

STATE OF VERMONT

SUPERIOR COURT

CIVIL DIVISION

CHITTENDEN UNIT

Docket No. S1588-09 CnC

FRED OSIER and)
EUGENE H. SHAVER,)
Plaintiffs)
)
v.)
)
BURLINGTON TELECOM, an enterprise)
of the City of Burlington, THE CITY OF)
BURLINGTON, and JONATHAN)
LEOPOLD, in his Individual Capacity,)
Defendants)

PLAINTIFFS' MOTION FOR CONTEMPT

Plaintiffs, by their attorneys Gravel and Shea, move for an Order finding Defendant City of Burlington in contempt of this Court's Interim Stipulated Order dated February 12, 2010, based on BT's use of approximately \$230,000 of City funds to renegotiate its lease with CitiCapital; to develop a new organizational structure; and to pay certain legal defense costs.

This motion is based on the following grounds:

1. The Interim Stipulated Order entered by this Court on February 12, 2010 ("Order") prohibits the City of Burlington from "utiliz[ing] its pooled cash management system []or any other City monies to make payments in violation of Condition 60 of the Certificate of Public Good issued in PSB Docket Order No. 7044 on September 13, 2005," unless such payments are reimbursed by Burlington Telecom within 60 days. *See* Ex. 1, ¶ 2 (Interim Stipulated Order).

2. Condition 60 of BT's Certificate of Public Good prohibits any expenditures of City of Burlington General Funds in connection with BT's operations as an internet, cable television, and telephone provider to the public, unless BT has 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. *See Ex.*

2. Condition 60 is intended is intended to "ensure that any and all losses . . . are borne by the investors in such business, and in no event by the city's taxpayers, as 24 V.S.A. App. § 3-438(c)(1) requires."

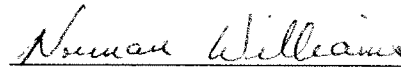
3. Following a news article in the Burlington Free Press on January 7, 2011, Plaintiffs' counsel wrote to counsel for the City of Burlington on January 14, 2011, raising concerns about the reported expenditure of approximately \$236,000 in City funds for BT between July 1, 2009 and December 21, 2010. Plaintiffs requested that BT reimburse the City's cash management pool to avoid the need for a motion for contempt. A copy of the letter is attached as Ex. 3.

4. Counsel for the City responded on January 18, 2011. *See Ex. 4.* Counsel acknowledged that City funds had been paid to Dorman & Fawcett, a telecommunications firm, for "negotiations with City [sic] Capital in an effort to restructure Burlington Telecom's lease agreement, negotiations with potential strategic and financial partners, and the possible development of an alternative organizational structure for Burlington Telecom." In addition, counsel stated that Dorman & Fawcett "are also involved in evaluating a possible new ownership and governance structure and the creation of a new legal entity." *Id.* Counsel for the City included with his letter a memorandum prepared by the City's Assistant Chief Administrative Officer, Scott Schrader, summarizing BT's expenses and who paid them. *See id.*

5. Counsel for the City defended the use of City funds for BT expenses on the grounds that “[t]his work is directly related to protecting the interests of the City, and its taxpayers, and is not related to the operations of Burlington Telecom.” *See* Ex. 4. Counsel did not suggest that BT would reimburse the City.

WHEREFORE, Plaintiffs ask that this Court hold Defendant City of Burlington in contempt for violating the Interim Stipulated Order dated February 12, 2010, and require all amounts improperly paid by the City on behalf of BT to be reimbursed immediately. Plaintiffs also ask that the City be ordered to pay the costs of this motion, including reasonable attorney’s fees.

Dated: Burlington, Vermont
January 25, 2011



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For Plaintiffs

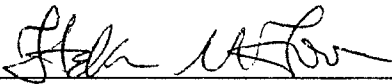
Exhibit 1

3. Every thirty (30) days, the City of Burlington shall provide Plaintiffs with documentation of Burlington Telecom's ability to reimburse the City pooled cash management system out of current revenues within sixty (60) days, including without limitation:

- (i) Daily Statement of City Accounts;
- (ii) Statement of Due To/Due From Burlington Telecom;
- (iii) Statement of Burlington Telecom Receivables;
- (iv) Statement of Burlington Telecom Accounts Payable;
- (v) Burlington Telecom's anticipated balance due to City; and,
- (vi) Burlington Telecom Cash Actual/Forecast.

