington Telecom's current management, the system has good and stable video quality. Tr. 9/26/18 at 51-53 (Barracrough).

26. The headend equipment and distribution system are in good working order and able to support current operations and customer needs as well as the anticipated continued expansion in the City. Champlain has not identified the need to make any material changes to the Burlington Telecom system equipment to support near-term plans. Schurz pf. at 23.

27. The Burlington Telecom facilities and equipment are structurally sound, are in good operating condition and repair, and are adequate for the services provided. The City is obligated to deliver these facilities and equipment in good operating condition and repair. Schurz pf. at 22-23; exh. Champlain-TS-5 at 27-28.

28. Champlain will offer continued employment to Burlington Telecom's existing workforce. These employees have demonstrated the ability to successfully operate Burlington Telecom's facilities and equipment. Schurz pf. at 23.

29. Consistent with existing Burlington Telecom practices, Champlain will perform all necessary work on the Burlington Telecom system, including construction, installation, and maintenance activities, in accordance with the National Electrical Safety Code, the Safety Rules for the Installation and Maintenance of Electrical Supply and Communication Lines published by the National Bureau of Standards, and all applicable federal, state, and municipal laws and regulations. The retention of Burlington Telecom's existing workforce will help ensure continuity in the maintenance of facility operations. Schurz pf. at 26.

30. Champlain intends to operate the existing Burlington Telecom system as a turn-key operation that will not result in any disruption of service to existing customers. Schurz pf. at 6-7, 15-16, 20.

31. Champlain is committed to completing the build-out of Burlington Telecom's system in the City to serve all Burlington residents within 24 months of taking ownership. However, there are 120 premises in the City that are cost-prohibitive to serve under existing conditions. Champlain will work with BED and technical-solution vendors to attempt to identify a solution for those 120 premises during the 24-month time period. Schurz pf. 29.

32. Champlain is exploring deployment of wireless extensions that could be used to provide service to the locations that are not currently served by Burlington Telecom, including the 120 premises described above. Tr. 9/26/18 at 119-120 (Schurz).

33. The areas surrounding the City are presently served by another cable operator. There is no evidence in this case that would suggest that Burlington Telecom is not a logical fit with neighboring systems. Corey Chase, Department, ("Chase") pf. at 13.

Provision of Service and Service Quality
[30 V.S.A. §§ 109(a), 231(a), and 504(b)(5) and (c)(1);
Commission Rule 8.214(B)(2) and (5); and 47 U.S.C. § 214(e)]

34. Burlington Telecom operates in a competitive market. Tr. 9/26/18 at 163 (Purvis).

35. Customers in the Burlington Telecom service area can obtain cable television content from a variety of other providers who could be considered competitors to Burlington Telecom. Comcast Xfinity provides a competing cable television service. Customers can also obtain video programming from satellite providers such as DirectTV and over-the-top video providers such as Netflix, Hulu, and Amazon. Schurz pf. at 24.

36. Champlain will not reduce any of the existing residential or commercial services, including cable television services, that are currently available to Burlington Telecom customers. Under Section 8.13 of the Purchase Agreement, Champlain has committed to this continuation of service. Schurz pf. at 25; exh. Champlain-TS-5 at 42.

37. Except as provided for in the Purchase Agreement, Champlain will not make changes to Burlington Telecom's existing residential and commercial services and current pricing. Schurz pf. at 23-24; exh. Champlain-TS-6 at 1-5; exh. Champlain-TS-5 at 42.

38. Champlain will continue to offer four service tiers ranging from "Basic" to "Premium," with each tier including a progressively larger range of standard- and high-definition

video channels. Customers will also receive access to digital music channels and a video-on-demand library. Schurz pf. at 23; exh. Champlain-TS-6 at 1-5; Chase pf. at 11-12.

39. Under the Purchase Agreement, Champlain has agreed to maintain all existing rates currently being charged by Burlington Telecom for broadband services for 60 months following the transaction closing. Any rate changes in the 24-month period thereafter will be discussed by, and are subject to approval of, the Champlain Board. Schurz pf. at 24; exh. Champlain-TS-6 at 1-5; exh. Champlain-TS-5 at 42.

40. Champlain has committed to expand and launch more advanced products and services. Champlain initially intends to improve the residential experience by launching a next-generation home-mesh-capable device that will provide better in-home broadband connectivity between customer devices and their wireless routers. Champlain also intends to expand the number of Wi-Fi hot spots located around the City for the benefit of Burlington Telecom customers. Tr. 9/26/18 at 118-120 (Schurz); Schurz pf. at 25.

41. There is no limit on the amount of standard- and high-definition channels that the Burlington Telecom system can accommodate in the future. Tr. 9/26/18 at 52 (Barracrough).

42. The Department routinely evaluates Burlington Telecom's cable television service quality and performance. The Department identified some areas requiring improved reporting. Overall, Burlington Telecom currently provides very good customer service based upon the Department's Consumer Affairs and Public Information ("CAPI") division review of the company's service quality reports and complaint history. Carol Flint, Department, ("Flint") pf. at 4-9.

43. To ensure continuation of Burlington Telecom's recent service quality results, the Department has proposed certain CPG conditions that Champlain has agreed to abide by. These conditions include a requirement that Champlain will be subject to the so-called CAPI stipulation criteria for cable television system operators. In addition, Champlain will be required to work jointly with CAPI to develop a service quality plan within 90 days of this order. All cable service quality and reliability plans will be filed with the Commission and the Department. Tr. 9/26/18 at 144-145 (Flint); Flint pf. at 9-10; Schurz pf. reb. at 3-4.

Customer Experience

[30 V.S.A. §§ 231(a), and 504(b)(4) and (c)(3), (4), and (5); Commission Rule 8.214(B)(6); and 47 U.S.C. § 214(e)]

44. Burlington Telecom does not currently discriminate against any customer in making cable television service available. Tr. 9/26/18 at 53 (Barraclough); Schurz pf. at 24-25.

45. Champlain will not make any changes to existing Burlington Telecom practices and procedures that prohibit discrimination against any customer in making cable television service available. Schurz pf. at 24-25.

46. Champlain will maintain the existing provisions of the Burlington Telecom Service Agreement that establish rules and policies for line extensions, disconnections, customer deposits, and billing practices. Schurz pf. at 29.

47. Champlain will adhere to net neutrality principles in its broadband internet services. Exh. Champlain-TS-5 at 42-43.

48. Champlain will maintain the existing contact methods for Burlington Telecom customers, including telephone, the company website, and in-person at the offices located at 200 Church Street. Champlain will lease the offices from the City for an initial five-year term after the closing to maintain operational continuity at Burlington Telecom in its present location. Schurz pf. at 28.

49. Champlain will utilize the existing listed toll-free telephone number for Burlington Telecom's call center. The call center will continue to be staffed between 8:00 A.M. and 6:00 P.M., Monday through Friday, and 8:00 A.M. to 4:30 P.M. on Saturdays. Burlington Telecom's technical service support team will be available Monday through Saturday between the hours of 8:00 A.M. and 10:00 P.M. and on Sundays between the hours of 10:00 A.M. and 6:00 P.M. Outside of these hours, Burlington Telecom has an answering service that answers all calls and an on-call technician can be paged if necessary. Schurz pf. at 28.

50. After billing systems are aligned, Champlain intends to expand overall customer service hours to include off hours during evenings and weekends and to increase availability of technicians for issues and trouble-shooting. Tr. 9/26/18 at 114 (Schurz); Schurz pf. at 25-28.

