

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)
Hearings at
Burlington, Vermont
May 25, 26, and 27, 2005

Order entered:

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Hearing Officer

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I. INTRODUCTION

This investigation concerns a petition by the City of Burlington ("City"), d/b/a Burlington Telecom ("BT"), seeking authority, in the form of a Certificate of Public Good ("CPG"), to operate a cable television system within its municipal boundary. In addition to reviewing this petition under the generally applicable statutory criteria of 30 V.S.A. § 504 and the Public Service Board's ("Board") "EMCO"¹ criteria, the Board must assure that the City will comply with specific City Charter provisions imposed by the legislature in conjunction with its grant of authority to the City to own and operate a cable system. The Charter requires that the Board take specific actions in this proceeding to ensure that all costs and any losses arising out of the City's commercial cable/telecommunications venture have been and continue to be charged to the competitive venture and its investors, and are not passed on to the City's taxpayers, electric ratepayers or the State of Vermont.² In addition, the Charter requires that any CPG issued by the Board to the City must contain terms and conditions that are consistent not only with generally applicable statutory requirements, but also with the establishment of competitive neutrality between any incumbents and new entrants.³ This Proposal for Decision ("PFD") reviews the City's qualifications to provide cable television service, and concludes that the City is qualified to do so, consistent with the recommendations of the petitioner and the Vermont Department of Public Service ("Department" or "DPS"). This PFD also concludes that, by establishing appropriate CPG conditions, the Board can assure that the City will comply with the provisions of its municipal charter. State and federal law allow for competition among cable system operators, and both state and federal policy encourage such competition. The City's project to provide cable service (and other services) will, if successful, provide tangible consumer benefits.

As noted in the procedural history below, the incumbent cable provider, Mountain Cable Company L.P., d/b/a Adelpia Cable Communications ("Adelpia"), intervened in this docket, with the assistance of the New England Cable and Telecommunications Association, Inc.

1. Board Rule 8.214(B).

2. 24 V.S.A. App., § 3-438(c)(1).

3. *Id.* at § 3-438(c)(2).

("NECTA"), as did the three public, educational, and governmental Burlington Access Management Organizations. It should be emphasized that none of these intervenors opposed the grant of a CPG to the City; instead they argued for inclusion of various provisions in any certificate to protect their interests. BT proposes to build a cable television ("CATV") system that will serve all areas of the City, as Adelphia's system now does. Neither federal nor state law permit the Board to issue exclusive cable television franchises and therefore Adelphia's current CPG represents nonexclusive authority to operate a CATV system in the City.⁴

II. PROCEDURAL HISTORY

On January 3, 2005, the City of Burlington, d/b/a Burlington Telecom, submitted its application for a CPG to provide CATV services within and throughout the City of Burlington, Vermont. On February 10, 2005, the Department recommended that the Board open an investigation into BT's application. A prehearing conference was convened on February 22, 2005. By Order dated March 21, 2005, I granted limited intervention to the three Burlington Access Management Organizations: VCAM/Channel 15, RETN/Channel 16, and Town Meeting TV/Channel 17 (collectively "BAMOs"); and to Adelphia and NECTA (collectively "Cable Parties").⁵ Pursuant to a schedule agreed to by the parties, technical hearings were held in Burlington, Vermont, on May 25, 26, and 27, 2005.

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board.

III. BURLINGTON TELECOM AND THE PROJECT

A. Burlington Telecom

1. The City of Burlington is a Vermont municipality. Exh. BT 6.
2. The city limits of the City of Burlington are provided for in its Charter. Exh. BT 6; 24 V.S.A. App. § 3-1.

4. 47 U.S. C. § 541(a)(1); 30 V.S.A. § 504(d).

5. Order of 4/8/05.

3. The City of Burlington, through its City department known as Burlington Telecom ("BT"), seeks a CPG to operate a CATV system throughout the City of Burlington. Nulty pf. at 1; exh. BT 6; exh. DPS-Cross-Nulty 20.

4. BT maintains its offices at 149 Church Street in Burlington, Vermont. Exh. BT 6.

5. Adelphia currently provides cable service within the City of Burlington pursuant to a CPG granted by the Board and subsequently amended by the Board. Tuthill pf. at 3–4, 9, 10; exh. Cable-5-RT 2.

6. The City Charter was revised in 1996 to authorize the City to engage in regulated cable or telecommunications lines of business, subject to the Board's granting certificates of public good in accordance with law. Keleher pf. at 2.

7. The General Assembly authorized the City to enter into a joint venture or other business relationship with private parties to provide cable or telecommunications lines of business, conditioned the terms under which the City (alone or in conjunction with a private co-venturer) could engage in such services, and made several additional Charter revisions. Exh. Cable 2; 1999 Municipal Act No. 14, sections 5a–5d (Adj. Sess.)

8. The City Charter, as revised in 2000, prohibited the City from offering cable or telecommunications services outside of City limits in the absence of a joint venture between the City and a private entity. 1999 Municipal Act No. 14, sections 5b and 5c (Adj. Sess.), codified at 24 V.S.A. App. §§ 3-431(4) and 438(c)(1).

9. The City Charter, as amended effective July 1, 2000, directs the Board, in any cable or telecommunications CPG proceeding initiated by the City, to ensure that all of the costs and any losses of the City's commercial cable and telecommunications activities be paid for by the investors and not by taxpayers, electric ratepayers, or the State of Vermont. Exh. Cable 2; 24 V.S.A. App. § 438(c)(1))

10. The City Charter, as amended effective July 1, 2000, also directs the Board, in the event of any CPG award to the City, to adopt CPG terms and conditions that are consistent with the establishment of competitive neutrality between the incumbent and the City. Exh. Cable 2; 24 V.S.A. App. § 438(c)(2).

B. The Burlington Telecommunications Project

11. The overall Burlington telecommunications project has been split into three major sections, or Phases: Phase I of the BT telecommunications project refers to a non-commercial network over which the City provides telecommunications and data services to its municipal offices and schools. Construction of the Phase I facilities began in June 2002 and was completed in September 2003. Phase I was accounted for as a City capital project and financed with a lease secured through Koch Financial, Inc. ("Koch Financial"). Keleher pf. at 3; Keleher reb. pf. at 1-2.

12. Phase II of the BT telecommunications project refers to BT's offer of commercial telecommunications and data services over the Phase I system to commercial and institutional customers located within reach of the facilities constructed to provide Phase I services. Phase II does not include CATV services. Following the issuance of CPG No. 743-C on June 18, 2003, BT began offering Phase II services. Keleher pf. at 3; Keleher reb. pf. at 2-3.

13. Phase III of the BT telecommunications project refers to the new facilities that BT intends to construct in order to offer CATV services, as well as telecommunications and high-speed internet services. In Phase III, BT will construct a fiber-to-the-premise ("FTTP") open access network that will pass every residence, business, and institution located within the City by summer 2006. The system will have the capability to allow BT to offer telephone service, high-speed internet access service, cable television service, and transport services to other service providers on an open access basis. Lackey pf. at 3; Keleher pf. at 3-4; Nulty pf. at 1-2, 7; exh. BT 6.

14. The head-end for the all-digital system will consist of a Simulsat dish connected to an array of electronic equipment, which will convert the satellite signal into IP signals for distribution over the network. This is the only equipment that is CATV-specific and will be used solely for the provision of cable service. All other equipment and facilities will also serve BT's telecommunications and high-speed internet offerings. Nulty reb. pf. at 15.

IV. STATUTORY AND EMCO CRITERIA

A. Statutory Criteria — 30 V.S.A. § 504(b)

1. Designation of adequate channel capacity and appropriate facilities for public, educational, or governmental use

15. The three BAMOs, VCAM/Channel 15, RETN/Channel 16, and Town Meeting TV/Channel 17, presently offer public access services and programming within the City of Burlington. Davitian pf. at 2.

16. BT committed to negotiate in good faith with the representatives of the BAMOs "to achieve contracts that are proportionally equivalent in scope to those which the [access management organizations] have with other Cable TV operators in Burlington." Exh. BT 4.

17. BT and the BAMOs have negotiated an *Aide Memoire* that specifies certain types and amounts of support BT will provide these entities (both through financial support and by cable-casting their programming) and that requires BT to do so in a manner comparable to the level presently required of Adelphia and which will meet the community needs. Exh. BT 11; tr. 5/25/05 at 207 (Nulty); tr. 5/26/05 at 169, 177 (Davitian).

18. BT committed in its Proposed CPG to comply with Board Rule 8.400, as may be amended, and which was most recently amended effective on March 1, 2005. Lackey pf. at 12; exh. BT 10 ¶ 28.

2. Adequate and technically sound facilities and equipment, and signal quality

19. BT intends to design and build its system to meet federal Rural Utilities Service ("RUS") specifications, which are sufficient to assure the system is adequate and technically sound. Lackey pf. at 13; Nulty pf. at 10–11.