4. To monitor this Order, the Court shall hold regular status conferences every sixty (60) days.

Dated: Burlington, Vermont
February 12, 2010



Judge, Chittenden Superior Court
Helen M. Toor

Exhibit 2

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)

Entered: 9/13/2005

CERTIFICATE OF PUBLIC GOOD
ISSUED PURSUANT TO 30 V.S.A. §§ 231 AND 503

IT IS HEREBY CERTIFIED that the Public Service Board ("Board") of the State of Vermont on this date finds and adjudges that the issuance of a Certificate of Public Good ("CPG") to the City of Burlington, d/b/a Burlington Telecom ("BT"), to serve the City of Burlington ("the City") and that the operation of a cable television system in said City will promote the general good of the State of Vermont subject to compliance with the following conditions:

General Provisions

1. This CPG does not grant to any entity, other than BT, which may intend to provide cable television service over BT's network utilizing an open access arrangement, authority to provide cable television service in Vermont. To the extent required by law, any entity, other than BT, which seeks to offer cable television service using BT's cable network shall first obtain a separate CPG from this Board pursuant to 30 V.S.A. §§ 231 and 503.

2. 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.

3. BT shall obtain all necessary Board approvals as required by 30 V.S.A. §§ 109 and 232 prior to entering into any leases or other arrangements subject to those provisions. BT shall not transfer title to or possession of any property or assets constituting 10% or more of BT's property used in or required for the provision of regulated public services under this CPG, including any equipment subject to a lease, without first obtaining Board approval as required by Vermont law.

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 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.

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.

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 the payment in lieu of taxes that BT is

Exhibit 3



GRAVEL AND SHEA
A PROFESSIONAL CORPORATION
Attorneys at Law

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William A. Mason, IV	Ross A. Feldmann
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Timothy M. Eustace	

*Admitted only in New York

January 14, 2011

VIA E-MAIL AND MAIL

Robert B. Luce, Esq.
Marc B. Heath, Esq.
Downs Rachlin Martin PLLC
P.O. Box 190
Burlington, VT 05402-0190

Re: Fred Osier and Eugene H. Shaver v. Burlington Telecom
Docket No. S1588-09 CnC

Dear Bob and Marc:

Based on my understanding that Downs Rachlin Martin PLLC is now representing the City of Burlington and Burlington Telecom in this matter, I am writing to express my concern that the City is in violation of the Court's Interim Stipulated Order dated February 12, 2010. The Interim Order prohibits the City from using the General Fund to pay BT expenses unless such amounts are reimbursed to the City's pooled cash management system within 60 days.

As reported in the *Burlington Free Press* on January 7, 2011, the General Fund has been used to pay BT expenses in the amount of approximately \$236,000 incurred between July 1, 2009 through December 21, 2010. The report is based on an expense sheet prepared by Assistant Administrative Officer Scott Schrader. Expenses paid from the General Fund include \$227,795 paid to the consulting firm of Dorman and Fawcett for negotiating BT's lease with CitiCapital, as well as legal fees and consulting services. There is no indication that BT reimbursed the pooled cash management system within 60 days.

In order to avoid troubling the Court unnecessarily, I would ask that you inform me no later than next Tuesday, January 18, 2011, whether BT will agree to reimburse the General Fund for these expenses immediately. Please also provide a copy of the expense sheet prepared by Mr. Schrader by that date. If BT declines to reimburse the cash pool, I will bring the matter to the Court's attention by means of a motion for contempt.

GRAVEL AND SHEA

Robert B. Luce, Esq.
Marc B. Heath, Esq.

January 14, 2011
Page 2

Thank you for your consideration. I look forward to hearing from you.

Very truly yours,

GRAVEL AND SHEA
A PROFESSIONAL CORPORATION

A handwritten signature in cursive script, appearing to read "Norman Williams".

Norman Williams

NW:kah

cc: Gregory Weimer, Esq.

Exhibit 4



MARC B. HEATH
mheath@drm.com
Direct: (802) 846-8306
Fax: (802) 862-7512

January 18, 2011

Norman Williams, Esq.
Gravel and Shea
76 St. Paul Street
P.O. Box 369
Burlington, VT 05402-0369

Re: Fred Osier, et al. v. City of Burlington, et al.

