

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7044

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

Order entered: 10/8/2010

ORDER ON MOTIONS AND CROSS-MOTION
FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

The Department of Public Service ("Department") filed a motion for partial summary judgment with the Public Service Board ("Board") on May 14, 2010, seeking entry of an order that would, among other things, find that the City of Burlington, d/b/a Burlington Telecom ("Burlington Telecom" or "BT"), has violated certain provisions of its Certificate of Public Good issued on September 13, 2005 ("CPG"). On May 17, 2010, Comcast of Connecticut/Georgia/Massachusetts/New Hampshire/New York/North Carolina/Virginia/Vermont, LLC, d/b/a Comcast ("Comcast"), filed a similar motion, and on June 14, 2010, Burlington Telecom filed, among other documents, a cross-motion for summary judgment.

In this Proposal for Decision, I recommend that the Board grant the Department's motion for partial summary judgment with respect to violations of Conditions 2, 17, 56, and 60 of the CPG and Comcast's motion for partial summary judgment with respect to violations of Conditions 2, 17 and 60. I also recommend that the Board deny Comcast's motion for partial summary judgment with respect to violations of Conditions 18, 61, and 63, as well as Burlington Telecom's cross-motion for partial summary judgment.

In addition, I recommend that Burlington Telecom be required to file a report with the Board on September 30, 2010, and additional reports every two months thereafter during the pendency of this proceeding, detailing its progress in curing or addressing violations of the CPG. The report should address with specificity the progress of negotiations with its lender, any developments in finding a private investor in or buyer for the network, and other efforts to cure or mitigate the violations of the CPG and the effects thereof.

II. BACKGROUND

The Board issued the CPG in Docket No. 7044 on September 13, 2005, to Burlington Telecom to provide cable television service in the City of Burlington subject to compliance with 65 conditions. On September 10, 2008, Burlington Telecom filed a petition to amend Condition 17 of its CPG, which requires that Burlington Telecom "build its network to serve every residence, building, and institution in the City of Burlington within 36 months of the date of this CPG." The Board took up the petition in existing Docket No. 7044. Burlington Telecom filed an amended petition on September 30, 2009, in which it additionally requested temporary relief from the limitation of Condition 60 of its CPG related to the use of City funds to finance its operations.

In its Order of January 8, 2010, the Board expanded the scope of this proceeding (i) to include a review of the compliance of Burlington Telecom with its CPG, including all conditions thereof, and with all applicable statutory provisions, and (ii) to consider the possible imposition of penalties for any non-compliance.

On May 14, 2010, the Department filed a motion for partial summary judgment seeking an order (1) finding that Burlington Telecom has violated Conditions 2, 17, 56 and 60 of its CPG, as well as the City Charter, (2) declaring that Burlington Telecom's opportunity to cure has commenced, and (3) directing Burlington Telecom to file either a proposal to cure the violations or regular status reports on its efforts to develop a cure. Together with this motion, the Department filed its Statement of Undisputed Facts ("DPS Facts") with supporting attachments.

On May 17, 2010, Comcast¹ filed a motion for partial summary judgment seeking an order declaring that Burlington Telecom has violated Conditions 2, 17, 18, 60, 61 and 63 of its CPG, which motion was accompanied by a memorandum in support of its motion, Comcast's statement of undisputed facts ("Comcast Facts"), and supporting attachments. On June 14, 2010, Burlington Telecom filed a cross-motion for partial summary judgment that Burlington Telecom (i) is in compliance with Conditions 57, 58, 59, 61, 62 and 63 of its CPG, and (ii) is entitled to an amendment of Condition 17 as a matter of law for good cause shown. Burlington Telecom also filed on the same date: (i) a memorandum in response to the motions of the Department and Comcast and in support of its own cross-motion; (ii) a response to DPS Facts ("BT's Response to DPS Facts"); (iii) a response to Comcast Facts ("BT's Response to Comcast Facts"); (iv) its statement of undisputed facts in support of its cross-motion for partial summary judgment ("BT Facts"); and (v) supporting exhibits. The Department and Comcast each filed responses to the cross-motion on July 15, 2010. Burlington Telecom filed a reply memorandum in further support of its cross-motion on July 29, 2010.

III. LEGAL STANDARD

Board Rule 2.219 states that the provisions of Rule 56 of the Vermont Rules of Civil Procedure ("VRCP") shall apply in proceedings before the Board. VRCP Rule 56 permits a "party seeking to recover upon a claim, counterclaim or cross-claim" and a "party against whom a claim, counterclaim, or cross-claim is asserted" to make a motion for summary judgment "in the party's favor" upon or as to "all or any part thereof."²

1. Comcast's participation in this proceeding is limited to issues of competitive neutrality. Order on Motions of Comcast of 2/18/09.

2. VRCP Rule 56(a) with respect to a claimant provides:

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

VRCP Rule 56(b) with respect to a defending party provides:

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

In the current proceeding, Burlington Telecom filed a petition and amended petition seeking modification of one condition and temporary relief from another condition of the CPG. On its own initiative, after the receipt of comments from the parties, the Board expanded the scope of the current proceeding in its Order of January 8, 2010, to include a review of the compliance of Burlington Telecom with the CPG and applicable statutes, as well as the possible imposition of penalties for non-compliance.

The parties' motions for partial summary judgment generally relate to requests for determinations that there are no genuine issue of material fact with respect to Burlington Telecom's violation of, or compliance with, certain conditions of its CPG that are within the expanded scope of the docket set forth in the Board's Order of January 8, 2010.³ For purposes of this summary judgment order, these motions for summary judgment will also be treated as claims by the respective moving parties asserting violations or compliance with specific conditions of the CPG to which their motions for summary judgment relate.⁴

The standard for summary judgment is set forth in VRCP Rule 56(c)(3) as follows:

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Under Rule 56, the party against whom summary judgment is sought is entitled to the benefit of all reasonable doubts and inferences in determining whether a genuine issue of fact exists.

Messier v. Metropolitan Life Ins. Co., 154 Vt. 406 (1990). When both parties seek summary judgment, each party receives this benefit while the opposing party's motion is being considered.

Toys, Inc. v. F. M. Burlington Co., 154 VT 44, 48 (1990).

3. The summary judgment motion of Burlington Telecom that it is entitled to amendment of Condition 17 as a matter of law is based upon its request for an amendment of such condition set forth in its amended petition.

4. Board Rule 2.106 provides for a liberal construction of Board rules "to secure the just and timely determination of all issues presented to the Board." As the Board has observed, "proceedings before the Board do not follow the exact framework of matters in civil court," so guidance must often be made by analogy rather than by direct reference. For example, "parties do not generally file an 'answer' in Board proceedings" in response to a "petition." Order of 2/14/01 in Docket 6300 at 9.

IV. FINDINGS OF FACT, RELATED DISCUSSION, AND CONCLUSIONS

The parties' respective motions for partial summary judgment relate principally to requests for findings that Burlington Telecom has violated or complied with specific conditions of the CPG and the related Board Order of September 13, 2005. Rather than separately addressing each party's motions, the discussion below is organized in terms of discussing all the parties' requests and responses with respect to each specific condition for which a party has requested a ruling in its summary judgment motion.

Condition 17

Both the Department and Comcast seek a determination that Burlington Telecom violated Condition 17 of its CPG. For its part, Burlington Telecom admits its non-compliance with Condition 17, but asserts that it is entitled to an amendment of Condition 17 as a matter of law for good cause shown.

Findings of Fact.

Based on the submissions of the parties, there is no genuine issue as to the following material facts related to Condition 17:

1. Condition 17 of the CPG provides as follows:

17. BT shall build its network to serve every residence, building, and institution in the City of Burlington within 36 months of the date of this CPG. Until such time as BT's network meets this requirement, the Company shall file a line extension report with the Department by April 15 of each year that provides the following information relative to line extensions completed during the preceding calendar year:
 - a. Location of line segment, including location of line segment by reference to nearest road(s);
 - b. Length of strand, in feet or miles;
 - c. Number of dwellings and multiple-unit business establishments passed, without discounting seasonal dwellings or dwellings with a satellite dish;
 - d. Date on which line was placed in service;
 - e. A street map and description of the streets and areas of the City to which BT does not yet provide service. BT shall, at that time, also file with the Department a projected completion date for line extensions to any areas of the City to which BT does not yet provide service and an explanation of the reasons for delay, if any, relative to the build-out plan described by BT in its petition for a CPG.

