

STATE OF VERMONT

CHITTENDEN SUPERIOR COURT

CHITTENDEN COUNTY, SS.

Docket No.

FRED OSIER and)
EUGENE H. SHAVER,)
Plaintiffs)
)
v.)
)
BURLINGTON TELECOM, an enterprise)
of the City of Burlington,)
Defendant)

COMPLAINT

Nature of Action

1. This is a taxpayer suit to recover approximately \$17 million in city funds which were borrowed and not repaid by Burlington Telecom (“BT”) to the City of Burlington’s pooled cash management system within 60 days, and have not been repaid to date. The failure to repay such funds violates BT’s Certificate of Public Good. It also places Burlington taxpayers at risk that losses from BT will be borne by them, in violation of the Certificate of Public Good and Burlington City Charter. Plaintiffs seek an order requiring Defendant to promptly repay such funds with interest to the pooled cash management system; an accounting to determine how the funds were spent and exactly what amount is owing; and an injunction to prevent Defendant from taking any further actions with respect to BT which would place taxpayer funds at risk as either a legal or practical matter.

Parties

2. Plaintiffs Fred Osier and Eugene Shaver are residents and taxpayers of the City of Burlington.

3. Defendant BT is an “enterprise fund” of the City of Burlington (“Burlington” or “City”). The City is a municipality chartered by the State of Vermont. Burlington’s charter is codified at Ch. 3, 24 V.S.A. App.

Facts

4. In 2000, the Vermont State Legislature approved amendments to the Burlington City Charter which allowed the City to own, operate and utilize cable television, fiber optic cable and other telecommunications services, either by itself or in a joint venture with one or more third parties. *See* 24 V.S. A. App. §§ 3-431(4), 3-449.

5. The State Legislature also amended the Burlington City Charter to provide that, if Burlington chose to own or operate cable television, fiber optic cable, or other telecommunications services, the public service board “shall ensure that any and all losses . . . are borne by the investors in such business, and in no event are borne by the city’s taxpayers.” 24 V.S.A. App. § 3-438(c)(1). Section 3-438(c)(1) was enacted specifically for the benefit of Burlington taxpayers, including Plaintiffs.

6. In January, 2002, the Burlington City Council approved the expenditure of \$2.6 million from the Burlington general fund to wire Burlington for high-speed internet services among its city offices and public schools.

7. In August, 2002, Burlington announced the completion of 17 miles of underground and aerial cable providing high-speed internet service and data access to its city offices and schools.

8. On September 13, 2005, the Public Service Board issued a Certificate of Public Good authorizing Burlington to establish BT to provide cable television, internet and telecommunication service in the City of Burlington.

9. In accordance with section 438(c) of the Burlington City Charter, the Certificate of Public Good for BT provides in Condition 60 that Burlington may make payments on or behalf of so-called "Phase III activities" only if specific financial conditions are present. "Phase III activities" refer to the provision of telephone, high-speed internet, cable television, and transport services by means of optic fiber to residences, businesses, and institutions.

10. Specifically, Condition 60 requires that BT must have "cash reserves, revenues receivable, or other payments receivable that, collectively, equal or exceed the sum of payments to be made by the City plus the balance of any other current payments owed to the City" before Burlington may make expenditures for Phase III activities.

11. Condition 60 of the Certificate of Public Good also provides that BT may receive funds from Burlington'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" (*i.e.*, BT customers).

12. Condition 58 of the Certificate of Public Good requires the City to establish separate accounting books and records for BT which are "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."

13. Condition 59 of the Certificate of Public Good requires the City “to develop, maintain, and update . . . a Cost Allocation Manual (“CAM”) that includes protocols for the allocation of direct and indirect expenses between BT and other City activities.”

14. In January, 2006, BT began offering internet, telephone, and cable television service to the public.

15. In late 2007 or early 2008, Defendant’s Chief Administrative Officer, Jonathan Leopold, authorized the payment of BT’s operating expenses from Burlington’s “pooled cash management system.” On information and belief, at the time such operating expenses were paid:

- i. BT did not have cash reserves or receivables exceeding the amount of such payments;
- ii. There was no realistic prospect that the amounts could be repaid within 60 days from BT’s revenues; and
- iii. No financing was in place from which the amounts could be repaid within 60 days.

16. On information and belief, Leopold was aware, or in the exercise of reasonable care should have been aware, of the facts alleged in paragraph 18.

17. In March, 2008, Burlington residents approved a \$39.6 million bond issue for the Burlington Electric Department. Proceeds from the bond issue were to be used exclusively for Burlington Electric Department projects. Such funds were not available for use by BT.

18. An audited financial report for BT prepared by the firm of Sullivan and Powers for the fiscal year ending June 30, 2007, showed that BT had exhausted the funds from its initial financing and had used more than \$5 million from the City’s pooled cash management system.

19. The audited financial report was addressed to the Mayor and City Councilors. It was provided in final form to Leopold in June, 2008. However, Leopold did not distribute the report to the Burlington City Council, nor was it made available to the public.

20. Despite being put on notice that BT was indebted to the city's cash pool in an amount exceeding \$5 million as of June 30, 2007, Leopold continued to authorize additional payments from the pool to BT.

21. According to the audited financial report for BT for the fiscal year ending June 30, 2008, BT's debt to the pool was never repaid and had grown to approximately \$15 million.