3. A reasonably broad range of public, educational and governmental programming

20. The all-fiber, all-digital design of BT's system will provide ample capacity to offer public access programming that is consistent with the community's needs. Lackey pf. at 13; Nulty pf. at 5–6; Davitian pf. at 15.

4. The prohibition of discrimination among customers of basic service

21. BT will file a tariff with the Board, which will allow the Board to identify any discrimination among customers of BT's basic cable service, and to assess any such allegations. As is the usual practice of the Department and Board, any issues of potential discrimination can be considered at the time BT files its tariffs for cable service, and need not be considered in detail in this investigation. Lackey pf. at 14.

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 Title 30

22. BT intends to offer basic service, as well as advanced services including premium and pay-per-view. Exh. BT 6, Exhibit G.

23. BT intends to overbuild the existing incumbent's system, thereby increasing the level of competition in the market that presently exists. Lackey pf. at 14.

Discussion

I conclude that BT meets the five statutory criteria of § 504(b). BT has reached an agreement, as represented in the *Aide Memoire*, to provide specific operational and capital funding support for the BAMOs, in addition to specific bandwidth, remote locations for cable casting, and interactive programming sufficient to meet the community needs. Further, the *Aide Memoire* was designed and intended by both BT and the BAMOs to assure a comparable level of support for public access as that currently provided by Adelphia. In addition, BT's all-digital system will be more than adequate to meet the community's public access needs into the future. BT will file tariffs that will assure that there is no discrimination among customers of basic service. Finally, BT will overbuild the incumbent's existing system bringing direct competition in the CATV market to the City.

B. Statutory Criteria — § 504(c)**1. A reasonable quality of service for basic, premium or otherwise, having regard to available technology, subscriber interest and cost**

24. The advanced architecture and capabilities of BT's system should assure that BT's services are of high technical quality. Lackey pf. at 15.

25. BT will have access to ample conventional programming content through the National Cable Television Cooperative ("NCTC"), as well as relevant local programming through agreements with local broadcast stations and BAMOs. Lackey pf. at 8, 15; Nulty pf. at 5.

2. Construction, including installation, which conforms to all applicable state and federal laws and regulations and the National Electric Safety Code

26. BT has committed that all construction and installations will conform to the National Electric Safety Code ("NESC") and all applicable state and federal laws and regulations. Lackey pf. at 15; Nulty pf. at 10.

3. A competent staff sufficient to provide adequate and prompt service and to respond quickly and comprehensively to customer and department complaints and problems

27. BT has hired a number of individuals, including several who have substantial relevant experience in customer care. Consistent with BT's intentions, employment of competent staff is reflected in the pro forma financial statements provided by BT. Lackey pf. at 15–16.

28. BT agrees to comply with the Customer Service Quality and Complaint Standards, Monitoring and Reporting Plan proposed by the Department. Nulty reb. pf. at 12; exh. DPS-LFL 1, Attachment B (attached to this Proposal as Attachment 2).

29. BT has indicated its commitment to conform to federal customer service standards, to monitor its performance relative to federal and Board-established customer service standards, and to submit monitoring and corrective action reports quarterly to the Department and Board, in addition to numerous other conditions relating to customer service and communications with customers as provided in its Proposed CPG. Exh. BT 10.

4. Unless waived by the board, an office which shall be open during usual business hours, have a listed toll-free telephone so that complaints and requests for repairs or adjustments may be received

30. BT will provide trained service representatives and management personnel to handle questions and correct problems or complaints during normal business hours, and will have a qualified service technician on call to respond during non-business hours. Nulty pf. at 8–9; Lackey pf. at 17.

5. Reasonable rules and policies for line extensions, disconnections, customer deposits and billing practices

31. BT has expressed its commitment to extend its service to every residence, business, and institution in the City within three years, so line extension requirements would be an unnecessary element of BT's CPG. Lackey pf. at 17; Nulty pf. at 9–10; exh. BT 6.

32. Through its Proposed CPG, BT has expressed its intent to establish and adhere to rules and policies for disconnections, customer deposits, and billing that conform to the Board's administrative rules. Lackey pf. at 17; exh. BT 10 ¶¶ 47–64.

Discussion

I conclude that BT meets the five statutory criteria of § 504(c). The advanced architecture of BT's system will allow it to assure high technical quality of its services. Further, its programming through NCTC and agreements with local broadcasters will assure ample programming content. BT will construct its system in accordance with NESC standards and other applicable state and federal laws and regulations. The BT staff will be adequate to provide adequate and prompt customer service. In addition, the conditions in my proposed CPG (attached hereto as Attachment A) will impose specific customer service and performance measures on BT, including requiring BT to conform to federal customer service standards, to monitor its performance relative to federal and Board-established customer service standards, and to submit monitoring and corrective action reports quarterly to the Department and Board. Further, BT intends to have trained representatives available during business hours and a service technician on-call outside of normal business hours. Finally, BT has expressed its commitment

to extend its service to every residence, business and institution in the City within three years, so line extension requirements would be an unnecessary element of BT's CPG and to adhere to rules and policies for disconnections, customer deposits and billing that conform to the Board's administrative rules.

C. The "EMCO" Criteria of Rule 8.214(B)

1. Financial soundness and stability, both of the applicant generally and the particular proposal

33. It is reasonable to expect the Phase III project to be economically viable for BT. Although BT's system will compete directly with the existing Adelphia system for cable and internet access customers, BT will also offer telecommunications services and wholesale open access transport. Lackey pf. at 6; Nulty reb. pf. at 19, 21–22.

34. BT has designed Phase III to be financially self-sufficient, in that it will not require the input of general or tax-based funds. Nulty pf. at 3–5.

35. Phase III will be financed through a capital lease with Koch Financial. Exh. BT 7.

36. The interest and principal payments under the Koch Financial lease will comprise the most significant fixed cost of the Phase III project. BT projects cash flow sufficient to make the required lease rental payments for the duration of the requested CATV franchise. The financial projections also indicate that BT is likely to have revenue, cash flow, and net income sufficient to offer high-quality cable services and to be financially self-sustaining. Lackey pf. at 7.

37. The City has carefully developed and reviewed the business plan for BT, including review by two teams of outside experts, both of which confirmed the soundness of the plan. Nulty pf. at 4; Keleher reb. pf. at 11; exhs. BT 8, 9, and 12.

38. The projections indicate the project will become cash positive by July 2006 and is expected to generate a total of \$22 million of positive cash flow in the first ten years of operation. Nulty pf. at 5.

39. BT's projections are appropriately characterized as conservative because its base case pro forma financial projection assumes that BT will eventually sell one or more services to 35% of the residences that it passes and does not rely for its success in selling cable service alone. BT's revenue base will be diversified among the three principal groups of services BT intends to

offer — cable television service, telephone service, and Internet access service — and does not represent in all cases the sale of cable television service. This service diversification should reduce the probability that BT will fail due to low customer demand, should it occur, for any individual service. Moreover, offering open access transport to other service providers, as BT states it will do, further diversifies BT's revenue base, reducing its business risk and increasing the probability that it will be profitable. Lackey pf. at 18.

40. Considerable public benefits will accrue from BT's offer of cable service, including increased consumer choice of services, improvements to the incumbent operator's service offerings and customer service and lower service prices that the direct competition from the new entrant operator will bring. Lackey pf. at 20–21.

Discussion

I conclude that BT meets this criterion. BT already holds a CPG for telecommunications services, demonstrating the stability of the applicant, and the lease arrangement with Koch Financial provides sufficient funds to build and operate the CATV system until such time as BT's projections indicate revenue will be sufficient to make the rental payments on the lease. Even recognizing that such projections are inherently subject to uncertainty and change over time, BT's business plan is sufficiently conservative and indicates a financial cushion sufficient to allow BT to weather variances in actual results from those presently projected.

Even if the Board concludes that BT's projections deserve less than absolute confidence, the state and federal policy of encouraging competition and the intended public benefits of such competition should outweigh any reservations the Board may have regarding BT's revenue projections. The Board has not established as a standard for review of any cable franchise that the operator must demonstrate unequivocally that their enterprise will succeed financially, particularly where consumers have an alternate choice of service provider. See Docket 5279, Order of 12/20/90 at 12 ("if competition is to even partly replace regulation, it should be of little concern and no surprise to the Board that not all competitors will survive the experience.") Moreover, the fact that the lessor, which presumably has purely financial objectives, has put a

substantial sum of capital at risk for this project should be a strong indicator of the soundness of the project and BT's business plan.

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

41. BT intends to buy programming through the NCTC, which will enable it to offer a range of channels similar to those offered by other Vermont NCTC members. BT proposes rates that will be competitive. Lackey pf. at 7; Nulty pf. at 5; exh. BT 6, Exhibit G; exh. DPS-Cross-Nulty 5.