CPG at 4–5.

2. Burlington Telecom has not built its system to serve every residence, building and institution in the City by September 13, 2008. DPS Facts at 1; BT's Response to DPS Facts at 1.

3. As of November 2009, a total of 3,297 service addresses within the City of Burlington are unable to take service from Burlington Telecom. Comcast Facts at 6; BT's Response to Comcast Facts at 4.

4. As of November 2009, 1,942 service addresses unserved by Burlington Telecom are located on public rights-of-way. Comcast Facts at 7; BT's Response to Comcast Facts at 5.

5. Burlington Telecom admits it is in violation of Condition 17 relative to all unserved addresses in the City that are located on public rights-of-way. Comcast Facts at 6; BT's Response to Comcast Facts at 5.

Discussion and Conclusions

All parties agree that Burlington Telecom has failed to complete the build-out of its system in accordance with Condition 17. According to the supplemental prefiled testimony of Burlington Telecom in September 2009 and subsequent updated discovery responses, Burlington Telecom was then capable of providing service to approximately 13,500 service addresses, but there were still 3,297 service addresses that were unable to take service from Burlington Telecom.⁵ Of the service addresses unable to take service from Burlington Telecom as of November 2009, 1,942 were located on public rights-of-way.⁶ Burlington Telecom acknowledges that the inability of these 1,942 service addresses to take service from it constitutes a violation of the CPG.⁷

Although there is agreement among the parties that Burlington Telecom violated Condition 17 by failing to complete the build-out of its system to at least 1,942 service addresses in the City of Burlington by September 2008, the extent and nature of the violations has yet to be fully determined. Burlington Telecom contends that it is not in breach of its obligations under

5. Burns supp. pf. (9/30/09) at 1; Burlington Telecom's Supplemental Response to First Set of Comcast Information Requests (11/13/09); BT Exhibit Supplemental Response Comcast 1-13.

6. Burlington Telecom's Supplemental Response to First Set of Comcast Information Requests (11/13/09), BT Exhibit Supplemental Response Comcast 1-13.

7. BT's Response to Comcast Facts at 5.

Condition 17 with respect to 1,355 service addresses located on private rights-of-way.⁸ Comcast and the Department each raise issues challenging this contention. At minimum, as the Department notes, there are factual issues related to the provision of a standard service drop that may be relevant in considering Burlington Telecom's obligation to provide service to at least some of the addresses on private rights-of-way.⁹

Comcast contends that Burlington Telecom also violated Condition 17 by failing to report delays in the schedule for projected network completion in its annual line extension reports to the Department for 2007 and 2008. Comcast points to a meeting of the City Board of Finance in February of 2007 at which a capital budget was approved that would defer "hook-ups" of many service addresses until after January 2009.¹⁰ Comcast argues that Burlington Telecom was required to disclose in its line extension reports that it would not be able to "timely complete the City-wide build-out within the three-year deadline."¹¹ Burlington Telecom did file maps with its line extension reports showing completed and planned construction. At least with respect to the line extension report for 2008, map codes would seem to indicate that certain lines along private and public rights-of-way would not be completed by the end of 2008. Giving Burlington Telecom the benefit of all reasonable doubts and inferences, this filing could be construed as notice that Burlington Telecom would not "timely complete" its build-out by September 2008. It should be noted, however, that substantial issues do appear to exist with respect to Burlington Telecom's compliance with the reporting requirements of Condition 17.¹²

Based on the minutes of the same Board of Finance meeting referenced by Comcast, the Department contends that "Burlington chose to implement a construction schedule that would not

8. These unserved addresses are located on private rights-of-way where Burlington Telecom's system passes within 300 feet. Burlington Telecom states that it would serve these properties if the property owners were "willing to pay the cost differential between the cost of Burlington Telecom's standard drop and the actual cost of construction." Amended Petition of Burlington Telecom (9/30/09) at 2.

9. DPS Response to Burlington Memorandum and Cross-Motion at 2.

10. Comcast Facts at 10-11.

11. Comcast's Memorandum in Support of its Motion at 10.

12. Condition 17 provides for the annual filing with the Department of "a projected completion date for line extensions to any areas of the City to which BT does not yet provide service and an explanation of the reasons for delay, if any, relative to the build-out plan." To the extent that Burlington Telecom did not provide "a projected completion date" for some line extensions and "an explanation of the reasons for the delay" of these lines extensions in its reports to the Department, an additional violation of Condition 17 may be found.

meet its obligation under Condition 17," while Burlington Telecom maintains that there was no "conscious decision" by the City not to meet its Condition 17 obligations. The disagreement between the Department and Burlington Telecom on this point rests on the issues of whether the action of the Board of Finance at that meeting constitutes a violation of Condition 17 and on whether the Board of Finance needed to be aware of the Condition 17 requirement in order for the Board to find a violation in the action of the Board of Finance.¹³ Judgment on these issues, if necessary, is reserved for a later date.

In its amended petition, Burlington Telecom seeks to remove the obligation to complete the build-out of its network by a certain date and replace it with the requirement that "Burlington Telecom will build out the remaining sections of the City as revenues provide."¹⁴ Burlington Telecom now submits that it has demonstrated "good cause" for the amendment and moves for summary judgment to approve such amendment. Among other considerations, Burlington Telecom states that it cannot complete the remaining build-out of its network because it has neither the funds nor current access to funds to complete the build-out to the remaining service addresses.¹⁵

While there seems to be no dispute about Burlington Telecom's financial inability to complete its build-out at this time, both the Department and Comcast oppose this motion, arguing that the record is insufficient to provide a basis for the proposed amendment.¹⁶ I agree that a decision to approve an amendment to this condition on the terms proposed by Burlington Telecom would be premature, at this time. There are unresolved factual, legal and policy issues

13. See BT's Response to DPS Facts at 2; DPS Response to Burlington Memorandum and Cross-Motion at 2.

14. Amended Petition at 2–3. In the Petition, it filed on September 10, 2008, BT originally sought to amend Condition 17 of its CPG by "enlarging the date by which it must complete its system buildout." Petition at 1.

15. Burlington Telecom's Memorandum in Response to the Motions for Partial Summary Judgment of the Department and Comcast and in Support of its Cross-Motion for Partial Summary Judgment at 12. In its amended petition, Burlington Telecom stated that the "remaining service addresses present challenging installation conditions in locations in the City, which contain ledge and rock, which are more time consuming than other areas of the City and cost more to build than expected at the time the CPG was issued." Amended Petition at 2.

16. "[A]ny amendment should be crafted with a full understanding of the circumstances facing BT and of the positions of the parties — in other words, on the basis of a record and interaction between affected parties and the Hearing Officer, not as part of a summary judgment." DPS Response to Burlington Memorandum and Cross-Motion at 3. "None of these grounds is supported by undisputed material facts and law sufficient to enter summary judgment in BT's favor at this time. The parties should have the opportunity to present factual, policy and legal grounds supporting a contrary result as the case proceeds." Comcast Response to Cross-Motion at 10.

surrounding the violation of Condition 17 and about the appropriateness of the proposed amendment.

Based on the foregoing, I recommend that the Board grant the motions of the Department and Comcast for summary judgment related to Condition 17 by finding Burlington Telecom in violation of Condition 17 with respect to the failure to complete the build-out of its network by September 13, 2018, to 1,942 service addresses along public rights-of way. I also recommend that the Board deny Burlington Telecom's cross-motion for partial summary judgment to amend Condition 17.

Condition 60

Both the Department and Comcast seek a determination that Burlington Telecom violated Condition 60 of its CPG. For its part, Burlington Telecom admits to non-compliance with Condition 60 of its CPG.

Findings of Fact.

Based on the submissions of the parties, there is no genuine issue as to the following material facts related to Condition 60.

