

Burlington Telecom Advisory Board

Report on Development of Criteria for Sale of Burlington Telecom

I. Background

Effective December 31, 2014, the City of Burlington conveyed the assets of its Burlington Telecom System (BT) to Blue Water Holdings, LLC and then leased those assets back from Blue Water so that the City could continue to operate BT. Blue Water paid the City \$6 million for those assets, which was used as the nut to enable the City to settle the Citibank litigation, which had sought damages in excess of \$33 million against the City.

The settlement with Citibank and sale of the assets of BT to Bluewater has eliminated the ability of the City to continue to be the sole owner in the future.

A. Settlement with Citibank

The Settlement Agreement with Citibank “is predicated on the assumption that the Financing [with Blue Water] is intended as a bridge to the eventual arm’s-length sale of the System to a private entity.” The Agreement goes on to provide that if the terms of the Financing do not provide a “liquidity event resulting in Net Proceeds being payable to Burlington or Citibank from the assets of the System, then the consent of Citibank shall be required, such consent not to be unreasonably withheld or delayed.” Thus, the assumption is that BT will be sold, but Citibank’s consent may not be unreasonably withheld for another type of transaction.

B. Agreement with Blue Water

Blue Water is a local holding company, financed by the Merchants Bank. The agreement with Blue Water (Burlington Telecom Management and Sales Agreement) provides that the City has until January 2, 2019 to find a Qualified Purchaser to purchase the BT System and direct a sale to that purchaser. After that time, Blue Water has the right to direct a sale to a purchaser of its choice. Further, after January 2, 2018, the City’s percentage of the proceeds of the sale drops from 50% to 35%. So, the optimum timeline for the City is to have a purchaser locked in by the end of 2017, subject to approval by the Public Service Board

Allocation of Net Sale Proceeds**

Sale date after commencement	Dates	Lessor %	City % *	Telecom Manager %
0-36 months	1/2/2018	40%	50%	10%
37-48 months	1/2/2019	55%	35%	10%
48-60 months	1/2/2020	65%	25%	10%
After 60 months	1/2/2021	80%	10%	10%
Event of Default		90%	0%	10%

*Note: 50% of the City’s share shall be paid back to Citi-Bank

** The definition of Net Sale Proceeds can be found in the Burlington Telecom Management and Sale Agreement: 1. Definitions, “Net Sale Proceed” (a) and (b).

The agreement defines a Qualified Purchaser as:

“Qualified Purchaser” means [an individual, company, partnership, etc.] that has the capability of operating a telecommunications company of size and service similar to Burlington Telecom and reasonably expected to satisfy any statutory criteria in order to obtain a certificate of public good from the PSB. Such [individual, company, partnership, etc.] may be a first-time operator if [Blue Water Holdings, LLC] reasonably determines such first-time operator to be able to timely obtain a certificate of public good from the PSB.

In the period prior to sale, Dorman & Fawcett has been engaged to operate Burlington Telecom. As the Telecom Manager, Dorman & Fawcett, is required to undertake “commercially reasonable efforts, consistent with Prudent Utility Practice, and considering the recommendations from the Burlington Telecom Advisory Board (BTAB) to operate BT and build the system “so as to maximize the value and importance to the residents and businesses of the City and adjacent communities, and increase Burlington Telecom’s potential sales price.”

The agreements with Blue Water and Citibank establish that the Net Proceeds of the sale of BT are to be split among Blue Water, the City (with half of the City’s proceeds going to Citibank), and the Telecom Manager (whose fees are no longer being paid on a monthly basis but are held until the sale and paid prior to the split of Net Proceeds). A chart of the allocation and what that would mean under two different scenarios is attached as Appendix A.

C. Statutory Criteria

The statutory criteria for obtaining a certificate of public good that are referred to in the definition of Qualified Purchaser are in 30 V.S.A. §504, and they require that any new purchaser be able to provide or ensure:

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

- (7) construction, including installation, which conforms to all applicable state and federal laws and regulations and the National Electric Safety Code;
- (8) a competent staff sufficient to provide adequate and prompt service and to respond quickly and comprehensively to customer and Department of Public Service complaints and problems;
- (9) unless waived by the Public Service Board, an office that shall be open during usual business hours, and have a listed toll-free telephone so that complaints and requests for repairs or adjustments may be received; and
- (10) reasonable rules and policies for line extensions, disconnections, customer deposits and billing practices.

Vermont law prohibits anyone from owning more than 40% of the voting interest in a company providing cable services without approval of the Public Service Board. 30 V.S.A. § 515.