51. Champlain will retain local managers to operate the business, and these management personnel will be authorized to make decisions that are intended, at a minimum, to ensure the continued provision of quality customer service and will be authorized to use customer service

expertise from other Schurz Communications subsidiaries to develop new initiatives. Schurz pf. at 26; exh. Champlain-TS-5 at 39-40.

52. Champlain will ensure that it responds quickly and comprehensively to customer complaints and problems and associated issues raised by the Department. Schurz pf. at 26-28.

53. Champlain will adhere, at a minimum, to the standards for privacy of user data that are currently being provided to Burlington Telecom customers. Champlain will publish its commitment to privacy protections on its website and in its subscriber agreements. Schurz pf. at 27-28; exh. Champlain-TS-6 at 6.

54. Champlain staff will also benefit from their ability to share information and best practices with experienced peers, including customer service providers, at other cable television providers that are also subsidiaries of Schurz Communications. Tr. 9/26/18 at 117-118 (Schurz); Schurz pf. at 31.

Technical Expertise

**[30 V.S.A. §§ 109(a) and 231(a); 47 U.S.C. § 541(a)(4)(C); and
Commission Rule 8.214(B)(4)]**

55. Champlain was founded to acquire most of the assets comprising the Burlington Telecom system so that Champlain can continue to operate the system in a turn-key fashion and eventually expand service offerings over time. Schurz pf. at 6-14.

56. Schurz Communications is the sole member of Champlain. Schurz pf. at 3.

57. The Champlain Board presently has three members who also serve as the company's officers. Todd Schurz is president, Brian Lynch is the vice president, and Gesumino (Jessie) Agostino is the treasurer. Schurz pf. at 6-7.

58. In addition to serving as the president of Champlain, Mr. Schurz is the chief executive officer of Schurz Communications. Mr. Schurz oversees operations of the privately held corporation's diversified portfolio of communications companies, including four cable television and broadband providers in states other than Vermont. Mr. Schurz started working in the publishing industry in 1991 and moved into the cable business around 2000. Schurz pf. at 3-7; exh. Champlain-TS-1.

59. In addition to serving as vice president of Champlain, Mr. Lynch is senior vice president of the Schurz Communications Broadband Division, supporting operations in

Maryland, Iowa, Arizona, and Minnesota. Mr. Lynch has served the cable and broadband industry since 1980 and has worked in leadership roles since 1984. In the 17 years before joining Schurz Communications, he served as vice president and area vice president for Maryland and Delaware at Comcast. Mr. Lynch presently serves on the National Cable Television Cooperative Board. Schurz pf. at 6-7, 13-15; exh. Champlain-TS-4.

60. In addition to serving as treasurer of Champlain, Mr. Agostino serves as the chief financial officer and treasurer of Schurz Communications. He is responsible for tax, accounting policy, budgeting, and reporting, and he partners with the executive team to determine the company's strategic direction. Previously, he held various auditor positions for Schurz Communications. Mr. Agostino has worked for Schurz Communications since 1992. Agostino pf. at 2-3; exh. Champlain-GA-1.

61. These officers are experienced managers with industry-specific knowledge and expertise who will be available to assist the Champlain Board and its local employee managers in maintaining and enhancing the quality of Burlington Telecom's products and services. Schurz pf. at 6-7, 14-15.

62. Schurz Communications has operated cable and broadband systems since 1968. The four-member leadership team supporting Schurz Communications Broadband Division collectively have 123 years of cable and broadband operating experience. Schurz pf. at 9

63. Schurz Communications has experienced marketing and technology professionals who can share information with Champlain on emerging technology development, strategic plans, and capital plans. Champlain can also benefit from economies of scale when coordinating purchases with Schurz Communications. Tr. 9/26/18 at 111-113, 117 (Schurz).

Financial Soundness

[30 V.S.A. §§ 109(a) and 231(a); Commission Rule 8.214(B)(1); and 47 U.S.C. § 214(e)]

64. Schurz Communications is a privately-held, family-owned company. Schurz pf. at 14.

65. Schurz Communications will make a capital contribution to Champlain in the approximate amount of \$31.5 million (the exact amount will be determined at the closing date). This amount represents the purchase price plus additional capital sufficient to operate the

Burlington Telecom system as per the Purchase Agreement. Agostino pf. at 4; exh. Champlain-TS-5.

66. Champlain will have access to future capital through member contributions, through Schurz Communications credit facilities, if necessary, to fund capital projects required by the Purchase Agreement, and through additional strategic growth that meets specific investment criteria and the overall business growth plan. Agostino pf. at 5.

67. Champlain will not have any long-term debt financing obligations at inception. Agostino pf. at 5.

68. Champlain commits to spending a minimum of \$6.2 million and up to \$8.84 million on capital projects for the period of 2018 through 2021. Exh. Champlain-TS-5 at 40.

69. Champlain does not currently assume the need for debt capital within the assumptions used to develop its “Eleven Year Plan.” Agostino pf. at 5; exh. Champlain-GA-2 (filed partially under seal).

70. The financial records and books of Champlain and Schurz Communications will be maintained separately and distinctly from each other as they are separate legal entities. It is anticipated that the separate books of Champlain will be consolidated into Schurz, together with all of Schurz’s other subsidiary businesses, for GAAP (generally accepted accounting principles) financial reporting and income tax filing purposes. However, as separately organized and incorporated entities, Schurz will not be responsible for current or future obligations of Champlain as owner of Burlington Telecom except for those items for which Schurz has explicitly agreed to guarantee in the Purchase Agreement, Section 13.12. Agostino pf. at 6; exh. Champlain-TS-5 at 58-59.

71. Champlain derives its financial strength from the purchased assets, properties, and rights (tangible and intangible, including the Burlington Telecom brand); the transferred employees, with their customer service track record; and Burlington Telecom’s existing customer base. After the initial capitalization of Champlain, the future cash flow generated from the existing revenues of the Burlington Telecom system will provide enough funding for Champlain to operate the existing business and achieve forecasted growth. Agostino pf. at 4-5.

Programming and Public Access
[30 V.S.A. §§ 504(b)(1) and (3); 47 U.S.C. § 541(a)(4)(B);
and Commission Rule 8.214(B)(2)]

72. Champlain has agreed to honor and abide by all public, education, and government (“PEG”) access conditions of the Burlington Telecom CPG issued in Docket 8719. This commitment includes continuing to provide: (1) the capacity and encoding equipment to broadcast one SD channel for each BAMO including Vermont Community Access Media (“VCAM”), Regional Educational Television Network, and CCTV 17, (2) both RETC and VCAM the ability to broadcast an HD channel, (3) CCTV with an additional SD channel dedicated to live, remote broadcasts, such as from the auditorium at Burlington City Hall, (4) Channel 17’s 917 “backhaul” channel used to transport live public meetings from municipal locations, (5) VCAM’s 215 HD channel that enables community producers to present their programs in a quality on par with neighboring commercial channels, (6) PEG access to Burlington Telecom’s interactive program guide, (7) server rack space and bandwidth in support of the Civic Cloud Collaborative, which aims to assist the BAMOs in repositioning themselves to adapt to changing technological factors, and (8) high bandwidth internet drops at points throughout the City to support live streaming of event-based community media content. Schurz pf. at 21-22; Schurz pf. reb. at 5-6; Davitian pf. at 5-6; exh. Champlain-TS-10.

73. Through a series of meetings, Champlain and the BAMOs have entered into a new MOU under which Champlain has agreed to the PEG-related CPG conditions of Docket 8719 and an operating agreement with the BAMOs. Tr. 9/26/18 at 136-137 (Davitian); Schurz pf. reb. at 7; exh. Champlain-TS-10.