6. Condition 60 of the CPG provides as follows:

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

CPG at 14.

7. The City of Burlington no longer distinguishes among "phases" for budgeting and accounting purposes. DPS Facts at 2; BT's Response to DPS Facts at 8.

8. From January 2007 through August 2007, the City of Burlington made payments on behalf of Burlington Telecom from the City's pooled cash management system ("cash pool") that

exceeded Burlington Telecom's cash reserves, revenues receivable, or other payments receivable. DPS Facts at 2; BT's Response to DPS Facts at 3.

9. From March 2007 until August 2007, Burlington Telecom failed to reimburse the cash pool within two months for prior payments from the cash pool made on behalf of Burlington Telecom. DPS Facts at 2; BT's Response to DPS Facts at 2-3.

10. In August 2007, after receiving additional financing, Burlington Telecom was able to repay the cash pool for the advances made up to that time. Comcast Facts at 14; BT's Response to Comcast Facts at 10.

11. From November 2007 through October 1, 2009, the City of Burlington made payments on behalf of Burlington Telecom from the cash pool that exceeded Burlington Telecom's cash reserves, revenues receivable, or other payments receivable. DPS Facts at 2; BT's Response to DPS Facts at 3.

12. From January 2008 to at least June 2010, Burlington Telecom failed to reimburse the cash pool within two months for prior payments made from the cash pool on behalf of Burlington Telecom. DPS Facts at 2; BT's Response to DPS Facts at 2-3.

13. As of June 2010, the outstanding amount of payments made from the cash pool on behalf of Burlington Telecom that had not been reimbursed to the cash pool by Burlington Telecom totaled \$16.9 million. DPS Facts at 2; BT's Response to DPS Facts at 3.

Discussion and Conclusion

By its own admission, the City of Burlington engaged in a course of conduct from January 2007 through August 2007 and from November 2007 through October 1, 2009 in financing the operations of Burlington Telecom that violated the terms of Condition 60.¹⁷ These violations include both the advance of funds from the cash pool in amounts that exceeded Burlington Telecom's¹⁸ "cash reserves, revenues receivable, or other payments receivable" and

17. Condition 60 applies to all of BT's operations, not just its cable television operations. Order of 9/13/05 at 40; Comcast Facts at 14; BT's Response to Comcast Facts at 9;

18. The reference to Phase III in Condition 60 should be understood to refer to Burlington Telecom, generally. As noted in Finding 7 above, the City of Burlington no longer distinguishes among project "phases" for budgeting and accounting purposes. As referenced in the Board's Order of 9/13/05, Phase III was the phase of the Burlington Telecom project related to the construction of the facilities and network required "to offer CATV services, as well as (continued...)"

the failure of Burlington Telecom to reimburse the cash pool for such advances within two months. The magnitude of these violations is apparent in the outstanding balance owed to the cash pool of \$16.9 million. Accordingly, I recommend that the Board grant the motions of the Department and Comcast for partial summary judgment related to Condition 60 of the CPG by finding that Burlington Telecom violated Condition 60 of the CPG as detailed in the above findings of fact.

As explained in the Board's Order authorizing the issuance of the CPG, Condition 60 is directly related to restrictions in the city charter that seek to ensure that the losses and costs of Burlington Telecom are not borne by city taxpayers.¹⁹ Condition 60 was included in the CPG specifically to preclude the City of Burlington "from using general revenue streams to fund commercial cable and telecommunications activities or to repay lease obligations relating to those same activities."²⁰ In an effort to provide some flexibility for Burlington Telecom in managing temporary cash flow shortages without creating a risk for city taxpayers, the Board allowed a limited exception in Condition 60 that was intended to permit short-term advances from the cash pool on behalf of Burlington Telecom so long as such advances were offset by receivables that, in essence, would enable Burlington Telecom to repay such advances within two months.

When seen in the context of the provisions of the city charter, which the state legislature enacted specifically to protect taxpayers from any liability for the losses and costs of Burlington Telecom,²¹ the necessity for strict compliance with Condition 60 should have been absolutely clear to the City of Burlington. The importance of the City's compliance with this condition was further emphasized by the explicit direction at the end of Condition 60 that the City obtain Board

18. (...continued)
telecommunications and high-speed internet services." Order of 9/13/05 at 6. Neither Phase I, which was completed in September 2003, nor Phase II of the project involved the provision of cable television services.

19. Order of 9/13/05 at 40. The city charter restrictions are discussed in more detail below under the heading "Condition 56."

20. *Id.*

21. *See* discussion below under heading "Condition 56."

approval prior to appropriating any funds on behalf of Burlington Telecom other than as permitted by the condition.²²

Based on Burlington Telecom's own admissions, significant violations of Condition 60 continued over more than a two-and-a-half-year period and allowed for the accumulation of a \$16.9 million deficit to the cash pool. The City's admitted conduct displayed a wanton disregard not only for a significant condition of the CPG, but also for provisions of the city charter that were enacted by the state legislature specifically to prevent such conduct.

Comcast contends that additional violations of Condition 60 have occurred since October 2009 to the extent Burlington Telecom has continued to borrow funds from the cash pool even if such borrowing was backed by current receivables and reimbursed within two months. Although such borrowing has not increased the aggregate amount of non-reimbursed payments made from the cash pool on behalf of Burlington Telecom, such borrowing would violate Condition 60 given that the outstanding balance of non-reimbursed payments exceeds the amount of cash reserves and current receivables of Burlington Telecom. As the Board observed in February 2010, such "borrowing would represent a violation of Condition 60 even if BT were to reimburse the City's cash pool within two months because Phase III does not have 'cash reserves, revenues receivable, or other payments receivable that, collectively, equal or exceed the sum of the payments to be made by the City plus the balance of any other current payments owed to the City.'"²³

As of yet, however, there does not appear to be a full record of the extent of borrowing from the cash pool since October 2009 from which conclusions can be drawn as to the number and seriousness of such violations.²⁴ Given the finding of even more substantial violations of

22. The inability of Burlington Telecom to procure timely private financing by January 2007 and again in 2008 provides no explanation for, nor clarification of, its failure to comply with Condition 60. *See* Burlington Telecom's Memorandum in Response to the Motions for Partial Summary Judgment of the Department and Comcast and in Support of its Cross-Motion for Partial Summary Judgment at 7–8.

23. Ruling on Motion for Temporary Relief of 2/16/10 at 3.

24. Comcast cites a specific payment from the cash pool in November of 2009 to meet an interest payment under Burlington Telecom's financing arrangements with CitCapital Municipal Finance, but presents no specific facts as to any other borrowing from the cash pool after October 2009. Comcast Facts at 15.

Condition 60 during the 2007-09 period, it seems appropriate to defer judgment as to post-October 2009 transactions with the cash pool until a more complete record is available.

Condition 56

The Department seeks a determination that Burlington Telecom violated Condition 56 of its CPG. Burlington Telecom contends that no violation of this condition has yet occurred.

Findings of Fact

Based on the submissions of the parties, there is no genuine issue of material fact as to the following matters related to Condition 56.

14. Condition 56 of the CPG provides as follows:

56. In no event shall any losses or costs, in the event the enterprise is abandoned or curtailed, incurred by BT be borne by the City of Burlington taxpayers, the City of Burlington Electric Department ("BED") ratepayers or the state of Vermont, nor shall the City of Burlington expend any funds received from the State of Vermont to cover any losses or costs, in the event the enterprise is abandoned or curtailed, incurred by BT, as provided in 24 V.S.A. App. § 3-438(c)(1).

CPG at 12.

15. The municipal charter of the City of Burlington provides that the Board in considering an application by the City for a cable television or telecommunications CPG:

shall ensure that any and all losses from these businesses, and, in the event these businesses are abandoned or curtailed, any and all costs associated with investment in cable television, fiber optic, and telecommunications network and telecommunications business-related facilities, are borne by the investors in such business, and in no event are borne by the city's taxpayers, the state of Vermont, or are recovered in rates from electric ratepayers.