42. BT's services will be Internet Protocol ("IP") based. The all-digital, all-fiber system will initially be configured to handle 217 channels (172 digital video, 45 music) plus 12 local channels, and will be able to accommodate more, if needed. Nulty pf. at 5; exh. BT 6, Exhibit E.

43. The services BT proposes to offer, coupled with currently available digital technology, permit BT to offer programming that meets or exceeds the community's needs for public access for the foreseeable future. Lackey pf. at 7–8; Nulty pf. at 5.

44. The use of an all-fiber architecture should allow BT to upgrade and expand its service capabilities without completely rebuilding its distribution plant. BT's ability to upgrade its network, to increase the network's service capabilities, and to supplement the services offered over the network may prove to be a significant benefit to the community BT will serve. Lackey pf. at 7–8; Nulty pf. at 5–6.

45. BT will be able to offer video channels on an open access basis, including additional community and public service channels, distance medical services, distance learning services, competing CATV companies, security companies, and many other services. Nulty reb. pf. at 13.

46. BT's IP system will provide the BAMOs opportunities to deploy new types of services not currently in their repertoire, such as video-on-demand content. Exh. DPS-Cross-Nulty 17.

Discussion

I conclude that BT meets this criterion. BT's proposal indicates that it intends to offer a range of channels and programming similar to those offered by other Vermont NCTC members.

The BT system will be configured to handle 229 channels, 172 digital video, 45 music, and 12 local channels, and will be able to accommodate more, if needed. Further, BT proposes rates that will be competitive.

The IP-based system BT intends to build will permit BT to offer programming that meets or exceeds the community's needs for public access for the foreseeable future and will provide more than adequate upgrade and expansion capabilities.

3. The commitment to a construction and in-service schedule

47. BT has committed to construct a system within 36 months that will pass every residence, business, and institution within the City, although it intends to complete the construction as much as a year earlier. Given the extent of construction required, this is a reasonable interval. Lackey pf. at 8; Nulty pf. at 6–7; exh. BT 6.

48. BT intends to begin a beta test of the system a month after issuance of a CPG to and begin construction for the first half of the City in late fall 2005. BT expects to begin construction for the second half of the City in April 2006 and have the construction completed by summer 2006. Nulty pf. at 6–7.

Discussion

I conclude that BT meets this criterion. The construction schedule proposed by BT is aggressive, but reasonable.

4. The experience and ability of the applicant to run and manage a cable TV system

49. BT currently employs nine staff members, including seven senior experts with experience, collectively, in all aspects of start-up telecommunications operations and core skills required for technical CATV operations in an IP environment. BT is currently hiring staff with expertise in particular aspects of CATV operations. Nulty pf. at 7; exh. DPS-Cross-Nulty 2; exh. DPS-Cross-Nulty 3.

50. BT estimates the average yearly number of employees to be 14 full-time equivalent employees in the first year and 22 full-time equivalent employees for each of the remaining years in the 10-year forecast. Exh. DPS-Cross-Nulty 23.

51. BT has joined the National Telephone Cooperative Association ("NTCA"), and the NCTC, both of which offer professional services, advice, and assistance. BT has been hiring personnel sufficient to start up its project. There is no reason to believe that BT will be unable to fill out its organization with experienced personnel with substantial technical and operational expertise. Lackey pf. at 8–9; Nulty pf. at 7; exh. DPS-Cross-Nulty 4.

52. As with any start-up business, it is reasonable to expect that the BT start-up will not be without flaws and that cable service could occasionally be disrupted. Before BT introduces service to a broad group of consumers, it will conduct a beta test offering service initially to a small set of households. This pilot should assist BT in identifying and solving any problems. There is no reason, however, to believe that such problems will be prolonged, serious, or systemic; the applicant has the experience and ability to run and manage the system. Lackey pf. at 8–9; Nulty pf. at 6.

Discussion

I conclude that BT meets this criterion. Existing BT staff possess sufficient expertise for the early stages of the start-up, and BT's budget and plan to hire additional personnel with additional expertise necessary for the long-term operation of the CATV system is reasonable.

5. The tariff and the rates proposed to be charged to customers

53. BT will provide a reasonable tariff that is similar to tariffs of cable operators that the Board has previously approved. BT's business plan is based on an assumption that BT will offer competitive services, at lower prices, to those presently offered in Burlington by Adelphia. Since there appears to be no current controversy as to whether Adelphia's rates are reasonable (as required by its CPG), and BT intends to offer similar services at lower prices, the Board can conclude that BT's prices will also be reasonable. Lackey pf. at 9; Nulty pf. at 8; exh. BT 6, Exhibit G.

Discussion

I conclude that BT meets this criterion. The initial rates proposed by BT are reasonable. In addition, the CPG should include conditions as proposed by the Department to require BT's prices to, at all times, be reasonable, and also to require BT to file any rate increase 45 days in advance with the Board and the Department.

6. Consumer policies, particularly re: complaints and problems

54. Among other measures, BT plans to provide 24/7 telephone customer service, with trained service representatives and management personnel available during normal business hours and technical support on call during non-business hours. BT states that its consumer policies applicable to the cable subscribers will be identical to those provided by other cable entities. Lackey pf. at 10; Nulty pf. at 8–9.

55. BT has indicated that it will accept numerous CPG conditions relative to customer care. Exh. BT 10.

56. The Department has proposed a reasonable Service Quality Plan for BT. Exh. DPS-LFL 1, Attachment B.

Discussion

I conclude that BT meets this criterion. In addition, the CPG should include conditions as proposed by the Department relating to customer care and the Service Quality Plan.

7. Availability of service to maximum number of residences

57. BT intends to build a system that will pass every residence, business, and institution in the City. BT has committed to complete the build-out within three years, but is currently planning its construction to allow it do so within two years of ground-breaking. Lackey pf. at 10; Nulty pf. at 9–10; exh. BT 6.

Discussion

I conclude that BT meets this criterion. BT intends to pass every residence, business, and institution within the City within three years. In addition, the CPG should include a condition⁶ relative to reporting on the build-out until construction is complete.

8. The quality of the engineering and materials used in the system

58. The BT system will be designed and built in accordance with RUS standards, assuring high quality. The passive optic network design will be the most advanced of any cable system in the State; no other cable system in Vermont presently uses a fiber-to-the-home design, nor end-to-end Internet Protocol for transport of all content. Lackey pf. at 10; Nulty pf. at 10–11.

Discussion

I conclude that BT meets this criterion. The system BT intends to build will be the most advanced of any in the state and will be designed and built in accordance with applicable federal standards.

9. Logical fit with neighboring systems

59. The geographic reach of BT's system will be as extensive as presently authorized by BT's municipal charter. Areas surrounding the City of Burlington are presently served by another cable operator, Adelphia, as is the City itself. Accordingly, BT's proposal will not leave any populated portions of its franchise area or neighboring areas without access to cable services. Lackey pf. at 11; Nulty pf. at 11.

Discussion

I conclude that BT meets this criterion because BT will build its system to the maximum extent authorized by the legislature.

The evidence in the record amply demonstrates that BT meets the EMCO and statutory criteria for issuance of a CPG and no party presented evidence to the contrary. Further, the

6. Condition 17 of the CPG.

addition of a competitor in the Burlington market is an added benefit to consumers and consistent with both federal and state law and policy. Therefore, I conclude that issuance of a CPG to BT to provide CATV services throughout the City of Burlington will promote the general good of the state. However, I must also consider what additional conditions the Board should impose on the CPG to BT to assure the provisions of the City Charter are met, as discussed in the next section.

D. The Burlington City Charter

The legislature has also placed certain restrictions on the City, and requirements on the Board, should the City seek to exercise its authority under § 3-431(4) of the City Charter (as it has now done). Section 3-438(c)(1) requires the Board, in its consideration of a City application for a CPG, to:

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.

In addition, § 3-438(c)(2) requires that any CPG issued by the Board:

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.

1. Section 3-438(c)(1): Taxpayers Shall Not Bear Losses

60. During November 2004, the City entered into a Master Equipment Lease Agreement in the amount of \$12.6 million to support the construction of its proposed system in one half of the City of Burlington (the "Koch Financial Agreement"). Exh. BT 7; Nulty pf. at 4.

61. The City stated that it anticipates seeking an additional \$7 million in similar financing in order to construct its proposed system in the other half of the City of Burlington. Exh. BT 6, Application Exhibit H; Nulty pf. at 4.

62. In the event of the failure of the City to make rental payments when due under the Koch Financial Agreement, Koch Financial may take control of all assets that secure the repayment of the \$12.6 million amount financed. Exh. BT 7.

63. Among the assets which may be taken over by Koch Financial are those currently used as a fiber backbone for service to municipal buildings and commercial buildings adjacent to the fiber backbone (the Phase I and II facilities). Exh. BT 7; exh. Cable 7 (FY 2004 Annual Report of City) at 165.