74. Champlain will provide annual capital funding to each BAMO totaling 0.5% of gross revenues. Exh. Champlain-TS-10, Attachment MOU-B at 4.

75. Champlain will create an “Additional Capital Fund” to cover, among other things, digital equipment needs or other PEG access related cable system improvements during the course of the term of its CPG, including the cost of interconnecting each BAMO to the system, and the reasonable capital costs of interim equipment needs that exceed the BAMOs’ Channel 175 annual capital budgets. The Additional Capital Fund includes 0.5% of Champlain’s gross revenues for each of the three BAMOs, for a total of 1.5% of gross revenues, at the conclusion of years one and five of the CPG term. Disbursements from the Additional Capital Fund will be

based on costs incurred by the BAMOs to meet community needs and approved by Champlain. Exh. Champlain-TS-10, Attachment MOU-B at 5.

76. Champlain will provide promotional support for the BAMOs' PEG offerings. Exh. Champlain-TS-10, Attachment MOU-B at 7.

77. Additionally, the operating agreement provides a framework to process requests from the BAMOs regarding: (1) access to upgraded technology that Champlain may deploy in the Burlington Telecom system, (2) enabling of cable casting and interactive programming from remote locations, and (3) reaching agreement about the equipment necessary to connect the BAMOs to the network. Exh. Champlain-TS-10; Davitian pf. at 6; Attachment MOU-B at 5-6.

78. The BAMOs consider Burlington Telecom to be a trusted partner that has made its best effort to fulfill the requirements of its CPG related to PEG access and its contracts with individual BAMOs. Davitian pf. at 12.

79. Over the past 13 years, the BAMOs have had a constructive relationship with Burlington Telecom as they proactively and creatively focus on the most efficient and cost-effective ways to manage and deliver PEG content within organizations and across the state. The BAMOs expect that Champlain will continue to be a partner in this effort. Champlain has represented to the BAMOs that it desires to continue a relationship with the BAMOs similar to the BAMOs' current relationship with Burlington Telecom. Davitian pf. at 12-13.

80. The BAMOs also fully support continuation, with updates to reflect existing conditions and non-material corrections, of the Docket 8719 CPG conditions related to PEG access and the terms of the proposed operating agreement. Tr. 9/26/18 at 138-140 (Davitian); exh. Champlain-TS-10.

81. Fulfillment of the PEG-related commitments is important today and will continue to be important in the future to meet cable-related community needs. Davitian pf. at 13.

Commitment to Act as a Fair Partner in Business Transactions with Vermont Citizens
[30 V.S.A. §§ 109(a) and 231(a)]

82. Champlain commits to acting as a fair partner in business transactions with the citizens of the State of Vermont. Schurz pf. at 35.

83. Champlain's sole member, Schurz Communications, has indirect, wholly-owned subsidiaries in other states serving more than 35 franchise authorities collectively that deliver

services similar to those offered by Burlington Telecom. Schurz Communications has never had a material breach or material violation of terms of any agreement during its operating life. In Maryland for example, Schurz Communications is on its third- or fourth- generation franchise agreement in many of its communities, and communities are generally granting Schurz Communications operating terms of 10 years or longer. Schurz pf. at 35-36.

Designation of Lifeline Eligible Telecommunications Carrier
[47 U.S.C. § 214(e); and 47 C.F.R. §§ 54.101, 54.201, and 54.202]

84. Champlain does not propose to make any changes to the Lifeline eligibility thresholds or criteria currently applied by Burlington Telecom, which is currently designated as a federal ETC for Lifeline purposes. Schurz pf. at 32.

85. Champlain will offer the same level of Lifeline telephone service and pricing described by Burlington Telecom in Docket 8883. Specifically, the Lifeline service will consist of voice-grade access to the public-switched telephone network as part of Burlington Telecom's basic telephone service, which costs \$20.00 per month. Burlington Telecom's basic telephone service charges will continue to charge customers \$0.02 per minute for local calls and \$0.05 per minute for long-distance calls. Lifeline customers will receive a \$9.25 discount/credit against the customer's bill, resulting in the equivalent of 462.5 minutes of local service at no charge. Burlington Telecom will also continue to offer eligible Lifeline customers no-cost long-distance toll-blocking. Burlington Telecom will continue to provide 911 access to all customers. Schurz pf. at 32-33.

86. Champlain seeks an ETC designation for the same Burlington area for which Burlington Telecom is currently designated, which includes zip codes 05401, 05403, and 05408. Schurz pf. at 33.

87. Champlain will employ the same advertising efforts to publicize its Lifeline services and rates using a variety of mass media of general distribution, such as social media, Burlington Telecom's website, and posting with local agencies, schools, and libraries. Schurz pf. at 34; exh. Champlain-TS-8.

88. Champlain will ensure that Burlington Telecom continues to have access to contractors in a permanent on-call capacity to assist in restoring service in the event of an

emergency. Similarly, Champlain will ensure that Burlington Telecom maintains, and when necessary enhances, its network of redundancy around high-capacity service links, several layers of power protection at each facility, and contracts with a regional answering service to deal with large emergency-situation call volumes, consistent with the arrangements described in Docket 8883. Schurz pf. at 34.

The City's Role in the Transaction

89. The City and Blue Water are parties to a management and sale agreement dated December 31, 2014 (the "Blue Water Agreement"), under which the City operates Burlington Telecom and is authorized for a limited time to direct its eventual sale and to receive an allocation of the net proceeds from its sale. Anderson pf. at 12; Dorman pf. at 9-10; exh. CITY-BA-2 at 10-11.

90. Under the Blue Water Agreement, the City will receive its maximum (50%) share of the net sale proceeds if it successfully closes on a definitive purchase and sale agreement that is executed with a qualified purchaser within 36 months from the date of the Blue Water Agreement (i.e., on or before December 31, 2017). Otherwise, the City's allocation of net sale proceeds will be reduced as follows: 35% of net sale proceeds for a definitive purchase and sale agreement executed with a qualified purchaser within 48 months of the Blue Water Agreement, (i.e. on or before December 31, 2018); 25% of net sale proceeds for a definitive purchase and sale agreement executed with a qualified purchaser within 60 months of the Blue Water Agreement (i.e., on or before December 31, 2019); and 10% of net sale proceeds for a definitive purchase and sale agreement executed with a qualified purchaser beyond 60 months of the Blue Water Agreement. Anderson pf. at 12; Dorman pf. at 9-10; Tr. 9/26/18 at 41-42 (Dorman); exh. CITY-BA-2 at 11.

91. The City's share of the net sale proceeds is subject to a further 50% split with Citibank, N.A., *et al.* ("Citibank"), pursuant to a mediated settlement agreement entered into as of January 29, 2014, by and among the City, its former outside counsel, and Citibank. Anderson pf. at 12; tr. 9/26/18 at 41-42 (Dorman).

92. Both the Blue Water Agreement and the Mediated Settlement Agreement with Citibank required the City to find a purchaser for Burlington Telecom. Dorman pf. at 9; Anderson reb. pf. at 6.

93. The Blue Water Agreement gives the City the right to direct the sale of Burlington Telecom to a qualified purchaser for the first four years after the date the Blue Water Agreement was executed. Tr. 9/26/18 at 97 (Anderson); exh. CITY-BA-2 at 10.

94. Under the Blue Water Agreement, the City has operated Burlington Telecom in a manner designed to maximize the value of Burlington Telecom and increase its potential purchase price in an eventual sale to a qualified purchaser. Dorman pf. at 8-9; tr. 9/26/18 at 96-97 (Anderson).