24 V.S.A. App. § 3-438(c)(1).

16. The admitted violation of Condition 60 of the CPG has resulted in non-reimbursed expenditures from the cash pool on behalf of Burlington Telecom of approximately \$16.9 million. DPS Facts at 3; BT's Response to DPS Facts at 4.

17. The City's auditors have concluded that: "The City is unable to provide an assessment of its ability to refinance its current debt or otherwise provide sufficient cash flow in the Telecom Fund in order to repay all, or a portion of, its interfund loan to the General Fund within a reasonable time." DPS Facts at 3; BT's Response to DPS Facts at 4.

18. The "interfund loan" referred to by the auditors consists of expenditures on behalf of Burlington Telecom from the cash pool. DPS Facts at 3; BT's Response to DPS Facts at 4.

Discussion and Conclusion.

Burlington Telecom asserts that the Department's motion is premature with respect to a violation of Condition 56 as there can be no violation until such time as Burlington Telecom abandons or curtails its business.²⁵ Burlington Telecom notes that the City of Burlington has engaged financial advisors to assist it in developing sale, partnership or restructuring alternatives for Burlington Telecom "that could alleviate or eliminate risk to the taxpayers."²⁶

The assertion that there can be no violation of Condition 56 until Burlington Telecom abandons or curtails its business is based on a misreading of the condition and is inconsistent with the intention of the condition and the applicable city charter provision on which it is based. In addition, as the Department observes, such a result would be absurd as it would permit the use of taxpayer funds up until the moment of abandonment or curtailment, at which point it might be impossible to prevent taxpayers from bearing the burden of significant losses and costs.²⁷

As the last phrase of Condition 56 makes clear, this condition was intended to mirror the city charter requirements of 24 V.S.A. App. § 3-438(c)(1).²⁸ Its purpose is to "safeguard against the imposition of costs and losses of the city's commercial cable/telecommunications enterprise upon taxpayers, electric ratepayers and the State of Vermont" in accordance with the legislative directive imposed on the Board under the city charter provision.²⁹

It is apparent that the legislature wanted to ensure that taxpayers not bear the burden of either Burlington Telecom business losses nor the costs of investment in Burlington Telecom facilities and network. The charter provision explicitly states that "any and all losses" of Burlington Telecom are "in no event" to be borne by the city's taxpayers. The reference to an

25. Burlington Telecom's Memorandum in Response to the Motions for Partial Summary Judgment of the Department and Comcast and in Support of its Cross-Motion for Partial Summary Judgment at 6.

26. BT's Response to DPS Facts at 4.

27. "It would be absurd to find a CPG holder in compliance with a condition intended to protect taxpayers, on the basis that the house of cards it has built with money borrowed from the taxpayers has not yet collapsed." Department's Motion for Partial Summary Judgment at 5.

28. See also Order of 9/13/05 at 24.

29. Order of 9/13/05 at 39.

abandonment or curtailment of the business clearly modifies the clause related to the costs of investment in the network (and not the "any and all losses" clause). The charter provision appears to anticipate that the significant costs of investment in the network and facilities of the business would be financed by private investors, and is directed at ensuring that taxpayers do not ultimately bear the cost of investments funded by private investors if the enterprise should fail.

Burlington Telecom disputes the Department's characterization that "all the money in the City's cash pool is taxpayer money."³⁰ Burlington Telecom describes the cash pool as the "City's general bank account" in which "the majority of City funds are commingled."³¹ As was discussed in the Board's Order under which the CPG was issued, any distinction that Burlington Telecom is seeking to make between city money and taxpayer money is largely immaterial:

It was clearly the legislative intent to avoid having the residents of Burlington saddled with a debt resulting from a failed venture. It would undermine this intent to accept the argument that dollars may be contributed by the City to BT from parking receipts, sales tax, license fees, or whatever, but not from the property tax. Dollars are the ultimate fungible, and have no identity as to their source. Even were that not the case, clearly, a dollar (or a million dollars) removed from the City's checking account leaves a hole that must be filled from somewhere, and the residual source is the property tax.³²

The Board's interpretation of the applicable City Charter provision was clearly stated in the Board's Order. The sources of funds to satisfy the financing needs and obligations of Burlington Telecom were limited to private financing and Burlington Telecom's revenues:

as long as all of the City's appropriations for BT's competitive services are financed by the lease arrangement with Koch Financial, and all payments due under that lease arrangement for the cable system are from BT's revenues, then the requirements of the City Charter will be met.³³

Contrary to the City Charter provision, the Board's Order and Condition 56 of the CPG, City taxpayers, directly or indirectly, currently bear a substantial portion of the losses and investment costs of Burlington Telecom. Specifically, as a result of the use of general revenues

30. DPS Facts at 3.

31. BT's Response to DPS Facts at 4.

32. Order of 9/13/05 at 39-40. In addition, the City of Burlington was cautioned explicitly in that Order "that the legislature most likely meant what it said in § 3-438(c)(1) of the City Charter, and that the taxpayers of Burlington are not to be burdened with the debts of the BT system." *Id.* at 40.

33. *Id.* at 24.

of the City in making payments on behalf of Burlington Telecom from the cash pool in violation of Condition 60, Burlington Telecom now owes the cash pool \$16.9 million with no immediate or probable prospects of full repayment by Burlington Telecom. This now leaves City taxpayers effectively bearing the burden of this \$16.9 million in Burlington Telecom losses. It is possible, as the City maintains, that there may be a future sale, partnership, financing or other restructuring alternative that could alleviate or eliminate the risk of loss to taxpayers. While any such alleviation or elimination of existing taxpayer losses would clearly be helpful, Burlington Telecom is currently in violation of Condition 56 given the burden of its losses now borne by City taxpayers.

In addition to finding a violation of Condition 56, the Department and Comcast each ask that the Board find the City of Burlington in violation of its Charter, specifically 24 V.S.A. App. § 3-438(c)(1).³⁴ Although the findings of violations of Condition 56 are based on the requirements of this charter provision and involve an implicit finding about this charter provision, it is unclear whether the Board has the jurisdictional authority under state law to find a municipality in violation of its charter. There may also be questions as to whether 24 V.S.A. App. § 3-438(c)(1) actually imposes any obligations on the City, in and of itself. Without a full briefing on these issues by the parties, it is not appropriate at this time to find the City in violation of its Charter.

Based on the foregoing findings of fact and the considerations discussed above, I recommend that the Board find that Burlington Telecom has violated Condition 56 of the CPG and grant the Department's motion for partial summary judgment with respect to this violation.

Condition 2

Both the Department and Comcast seek a determination that Burlington Telecom violated Condition 2 of its CPG. For its part, Burlington Telecom admits its non-compliance with Condition 2 of its CPG.

34. Department's Motion for Partial Summary Judgment at 2-3; Comcast's Memorandum in Support of its Motion at 16.

Findings of Fact

Based on the submissions of the parties, there is no genuine issue as to the following material facts related to Condition 2.

19. Condition 2 of the CPG provides as follows:

BT shall at all times conduct its operations consistent with Board rules or regulations, as amended from time to time, this CPG, and Vermont law, including all applicable provisions of the City of Burlington Municipal Charter 24 V.S.A. App. Chapter 3.

CPG at 1.

20. Burlington Telecom is in violation of Conditions 17, 56 and 60 of the CPG. DPS Facts at 4; BT's Response to DPS Facts at 5; Comcast Facts at 20-21; BT's Response to Comcast Facts at 13; findings 1 through 19, above.

Discussion and Conclusion

Condition 2 requires that Burlington Telecom conduct its operations consistent with the CPG. As set forth above, I recommend that the Board find Burlington Telecom has violated Conditions 17, 56, and 60 of the CPG. Given these violations, Burlington Telecom is not in compliance with Condition 2 of its CPG. Accordingly, I recommend that the Board grant the motions of the Department and Comcast for partial summary judgment with respect to these violations of Condition 2.

Condition 18

Comcast seeks a summary judgment in its favor that Burlington Telecom has violated Condition 18 of its CPG. Burlington Telecom admits the violation, but contends it is not material.