64. BT proposes to construct the new facilities and offer CATV services in two stages: the first stage includes installation of the central facilities (head-end, satellite dishes, central office) and wiring approximately one-half of the City of Burlington at a cost of approximately \$10 million. During the second stage, the remainder of the City would be wired at a cost of approximately \$7 million. Exh. BT 6, Exhibit H.

65. The new facilities will be for Phase III of the BT telecommunications project and will be separate from facilities the City of Burlington already has constructed and is using to provide telecommunications services in connection with Phases I and II of its telecommunications project. Nulty pf. at 1.

66. On May 24, 2004, the City Council passed a resolution endorsing evaluation of Phase III services, and authorized the lease financing for this phase on October 12, 2004. Nulty pf. at 1–2; Keleher pf. at 3–4; exhs. BT 1, 2, and 6.

67. The network constructed and used to provide Phases I and II services will not be used to provide CATV service. Nulty pf. at 1–2; Keleher reb. pf. at 2–3; exh. BT 6.

68. A very small amount of fiber will be used jointly for Phases I/II and Phase III telecommunications services and will be allocated and accounted for pursuant to the City's cost allocation policy. Exh. DPS-Cross-Nulty 22.

69. The City formally adopted a plan for continued pursuit of an open cable and telecommunications system to provide cable, telecommunications, and data services throughout the City in January 2002. Keleher pf. at 3.

70. The City's Telecommunications Project requested and obtained make-ready work, fiber pulling services, and inner duct pulling services from the City of Burlington Electric Department during 2002. Exh. DPS-Cross-Burns 1.

71. The City applied for a CPG to offer commercial telecommunications services in April 2003. That application identified the scope of planned services to include cable television, data, and voice over an "open," common system. Exh. Cable 99; tr. 5/26/05 at 209–210.

72. The Koch Financial Agreement provides that the obligation of the City to make rental payments is subject to annual appropriations by the City. Exh. BT 7, Master Agreement, paragraph 7.

73. The City has operated its Telecommunications Project out of existing municipal departments, including the Office of the Treasurer. Exh. Cable 73.

74. The City has not yet established an enterprise fund to carry out regulated cable and telecommunications activities. Glist reb. pf. at 8; exh. Cable 31.

75. The City has not yet included the Telecommunications Project as a separate department subject to the allocation of centralized services costs in accordance with a City Cost Allocation Plan. Glist reb. pf. at 9–10; exh. DPS-Cross-Keleher 7.

76. The City has not yet adopted a Chart of Accounts that provides for the recognition of any cable-related costs. Glist reb. pf. at 9.

77. The City has stated that it has the right under the Charter to fund the regulated cable/telecommunications activities of its Telecommunications Project through non-property tax revenue streams currently used to support general governmental services, including but not limited to rooms and meals taxes, charges for services, and development impact fees. Keleher reb. pf. at 8–10.

78. The City has previously made cash advances to fund its Telecommunications Project in anticipation of future sources of funding and states that it regards such past and any future advances as proper under the City Charter. Glist supp. pf. at 3; exh. Cable 7 at 160.

79. The City has proposed to locate a portion of its cable headend facilities on land under the control of the School Department, but intends to pay nothing to the School Department unless a regulatory body directs it to do so. Glist reb. pf. at 12; tr. 5/25/05 at 172–174 (Nulty).

80. BT maintains highly detailed books to manage each phase of the BT telecommunications and CATV project. All costs incurred to construct and operate the CATV system are separately tracked and recorded following GASB accounting standards. Every invoice is reviewed by BT and coded to the appropriate phase for which the expense was incurred and appropriate allocations are made where a single invoice covers expenditures for more than one phase. The City's accounting system handles the payment of invoices. It is City policy to review and approve all expenditures. Keleher pf. at 7; Keleher reb. pf. at 7–8; exh. DPS-Cross-Keleher 2; exh. Cable 52.

81. Disbursements are funded through draws against the escrow account set up as part of the capital lease with Koch Financial and are supported by copies of invoices and cancelled checks. The City can draw from this escrow account to purchase the necessary equipment for the project and to pay administrative costs associated with the start-up of the project. Nulty pf. at 4; Lackey pf. at 23–24; DPS-Cross-Nulty 8.

82. The first 18 months of payments due from the City under the lease have been capitalized, allowing the City to make payments through May 2006 from the escrow account. Lackey pf. at 23–24.

83. The City has structured the lease agreement to allow it to ensure that the City's taxpayers and electric ratepayers and the State of Vermont are protected from incurring any losses, or, in the event the project fails, any costs in connection with the project. Section 7 of the Lease Agreement permits the City to terminate the lease agreement at the end of the then-current fiscal year by failing to budget, appropriate, or otherwise make available funds to make the rental payments under the lease. In that circumstance, the City's only obligation under the lease would be to "peaceably deliver" the equipment at a location specified by Koch Financial. Under Section 25, Koch Financial will have a secured interest only in the physical assets and the proceeds therefrom. Section 9 of the lease specifies that the rental payments due under the lease shall be a current expense of BT and shall not be construed to be a debt of BT in contravention of any statutory limitation and shall not constitute a pledge of the City's general tax revenues, funds, or monies. Nulty pf. at 4; Lackey pf. at 24–25; exh. BT 7; exh. DPS-Cross-Nulty 9.

84. In the event the City defaults, the lease contemplates and provides for the transfer of control of the project's assets from BT to Koch Financial, and subsequently to another party, while at the same time allowing the City to generally control when such events would occur. Nulty pf. at 4; Lackey pf. at 27–28; exh. BT 7.

85. The City has a long-standing Cost Allocation Plan for handling cost allocations between departments and which allocates centrally administered expenditures to appropriate departments. These expenditures include insurance, risk management administrative costs, employee benefits, indirect costs (general accounting services, payroll costs, personnel costs, finance administration, general governmental costs, and information services), and outside audit costs. City departments share in these costs to the degree they benefit from the services provided. Keleher pf. at 7–8; Keleher reb. pf. at 7–8; exh. DPS-Cross-Keleher 1; exh. Cable 31.

86. The City is expanding the Cost Allocation Plan to include BT and will distribute the allocated centralized costs to BT when that is complete. Tr. 5/25/05 at 75, 144–147 (Keleher); exh. DPS-Cross-Keleher 6; exh. Cable 33.

87. BT maintains fully articulated, transparent, and auditable accounts fully separating the Phase I and Phases II/III projects. No cross-subsidy occurs between the Phase I operations, through which BT provides services to the City, and the Phases II and III operations, through which BT provides services to the public. Nulty reb. pf. at 18, 22.

88. BT has segregated accounts for the capital costs of the three phases and for the revenues from each phase, and the services that will use the Phase III network will bear the burden of covering the lease payments on plant used by the network. Lackey pf. at 6.

89. Phase I revenues and expenditures have been fully accounted for and audited within the annual City audits. Because Phase I services are provided predominantly to the City, enterprise accounting was not called for under generally accepted accounting principles. Keleher reb. pf. at 2.

90. All activities under Phase II have been separately accounted for and reported on the City's financial records. Keleher reb. pf. at 3.

91. The expenditures of the BT project have been reviewed directly by the City's independent auditors and appropriately accounted for in the City's annual financial reports. Keleher reb. pf. at 2.

92. A portion of the make-ready for the installation of the Phase I facilities will be useful for the Phase III facilities where they follow the same route and overlap is appropriate, and an appropriate cost allocation has been made to the Phase III operations. Tr. 5/25/05 at 130–131 (Keleher).

93. BT is organized to allow cross-subsidies between the competitive services offered through the Phases II and III operations. Nulty reb. pf. at 22–23.

94. The City will establish a full enterprise fund basis of accounting for the activities of BT for FY 2005 and beyond. Keleher reb. pf. at 2, 7; tr. 5/25/05 at 131–132 (Keleher).

95. For the fiscal year ending June 30, 2005, the Koch Financial lease is carried on the City's books as a note payable in the liabilities section of the balance sheet, the same treatment as other lease contracts in other City enterprise funds. Exh. DPS-Cross-Keleher 5.

Discussion

The Burlington City Charter requires the Board to "ensure that any and all losses" incurred by BT's operation of its cable system, and in the event BT abandons or curtails its cable system operations, "then any and all costs associated with the investment" in the cable system, are "borne by the investors" in BT's cable system and "in no event are borne by the city's taxpayers, the state of Vermont, or are recovered in rates from electric ratepayers."⁷ In order to ensure that this provision is met, the Board should condition BT's CPG to require BT to create and maintain reasonably detailed and auditable records and documentation of costs associated with the investment in the cable system, including cost allocations. In addition, the Board should include a specific condition in the CPG that addresses this requirement of the City Charter.