Dear Norman:

I am responding to your letter of January 14, 2011. Attached please find a copy of Mr. Schrader's memorandum dated December 21, 2010, pursuant to your request.

The City of Burlington has retained the consulting firm of Dorman & Fawcett to assist it in securing alternative financing arrangements for Burlington Telecom, as recommended by the Blue Ribbon Committee and approved by the City Council. This consulting firm has been involved in negotiations with City Capital in an effort to restructure Burlington Telecom's lease agreement, negotiations with potential strategic and financial partners, and the possible development of an alternative organizational structure for Burlington Telecom. They are also involved in evaluating a possible new ownership and governance structure and the creation of a new legal entity.

This work is directly related to protecting the interests of the City, and its taxpayers, and is not related to the operations of Burlington Telecom. Therefore, in our view, this expense does not violate Condition 60 of the C.P.G., and therefore, complies with the Stipulated Interim Order.


As you are well aware, a key component of all of these negotiations is an attempt to secure repayment of the outstanding debit to the City's cash management fund. Interfering with this effort would certainly not be in the best interest of the taxpayers of Burlington.

Norman Williams Esq.
January 18, 2011
Page 2

I would point out that Dorman & Fawcett has also been retained to provide operational oversight of Burlington Telecom. These services have been separately billed and paid out of Burlington Telecom's operating revenues, as the attachment shows.

In the event we disagree on the appropriateness of the payment to the consultants, I would respectfully suggest that the appropriate method of resolving that dispute would be to request a status conference with the judge. I look forward to discussing this matter with you further.

Sincerely,

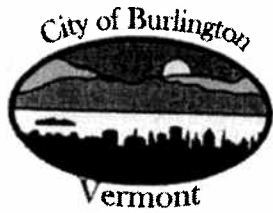

Marc B. Heath

Enclosure

cc: Kenneth Schatz, Esq.
Robert B. Luce, Esq.
Gregory A. Weimer, Esq.

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OFFICE OF THE CLERK/TREASURER
City of Burlington

City Hall, Room 20, 149 Church Street, Burlington, VT 05401

Voice (802) 865-7000
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December 21, 2010

To: Councilor Paul
 Councilor Decelles

From: Scott Schrader, Assistant Chief Administrative Officer

Re: Request for Information on Legal/Consultant Services for Burlington Telecom

The following tables are provided in response to your requests for information on expenses paid beginning July 1, 2009 to date for Legal Services and Consultant Services, respectively related to the challenges faced by Burlington Telecom.

Legal/Regulatory Services:

Firm Name	Purpose	Amount	Fund
McNeil, Leddy & Sheahan	Regulatory and Permit representation.	\$165,465	BT
Burak, Anderson & Melloni	City Capital and BT Financing	\$ 3,227	BT
Langrock, Sperry & Wool	Defense	\$ 2,960	GF
Miller Van Eaton	Regulatory representation	\$ 9,197	BT
Public Service Department	Larkin Review	\$ 64,667	BT
	Total	\$245,516	

Consultant Services:

Firm Name	Purpose	Amount	Fund
Dorman & Fawcett	CitiCapital Negotiations	\$227,795	GF
	Sub-Total	\$227,795	
Northpoint Consulting	Report to Blue Ribbon	\$ 5,000	BT
Stratum Broadband	Business Plan Analysis to Blue Ribbon	\$ 10,000	BT
Stratum Broadband	Business Plan Analysis to Blue Ribbon	\$ 5,740	GF
HBC (Gary Evans)	Report to Blue Ribbon	\$ 27,485	BT
	Sub-Total	\$ 48,225	
Dorman & Fawcett	BT operational oversight	\$ 76,007	BT
HBC (Gary Evans)	Marketing and Administrative	\$ 27,520	BT
	Sub-Total	\$103,527	
	Total	\$379,547	

If you have any questions regarding this information, please contact this office.

C: Mayor Kiss
 City Council

The City of Burlington does not discriminate on the basis of political or religious affiliation, race, color, national origin, age, sex, sexual orientation, marital status, veteran status or disability. Persons with disabilities who require assistance or special arrangements to participate in programs and activities of the Clerk Treasurer's Office are encouraged to contact us at 865-7000 or 865-7142 (TTY) at least 72 hours in advance so that proper arrangements can be made.