95. Since the 2014 Blue Water Agreement, Burlington Telecom has seen steady progress in its operations, with year-over-year increases in both subscribers and revenues. Dorman pf. at 8-9.

96. On November 28, 2017, the City Council approved Schurz Communications as the purchaser of Burlington Telecom, with the understanding that Champlain, a newly formed Vermont limited liability company having Schurz Communications as its sole member, would own and operate Burlington Telecom upon the closing of the Purchase Agreement. Dorman pf. at 11.

97. The Purchase Agreement was executed and timed to maximize the City's allocated share of the net sale proceeds under the Blue Water Agreement. Tr. 9/26/18 at 42 (Dorman); Anderson pf. at 12.

98. The Purchase Agreement authorizes the City to elect to use some of its designated closing proceeds, or other funds as determined at the election of the City, to purchase up to 33% of the voting membership interests of Champlain. Anderson pf. at 4; exh. Champlain-TS-5 at 41-42.

99. Any equity interest that the City purchases in Champlain will not be diluted even after Champlain makes capital expenditures of between \$6.2 million and \$8.84 million during 2018-2021. Anderson pf. at 11; exh. Champlain-TS-5 at 40.

100. If the City elects to purchase an equity interest in Champlain, the City will also have the right to redeem its interest based on an annual valuation by an independent third party

as a floor without discount for marketability and minority, and with a minimum purchase price based on an established EBITDA (earnings before interest, taxes, depreciation, and amortization) multiple of 6.0. Anderson pf. at 11; exh. Champlain-TS-5 at 41-42.

101. The City expects to receive net sale proceeds of approximately \$12.6 million, of which approximately \$6.3 million would be payable to Citibank under the mediated settlement agreement. Anderson reb. pf. at 5.

102. The City will pay closing and transaction costs and outstanding liabilities from the City's \$6.3 million portion of the net sale proceeds. Tr. 9/26/18 at 93 (Anderson).

103. The remaining sale proceeds will be held in a dedicated Burlington Telecom account in contemplation of the City's election of its MIPA rights under the Purchase Agreement. Anderson pf. at 13; Tr. 9/26/18 at 67, 93 (Anderson).

104. The cost of a 7.5% membership interest in Champlain would be approximately \$2.31million. Exh. BEW-2 at 5.

105. Ownership in Burlington Telecom may allow the City the possibility of future recovery of written-off losses by participation in future profits of Champlain and ongoing growth of Burlington Telecom. Anderson pf. at 14.

106. The City expects that any funds from the net sales proceeds that remain after payment of the transaction costs, the outstanding liabilities, and the MIPA election will become part of the City's general fund and the Burlington Telecom enterprise fund will be closed. Tr. 9/26/18 at 67, 69 (Anderson).

VII. DISCUSSION

Sale of Burlington Telecom to Champlain

The Citizen Intervenors oppose the sale of Burlington Telecom to Champlain and argue that the Commission must reject the Joint Petitioners' petition on the grounds that the sale is unlawful under the municipal charter and state statute and the sale cannot be justified by necessity. For context, we provide a brief summary of the background leading up to the present petition and then address the Citizen Intervenors' arguments.

Background

In September 2005, the Commission issued a certificate of public good to the City, doing business as Burlington Telecom, to provide cable television services in Burlington, Vermont.²¹ In accordance with a provision of the municipal charter,²² the Commission imposed conditions in the CPG to ensure, among other things, that any and all losses of Burlington Telecom and any costs of investment in the Burlington Telecom system would ultimately not be borne by the City's taxpayers.²³

In August 2007, the City obtained financing from Citibank under a Master Lease/Purchase Agreement (the "CitiCapital Lease"). The City entered into this capital lease financing to replace and repay the original capital lease funding provided through Koch Financial and to fund the acquisition of equipment to build-out Burlington Telecom's system. Payments under the CitiCapital Lease were subject to annual appropriation by the City.

In late 2009, it emerged that the City had been making monetary advances to Burlington Telecom from its general fund that had not been repaid within 60 days, as required by the cable television CPG. The outstanding amount of non-reimbursed advances totaled \$16.9 million.

In October 2010, on the basis of facts that were undisputed by the City, the Commission issued an order in which it found that certain actions by the City, including the failure to repay the general fund advances of \$16.9 million, had violated Conditions 2, 17, 56, and 60 of its cable television CPG.²⁴

Also, in 2010, the CitiCapital Lease terminated in accordance with its terms when the City did not appropriate funds to make such payments for the City's 2011 fiscal year. In September 2011, Citibank filed a lawsuit against the City seeking more than \$33.5 million in monetary damages and equitable relief.

In January 2014, the City entered into a settlement agreement with Citibank.

²¹ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 9/13/05.

²² 24 App. V.S.A. ch. 3 § 438(c)(1).

²³ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Certificate of Public Good of 9/13/05.

²⁴ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 10/8/10.

In March 2014, the City filed a petition with the Commission requesting that the Commission approve the settlement agreement and authorize certain actions to implement the settlement, including the sale of Burlington Telecom's assets to Blue Water and the lease back by Blue Water to the City of the assets for a maximum five-year lease term under the proposed Blue Water sale and lease financing.²⁵

In November 2014, the Commission issued an order in which it, among other things: (1) approved the Citibank settlement, (2) approved the sale of Burlington Telecom's assets to Blue Water and the lease back by Blue Water to the City of the assets, and (3) determined that all existing and ongoing violations of Conditions 2, 17, 56, and 60 of the cable television CPG, as described in the October 8, 2010, Order, were resolved.²⁶

Municipal Charter

The Citizen Intervenors argue that Section 438(c)(1) of the municipal charter for the City of Burlington prohibits the Commission from granting the relief requested under the petition because Section 438(c)(1) requires the Commission to find that any and all losses from Burlington Telecom are not borne by the City's taxpayers. However, the Citizen Intervenors contend the sale of Burlington Telecom to Champlain will leave unpaid \$11.4 million of the \$16.9 million owed to Burlington taxpayers.²⁷

Section 438(c)(1) imposes an obligation on the Commission to exercise its authority under Title 30 of the Vermont Statutes Annotated to protect City taxpayers from losses when: (1) the City exercises its authority under the charter to provide telecommunications or cable television service, and (2) the Commission is considering an application for a CPG.²⁸ 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. In the present petition, Champlain, not the City, is requesting a CPG to own and operate Burlington Telecom.

²⁵ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Petition of 3/28/14.

²⁶ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 11/3/14.

²⁷ Citizen Intervenors' Corrected Post-Hearing Memorandum at 2-3, 5-7.

²⁸ 24 App. V.S.A. c. 3 § 438(c)(1).

Regarding the City's original investment in Burlington Telecom, the Commission completed its review of the City's CPG application and properly exercised its jurisdiction under Section 438(c)(1) when it issued the City a CPG in 2005.²⁹ As a part of that order, the Commission made findings that the proposed financial arrangements between the City and its creditors were designed to shield the City from any debts or liabilities if the venture failed.³⁰ Additionally, the Commission established conditions intended to ensure that the City operated Burlington Telecom in compliance with the charter.³¹ While the conditions ultimately did not prevent City officials from violating the CPG and misusing \$16.9 million of the City's funds, the Commission properly completed its review and exercised its authority under Section 438(c)(1).