22. On November 6, 2008, BT's attorney, William Ellis, Esq., stated in an e-mail to Leopold that his "biggest concern" prior to a meeting with the Public Service Department on November 7, 2008, was BT's violation of Condition 60 of the Certificate of Public Good. Attorney Ellis stated in the e-mail that "my present assessment is that the present use of the city's 'pooled resources' to fund BT to the tune [sic] of \$10 million with no repayment obligation within 2 months is a violation." Despite Ellis's concerns, the violation was not disclosed to the Public Service Department at the meeting on November 7, 2008.

23. On December 15, 2008, Attorney Ellis reiterated in an e-mail to BT's attorney, Amber Thibeault, with copies to Leopold and City Attorney Ken Schatz, that "[t]he city's loan to BT is, at a minimum, a violation of Condition 60. My thought is we deal with this issue head on and take whatever additional penalty the DPS may want to foist upon us now as opposed to down the road." At the end of the e-mail, Attorney Ellis wrote: "Jonathan, any input on this matter would be appreciated."

24. According to a memorandum dated April 14, 2009, prepared by Attorney Ellis and his partner, Joseph McNeil, Esq. for Mayor Bob Kiss and marked "For Your Eyes Only," Leopold chose not to reveal the violation of Condition 60 to the Department of Public Service in December, 2008, but rather "to let sleeping dogs lie."

25. In the April 14, 2009, memorandum, Attorneys Ellis and McNeil again express the view “that the city should address the issue head on sooner rather than later, and not wait to have it brought up by DPS or worse, Comcast.” Despite this advice, the violation was not disclosed at that time to the Department of Public Service, city councilors, or the public.

26. On May 18, 2009, Leopold informed the City Council in an executive session that BT was in debt to the City, although some councilors assert that they were not informed that it was in violation of the Certificate of Public Good. Leopold did not and still has not provided BT’s audited financial reports to the Council or to the public.

27. In September, 2009, BT notified the Public Service Board that it was in violation of Condition 60 of the Certificate of Public Good and requested relief from that Condition.

28. On October 5, 2009, Leopold informed the City Council that, as of June 30, 2009, BT was in debt to the City in the amount of approximately \$17 million and that it also was in violation of Condition 60.

29. On October 16, 2009, Department of Public Service Commissioner David O’Brien called on BT to repay its debt to the City of Burlington immediately.

30. To date, BT has not repaid the monies it borrowed from the City’s cash pool.

Legal Claims

Count I – Repayment of Taxpayer Funds

31. Plaintiffs are entitled to recover for the benefit of Burlington taxpayers all amounts provided to and not repaid by BT in violation of Condition 60 of the Certificate of Public Good and the City Charter.

32. On information and belief, Leopold authorized the payment of funds to BT from the City’s pooled cash management system when BT did not have cash reserves, revenues,

receivable, or other payments that, collectively, equaled or exceeded the sum of payments made by the City plus the balance of other current payments owed by BT to the City. The provision of such funds violated BT's Certificate of Public Good and the City of Burlington Charter.

33. On information and belief, Leopold authorized the payment of funds to BT from the City's pooled cash management system even though it was apparent that such funds could not be repaid by BT within 60 days and no refinancing of BT was in place, in violation of BT's Certificate of Public Good and the City of Burlington charter.

34. BT has failed to repay funds from the City's pooled cash management fund for more than two years, in violation of BT's Certificate of Public Good and the City of Burlington Charter. The amount of overdue debt now exceeds \$17 million.

35. Even though Leopold knew that BT had not and could not repay funds from the City's cash pool management system within 60 days as required by its Certificate of Public Good, he continued to authorize the payment of such funds to BT and to hide the violation from regulatory authorities, city councilors, and the public. Such conduct constitutes deceit and renders Leopold personally liable for the unpaid funds.

Count II – Constructive Trust

36. Plaintiffs and other Burlington taxpayers paid tax funds to the City on the understanding that such funds would be treated in accordance with legal requirements, including the City Charter and the BT Certificate of Public Good.

37. Defendant had a duty of good faith and fair dealing with respect to taxpayer funds.

38. Leopold violated his duty of good faith and fair dealing by authorizing taxpayer funds to be paid to BT in violation of Condition 60 of the BT Certificate of Public Good and when there was no prospect that BT could repay such funds within 60 days.

39. BT currently holds funds and owns assets which in equity and good conscience it should not retain but which belong to Burlington taxpayers.

40. The Court should imply a constructive trust for the benefit of Burlington taxpayers with respect to all funds held and assets owned by BT.

Count III – Accounting

41. Plaintiffs are entitled to an accounting with respect to all amounts provided to BT from the City's cash pool management system.

42. The accounting must disclose at least the following:

- i. the timing and amount of all payments from the City's cash pool management system;
- ii. how such payments were used by BT;
- iii. the amount currently owed by BT to the City, including interest; and
- iv. the ability or lack thereof of BT to promptly repay such amounts from its operating revenues or assets.


Count IV – Permanent Injunction

43. Plaintiffs are entitled to an Order from this Court enjoining Defendant from taking any further actions which violate BT's Certificate of Public Good or the Burlington City Charter, or which are likely to place Burlington taxpayers at further risk as a legal or practical matter.

Count V – Attorney’s Fees

44. Plaintiffs are entitled to an award of the costs and reasonable attorney’s fees of this action under the common fund theory.

Dated: Burlington, Vermont
December 7, 2009



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