The City is financing the costs of the cable system through the capital lease arrangement the City has with Koch Financial. Under the terms of the lease agreement, if the City fails to appropriate the funds necessary to make the rental payments, then Koch Financial's only recourse

7. 24 V.S.A. App. § 3-438(c)(1).

is against the physical assets of and the revenues generated by the system. Therefore, as long as all of the City's appropriations for BT 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. Even though the City has structured the lease to enable it to comply fully with the requirements of the City Charter, 24 V.S.A. App. § 3-438(c)(1), in order for the Board to fulfill its obligations under that same section, I have included a specific requirement⁸ that BT comply with that provision.

The City is in the process of updating its Cost Allocation Manual to include the BT operations, including separate tracking and recording of all costs to construct and operate the CATV system following GASB accounting standards. The City Charter does not prohibit cross-subsidies among the commercial aspects of the BT enterprise.

Finally, although the lease agreement allows the City to control the event of a default, the terms of the lease would allow the automatic transfer of control of BT's assets or abandonment of service, which is not permitted under Vermont law without Board approval. Therefore, my proposed CPG includes provisions⁹ requiring the City to obtain the Board's permission before either abandoning service or transferring control of assets to Koch Financial or any other person or entity.

2. Competitive Neutrality

96. BT is committed to adhering to the competitive neutrality requirements of the City Charter. Keleher pf. at 4, 8.

Payments in Lieu of Taxes and Financing Rates

97. In order to maintain competitive neutrality, BT will make payments in lieu of taxes to the City in the amount the City would have received in ad valorem real estate taxes and personal property inventory taxes were BT a privately owned utility. For equivalent value in property and

8. Condition 56 of the CPG.

9. Conditions 3 and 4 of the CPG.

equipment, BT will pay the same in lieu of taxes as a property tax payment made by Adelphia. Keleher pf. at 6; Keleher reb. pf. at 10; exh. DPS-Cross-Keleher 4.

98. The City will charge BT the full cost of a taxable financing in order to maintain competitive neutrality. Keleher pf. at 7; exh. DPS-Cross-Nulty 12.

99. BT will pay a 5% Burlington Franchise Fee. BT will also pay the Burlington excavation fee, which Adelphia does not pay pursuant to a 1990 agreement with the City. Keleher reb. pf. at 11–12; exh. BT 3.

Discussion

The City has agreed that BT will make payments in lieu of taxes and has also taken steps to assure that the financing for the BT project is on commercial terms, rather than the more favorable tax-exempt financing the City would be able to obtain. The City has chosen to take these steps to assure competitive neutrality with the incumbent in these areas. The Cable Parties have indicated that they view the payments in lieu of taxes to be an important aspect for competitive neutrality. Even though the City has agreed to make such payments, my proposed CPG requires¹⁰ the City to make payments in lieu of taxes and to identify the methodologies used to determine the amounts of such payments and file its agreements with the Board and Department.

3. Pole Attachments, Conduits, and Utility Rates

100. The City, acting by and through the City of Burlington Electric Department ("BED"), has historically never had a policy of offering the use of or allowing cable or telecommunications service providers to locate their facilities in ducts within BED-owned conduit. Tr. 5/25/05 at 36 (Willette).

101. No third party cable or telecommunications service providers use BED-owned conduit. Tr. 5/25/05 at 23, 24 (Willette).

102. The City, acting by and through BED, allowed the City's Telecommunications Project to place its facilities in ducts within BED-owned conduit in advance of the execution of any conduit

10. Condition 60 of the CPG.

license agreement authorizing such use and the payment therefore. Tr. 5/25/05 at 153, 154 (Nulty); exh. Cable 42.

103. In January 2003, BED entered into a conduit license agreement with the City's Telecommunications Project. Exh. Cable 42.

104. Use of BED-owned conduit enables the City's Telecommunications Project to avoid the up-front capital costs and delays associated with the construction of its own underground conduit. Tuthill pf. at 27; Glist reb. pf. at 11.

105. Use of BED-owned conduit enables the City's Telecommunications Project to avoid City excavation fees that would apply if the Telecommunications Project were required to construct its own underground conduit facilities. Tuthill pf. at 22.

106. BED will offer Adelpia access to its conduit system on the same terms and conditions available to BT. Exh. DPS-Cross-Willette 2.

107. The Telecommunications Project has obtained access to and use of BED poles for purposes of attaching its proposed system to BED poles. Willette pf. at 1, 2.

108. The City has refused to commit to limiting the aerial attachments of the Telecommunications Project to the communications space on its poles, where all other providers of cable and telecommunications services have been required to attach. Glist reb. pf. at 11.

109. BED has stated that it would allow the Telecommunications Project to place its cable/telecommunications attachments in the safety space on its poles. Tr. 5/25/05 at 38–41 (Willette).

110. BT's witness, Mr. Nulty, stated that use of the safety space is a violation of the NESC and that BT has no intention of attaching there. Tr. 5/27/05 at 84–85 (Keleher).

111. The City has not ruled out seeking to attach its Telecommunications Project aerial attachments in the power space on its poles, although it has no current plans to do so. Glist reb. pf. at 11; tr. 5/27/05 at 84, 85 (Keleher).

112. Attachment in the power space would enable the Telecommunications Project to avoid the more extensive make-ready work, with associated costs and delays, that competing providers of cable and telecommunications services must incur as a result of the use of the communications space as required by pole owners. Tr. 5/26/05 at 71, 108, 109 (Keleher).

113. BED has not offered or provided BT with any advantages over other pole attaching entities. BED treats BT as any other third party and charges BT for make-ready work and pole attachments at the same rate it charges all other attaching entities. Willette pf. at 2–3; Willette reb. pf. at 4, 5–6; Nulty reb. pf. at 16; exhs. DPS-Cross-Willette 1, DPS-Cross-Burns 1.

114. BED identified and corrected an error in billing BT for pole attachments at the 1-foot rate rather than the 2-foot rate. BED recalculated the amount BT should have been charged, credited BT for the lower rate that is part of the proposed settlement in Docket 6604 and BT has agreed to pay the difference of \$5,835.97 once the lower rate is approved by the Board. Willette pf. at 2–3; Willette reb. pf. at 5.

115. BT leases space within a portion of BED's conduit system pursuant to a Conduit License Agreement between BT and BED at the same rate and on the same terms and conditions as the only other current licensee in BED's conduit system. Willette pf. at 1–3; Willette reb. pf. at 1–2; exh. DPS-Cross-Willette 3; exh. Cable 42.

116. BED would offer Adelpia access to its conduit system on the same terms and conditions available to BT and others. Exh. DPS-Cross-Willette 2.

117. BT has contracted with BED to pull its fiber optic cable through BED's conduit system and also contracts with BED whenever work needs to be performed on BT's facilities within any of the conduit system. BED charges BT the same rate for labor, material, and equipment, including all fees and taxes, that would have been charged to any other entity contracting with BED for these services. Willette pf. at 2, 4.

118. BT will pay utility services, such as electricity, water, and sewer directly pursuant to the tariffed or established rate for the service. Keleher pf. at 8.

119. By design, BED's tariffs establish competitively-neutral terms and conditions for all current and potential cable operators. Lackey pf. at 32.

120. BED has installed fiber optic cable owned by the Vermont Electric Power Company ("VELCO") within the safety space on several of its poles. BED charges VELCO its tariffed pole attachment rate for these attachments and also charges VELCO for the work BED is required to perform on VELCO's behalf within the safety space. BED has never allowed a BT employee to access any of its energized environments. Willette reb. pf. at 3–4.

121. There are no common employees between BED and BT. Willettereb. pf. at 4.

Discussion

Based on the evidence presented, I conclude that BT has received requested services from BED on terms and at rates pursuant to BED's tariff and that BT has not sought or received any benefit from BED that would be prohibited by § 3-438(c)(2). Nevertheless, and although BT has clearly stated its intention to comply with that section of the City Charter, my proposed CPG includes specific requirements¹¹ that BT comply with that provision. In particular, that condition requires BT to pay the same rental rates and make-ready charges as it would if it were a commercial enterprise unrelated to the City and BED, and that it not accept preferential treatment from BED with regard to its lines, pole attachments, or conduits.

V. PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS

A. Public Access Channels, Equipment, and Facilities

122. Adelphia pays 5% of its gross revenues (as defined) to fund public access operating budgets and 1.5% of its gross revenues (as defined) to fund public access capital requirements. Tuthill pf. at 12.

123. The BAMOs have entered into contracts with Adelphia that cover the funding and provision of public, educational, and governmental access within the communities served by Adelphia's system that covers Burlington. Tuthill pf. at 10; exhs. Cable 5-RT 3, RT 4, and RT 5.

124. BT has entered into an *Aide Memoire* with the BAMOs that is intended by the parties to be the basis for a negotiated public access contract. Nulty reb. pf. at 24; exh. BT 11; tr. 5/26/05 at 179 (Davitian).