Importantly, neither Section 438(c)(1) nor any other provision of 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).³² Rather, for purposes of enforcing Section 438(c)(1), the Commission's remedial jurisdiction is limited to enforcing CPG conditions through the imposition of penalties or revocation of a CPG.³³ In the Commission's November 2014 Order in which it reviewed the City's CPG violations, including the City's failure to reimburse the \$16.9 million in taxpayer funds, the Commission concluded that "no constructive regulatory purpose would be served by revoking BT's CPG or imposing monetary penalties that effectively would be visited upon City taxpayers and BT customers" and thereby determined that all existing and ongoing violations of Conditions 2, 17, 56, and 60 of the cable television CPG, as described in the October 8, 2010, Order, were resolved.³⁴

²⁹ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order and Certificate of Public Good of 9/13/05.

³⁰ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 9/13/05 at 18-24.

³¹ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Certificate of Public Good of 9/13/2005 at condition nos. 56-60.

³² See *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7 (1941); see also *Petition of the City of Burlington for a Declaratory Ruling*, Case No. 18-1502-PET, Order of 9/5/18 at 6 (stating that the Commission is an administrative body that "has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted").

³³ 30 V.S.A. §§ 231(a) and 509(a).

³⁴ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 11/3/2014 at 32.

Because the Commission previously exercised the extent of its authority under Section 438(c)(1) when it reviewed the City's application, issued a CPG with conditions to ensure that losses were not borne by the City's taxpayers, and later resolved the City's violations of its CPG, we conclude that the Citizen Intervenors' arguments in regard to Section 438(c)(1) are inapplicable to this case. As discussed in greater detail below, the Citizen Intervenors are precluded from relitigating the issues previously decided in the November 2014 Order.

The 2014 Commission Order

The Citizen Intervenors argue that the Commission's November 2014 Order did not resolve the issue of the repayment of the \$16.9 million to taxpayers and that even if it had, any rulings by the Commission in the November 2014 Order are not binding on the Citizen Intervenors under the theory of claim preclusion ("res judicata").³⁵

The General Good

The Commission's November 2014 Order resolved all existing and ongoing violations of Conditions 2, 17, 56, and 60 of the cable television CPG, including the City's failure under the CPG to repay \$16.9 million of advances from the City's general fund. However, the Commission still has an obligation under 30 V.S.A. § 109(a) to ensure the current sale "will promote the general good of the State," just as it did in approving the 2014 sale. The assessment of whether the sale will promote the general good must be made in the context of the Commission's November 2014 Order, in which the Commission: (1) resolved the City's violation of its CPG, and (2) knowingly approved a sale structure that would reduce the ability of the City and its taxpayers to recover a substantial portion of the City's unauthorized \$16.9 million investment.³⁶ In short, the 2014 Order addressed the concern raised here by the Citizen Intervenors and the Commission concluded that it would better promote the general good of the State to approve the sale to Blue Water, even if the taxpayers ultimately would not be made whole, than to reject the sale because it did not guarantee full recovery of all the taxpayers'

³⁵ Citizen Intervenors' Corrected Post-Hearing Memorandum at 10-12.

³⁶ *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 (The Commission discussed proposed alternatives to the sale of Burlington Telecom to Blue Water and determined that despite the "significant effect the proposed sale of BT's Assets to Blue Water would have in reducing the ability of the City and its taxpayers to recover a substantial portion of the City's unauthorized \$16.9 million investment in Burlington Telecom," the sale promotes the general good of the State).

money. In this current sale, the City will recoup some of the taxpayers' money, consistent with the 2014 Order's decision to approve a sale with a prospect for future taxpayer recoupment from another sale.

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 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. Further, if the Commission denied the sale solely on the basis that it would not make the City whole for the misappropriated \$16.9 million, that holding would potentially establish a regulatory barrier that would effectively prohibit the sale of Burlington Telecom assets.

Claim Preclusion

Finally, we address the Citizen Intervenors' argument that they are not bound by any rulings in the November 2014 Order because they were not parties to that proceeding.³⁷ The Citizen Intervenors attempt to draw a bright-line rule that claim preclusion can never apply unless the parties in both proceedings are identical. That is not the correct test. Claim preclusion also applies when the parties are "*substantially identical*."³⁸ Here, although the Citizen Intervenors were not parties in the previous proceeding, the Department was a party. As the Vermont Supreme Court has held, "[t]he Department of Public Service represents the public in

³⁷ Citizen Intervenors' Corrected Post-Hearing Memorandum at 10 (citing *In re Tariff Filing of Central Vermont Public Service Corp.*, 172 Vt. 14, 21, 769 A.2d 668, 674 (2001)).

³⁸ *In re Tariff Filing of Central Vermont Public Service Corp.*, 172 Vt. 14, 20, 769 A.2d 668, 673 (2001) (emphasis added; quotation omitted).

matters before the [Commission].”³⁹ The Citizen Intervenors fail to identify any barriers to their interests as taxpaying members of the public being represented by the Department in 2014.

Also, the Citizen Intervenors do not claim they were prevented in any way from intervening in the earlier proceeding, but rather rely on the case *Daiello v. Town of Vernon*⁴⁰ to support their argument that they may relitigate issues previously decided in the November 2014 Order even though they could have intervened in the earlier proceeding.

The City and other Joint Petitioners have reasonably relied on the finality of the Commission’s November 2014 Order as the basis for the transactions proposed in the petition. Furthermore, reopening issues previously resolved with finality would undermine the Commission’s jurisprudence.

Daiello does not support the Citizen Intervenors’ position that they may relitigate issues previously decided in the November 2014 Order. In *Daiello*, the Vermont Supreme Court held that the Town of Vernon was not precluded from relitigating an issue that was resolved in previous litigation between two private parties because neither of the private parties had joined the Town in the earlier litigation, even though the Town was a necessary party to that earlier litigation.⁴¹ By failing to join the Town as a necessary party in the earlier litigation, the parties “ran the risk that issues resolved in that action would be subject to relitigation in any later action.”⁴² In the present proceeding, there is no suggestion that the Citizen Intervenors were necessary parties in the 2014 Commission proceeding or that there was any requirement to join them as parties in the 2014 proceeding. The Citizen Intervenors had adequate notice and ample procedural opportunities to move to intervene and to raise their concerns in a timely fashion during the 2014 proceeding. Their failure to do so then does not provide them with a new opportunity to do so now. In addition, as noted above, the interests of the Citizen Intervenors were represented by the Department, the agency charged by State law with the obligation to represent the public.

The Court in *Daiello* was also clear that the facts of that case presented “a rare instance” in which relitigation of an issue is not precluded when there exists “a clear and convincing need

³⁹ *In re Vicon Recovery Sys.*, 153 Vt. 539, 539, 572 A.2d 1355, 1356 (1990).

⁴⁰ 2018 VT 17, 184 A.3d 1192 (2018).

⁴¹ *Daiello v. Town of Vernon*, 2018 VT 17, ¶¶ 26-28, 184 A.3d 1192, 1200-01 (2018).

⁴² *Daiello v. Town of Vernon*, 2018 VT 17, ¶ 29, 184 A.3d 1192, 1201 (2018).

for a new determination of the issue ... because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action.”⁴³ Far from being “not sufficiently foreseeable at the time of the initial action,” 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 the Commission’s notice for the prehearing conference in the 2014 proceeding, the Commission requested that the parties address “whether the City’s current proposals are preferable to alternatives that might better maximize the future recovery for the City’s taxpayers and minimize the losses they will otherwise bear as a result of the City’s past conduct.”⁴⁴ Furthermore, in the Commission’s memorandum and order issued immediately after the prehearing conference, the Commission stated, “any acceptable resolution of the City’s CPG violations may involve significant consequences for the City ... especially if the [Commission] concludes, after undertaking its independent inquiry, that there may be other reasonable alternatives to the City’s s proposal that might better limit the losses that the City’s taxpayers will ultimately bear as a consequence of the City’s violations of its CPG.”⁴⁵ Additionally, in 2014 the City argued that there were no reasonable alternatives to the 2014 sale and that approving the 2014 sale, with its opportunity for a subsequent sale in which the City would receive a portion of the proceeds, would best promote the general good. Therefore, the Citizen Intervenors cannot rely on the *Daiello* exception in this proceeding because it is factually different in the most significant respects.