Findings of Fact

Based on the submissions of the parties, there is no genuine issue as to the following material facts related to Condition 18.

21. Condition 18 of the CPG provides in applicable part as follows:

BT shall comply with all regulations of the Federal Communications Commission, including the regulations governing commercial leased access.

CPG at 5.

22. As of December 18, 2009, Burlington Telecom is in violation of FCC performance-testing requirements in 47 CFR § 76.605(a)(1)-(11). Comcast Facts at 21; BT's Response to Comcast Facts at 13.

Discussion and Conclusion

According to Burlington Telecom, the FCC's applicable performance-testing requirements relate to analog systems and do not contain an exception for all-digital systems. Because it has an all-digital system, Burlington Telecom is unable to strictly comply with these performance-testing requirements. Burlington Telecom reports that there is precedent for the FCC to waive this requirement for all-digital systems, and that it petitioned the FCC on December 14, 2009, for such a waiver.

Based on the foregoing findings of fact, Burlington Telecom's failure to comply with the FCC's performance testing requirements constitutes a violation of Condition 18. Assuming, however, Burlington Telecom is correct about the nature of the non-compliance and the reason it was unable to comply with the FCC requirements, this violation would appear to be technical and unavoidable given the all-digital nature of Burlington Telecom's system.

Despite the violation of Condition 18, I do not find a sufficient basis to grant Comcast's motion for partial summary judgment in its favor with respect to this violation. Comcast's participation in this proceeding is expressly limited to issues of competitive neutrality.³⁵ The Board's Order approving the issuance of a CPG to Burlington Telecom specifically identified conditions 56–65 as relevant to the establishment of competitive neutrality.³⁶ While there are other conditions of the CPG, such as Condition 17, that may have implications for competitive neutrality,³⁷ Comcast provides no basis in its motion for partial summary judgment or in its supporting memorandum for how this particular violation of Condition 18 by Burlington Telecom relates to an issue of competitive neutrality. Accordingly, I recommend that the Board deny Comcast's motion for partial summary judgment in its favor with respect to the violation of Condition 18.

35. Order on Comcast Motions of 2/18/09.

36. Order of 9/13/05 at 47.

37. See Comcast's Memorandum in Support of its Motion at 2 (fn. 8).

Condition 61

Comcast seeks a determination in its motion for partial summary judgment that Burlington Telecom violated Condition 61 of its CPG. In its cross-motion for partial summary judgment, Burlington Telecom seeks a determination that it is in compliance with Condition 61.

Condition 61 provides as follows:

61. BT shall make payments in lieu of local and state taxes in an amount consistent with such taxes imposed on other private cable operators' businesses in Burlington.

a. In anticipation of the obligation to make such payments, BT shall identify in writing through a PILOT agreement, the methodologies used for the valuation of BT's various properties, including all real, personal business and nonresidential property, and clearly identify the in lieu of tax rate or rates that will be applied to the various categories of property in order to determine {whether} the payment in lieu of taxes that BT is required to make is comparable to payments made by private cable operators in Burlington. BT shall file its valuations with the Board and the Department.

b. Not less than sixty (60) days from date of this Order, BT shall file with the Board and Department a copy of a fully executed payments in lieu of taxes agreement with the City. Thereafter, within ten (10) days of executing any amended or successor agreement, BT shall likewise file copies of such agreements with the Board and Department. The Board, as a condition of this CPG, may direct BT and the City to modify or enter into substitute payments in lieu of tax agreements as necessary to assure compliance with 24 V.S.A. App. § 3-438(c)(2).

Comcast maintains that Burlington Telecom has violated Condition 61 by failing to pay consideration for two facilities located on City property, by locating facilities on other City property without advance agreement establishing the fair value of the use of that property, and by reaching some agreements that would permit its use of City property at less than fair value. As a result, Comcast contends that Burlington Telecom should be found in violation of Condition 61 by failing to make appropriate payments in lieu of taxes on these properties. Comcast's claims relate to facilities of Burlington Telecom at Barnes School, Flynn School, Hunt School, and Taft School. Comcast does not distinguish between leased and purchased facilities.

As Burlington Telecom observes in its response, Comcast appears to have confused the issue of whether Burlington Telecom has paid "fair rental value to the Burlington School District for its four fiber aggregation points" and the issue of whether Burlington Telecom has made

appropriate payments in lieu of taxes.³⁸ Condition 61 relates to payments in lieu of taxes and not to lease payments. In any event, based on the submissions of Comcast and Burlington Telecom, there appear to be genuine issues of material fact with respect to the extent to which Burlington Telecom has or has not paid appropriate consideration for the use of the School District's facilities.

On the other hand, based on the submissions of the parties, there is no basis to conclude that Burlington Telecom has fully complied with Condition 61. Not only are there material facts about which there may be genuine issues of dispute concerning Burlington Telecom's compliance with Condition 61,³⁹ but any finding of compliance would be premature at this stage of an ongoing investigation and inappropriate.

Accordingly, I recommend that the Board deny Comcast's motion for partial summary judgment with respect to the alleged violation of Condition 61 and Burlington Telecom's cross-motion for partial summary judgment with respect to its alleged compliance with Condition 61.

Condition 63

Comcast seeks a determination in its motion for partial summary judgment that Burlington Telecom violated Condition 63 of its CPG. In its cross-motion for partial summary judgment, Burlington Telecom seeks a determination that it is in compliance with Condition 63.

Condition 63 provides as follows:

63. BT shall obtain an independent appraisal of the property to be used for its headend antenna(e) and building, and shall pay a fair rental (or purchase) to the City department that owns it.

Comcast maintains that Burlington Telecom violated Condition 63 because Burlington Telecom did not obtain an "appraisal" of the property to be used for its headend antennae. There apparently is no dispute as to the fact that Burlington Telecom received an estimate of the lease value of the property from a real estate consultant and appraiser. In his letter of October 11, 2005, Stephen D. Allen of Allen & Brooks establishes an estimate of lease value for the property

38. Burlington Telecom's Memorandum in Response to the Motions for Partial Summary Judgment of the Department and Comcast and in Support of its Cross-Motion for Partial Summary Judgment at 10–11.

39. See Response of Comcast to Burlington Telecom's June 14, 2010, Statement of Undisputed Facts at 7–8 and Response of Comcast to Burlington Telecom Cross-Motion for Summary Judgment and Supporting Memorandum at 7.

based on a description of the proposed facilities and "through research and a comparison with leases on other sites of this type."⁴⁰ The letter also states that Mr. Allen conducted his analysis as a consultant and did not complete "a formal appraisal" and that the letter "is not represented as an appraisal."⁴¹

Burlington Telecom observes that the purpose of Condition 63 was to provide a valuation that would provide a fair rental or purchase price for the headend antennae property at 287 Shelburne Road.⁴² Burlington Telecom details Mr. Allen's qualifications and the steps he took to arrive at his estimate of rental value. On this basis, it asserts that the Board should find that Burlington Telecom is in compliance with Condition 63 and should grant its cross-motion for partial summary judgment with respect to this condition.

There is a genuine issue of material fact as to whether the estimate of fair rental value obtained by Burlington Telecom is an "unsubstantiated and informal value estimate,"⁴³ which may rest in part on the extent to which the analysis performed by Mr. Allen was deficient. However, the fact that Mr. Allen's estimate of a fair rental value did not meet a professional appraiser's standards for a formal appraisal is not sufficient, by itself, to permit a finding of a violation of Condition 63.

Accordingly, I recommend that the Board deny both Comcast's motion and Burlington Telecom's cross-motion for partial summary judgment with respect to Condition 63.

40. Letter to Burlington Telecom from Allen & Brooks, dated October 11, 2005, attached as Exhibit V to the Affidavit of Robert J. Munnely, Jr., submitted by Comcast in support of its motion for partial summary judgment.

41. *Id.*

42. The need for a fair valuation of this property was discussed in the Order related to the CPG:

BT intends to place its headend building and satellite dish on a small portion of property owned by the City of Burlington School Department. Mr. Nulty testified that this property is not being used for school purposes, and that BT will be allowed to use the land rent-free unless the Board requires that it pay a fair market value rent. It does seem that BT ought to pay its own way, and my proposed CPG includes a requirement that the land be assessed and that BT pay a fair rent to the Burlington School Department.