125. The *Aide Memoire* agreement with the BAMOs commits BT to the same operational and capital funding requirements to which Adelphia is currently committed. This includes payments equal to 5% of gross revenues for operational needs and 1.5% of gross revenues for capital funding needs, plus a formula for additional capital funding in future years. Nulty reb. pf. at 11; exh. BT 11.

11. Condition 57 of the CPG.

126. BT promises to enter into contracts to support PEG access that are proportionally equivalent in scope and cost to those that the entities have with Adelphia. Keleher pf. at 5; exhs. BT 4 and 11.

127. BT has agreed to designate and connect each of the BAMOs, even RETN, which does not operate in Burlington. Tr. 5/25/05 at 157–158, 210 (Nulty); exh. BT 11.

128. BT has agreed to connect to a statewide interconnect if and when it is built, and to provide appropriate transport and drops at the BAMOs locations for insertion into the BT system. BT has also committed to ensuring that the existing PEG channels can be broadcast over digital networks. BT has agreed to purchase the equipment the BAMOs need to convert analog broadcast into IP digital format. Nulty reb. pf. at 11–12; exh. Cable 59.

129. BT should be required to cover the capital costs of interconnecting its system to all designated BAMO studio locations. Tuthill pf. at 14, 15; Glist pf. at 36; Glist reb. pf. at 24; exh. Cable 6, ¶ 33.

130. Adelphia currently has an obligation in its CPG to convert PEG access channels to a digital format for cablecasting when the penetration of digital sets in the service area reaches approximately 70%. Exh. Cable 5-RT 2 ¶31.

131. The Board has recently revised its Rule 8.000, which establishes a presumptive minimum level of support by cable operators for public access. Lackey pf. at 32.

132. The revised Rule 8.000 also establishes a framework in which cable operators and BAMOs negotiate contracts and arrange for mutual delivery of public access television of the levels and types that are consistent with demonstrated public need. Lackey pf. at 32.

133. BT has expressed its intention to, and commitment to, comply with the requirements of the newly revised Rule 8.000. Tr. 5/25/05 at 210 (Nulty); exh. BT 10, ¶ 25.

134. Adelphia has negotiated contracts with the BAMOs. Exhs. Cable 5-RT 3, 4, and 5.

135. The BAMOs are separately negotiating contracts with BT. Nulty reb. pf. at 24; exh. BT 11.

136. To simply copy Adelphia's current obligations into a BT CPG or into new BAMO contracts would fail to recognize that the two cable operators will share the market, may burden cable subscribers with the costs of supporting duplicated services, and may apply to BT

conditions that were specific to and appropriate for Adelphia in 2000 but that burden or constrain BT unnecessarily and without added benefit. Lackey reb. pf. at 4–5.

137. The guiding principle for the cable operators' negotiations with the BAMOs is that the total responsibility for meeting the public's need for public access is apportioned between Adelphia and BT in a way that is competitively neutral. Lackey reb. pf. at 4–5.

138. BT and the BAMOs have made good faith efforts to negotiate terms and conditions of public access that are competitively neutral with Adelphia's current public access obligations. Exh. BT 11.

139. BT should make two additional capital funding payments over the course of its CPG to cover the cost of future upgrade of PEG facilities that are reasonably necessary to meet the cable-related community needs of BT's subscribers. BT has agreed to making these additional capital payments. Tuthill pf. at 15; Glist pf. at 36; Glist reb. pf. at 16–21; exh. Cable 6; exh. BT 11.

140. Pursuant to Board Rule 8.406(b), BT should be required to obtain and pay for any specialized equipment that is required for receipt and/or transportation of PEG programming on its IP digital system upon activation of any portion of its system. Tuthill pf. at 14–16; Glist pf. at 36; Glist reb. pf. at 24; exh. Cable 6.

141. It would be improper for these costs to be paid for out of BAMO revenues or reserves that are the result of funding provided by Adelphia. Tuthill reb. pf. at 2.

Discussion

The Charter expressly mentions public access-related terms and conditions among the terms and conditions that the Board must consider in establishing a CPG for BT that is competitively neutral in relation to the CPG of the incumbent cable operator. As a general matter, the parties do not appear to disagree with the principle that BT's public access obligations should be on a par with those of Adelphia. However, they have diverging views on what PEG obligations should be included in any CPG award and to what extent any PEG obligations may be left open for negotiation between BT and the Access Management Organizations.

The BAMOs seek to have the terms of the Aide Memoire incorporated into the CPG.¹² BT indicated it would not object to a CPG condition that imposes as PEG obligations the terms specified in the Aide Memoire.¹³ The Cable Intervenors also seek specific public access CPG conditions, some of which are the same or substantially similar to provisions in the *Aide Memoire*.¹⁴

The Department proposes some specific public access CPG conditions, but does not support incorporating the Aide Memoire into the CPG. Rather, the Department seeks to have negotiations under the recently revised Rule 8.400 provide more flexibility for PEG requirements than the past practice, prior to the recent Rule revisions, of including very specific public access requirements as CPG conditions.¹⁵ The Department urges the Board to begin to implement the newly revised Rule 8.000 and leave many of the specific terms and conditions for negotiation as anticipated under the rule.¹⁶

In the past, the Board has incorporated extensive and specific PEG access requirements into CPG's issued to cable operators. *See, e.g.,* Dockets 6101, CPG of 4/28/00 and 7/19/00 (Adelphia); Docket 6521, CPG of 9/8/03 (Charter). However, since those Orders, the Board substantially revised its rules relating to cable television, including Rule 8.400 relating specifically to PEG access. The new Rules were effective on March 1, 2005. Continuation of the practice of including all PEG access requirements in a cable operator's CPG diminishes the effectiveness of the framework established in the new Rule 8.400 and, therefore, the Board should include only those PEG access requirements that are imposed outside of the negotiations and requirements of the Rule.

Even if specific PEG CPG conditions were incorporated into BT's CPG at this time to assure parity between BT and Adelphia, that parity could be lost when Adelphia's CPG is

12. Tr. 5/26/05 at 173 (Davitian).

13. Tr. 5/27/05 at 94–95 (Nulty).

14. Exh. Cable 6; exh. BT 11.

15. Lackey reb. pf. at 3, 7–8; tr. 5/27/05 at 22–23 (Lackey).

16. Exh. DPS-LFL 1; Lackey reb. pf. at 3, 7–8.

amended or a new entity acquires the Burlington system. Alternatively, in order to assure parity, it could become necessary to continue to impose Adelpia's current specific PEG CPG requirements on all Burlington entities for the foreseeable future, without modification since it is unlikely the CPG's will ever be under consideration at the same time. This could result in many inefficiencies in the efforts of the cable operators and the BAMOs to meet the community public access needs over time and could prevent the advantages of Rule 8 from being realized.

In addition, the Board should provide guidance and encouragement to the BAMOs, BT, and Adelpia to jointly negotiate in good faith the best way for the cable operators to jointly meet the community's needs in a competitively neutral manner. There remains a risk of unnecessary duplication of services, which becomes an unnecessary expense of the cable subscribers, and also then diverts available funds away from meeting the community needs. The competitive neutrality provision of the City Charter should not result in identical public access requirements where services are provided by both operators in a circumstance where only one is needed. In addition, while the different technologies employed by BT and Adelpia present some new challenges for the BAMOs, they also present some new opportunities for efficiencies that have the potential to benefit the BAMOs, both cable operators, and all cable subscribers in the community.

On balance, I recommend that the Board not include specific requirements in the CPG equivalent to those in Adelpia's, but rather leave these terms for negotiation. My proposed CPG includes reference to the *Aide Memoire*, but does not incorporate its complete terms. It is better to give the BAMOs some leverage in the negotiations with BT, without burdening the CPG with too much specificity. Since some terms will need to be negotiated with Adelpia, and since Adelpia is presently before the Board seeking to sell its system to Comcast (Docket 7077), all parties will need all the good will and flexibility that can be mustered.

B. Reimbursement of Portion of Historic Capital Payments Made by Adelpia and Not Charged to Adelpia Subs

142. Adelpia calculated that, during the past four years, it made capital payments of \$1,196,102 which were not passed through to its subscribers, and the Burlington portion of

which was approximately \$448,000. Tuthill pf. at 12–13; exh. Cable 5-RT 6; tr. 5/26/05 at 186–188.

143. PEG capital funding that Adelphia provided to the BAMOs in past years was a requirement of Adelphia's CPG at the time the expenses were incurred. Tr. 5/26/05 at 96 (Glist).

144. Adelphia submitted detailed calculations of these sunk costs, which were approximately \$448,000. Adelphia also demonstrated that these sunk costs have not been passed through as a line item on its subscriber's bills. Glist pf. at 35–36; Tuthill pf. at 13.

145. The Cable Parties have suggested that a reasonable reimbursement would be based upon 50% of the sunk costs that Adelphia has already invested in PEG over the past 4 years (2001-2004) that have not been billed to subscribers. Tuthill pf. at 12; Glist pf. at 35–36; exh. Cable 6 at ¶ 29(e).