D. Public Service Board Criteria

In addition, the Public Service Board requires any entity seeking a certificate of public good to provide cable TV services to meet standards known as the EMCO criteria, and they include:

- (1) financial soundness and stability, both of the applicant generally and the particular proposal (this should include an eleven (11) year pro-forma Balance Sheet and Income Statement);
- (2) the present proposed service offerings to customers, including the number of channels and the ability and capacity of the system to offer additional varied services in the future, and the ability to provide public access;
- (3) the commitment to a construction and in-service schedule;
- (4) the experience and ability of the applicant to run and manage a cable television system;
- (5) the rates proposed to be charged to customers;
- (6) consumer policies, particularly re: complaints and problems;
- (7) availability of service to maximum number of residences;
- (8) the quality of the engineering and materials used in the system; and
- (9) logical fit with neighboring systems.

A Certificate of Public Good from the Public Service Board is not required for the provision of Broadband Services (internet)

E. City Charter Provisions

Several provisions of the City Charter are relevant, as well. Section 422(b) requires that:

(b) In no case shall funds collected from electric ratepayers be used to cross-subsidize or finance the repayment of any debt instrument used to fund the construction, operation or utilization of any new cable television, fiber optic cable, or other telecommunications network or telecommunications business, and the expenses from such enterprises may not be included in the cost of electric service, except to the extent that the city has utilized such funds directly for its own utility plant or electric services.

Section 431 (4) provides:

Such term may also include ownership, operation and utilization of cable television, fiber optic cable and other telecommunications within the corporate limits of the city; provided that the city shall have no power under Chapter 79 of Title 30 to take by eminent domain telecommunications, cable television or natural gas property; and provided further that before the city may sell telecommunications or cable television services it shall obtain a certificate of public good under Section 231 of Title 30 from the public service board.

Section 438(c) provides:

(c) (1) If the city exercises its authority under subdivision 431(4) or section 449 of this title, the public service board, in considering any application for a certificate of public good, shall ensure that any and all losses from these businesses, and, in the event these businesses are abandoned or curtailed, any and all costs associated with investment in cable television, fiber optic, and telecommunications network and telecommunications business-related facilities, are borne by the investors in such business, and in no event are borne by the city's taxpayers, the state of Vermont, or are recovered in rates from electric ratepayers.

(2) Any certificate of public good issued shall contain terms or conditions that are consistent with both the statutory requirements of Chapter 13 of Title 30 and the establishment of competitive neutrality between incumbents and new entrants, after the evaluation of factors that include, but are not limited to, the payment of pole attachment rental fees, and the provision of public access channels, equipment, and facilities.

II. Procedure for Determining Sale Criteria

On Sept. 21, 2015, the Burlington City Council adopted a resolution approving the process recommended by the BTAB for determining the criteria by which the City can choose an appropriate sale transaction.

The first step in that process was a BTAB meeting on October 21, 2015, at which Telecom Manager principal Terry Dorman set the stage for the upcoming discussion, discussing the terms currently established in the legal agreements (see Background above) as well as market conditions and other factors that may affect the criteria.

Then, a public educational meeting was held on October 29, 2015. Visiting participants included Bill Wallace of US Ignite, Lev Gonick from OneCommunity, Cleveland Ohio and US Ignite; Ken Hayes from Chattanooga and Aaron Deacon (by phone) from Kansas City, two other communities with city wide fiber optic infrastructures (Chattanooga built by EPB the local municipal electric utility, and Kansas City built by Google). Gary Evans, the now retired former CEO of HBC, an operator based in Winona, Minnesota which has built fiber networks into multiple neighboring communities and who has a detailed understanding of BT's operations also participated in person.

The BTAB then held three public meetings—on November 18, November 20, and December 9 to accept public input. Those meetings were chaired by BTAB Chair David Provost and elicited both written and verbal comments about the criteria. Minutes of those meetings, and copies of the materials received at them, are attached as Appendix B. A petition with more than 350 names asked the City to “ensure that BT remains locally controlled, affordable for all Burlington residents, and accountable to all sectors of our community.”

During this time, the City also made available an online survey to accept comments online. The survey had 216 respondents who responded to two questions asking them to rank specific criteria in order of importance, and many of whom also added substantial comments about their thoughts and concerns. Input from the Survey is covered in Section **III. A.** below.

The next steps for the BTAB are to discuss a recommendation in January 2016, finalize a recommendation in February 2016, hold a final Public Forum in February 2016 to present the recommendation, and then presenting to the City Council for approval.