Order of 9/13/05 at 43.

43. Comcast's Memorandum in Support of its Motion for Partial Summary Judgment at 20. As this investigation proceeds, it is also possible that additional questions may arise as to whether Burlington Telecom has paid a fair rental value for the lease of the property.

Conditions 57, 58, 59, and 62

In its cross-motion for partial summary judgment, Burlington Telecom also seeks determinations that it is in compliance with Conditions 57, 58, 59, and 62 of the CPG.⁴⁴

44. These conditions provide as follows:

57. BT shall comply with 24 V.S.A. App. § 3-438(c)(2) and shall pay, pursuant to tariffs, to attach to poles wholly owned by BED the same pole attachment fee that would be required from any other, non-City entity, and BT shall pay to attach to poles owned jointly by BED and Verizon New England Inc., d/b/a Verizon Vermont ("Verizon"), or solely by Verizon pursuant to pole attachment agreements or pole attachment tariffs as are generally applicable to other attaching entities.

a. BT shall be prohibited from accepting any preference from the City or BED in the construction, operation, and maintenance of its plant and facilities in the public rights-of-way, in underground conduit or ducts, or as attached to utility poles.

b. BT shall pay the same rate for conduit access, make ready surveys, and make ready labor rates as other cable or telecommunications providers.

c. BT shall not receive make-ready or other outside plant services from BED on a schedule more favorable than that performed by BED for Adelpia. Within 30 days of the date of this certificate, the City shall establish a tracking mechanism that measures the time from request to completion of work performed by BED for BT, Adelpia, Verizon, and other pole-attaching entities. The City shall submit a quarterly report during the three-year construction period for the system.

d. BT shall place its aerial facilities in the communications space on utility poles, not in the power space. This provision shall not be construed to prevent placement of facilities in the safety or unusable space that is normally allowed for facilities belonging to Adelpia or Verizon.

58. The City shall establish BT as a separate enterprise fund and shall assure that within thirty (30) days of issuance of this CPG that a separate Chart of Accounts, and accounting books and records, are established consistent with BT's operation as an enterprise fund. The accounting system shall be capable of tracking in a transparent and auditable manner the direct and indirect costs from BT's financing, construction, operation, and maintenance of its facilities including cable plant, equipment, expenses, and other cable expense categories. The cost accounting system shall have sufficient detail to be capable of tracking, in an auditable manner: (i) all costs during the applicable accounting period that have been directly assigned to Phase III and the accounts to which such costs have been booked; (ii) all indirect costs (costs incurred in support of multiple City services or functions) that have been allocated to Phase III from the City, from BED, or from any other City operation, the accounts charged, the allocator used and the derivation of the allocator, including a demonstration that the amounts allocated to Phase III are appropriate when considered in light of the amounts allocated to all other City activities; (iii) an explanation of the allocation of any centralized costs charged by the City to BED and in turn allocated by BED to the BT; and (iv) identification of any benefits BT receives from the City or any City activity but for which, for any reason, no allocation of costs is made to the cable system. The Accounts of the fund shall recognize start-up costs beginning on January 1, 2002.

59. The City shall develop, maintain, and update with appropriate frequency a Cost Allocation Manual ("CAM") that includes protocols for the allocation of direct and indirect expenses between BT and other City activities, and between BT's provisioning of telecommunications services to other City departments (the so-called "Phase I" activities) and its provision of cable television and other services to non-City entities on a common carrier basis ("Phases II and III" activities). The CAM shall identify all common and joint costs, describe the allocators used to allocate all joint and common costs, describe the method(s) by which the allocation factors are calculated, describe the sources of information from which costs shall be allocated, and describe the frequency and times at

(continued...)

As noted above in the discussion related to Condition 61, any finding of compliance would be premature at this stage of the investigation and inappropriate. The scope of this proceeding was expanded in January of 2010 to include a review of Burlington Telecom's compliance with the conditions of its CPG. There is no justifiable basis to preemptively conclude during an ongoing investigation that Burlington Telecom has complied with a provision of its CPG before the Board has completed its investigation.⁴⁵

Accordingly, I recommend that the Board deny Burlington Telecom's cross-motion for partial summary judgment with respect to Conditions 57, 58, 59 and 62.

Effects of Findings of Violations; Section 509(b) Findings; Status of Amended Petition

As discussed above, I recommend that the Board find on summary judgment that Burlington Telecom is in violation of Conditions 2, 17, 56 and 60 of its CPG. It should be noted that the full extent and nature of the violations of these conditions has not been established, only that there has been a violation of these four conditions. There are issues of disputed fact involving these violations, and there may be additional facts to be discovered with respect to these violations, as the investigation continues.

Although issues remain to be resolved with respect to the nature and extent of the CPG violations, there seems little basis to dispute the conclusion that the provisions of the CPG violated by Burlington Telecom are material provisions of the CPG for purposes of 30 V.S.A. § 509(b). The four violated conditions relate to obligations of Burlington Telecom to comply with the CPG and state law, to build out its network throughout the City of Burlington by a certain date, and to finance its build-out and operations without cost to taxpayers in accordance with a specific statutory directive. Burlington Telecom does not appear to dispute that the provisions of the CPG that it has violated are material provisions of its CPG, stating only that the

44. (...continued)
which direct and indirect costs shall be assigned to BT. The CAM should be applied not only going forward, but should be applied to costs incurred from January 1, 2002.

62. BT shall pay any lawful, applicable municipal and street excavation fees, as would apply if BT were a private, non-governmental entity.

45. On the other hand, this is not to suggest that efforts by the parties to limit by stipulation the issues in the investigatory portion of this proceeding would not be welcomed.

issue of materiality involves mixed issues of fact and law and that it disputes the characterization by the Department that the build-out of the network throughout the City was a centerpiece of the City's application for a CPG.⁴⁶ Accordingly, I recommend that the Board find and conclude that these provisions of the CPG are material provisions of the CPG.

As part of its motion, the Department requests a declaration that Burlington Telecom's opportunity to cure under 30 V.S.A. § 509(b) has commenced. The interpretation of this provision and its application to this proceeding is a matter of some dispute among the parties. The first sentence of Section 509(b) provides that "[i]f the board finds that a company has violated any material provision of its certificate or this chapter, it shall allow the company a reasonable opportunity to cure the violation." The following two sentences of Section 509(b) provide that a failure to cure may lead the Board to revoke the company's CPG and that the company's efforts to cure violations are a factor in assessing civil penalties.⁴⁷

The Department believes that a Board finding of a violation followed by a reasonable opportunity to cure are prerequisites to the imposition of penalties or CPG revocation. Comcast takes the position that "Section 509 should not be construed to require the Board to provide an opportunity to cure" in a case of admitted non-compliance in which no specific cure proposal is made.⁴⁸

It is not necessary to resolve issues related to the interpretation of Section 509(b) at this time. To the extent that the commencement of a cure period is dependent on the Board first finding such violations, Burlington Telecom's opportunity to cure these violations begins upon the entry of an order making or adopting such findings.

The findings on summary judgment that Burlington Telecom is in violation of Conditions 17, and 60 of its CPG obviously do not affect the status of Burlington Telecom's requests for an

46. See BT's Response to DPS Facts at 2 and DPS Response to Burlington Memorandum and Cross-Motion at 3; DPS Motion at 3-4; DPS Response to Burlington Memorandum and Cross-Motion at 3.

47. "Thereafter, in the event of failure to cure, the board may enter an order revoking the certificate. In addition, the board may impose a civil penalty in an amount not to exceed \$1,000.00 per day nor a total of \$20,000.00 for each violation unless otherwise provided in the certificate of public good, after giving due consideration to the size of the company, severity of the violation, and efforts to cure. 30 V.S.A. § 509(b).

48. Comcast's Memorandum in Support of its Motion at 1.

amendment to Condition 17 and for temporary relief from Condition 60 of the CPG. These requests are still pending and will be adjudicated as part of this proceeding.