24 V.S.A. § 1913

For the same reasons that the Citizen Intervenors argue that the Commission must reject the Joint Petitioners’ petition under Section 438(c)(1), the Citizen Intervenors contend the Commission is prohibited from granting the petition under 24 V.S.A. § 1913, which requires a municipality to ensure that any and all losses from investments in businesses providing

⁴³ *Daiello v. Town of Vernon*, 2018 VT 17, ¶ 24, 184 A.3d 1192, 1200 (2018).

⁴⁴ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 4/4/14 at 2.

⁴⁵ *Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good*, Docket 7044, Order of 5/14/14 at 3.

communications services and associated communication infrastructure are not borne by the municipality's taxpayers.⁴⁶

According to the plain language of 24 V.S.A. § 1913, the section applies to a *municipality*, not the Commission or any other entity. Additionally, there is no authority to support the Citizen Intervenors' proposition that the Commission is governed by Section 1913 or authorized to enforce a violation of that section. While the Commission may consider the City's actions under Section 1913 when assessing whether the sale will promote the general good under 30 V.S.A. § 109, Section 1913 does not bind the Commission.⁴⁷ For the reasons discussed above, denial of the proposed sale would reduce the likelihood, and the amount, of any recovery of taxpayer funds. Thus, we reject the Citizen Intervenors' argument that the Commission's approval of the Joint Petitioners' petition is unlawful under Section 1913.

30 V.S.A. § 231(b)

Citing prior Commission decisions, the Citizen Intervenors contend that the proposed sale of assets constitutes an abandonment or curtailment of service under 30 V.S.A. § 231(b) and therefore requires a finding by the Commission that the abandonment or curtailment is consistent with the public interest.⁴⁸ The Citizen Intervenors argue that the proposed transaction cannot meet the public interest standard because it departs from the City's commitments to abide by Section 438(c)(1) of the municipal charter and violates the charter and state statute, as discussed above.⁴⁹

Section 231(b) regarding abandonment and curtailment does not apply to the Joint Petitioners' petition. The Commission has previously interpreted "abandonment" in Section 231(b) to mean a scenario in which no utility remains authorized to provide a regulated service.⁵⁰

⁴⁶ Citizen Intervenors' Corrected Post-Hearing Memorandum at 3-7.

⁴⁷ As previously stated, the Commission addressed the City's failure to reimburse the \$16.9 million in taxpayer funds in its November 2014 Order. Additionally, as stated above, the Commission finds the sale will promote the general good of the State.

⁴⁸ Citizen Intervenors' Corrected Post-Hearing Memorandum at 4-7 (citing *Joint Request of Green Mountain Power Corporation and Village of Hyde Park Electric Department*, Docket 8100, Order of 9/10/13; and *Joint Petition of Otelco, Inc., Shoreham Telephone, LLC, and Shoreham Telephone Inc.*, Docket 7735, Order of 9/30/11).

⁴⁹ Citizen Intervenors' Corrected Post-Hearing Memorandum at 4-7.

⁵⁰ See, e.g. *Petition of Pines Development Water System to amend its certificate of public good to reflect a change in ownership*, Docket No. 8207, Order of 6/6/14 at 4 (noting previous efforts to abandon service under Section 231(b) when a company was unable to transfer a water system to a new owner); *Petition of Rutland Gas*

In the present case, the City is seeking to have its CPGs revoked and Champlain is seeking to purchase Burlington Telecom and continue to provide and expand upon the services Burlington Telecom has historically provided. No services will be abandoned or curtailed.

The Commission acknowledges there are previous cases in which the Commission has applied Section 231(b) to the transfer of a portion of a service territory not involving the revocation of a CPG in which one company is taking over service from another.⁵¹ However, even if we were to hold that Section 231(b) applies, the proposed transaction satisfies the public interest standard under Section 231(b), as discussed above in the context of the general good standard under 30 V.S.A. § 109. 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. Therefore, we conclude that approval of the Joint Petitioners' petition is in the public interest.

Necessity

The Citizen Intervenors argue that the Commission should not approve the sale of Burlington Telecom to Champlain because the Joint Petitioners are “implicit[ly]” arguing “that the Charter be ignored” and that this “departure from the law can be justified by necessity,” when the Joint Petitioners have not shown that the proposed sale is “justified by necessity.”⁵² The Citizen Intervenors contend that to justify the necessity of the sale, the City would have to demonstrate that but for the sale, service or quality of service would be placed at risk and that the sale of Burlington Telecom to Champlain was the best offer available.⁵³

Corp. for authority to abandon service, Docket No. 4703, Order of 9/9/82 (order approving the complete abandonment of service by a propane-air gas distribution company because its system was deemed unsafe, the system could not be affordably upgraded, and a buyer could not be found).

⁵¹ See, e.g. *Joint Request of Green Mountain Power Corporation and Village of Hyde Park Electric Department*, Docket 8100, Order of 9/10/13 (order authorizing the Hyde Park Electric Department to take over a portion of Green Mountain Power's existing service territory and authorizing the abandonment by Green Mountain Power of service to the customers in that service territory).

⁵² Citizen Intervenors' Corrected Post-Hearing Memorandum at 7-9.

⁵³ Citizen Intervenors' Corrected Post-Hearing Memorandum at 7-9.

As explained above, the charter is not being “ignored” here. Rather, the charter simply does not apply in the way the Citizen Intervenors claim it does. There is thus no “departure from the law” that would need to be “justified by necessity” as the Citizen Intervenors claim. Further, the Citizen Intervenors’ “justified by necessity” standard has no basis in Vermont law. The sale of a regulated utility is subject to 30 V.S.A. § 109(a), which requires that the Commission find the sale “will promote the general good of the State” and typically includes an assessment of the purchaser’s technical and managerial competence, its financial resources, its reputation, and the competitive effect of the sale. The Commission’s duty under Section 109(a) is to ensure a purchaser is capable of providing service in accordance with applicable statutory and regulatory standards. It is not the Commission’s duty, in the context of a proposed sale of the assets of CPG holder, to review the current owner’s provision of service and whether a sale is necessitated due to failures of the current owner; nor is it the Commission’s responsibility to evaluate all potential purchasers or options for sale. Therefore, the Commission rejects the Citizen Intervenors’ argument that the sale must be “justified by necessity.”

The City’s Proposed Investment in Champlain

The Asset Purchase Agreement provides the City with the right to enter into a Membership Interest Purchase Agreement (“MIPA”) pursuant to which the City may purchase up to 33% of the membership interests in Champlain, provided the City elects to enter into the MIPA within one year of the closing of the sale of Burlington Telecom’s assets to Champlain.⁵⁴ The City and the other parties expressing a position on this matter agree that the potential purchase by the City of membership interests in Champlain triggers the need for a Commission finding under the previously referenced provision of the City’s municipal charter (24 App. V.S.A. § 3-438(c)(1)). This provision requires, if the City establishes a business relationship with a third party to provide telecommunications or cable television services, that the “Commission, in considering any application for a certificate of public good, shall ensure” that any costs and losses related to the investment in such businesses are not borne by the City’s taxpayers.⁵⁵

⁵⁴ Exh. TS-5 (Asset Purchase Agreement § 8.09); *see also* Anderson reb. pf. at 11 (fn. 6).