Once adopted, the sale criteria will be used by the Telecom Manager in analyzing potential buyers to recommend to the BTAB, Mayor, and City Council.

III. The Criteria

A. Survey Results

The survey asked respondents to rank in order of importance which outcomes/qualities are most important in a sale of BT. Based on survey responses, the following outcomes/qualities are listed in order of importance:

- Local ownership
- Continued affordability of services
- Commitment to net neutrality

- Continued local presence, particularly for functions such as customer service
- Commitment to continuing to support local affordable public access currently available
- Continued emphasis on customer service
- Commitment to continue to offer both residential and commercial services
- Financial capacity of new owner to maintain BT's "state of the art" capabilities
- Commitment of new owner to issues important to Burlington
- Management experience and skill of new owner and management team
- Partnership with the City of Burlington
- Some local ownership
- Community input into programming decisions¹⁰⁰⁰
- Financial capacity of new owner to expand BT's footprint into neighboring communities
- BT's continued active participation in the US/BTV Ignite initiative
- Some involvement of elected public officials in BT
- Recovery of as much of the \$16.9M as possible
- Restoration of Burlington's credit rating.

Numerous comments were received in response to a question asking if there were other factors or considerations the City should evaluate in choosing a buyer. The complete list of comments is provided in Appendix C. Representative among them, however, were the following:

- Local cooperative/community ownership
- Do not sell to Comcast, Fairpoint, AT&T, Verizon or other major "ISP"
- Finish build out
- Long term sustainability of the business
- Must be willing to allow the City to maintain at least a minority stake
- Continued competition in the market for the services BT offers – no monopolies

¹ An existing established body, currently a requirement of BT's (and Comcast's) CPG provides for this. The BT Cable Advisory Committee is charged with meeting a minimum of two times a year.

- Taxpayers have already paid \$16.9 million so want some return on that investment over time
- The \$16.9 million is gone
- Maintain BT as a public utility
- Continue the level of service by a competent provider
- Need a sustainable model like BED

B. BTAB Recommendations

From both verbal and written comments, it is clear that a large number of interested Burlington residents have a strong feeling that Burlington Telecom should remain locally owned as a cooperative or non-profit or as a municipal entity. The BTAB is cognizant that there may be multiple ownership structures that could meet the concerns and goals behind these sentiments, including a local cooperative model or some continued partnership with, or management by the City of Burlington. Though the City is precluded by the terms of its settlement Agreement with Citibank from continuing to own the Asset, a carried equity interest is permitted. It is important that all ownership options be explored and considered in light of the legal requirements and the City's goals for BT. However, the BTAB agrees with the vast majority of interested participants in this process that the sale of BT to one of its existing, national competitors would likely not be in the overall best interests of the City.

The BTAB recommends the following criteria by which any purchaser or ownership structure is evaluated, along with all of the previously mentioned legal criteria:

Any new purchaser must demonstrate a commitment to:

- * Continue to offer affordable services that provide a competitive opportunity for BT customers.
- * Continue to have a local presence (office) with an emphasis on responsive and effective customer service.
- * Continue BT's commitment to net neutrality, support of affordable, local public access, and other issues of importance to Burlingtonians.
- * Continue to offer both residential and commercial services.
- * Continue to engage in active participation with the US Ignite and BTV Ignite initiatives focused on realizing the ongoing and sustainable economic development benefits to the local economy that the network infrastructure affords.
- * Establish a skilled, experienced management team to:
 - sustain BT's "state of the art" capabilities.
 - keep pace with technology changes.
 - support expansion to the currently unserved areas of Burlington as well as other communities.
- * Demonstrate sufficient financial capacity to:
 - sustain BT's "state of the art" capabilities.
 - keep pace with technology changes.
 - support expansion to the currently unserved areas of Burlington as well as other communities.

- * Maintain and foster a strong partnership with the City of Burlington and its elected public officials.
- * Allowing the City of Burlington the opportunity to retain a meaningful carried equity interest in Burlington Telecom.
- * Ability to complete a transaction by the 2 January 2018, subject to regulatory approval.
- * A strategy of holding the asset for the long-term.
- * A strategy to reinvest and or invest into the business.
- * It is important for the City's public officials to try to recover as much of the taxpayer's \$16.9 million as possible. Part of that should come from:
 - the price paid by the purchaser of the BT System.
 - the City's maintaining a continued meaningful interest in BT that enables financial recovery over the next decades.
 - the indirect benefits of maintaining a strong Telecom System, recognizing the potential of BT's fiber optic infrastructure to enable sustainable economic growth and job creation in an increasingly Tech centric economy.