The Department requests that Burlington Telecom be required to submit specific language related to the proposed amendment of the CPG.⁴⁹ To date, Burlington Telecom has only stated that it seeks to remove the obligation to complete the build-out of its network by a certain date and replace it with the requirement that it will build out the remaining sections of the City as revenues provide.⁵⁰ The submission of specific language for a proposed amendment would be helpful in providing a more complete understanding of the proposed amendment sought by Burlington Telecom and would facilitate an evaluation of its merits and practicality.

In addition, it would also be helpful if Burlington Telecom would clarify in specific terms the temporary relief it is seeking from Condition 60 as well as the purposes of such relief. In its Amended Petition, Burlington Telecom states only that temporary relief from the financing limitations of Condition 60 is required "in order to complete the build out of the City in a cost effective manner."⁵¹ In crafting a specific proposal for temporary relief from Condition 60, I would recommend that Burlington Telecom be mindful of the Board's statements in its Ruling on Burlington Telecom's Motion for Temporary Relief in February:

The Board's consideration of this request for temporary relief cannot be assessed solely in terms of the policy, legal and practical considerations that would typically guide the Board's decision-making process. Regardless of the City's or our own views as to the policy merits of applicable City Charter provisions and state statutes, both the City and the Board are bound by legislative directives that essentially require that the costs of any investment in BT and any losses of BT not be borne by the City's taxpayers. To the extent the City or BT wishes to find relief from this directive, it must be provided by the state legislature and not by the Board.⁵²

This is not to suggest there is no possibility for temporary relief from Condition 60, but it does make clear that a fundamental principle in assessing the merits of such relief has to be its effect on the City's taxpayers. As the Board also observed, the creation of a sufficient evidentiary

49. DPS Response to Burlington Memorandum and Cross-Motion at 3.

50. Amended Petition at 2–3. In the Petition it filed on September 10, 2008, BT originally sought to amend Condition 17 of its CPG by "enlarging the date by which it must complete its system buildout." Petition at 1.

51. Amended Petition at 2.

52. Ruling on Motion for Temporary Relief of 2/16/10 at 3.

record in this proceeding might "allow the Board to conclude that the risks to, and ultimate unfavorable consequences for, the City's taxpayers, in light of the existing violations of Condition 60, would be reduced by granting the requested temporary relief from Condition 60."⁵³

Accordingly, I recommend that the Board require Burlington Telecom to file by September 30, 2010, specific language for the proposed amendment of Condition 17 and a more detailed statement as to the specific relief it seeks from the financing limitations of Condition 60.

Reports to the Board

In its motion for partial summary judgment, the Department proposed that the City of Burlington file either a proposal to cure the violations of the CPG or regular status reports on its efforts to develop a cure for the violations.⁵⁴ Burlington Telecom indicates that it does not have a proposal, at present, to cure all the violations of the CPG (specifically, Condition 60), but is willing to provide quarterly status reports to the Board on its efforts.⁵⁵ I have some concern that quarterly reports will not be frequent enough in apprising the Board of developments. In addition, these status reports should be detailed enough to provide a basis for the assessment of the progress of Burlington Telecom's efforts to cure the violations or alleviate their effects. For example, a statement in a status report that "negotiations with CitiCapital Municipal Finance continue on an ongoing basis" would not be sufficient.

In accordance with the foregoing, I recommend that the Board require Burlington Telecom to file a report with the Board on September 30, 2010, and additional reports every two months thereafter during the pendency of this proceeding, detailing its progress in curing or addressing violations of the CPG, which reports should discuss with specificity the status of negotiations with its lender, any developments in finding a private investor in or buyer for the network, and other efforts to cure or mitigate the violations of the CPG and the effects thereof.

53. *Id.*

54. DPS Motion at 1 and 7.

55. BT's Response to Motions of the Department and Comcast and in Support of its Cross-Motion at 18-19.

V. SUMMARY

Set forth below is a summary of the recommendations in this proposal for decision:

1. I recommend that the Board grant the motions of the Department and Comcast for partial summary judgment related to Condition 17 of the CPG by finding Burlington Telecom has violated Condition 17 with respect to the failure to complete the build-out of its network by September 13, 2018, to 1,942 service addresses along public rights-of way.

2. I recommend that the Board grant the motions of the Department and Comcast for partial summary judgment related to Condition 60 of the CPG by finding that Burlington Telecom has violated Condition 60 of the CPG as detailed above.

3. I recommend that the Board grant the Department's motion for partial summary judgment related to Condition 56 of the CPG by finding that Burlington Telecom has violated Condition 56 of the CPG as detailed above .

4. I recommend that the Board grant the motions of the Department and Comcast for partial summary judgment related to Condition 2 by finding that Burlington Telecom has not conducted its operations consistent with the CPG as a result of its violations of Condition 17, 56 and 60.

5. I recommend that the Board deny all other motions and cross-motions by the parties for partial summary judgment.

6. I recommend that the Board find and conclude that the provisions of the CPG that Burlington Telecom has been found to have violated are material provisions of the CPG for purposes of 30 V.S.A. § 509(b).

7. I recommend that the Board conclude that, to the extent a reasonable opportunity to cure the violations of Conditions 2, 17, 56, and 60 of the CPG is dependent for purposes of 30 V.S.A. § 509(b) on the Board first finding such violations, Burlington Telecom's opportunity to cure these violations will begin upon the entry of an order by the Board making or adopting findings of violations.

8. I recommend that the Board require Burlington Telecom to file with the Board by September 30, 2010, specific language for the proposed amendment of Condition 17 and a more detailed statement as to the specific relief it seeks from the financing limitations of Condition 60.

9. I recommend that the Board require Burlington Telecom to file a report with the Board on September 30, 2010, and additional reports every two months thereafter during the pendency of this proceeding, detailing its progress in curing or addressing violations of the CPG, which reports should address with specificity the status of negotiations with its lender, any developments in finding a private investor in or buyer for the network, and other efforts to cure or mitigate the violations of the CPG and the effects thereof.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 10th day of September, 2010.

s/ John P. Bentley

John P. Bentley, Esq.
Hearing Officer

VI. BOARD DISCUSSION

The Department filed a letter with the Board on September 3, 2010, in support of the Board's adoption of the proposal for decision. On the same date, Burlington Telecom filed comments on the proposal for decision challenging certain findings and recommendations of the Hearing Officer and requesting oral argument. Comcast did not file any comments on the proposal for decision. In response to the request of Burlington Telecom, oral argument on the proposal for decision was held before the Board on September 22, 2010.

Burlington Telecom challenges the Hearing Officer's recommendation that the Board grant the Department's motion for summary judgment finding Burlington Telecom in violation of Condition 56 of its CPG. It also seeks Board review of the Hearing Officer's denial of its cross-motion for summary judgment that it is in compliance with Conditions 57, 58, 59, 61 and 62 of its CPG. In addition, while not disputing the findings or conclusions of the Hearing Officer that Burlington Telecom violated Condition 60, Burlington Telecom objects to the Hearing Officer's characterization of its violation of Condition 60 as reflecting a "wanton disregard" of the condition. Furthermore, Burlington Telecom seeks to defer the filing of specific proposals to amend Condition 17 and for relief from Condition 60 until a later date after its present financial situation is addressed in the case of Condition 17, or after the conclusion of its negotiations with CitiCapital in the case of Condition 60. Burlington Telecom also requests a delay in the filing of its first status report detailing, among other things, the status of negotiations with its lender until October 31, 2010, and seeks the ability to file this and future reports, if necessary, under seal pursuant to the Procedural Order in this docket of December 4, 2008. Finally, Burlington Telecom requests that the Board stay any further proceedings in this docket until Burlington Telecom concludes negotiations with CitiCapital and has proposed a cure for the violation of Condition 60.