⁵⁵ *See* 24 App. V.S.A. § 3-438(c)(1) and 24 App. V.S.A. § 3-449.

The Joint Petitioners' petition requests that the Commission make a finding that the costs of, and any losses resulting from, any investment by the City in Champlain will not be borne by the City's taxpayers. The Burlington City Council adopted a resolution to seek Commission approval for such an investment,⁵⁶ and the City views a Commission determination under Section 438(c)(1) as necessary for the City to proceed further with the MIPA process.⁵⁷

The City states that it will not use the City's general fund or any funds raised by taxation to make an investment in Champlain.⁵⁸ The only clearly identified source of funding that the City currently contemplates using for this purpose is the City's share of net proceeds from the sale of Burlington Telecom assets to Champlain.⁵⁹ Because the sale proceeds are utility funds that will be held in a dedicated account pending the City's exercise of its MIPA rights under the Asset Purchase Agreement, the City maintains that neither the cost of such an investment in Champlain, nor any loss resulting from such investment will be borne by the City's taxpayers. There is also the possibility that other "non-taxpayer" sources of funds in addition to sale proceeds could be used in connection with the City's potential investment in Champlain, such as the proceeds of a "special financing" or donations "earmarked" for that express purpose.⁶⁰

In its brief, the Department requests that the Commission deny the Joint Petitioners' request for a Commission ruling related to the municipal charter provision "at this time because the evidentiary record does not contain sufficient information to allow the Commission to determine whether an equity investment by the City into Champlain satisfies the requirements of the City Charter."⁶¹ It recommends that the Commission "allow for the City to either request that the evidentiary record be reopened on that discrete issue or allow for the City to file a separate petition to investigate that issue in more detail in a new proceeding."⁶²

⁵⁶ Exh. BA-1 (City Council resolution related to pursuing MIPA with Champlain). The City is not requesting that the Commission approve an investment in Champlain at this time. The Commission notes that the City may be required to obtain Commission approval of the purchase of an equity interest in Champlain pursuant to 30 V.S.A. § 107 before acquiring such interest.

⁵⁷ See Anderson pf. at 5.

⁵⁸ Anderson pf. at 13-14.

⁵⁹ Anderson pf. at 14; City's Reply Brief at 3.

⁶⁰ Anderson pf. at 14; tr. 9/26/18 at 72-73 (Anderson).

⁶¹ Department's Brief at 7.

⁶² Department's Brief at 12.

The Department notes that the City “has not determined the amount that it will invest into Champlain or identified all sources of potential funds for investment into Champlain.” The Department also believes that the City has failed to fully resolve questions about how and into what accounts the City’s net sale proceeds, future revenues from an investment in Champlain, and proceeds from the City’s exercise of any redemption rights related to the Champlain investment would be deposited and accounted for by the City.

We agree with the Department that the evidentiary record is insufficient insofar as it relates to the City’s use of any source of funding other than its net proceeds from the sale of Burlington Telecom assets to Champlain. Accordingly, the Commission is not able to make a ruling at this time as to whether funds from a special financing or from earmarked donations may be used to fund the purchase of membership interests in Champlain. There is nothing in the record that explains what the City means by a special financing⁶³ or that suggests that the prospect of the City receiving earmarked donations to fund the investment is more than speculative. If the City subsequently receives earmarked donation pledges or decides to use some form of “special financing” to fund a portion of its investment in Champlain, it may petition the Commission for a declaratory ruling to the extent that the City believes such a ruling is necessary for it to resolve any issue under Section 438(c)(1) of the municipal charter.

We conclude, however, that the existing evidentiary record is sufficient to resolve the issue of whether the City’s share of net sales proceeds may be used for the purchase of membership interests in Champlain. The specific question presented under Section 438(c)(1) is whether the costs of or losses from an investment in Champlain using the City’s net sale proceeds would be borne by the City’s taxpayers. The resolution of this issue does not depend on the amount of sales proceeds that the City plans to invest or the accounts into which future revenue or proceeds are deposited. The City’s net sales proceeds are clearly identifiable as a source of funds, can easily be tracked, and do not raise issues that would be present if sources of general revenue such as parking and license fees were used to make the investment.

⁶³ Without a description of what kind of special financing is contemplated, it is impossible for the Commission to determine at this time how making the investment through such financing would not involve a cost or potential loss to taxpayers.

Under the municipal charter provision, the Commission must determine whether the cost of the investment and any losses related to this investment will be borne by the City's taxpayers. The potential for investment losses is relatively small as compared to the risks associated with an investment in a newly formed telecommunications or cable television provider that has yet to build an infrastructure and has no operating income.⁶⁴ However, there remains some risk exposure and the potential for losses related to the City's investment in Champlain.⁶⁵ Because Champlain is a limited liability company, any loss the City experiences through this investment will not exceed the cost of its investment (that is, the amount of the invested sales proceeds) in the absence of extraordinary circumstances such as those that would permit the piercing of the protection afforded by limited liability. Accordingly, the question remains the same whether considering the cost of the investment or potential losses related to the investment. Will an investment by the City in Champlain that is funded by the net sales proceeds the City receives from Champlain be borne by the City's taxpayers for purposes of the municipal charter provision?

The City's position is that the costs and losses of an investment in Champlain funded by net sales proceeds received by the City from the sale of utility assets to Champlain would not be borne by the City's taxpayers. The Department does not respond to this argument. In their post-evidentiary hearing filings, the Citizen Intervenors briefly address the City's potential purchase of membership interests in Champlain. Because the investment of sales proceeds in Champlain would create the risk of loss, they maintain that it would place taxpayer funds at risk in violation of the municipal charter provision and a similar provision in a state statute related to the construction by a municipality of communications infrastructure with the intent of providing communications services (24 V.S.A. § 1913(c)).⁶⁶ The Citizen Intervenors suggest that the City could "fund the investment from other sources, such as revenue bonds."⁶⁷ However, the filings

⁶⁴ It may be that 24 V.S.A. App. §§ 3-449 and 3-438(c)(1) were intended to apply only to investments in inherently risky start-up enterprises and not to a purchase of a minority equity interest in an established telecommunications or cable television business. Commission action under Section 438(c)(1) to ensure that costs and losses are not borne by taxpayers is explicitly tied to the consideration of an application for a CPG. The purchase of an equity interest in a telecommunications or cable television company does not require or typically involve an application for a CPG. However, no party has advanced such an argument.

⁶⁵ Anderson pf. at 15.

⁶⁶ Citizen Intervenors' Corrected Post-Hearing Memorandum at 12; Citizen Intervenors' Reply Brief at 10.

⁶⁷ Citizen Intervenors' Reply Brief at 10.

of the Citizen Intervenors do not explain why the reinvestment of net sale proceeds in Champlain places taxpayer funds at risk and do not otherwise respond to the City's arguments to the contrary.

The Commission has previously concluded in interpreting Section 438(c)(1) in connection with the issuance of the Burlington Telecom CPG to the City in 2005 that the City could not use tax revenue or other general revenue to invest in or support Burlington Telecom (except on a short-term basis in the event of temporary liquidity constraints).⁶⁸ The City was not restricted, however, from using or reinvesting any revenue or proceeds resulting from the ownership and operation of Burlington Telecom. In this case, the purchase of membership interests in Champlain will be made from proceeds from the sale of Burlington Telecom's assets and will not be made from tax collections or from the City's general revenue.