Discussion

The Cable Parties argue that they have contributed hundreds of thousands of dollars in capital funding for the BAMOs, funds that were not passed through to customers as an additional bill line items as were the operating expense contributions. They note that, since BT will immediately and substantially benefit from the ability to interconnect with existing public access studio facilities that it has not contributed capital to construct, BT should be required to reimburse Adelphia for a reasonable portion¹⁷ of such capital payments made by Adelphia and not directly charged to cable subscribers. BT will have equal benefit from PEG programming, is supposed to be competing equally, and should be contributing equally. BT responds that such a reimbursement to Adelphia would unfairly burden BT and BT's customers and provide a windfall for Adelphia.¹⁸

The Cable Parties' argument is superficially attractive. BT would come into the marketplace and take advantage of the PEG operations that Adelphia funded over the years and essentially "ride free" on Adelphia's hard work and capital. However, the argument leaves out

17. They suggest half, i.e., \$224,000.

18. Nulty reb. pf. at 11; Lackey reb. pf. at 10; tr. 5/27/05 at 34–35, 74.

the dimension of time. During the time Adelphia's obligation to support access was being fulfilled, BT was not operating a cable system. Adelphia made current payments on a current obligation; BT does not inherit that obligation, but accepts a (current) one of its own. A new drug store in town does not owe the existing Rite-Aid a portion of the property taxes paid in past years to improve the streets that the newcomer's customers will use.

Beyond that, it is incontrovertible that Adelphia's customers in fact paid for those capital contributions in cable rates, whether or not they were separately charged in a line item, just as those customers paid for Adelphia's trucks, wires, and head-end building rent. In this case they paid for capital equipment that was being contributed to support operations of non-profit entities operating for the benefit of the customers. It is unfair to conceive of BT's use of these facilities as benefitting BT; it is BT's customers who will benefit, and they are a subset of Adelphia's present customers.

It is understandable that Adelphia finds this situation annoying. Nonetheless, I conclude that there is no lack of competitive neutrality if BT's obligation going forward will be congruent with Adelphia's, and that there is no need for BT to reimburse Adelphia for its past contributions.

C. Miscellaneous PEG-Related Terms and Conditions

The Cable Parties also recommend that BT be required to provide 5MB of server space and similar IP support as Adelphia, paid access to its electronic programming guide, and on-screen and semiannual newspaper promotion for PEG programming and community courtesy services. These are required of Adelphia and should be required of BT.¹⁹

D. BT Commitments Unrelated to Cable-Related Community Needs Should be Considered Voluntary and Should Not be Considered in Establishing Competitively Neutral CPG Terms and Conditions

The Cable Parties have not opposed BT's negotiating with the BAMOs regarding additional contractual obligations pursuant to Board Rule 8.400. However, a number of items on the BAMOs' wish list are not cable-related PEG needs. For example, the BAMOs have requested

19. Glist reb. pf. at 25.

such non-cable benefits as "broadband access" that includes streaming media, "podcasting" and "community portal" capabilities.²⁰ The scope of Vermont's new public access rules is spelled out in Section 8.400(B). The Board should not compel BT to provide these services, which are beyond the scope of that Rule, as part of a cable CPG. Should BT decide to voluntarily agree to these types of non-cable commitments, they should not be considered by the Board in determining the cable-related PEG commitments that BT must make in order to satisfy competitive neutrality standards regarding PEG access.

VI. POLE ATTACHMENTS, CONDUIT, AND MAKEREADY TERMS AND CONDITIONS

Consideration of attachment issues is within the scope of the competitive neutrality review under the City Charter and properly required where the City will be attaching to facilities owned and controlled by the City and the risk of self-dealing is great.²¹ The City should be required to adhere to CPG terms and conditions that are reasonably needed in order to ensure that BT constructs and operates its proposed cable system on a competitively neutral basis, without undue preferences and advantages arising out of the City's common ownership and operation of BT and BED, the owner (or joint owner) of poles and conduits used by BT.

The Cable Parties have asked that several conditions be included in the CPG that are designed to explicitly prevent unfair or uncompetitive actions by the City and BED. As noted below, I have included several of these conditions in my proposed CPG, despite the objections of BT (often with the support of the Department). I have done so despite the fact that, in most cases, BT's witnesses were willing to promise that these conditions are unnecessary because the City, BED, and BT are fully committed to behaving in a fair and above-board manner. I wish to stress that my inclusion of these conditions does not reflect any doubt as to the sincerity of these witnesses; however, in the heat of a competition for the eyes and dollars of the inhabitants of Burlington, the limits of fair play may look differently from the way they look now. For human beings in general, it is better if there are bright lines rather than good intentions.

20. Davitian pf. at 12–13; Glist reb. pf. at 14.

21. 24 V.S.A. App., § 3-438(c)(2).

Public Service Board Rule 3.700, by itself, is not an adequate competitive safeguard. Rule 3.700 does not apply to conduit access arrangements between BT and BED. For example, the City enabled BT to use BED conduit²² without the prior execution of a conduit license agreement and in the absence of any conduit tariff.²³ BED has admitted that until it afforded BT access to its electric conduit system, it had not been BED's practice to allow providers of cable and telecommunications services to use its conduit.²⁴ Other service providers have had to incur the substantial costs and delays associated with the permitting and construction of conduit, as well as the obligation to pay excavation fees to the City.²⁵ BT has avoided these costs and delays. Similarly, BT has been paying pole attachment fees on the basis of the "cable only" 1-foot rate, at the same time BED has been billing Adelphia at the telecommunications 2-foot rate, a discrepancy that BED has remedied only by charging BT the higher rate that should have been charged all along, with no promise to adjust for having billed Adelphia's cable attachments as though Adelphia provided telecommunications services to every customer (which it does not).

The provisions of Rule 3.700 were intended to comply with the National Electrical Safety Code ("NESC"). As the Rule recognizes, electric utilities typically attach their energized (ungrounded) lines and facilities at the highest part of the pole. The length of the pole in which ungrounded facilities are attached is referred to here as the "power space." Beneath the power space is a 40-inch "safety space," in which grounded facilities may be attached but not (normally) communications facilities. Below the safety space is the "communications space," where the cable and telephone facilities are attached (usually, by preference, the incumbent local exchange carrier will attach at the lowest level, with competitive telephone carriers and cable television equipment located above). The communications space extends downward to the lowest height at which the ground (and other) clearances of the NESC can be maintained. The length of pole below that height to the surface of the ground is considered "unusable." The NESC apparently

22. Note that these were Phase I or II facilities, not Phase III.

23. Tr. 5/25/05 at 153, 154 (Nulty); exh. Cable 42.

24. Tr. 5/25/05 at 36 (Willette).

25. Glist reb. pf. at 11.

does not prohibit communications facilities from the power space, it only provides that work on those facilities must be performed by workers trained to work in such electrically-hazardous environments—that is, electric linemen.²⁶ It would be impractical for Adelphia, for instance, to hire such workers for its lines, even assuming the pole owners would give permission. However, it would not be a stretch to imagine BT calling upon BED to install and service BT's cable plant; even assuming that BED charged a fully-allocated labor rate for the work, the ability to avoid substantial make-ready work would be a considerable competitive advantage for BT. No other provider of cable and telecommunications services has been afforded access to the power space by an electric utility. Such preferential access would be unduly discriminatory because, as Mr. Willette conceded, it would enable BT to avoid the significant costs and delays associated with make-ready work required when an additional attachers wishes to use the communications space.²⁷ Adelphia and other attachers in the communications space have been required to bear these costs and delays, and it would be an undue preference if BT were permitted to avoid these same costs and delays. The Cable Parties urge that the Board require all of BT's aerial attachments to be placed in the communications space on poles, where all other providers of cable and telecommunications services are attached, and that BT be prohibited from placing any aerial facilities within the power space on utility poles. This proposed condition²⁸ does no more than hold BT to the same attachment practices that have been imposed by pole owners upon private cable and telecommunications providers, but that BT has refused to accept and BED has refused to apply in the case of BT.²⁹

26. See Section 224, NESC, 1997 Edition; tr. 5/26/05 at 70–72 (Nulty).

27. Tr. 5/25/05 at 41 (Willitte).

28. Condition 57 of the CPG.

29. On a side note, the testimony concerning the location of communications facilities in either the power space or the safety space was somewhat confused (and confusing). It seemed clear that some VELCO communications facilities are located within the safety space on some poles. Whether this is proper is unclear; VELCO's attachments are irrelevant to this proceeding, and neither the witnesses nor the examiners were sufficiently conversant with the NESC to judge this issue. I do wish to make clear that nothing in this proposed order should be taken to suggest that either BT nor BED (or VELCO) are relieved of the necessity to build and maintain their systems in accordance with the NESC, as amended. See Board Rule 3.500.