Burlington Telecom asserts that there can be no violation of Condition 56 until such time as Burlington Telecom curtails or abandons operations. It maintains that the unreimbursed \$16.9 million in funds advanced to Burlington Telecom from the City's cash pool are not yet losses borne by City's taxpayers. We find these arguments no more persuasive than the Hearing Officer found them for the reasons set forth in his discussion of Condition 56 above. Fundamentally,

Burlington Telecom's interpretation is inconsistent with the purpose of the condition, and the applicable city charter provision on which it is based, to protect taxpayers from ultimately bearing the losses and investment costs of Burlington Telecom. Burlington Telecom's interpretation would make the condition essentially meaningless in protecting City taxpayers.

Burlington Telecom contends that the Hearing Officer was also mistaken in denying Burlington Telecom's cross-motion for summary judgment that it is in compliance with certain conditions of its CPG. Burlington Telecom observes that neither the Department nor Comcast set forth any genuine issues of material fact related to Burlington Telecom's statement of facts establishing its compliance with certain conditions. If this were an ordinary litigation in the civil courts, Burlington Telecom's position might have merit. However, this proceeding involves an investigation of compliance with the CPG initiated by the Board, which has independent public policy obligations under state law. Until the Board completes its investigation, it would indeed be premature to declare Burlington Telecom in compliance with certain conditions of its CPG based solely on the submissions of the parties.⁵⁶

While not contesting the Hearing Officer's specific findings with respect to violations of Condition 60 of its CPG, Burlington Telecom objects to the Hearing Officer's characterization of Burlington Telecom's admitted conduct as a "wanton disregard" of this condition of its CPG and the related City Charter provision. Based on the number, magnitude and duration of Burlington Telecom's admitted violations of Condition 60 of its CPG, the words "wanton disregard," as commonly understood, are an appropriate characterization of Burlington Telecom's behavior,⁵⁷ and, therefore, we do not modify the Hearing Officer's characterization. This is not to suggest, however, that the degree of Burlington Telecom's scienter with respect to these violations has been factually or legally established.

56. The Board also observes that it is not the general practice of the Board to declare a party in compliance with certain conditions of its CPG following an investigation. The Board either finds, or does not find, violations of the CPG.

57. Black's Law Dictionary (8th ed. 2004) defines "wanton" as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences" and defines "wantonness" as "conduct indicating that the actor is aware of the risks but indifferent to the results." Burlington Telecom's admitted conduct and disregard of Condition 60 of its CPG evinces, at minimum, an unreasonable and careless indifference to the condition, behavior that falls within these definitions.

Burlington Telecom seeks to defer the filing of specific proposals for the amendment of Condition 17 and relief from Condition 60 until indeterminate future dates. Given the current uncertainties related to the effect of current negotiations with Burlington Telecom's secured creditor and others, a delay in such filing obligation seems appropriate. However, any deferral of this requirement should not be open-ended. Therefore, our order requires Burlington Telecom to make such filing of specific proposals by December 31, 2010, with any further extensions left to the Hearing Officer's discretion upon motion by Burlington Telecom.

Giving the timing of this Order, the proposal of the Hearing Officer regarding the date by which the first status report by Burlington Telecom is due needs to be reset. The Board accepts Burlington Telecom's recommendation that the due date for the first status report be October 31, 2010. Burlington Telecom's ability to file portions of the status report under seal will depend on the extent to which the filing of such status report is subject to the Protective Agreement, dated as of October 24, 2008, under the Hearing Officer's Procedural Order of December 4, 2008. The Board generally disfavors the filing of material under seal, and this is especially true when, as in this proceeding, there is a strong public interest for greater disclosure and public knowledge with taxpayer funds at risk. To the extent the filing of the status report is properly subject to the Procedural Order, Burlington Telecom must file as much material as is reasonably possible in a publicly available document and is reminded of its obligation under that Procedural Order to submit a detailed, information-specific averment of the basis for the treatment of any material as "allegedly confidential information" as set forth in the Procedural Order.

As to Burlington Telecom's request for a stay in this proceeding, Burlington Telecom has not yet properly filed a motion for a stay. If and when it chooses to file such a motion, any decision as to whether to grant such stay will rest, at least initially, with the Hearing Officer.

Finally, while not directly relevant to the Proposal for Decision, the Board wishes to express two other concerns in the hope that it may assist the parties and the Hearing Officer in resolving certain matters. The Board is concerned about both the possibility of continuing delays in achieving a resolution of negotiations with Burlington Telecom's secured lender and an outcome to those negotiations that the Board, under current statutes, would be unable to support because it would involve a payment of additional City funds on behalf of Burlington Telecom.

As to the first issue, the Board notes that many commercial lenders appear to be responding to the significant rise in commercial loan delinquencies with a strategy that has been referred to by some commentators as "extend and pretend." The Board is concerned that Burlington Telecom's secured lender may have some incentive to continue to extend the negotiations period to delay the time when its loan losses have to be written down to a realistic approximation of its likely recovery. Such an approach by the lender, or by Burlington Telecom, could further delay any resolution of issues related to Burlington Telecom. Secondly, the Board wants to ensure that both the City of Burlington and the City's financial advisors who are assisting in negotiations with CitiCapital are fully aware of the legal restrictions on the use of City funds that would be applicable to any settlement or restructuring of Burlington Telecom's indebtedness to CitiCapital. To present the Board with an outcome to these negotiations that the Board would be unable to support because of existing statutory restrictions would be a most unfortunate result for all concerned. Burlington Telecom should address both these matters in the first status report it files under this Order.

VII. BOARD ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board ("Board") of the State of Vermont that:

1. The findings, conclusions and recommendations of the Hearing Officer are adopted except for changes to the dates by which Burlington Telecom must make certain filings as set forth in paragraphs 9 and 10 below.

2. The motions of the Department of Public Service ("Department") and Comcast of Connecticut/Georgia/ Massachusetts/New Hampshire/New York/North Carolina/Virginia/Vermont, LLC, d/b/a Comcast ("Comcast"), for partial summary judgment related to Condition 17 of the Certificate of Public Good ("CPG") issued to the City of Burlington, d/b/a Burlington Telecom ("Burlington Telecom"), are granted. We find that Burlington Telecom has violated Condition 17 with respect to its failure to complete the build-out of its network by September 13, 2018, to 1,942 service addresses along public rights-of way.

3. The motions of the Department and Comcast for partial summary judgment related to Condition 60 of the CPG are granted. We find that Burlington Telecom violated Condition 60 as detailed in the Hearing Officer's findings and conclusions.

4. The Department's motion for partial summary judgment related to Condition 56 of the CPG is granted. We find that Burlington Telecom has violated Condition 56 of the CPG as detailed in the Hearing Officer's findings and conclusions.

5. The motions of the Department and Comcast for partial summary judgment related to Condition 2 of the CPG are granted. We find that Burlington Telecom has not conducted its operations consistent with the CPG as a result of its violations of Condition 17, 56 and 60.

6. All other motions and cross-motions by the parties for partial summary judgment are denied.

7. The provisions of Conditions 2, 17, 56 and 60 violated by Burlington Telecom are material provisions of the CPG for purposes of 30 V.S.A. § 509(b).

8. To the extent a reasonable opportunity to cure the violations of Conditions 2, 17, 56 and 60 of the CPG is dependent for purposes of 30 V.S.A. § 509(b) on the Board first finding such violations, Burlington Telecom's opportunity to cure these violations begins with the entry of this Order.

9. Burlington Telecom shall file with the Board by December 31, 2010, or such later date as the Hearing Officer shall determine, specific language for the proposed amendment of Condition 17 and a more detailed statement as to the specific relief it seeks from the financing limitations of Condition 60.

10. Burlington Telecom shall file a report with the Board on October 31, 2010, and additional reports every two months thereafter during the pendency of this proceeding, detailing its progress in curing or resolving violations of the CPG, which reports should address with specificity the status of negotiations with its lender, any developments in finding a private investor in or buyer for the network, and other efforts to cure or mitigate the violations of the CPG and the effects thereof.

11. This docket is remanded to the Hearing Officer for further proceedings consistent with this Order.

Dated at Montpelier, Vermont, this 8th day of October, 2010.

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

OFFICE OF THE CLERK

FILED: October 8, 2010

ATTEST: s/ Susan M. Hudson
Clerk of the Board

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

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