The City also observes, citing Commission precedent, that proceeds from the sale of utility assets are generally to be used in support of utility purposes.⁶⁹ These proceeds are utility funds and, according to the City, may be used for a utility purpose- namely, for an investment in Champlain. We find the City's arguments persuasive that the sale proceeds will remain utility funds that are available for the purchase of membership interests in Champlain unless and until the City decides not to exercise its MIPA rights under the Asset Purchase Agreement.

The Commission also notes that, as a practical matter, the contemplated reinvestment of net sales proceeds in Champlain doing business as Burlington Telecom is no different than if the City had retained a minority equity interest in Burlington Telecom following the 2014 restructuring and asset sale to Blue Water and had continued to retain a minority interest in connection with the current sale to Champlain. A decision by the City to retain equity in Burlington Telecom would not have raised an issue under Section 438(c)(1), and we see no reason to conclude that a similar outcome accomplished through the reinvestment of proceeds received from the sale of Burlington Telecom's assets should yield a different outcome when applying that municipal charter provision.

We therefore determine that the costs and losses from the reinvestment of the City's sales proceeds will not be borne by the City's taxpayers for purposes of the municipal charter

⁶⁸ Docket 7044, *Petition of City of Burlington d/b/a Burlington Telecom*, Order of 9/13/2005.

⁶⁹ City's Brief at 14-15

provision. Accordingly, we find that the use of the City's share of net sales proceeds to purchase membership interests in Champlain is not barred by Section 438(c)(1). This Commission determination relates only to the applicability of the municipal charter provision to the use of sale proceeds to make the proposed investment. To the extent the City or Champlain seeks additional rulings pursuant to Section 438(c)(1) related to other sources of investment funds or is required to obtain Commission approval for the equity purchase or any other related matters pursuant to 30 V.S.A. § 107 or any other statute, each will need to file with the Commission a request for a declaratory ruling or a petition requesting the necessary approvals.

Although the Commission concludes that the use of the City's net sale proceeds to purchase membership interests in Champlain does not raise a legal issue under Section 438(c)(1), it is also appropriate, given the history and unique circumstances of Burlington Telecom, for the Commission to consider, in evaluating the contemplated purchase of membership interests, the City's policy preferences and the effect a reinvestment of the sale proceeds may have on any future recovery of the City's losses related to Burlington Telecom.

In the Commission's 2014 Order approving the Citibank settlement and the terms of the restructuring transaction in which Burlington Telecom's assets were sold to Blue Water, the Commission concluded in regard to Burlington Telecom that it was appropriate "to give due consideration to the informed choices and judgments of the City's elected officials, who are actively involved in the matter and are accountable to Burlington voters."⁷⁰ As reflected in the City's testimony, the actions of the City Council, and many public comments, Burlington officials and residents believe that it is important for the City to maintain an ownership interest following the sale to Champlain. As the Department observes, "retaining a degree of local control over Burlington Telecom weighed heavily in the Burlington City Council's decision to direct the sale of the Burlington Telecom assets to Champlain."⁷¹

In addition, the Commission notes that if the City does not retain an investment in Burlington Telecom through the purchase of membership interests in Champlain, the City's relatively small net share of the \$30.8 million of estimated sale proceeds will establish the maximum amount of the \$16.9 million loss that the City will ultimately be able to recover. As

⁷⁰ Case 7044, Order of 11/3/2014 at 3 and 25.

⁷¹ Department's Brief at 11.

stated in the City's testimony, "[m]odest ownership in Burlington Telecom may also allow the City the possibility of future recovery of written off losses by participating in future profits and ongoing growth of Burlington Telecom."⁷²

Furthermore, the terms of the membership interest purchase should help to minimize the risk of investment losses and appear to be favorable to the City in other respects. The City will have the right to redeem its equity interest at a minimum price based on an independent evaluation of the business's value without any minority interest or marketability discount. The City will also have the right to appoint one member of Champlain's board of managers if the City purchases an equity interest in Champlain of at least 7.5%, and two members if the City purchases a 33% equity interest. In addition, Champlain has committed in the Asset Purchase Agreement to spend between \$6.2 million and \$8.84 million on capital projects through 2021 without any dilution of the City's equity interest in Champlain.⁷³ In addition to the anti-dilution provision, Champlain's commitment to make significant capital expenditures over the next few years seems likely to facilitate the growth of the business and enhance the value of any equity interest purchased by the City.

VIII. CONCLUSION

Based on our review of the record in this case, we find that the proposed transaction will promote the general good of the State of Vermont. The evidence shows that Champlain has the technical expertise, financial resources, and management experience to assume ownership of the Burlington Telecom assets and to operate the telecommunications and cable television systems. The record also supports our conclusion that Champlain will be a fair partner in business transactions with Vermont citizens and our decision to designate Champlain as an ETC for Lifeline purposes under 47 U.S.C. § 214(e). For the reasons discussed in this Order, we grant Champlain CPGs to own and operate Burlington Telecom. Accordingly, the existing CPGs that currently authorize Blue Water and the City to own and operate Burlington Telecom are revoked upon the closing of the sale.

⁷² Anderson pf. at 14.

⁷³ The Commission notes that Burlington Telecom's capital expenditures for many years have been funded solely through its cash flows. See Case 7044, Order of 11/3/2014 at 8 (finding 23) and 18 (finding 59).

IX. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission (“Commission”) of the State of Vermont that:

1. Pursuant to 30 V.S.A. § 109, the transfer of assets from Blue Water Holdings, LLC, and the City of Burlington, doing business as Burlington Telecom, to Champlain Broadband, LLC, is approved.

2. A Certificate of Public Good shall be issued under 30 V.S.A. § 504 to Champlain Broadband, LLC, to provide cable television service in the City of Burlington and surrounding communities for a statutory period of 11 years.


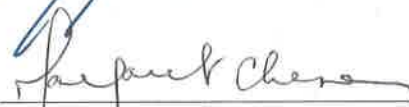

3. A Certificate of Public Good shall be issued under 30 V.S.A. § 231(a) authorizing Champlain Broadband, LLC, to offer intrastate telecommunications services, including service to the local exchange, on a common carrier basis in the State of Vermont.

4. The existing Certificates of Public Good held by Blue Water Holdings LLC and the City of Burlington to own and operate Burlington Telecom are hereby revoked upon the closing of the sale.

5. The use of the City of Burlington’s share of net sales proceeds to purchase membership interests in Champlain Broadband, LLC, is permissible under Section 438(c)(1) of the municipal charter.

6. Champlain Broadband, LLC, is designated as an Eligible Telecommunications Carrier (“ETC”) for Lifeline Purposes under 47 U.S.C. § 214(e) and shall offer the same level of Lifeline telephone service and pricing described by Burlington Telecom in Docket 8883. Champlain Broadband, LLC, shall adhere to all conditions prescribed by the Commission in its Order issued on May 22, 2017, in Docket 8883. Accordingly, the ETC designation shall expire on May 22, 2020, and redesignation shall occur subject to the process described in the Docket 8883 Order.

Dated at Montpelier, Vermont, this 19th day of February, 2019.

 Anthony Z. Roisman)	PUBLIC UTILITY
)	
 Margaret Cheney)	COMMISSION
)	
 Sarah Hofmann)	OF VERMONT
)	

OFFICE OF THE CLERK

Filed: February 19, 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 reconsideration or 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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