Given that the Board's rules prescribe only maximum intervals for the performance of make-ready survey and make-ready work, it is not difficult to imagine BED's performing work requested by BT within a day or two of receiving the request while performing similar work for Adelphia and telecommunications service providers within the required Board intervals, but on the last possible date. Thus, technical compliance with the Board's rules would not ensure competitive neutrality, for example, if BT and Adelphia were seeking to serve the same customer and each depended upon make-ready from BED to reach the customer first. This type of competitive neutrality condition (assuring that the owner of facilities used by itself and its competitors does not treat its competitors worse than it treats itself) is very common in the telecommunications industry, where competitors depend upon services provided by the owner of facilities with whom they compete. Performance measures have been adopted to ensure that those services are provided at comparable time intervals in a competitively neutral manner.³⁰ Given BED witness Willette's testimony about BED internal record-keeping regarding the performance of make-ready and other outside plant work,³¹ it should not be burdensome for the City to comply with the proposed CPG condition that I have included in my proposed CPG. Under this proposed CPG term, BT's receipt of make-ready or other outside plant services from BED would be at intervals not more favorable than those for similar services provided by BED to Adelphia. A tracking mechanism would be established within 30 days following any CPG award and quarterly reports would be submitted by the City during the 3-year construction period for its proposed system.

The Cable Parties also have recommended that the Board adopt conditions that would: (1) prohibit BT from accepting any benefit, privilege, or preference (that is not available to other attaching entities under tariff or by contract) 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; (2) require BT to pay the same rate for conduit access, make-ready surveys, and make-ready labor rates as other telecommunications providers; and

30. Tr. 5/26/05 at 99–101 (Glist).

31. Tr. 5/25/05 at 42 (Willette).

(3) prohibit BT and its contractors (but not BED under Rule 3.709) from relocating, adjusting, or in any other way interfering in a manner inconsistent with applicable law with the facilities of existing users of utility poles, including Adelphia. I have included these terms in my proposed CPG.

VII. ACCOUNTING AND FINANCIAL SAFEGUARDS

A. City Charter Provisions

The CPG must contain terms and conditions that (1) are consistent with the establishment of competitive neutrality and (2) 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. These substantive requirements for decision-making by the Board have been placed upon the Board by the Vermont General Assembly, through directives contained in the City Charter. I have discussed these issues more fully in Section IV.D., above.

B. Use of General Municipal Revenues to Support Commercial Cable and Telecommunications Activities

The City argues that it may use City funds as long as the source of those funds is limited to property tax revenues. It reaches this position by construing the phrase "the city's taxpayers" as meaning "the [city's] property tax payers."³² No explanation is offered for this leap, and I conclude that there is no rational explanation. 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. I agree with the Cable Parties that the City must be cautioned, up front, that the legislature most likely meant

32. Keleher reb. pf. at 9.

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.³³

The CPG should include a condition³⁴ that precludes the City from using general revenue streams to fund commercial cable and telecommunications activities or to repay lease obligations relating to those same activities. It is necessary that this CPG condition apply to both cable and telecommunications activities because: (1) the Charter is directed to both of these commercial activities and no such limitation is contained in the City's telecommunications CPG; (2) one City venture is carrying out both of these commercial activities; (3) the City is using a common network system to provide both commercial services; and (4) any failure to apply this limitation to either of these commercial activities would create a loophole allowing the City to use general revenues to fund its commercial activities (i.e., by claiming that 90% of its facilities and costs to be "telecom, not cable"). The City's stated intention to treat any future "open access" arrangements with video service providers as "telecommunications" also makes it critical that the "open access" system that the City has been constructing is not subsidized by general revenues.

C. The Use of Advances from General Revenues to Support Commercial Cable and Telecommunications Activities

As both the Cable Parties and the Department argue, the City should not make advance payments from City revenues that cannot be recovered from the commercial revenues or financing arrangements for the support of BT, because of the risk that substantial cash advances could not be repaid in the event of a business failure of BT. The Cable Parties suggest a CPG condition that categorically forbids such advances, while the Department proposes a slightly less restrictive condition that would allow the City to offer limited cash-management support. I have included the Department's proposed condition as condition 60 of my proposed CPG.

33. *Vermont Development Corp. v. Kitchel*, 149 Vt. 421, 424 (1988) (statute not to be construed in manner that will lead to irrational consequences); *Burlington Elec. Dept. v. Dept. of Taxes*, 154 Vt. 332, 335–336 (1990) (plain meaning must control), *State v. Read*, 165 Vt. 141, 147 (1996).

34. Condition 60 of the CPG.

D. Miscellaneous Charges

Adelphia currently pays a variety of other fees and taxes, which include municipal real property taxes, the state education real property tax collected by the City and remitted to the State, a municipal fee which is currently at \$51,450 and subject to annual adjustment (in lieu of an excavation fee by agreement with the City), a .05% gross revenue provider tax to support Board and Department operations, and a municipal business personal property tax.³⁵ The Cable Parties urge that BT should be required to make all the same payments, and of the same magnitude. The Department suggests that the proper standard for evaluating the competitive neutrality of payments is whether the payments are consistent with those that would legally be required if BT were a private entity starting up in Burlington, and I agree that this is the proper measure. This would certainly include a payment in lieu of taxes, and the proposed CPG includes a requirement³⁶ that BT and the City file an agreement for such payment within 60 days of the final order in this case.

BT witnesses also testified that BT will pay a municipal franchise fee of 5% of gross revenues and the municipal street excavation fees.³⁷ These fees will also be required³⁸ by the CPG.

E. Operation as an Enterprise Fund

There appears to be no dispute that the City should carry out its commercial cable and telecommunications activities through an enterprise fund.³⁹ My proposed CPG includes this requirement, as well as that BT be part of the City's Cost Allocation Plan.⁴⁰ However, I did not adopt the Cable Parties' suggestion that the Board automatically hold a hearing to examine the

35. Tuthill pf. at 17, 18.

36. Condition 61 of the CPG.

37. Keleher reb. pf. at 12.

38. Condition 62 of the CPG.

39. Tr. 5/25/05 at 131–132.

40. Exh. Cable 31; tr. 5/25/05 at 75 (Keleher).

sufficiency of the Plan. The Board and Department have adequate authority to commence an investigation if the Plan appears flawed.

F. Accounting for Start-Up Costs

The Cable Parties have argued⁴¹ that the City's Telecommunications Project is really a single project, with its origins in the 1990's, and that some portion of the costs of planning (including allocated overheads) should be booked to the BT cable project. However, I have found that the cable project was not authorized until 2004; further, substantial pre-authorization sums⁴² have already been booked to the cable project. Much of the concern expressed by the Cable Parties might have been mitigated but for an apparent failure to communicate during discovery; BT answered questions about record-keeping and accounting narrowly, and did not volunteer information about very complete but somewhat unofficial records on cost itemizations and separations.⁴³ The conditions⁴⁴ in the proposed CPG are adequate to track and audit revenues and expenditures for compliance with Vermont law.

G. Penalties

The Cable Parties suggest that conditions be included in the CPG that provide specific penalties for violations of the City Charter or of Vermont law. The suggested provisions do not particularly go beyond the penalties already allowed under 30 V.S.A. § 509, except that they seem to contemplate passing the penalty fines collected over to "BT's competitors." Since the proposed penalties are not more useful than those already in place, and since I doubt both the legality and wisdom of using penalty receipts to compensate Adelphia, I have declined to include these conditions.

41. Cable Parties' Initial Brief, pp. 52–64.

42. Keleher reb. pf. at 3–7.

43. Tr. 5/25/05 at 188–201 (Nulty). *See* findings 87–91, above.

44. Conditions 58 and 59 of the CPG.

H. BT Headend Building

BT intends to place its headend building and satellite dish on a small portion of property owned by the City of Burlington School Department.⁴⁵ 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 requirement⁴⁶ that the land be assessed and that BT pay a fair rent to the Burlington School Department.

VIII. CONCLUSION

The issuance of a CPG to BT will promote the public good, subject to the conditions in Attachment 1.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811. Findings proposed by any party not consistent with the above are hereby rejected.

Dated at Montpelier, Vermont, this _____ day of _____, 2005.

John P. Bentley, Esq.
Hearing Officer

45. See finding 79, above.

46. Condition 63 of the CPG.

IX. ORDER

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

1. The Findings and Conclusion of the Hearing Officer are adopted.
2. A Certificate of Public Good shall be issued to the City of Burlington, d/b/a Burlington Telecom, to provide cable television service within the City of Burlington, Vermont.

Dated at Montpelier, Vermont, this _____ day of _____, 2005.

_____)	
_____)	PUBLIC SERVICE
_____)	
_____)	BOARD
_____)	
_____)	OF VERMONT
_____)	

OFFICE OF THE CLERK

FILED:

ATTEST: _____
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: Clerk@psb.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.