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MEMORANDUM

Confidential Attorney–Client Work Product

To: Burlington City Council Democratic Caucus
From: Daniel Richardson, Esq. DPR
Date: November 9, 2009
Re: Release of Attorney–Client Materials Concerning Burlington Telecom, September 2005–October 2009

Introduction

This memorandum was drafted to address issues concerning the proposed release of attorney–client communications and documents drafted to or from William Ellis, Esq. in the scope of his representation of the City during the pending petition for relief of Condition 17 before the Public Service Board. The specific question posed by the client is "whether or not [the City Council] should be releasing the information contained therein to the public." As the following discussion will detail, the answer to this question requires the Council to weigh several competing factors. This letter is to memorialize the e-mail that I sent to your office on Monday, March 30, 2009 for your records.

Background

In 2005, under the Peter Clavelle administration, the City of Burlington obtained a Certificate of Public Good that permitted the City to start a telecom business. Burlington Telecom was thus launched and through capital funding began to build out telephone, cable, and internet services to the community. Under the terms of the City's Certificate, however, the City and Burlington Telecom were subject to 65 conditions that governed how the telecom business was to be run.

On September 10, 2008, Burlington Telecom, through its attorney, William Ellis, Esq., filed a petition with the Public Service Board for relief from Condition 17. This condition required Burlington Telecom to build out its network so that it served every residence, building, and institution in the City of Burlington by September 13, 2008. The petition was filed because Burlington Telecom could not achieve build out by the date set, and it needed approval from the Board to have more time to complete this task. As a result of this petition, the City began working with the Department of Public Service on a stipulated agreement to resolve the issue. When no agreement was forth coming, the petition entered into litigation mode in the beginning

of 2009. As a litigated petition, the Board granted Comcast, Burlington Telecom's main competitor, party status for the limited interest in promoting "competitive neutrality."

In the spring of 2009, the Department of Public Service and Comcast began serving discovery requests on Burlington Telecom that requested information on Burlington Telecom. These requests sought information beyond the apparent scope of Condition 17 and into the area of how Burlington Telecom was being funded. Burlington Telecom objected to these requests and eventually filed a protective order with the Board against Comcast's motion to compel.

On September 30, 2009, Burlington Telecom filed an amended petition with the Board seeking relief from Conditions 17 and 60. Condition 60 concerns the limitation on Burlington Telecom as to how it may borrow money from the City's "pooled funds." Condition 60 allows Burlington Telecom to borrow funds but requires that they be repaid in full within 60 days. Pending this amendment, the Board has ordered the parties to resolve their discovery dispute by October 30, 2009, or it will rule on the pending motions to compel and protect filed by Comcast and Burlington Telecom.

What the Attorney–Client Communications Say

Against the background of Burlington Telecom's 2008 petition, William Ellis, Esq. appears to have generated and receieved roughly 131 pages of e-mail communications and memoranda concerning his representation of Burlington Telecom. Most of these communications concern the review of Mr. Ellis' work product, alterations to that work product, and approval from Burlington Telecom and City officials. The most common communicants with Mr. Ellis are Jonathan Leopold, the City's Chief Administrative Officer; Amber Thibeault, Bulrington Telecom's Contract and Governmental Affairs Specialist; and Christopher Burns, Burlington Telecom's General Manager.

Among the the various correspondences, there are several e-mail communications and memorandums discussing the issue of Condition 60. This conversation starts on November 6, 2008, with an e-mail from Mr. Ellis to Mr. Leopold and Ken Schatz, the City Attorney, where Mr. Ellis states that his "biggest concern" is Condition 60 and the City's "apparent violation of this provision" through its "present use of [its] 'pooled resources' to find BT to the toon [sic] of $10M with no repayment obligatin within 2 months." This led to a meeting on November 17, 2008 between Mr. Ellis and Mr. Leopold where the nature of Burlington Telecom was discussed.

The result of that meeting is contained within a follow up e-mail on November 18, 2008 where Mr. Ellis expresses concerns that Mr. Leopold's apparent proposal to give the City a loan for "capital projects" would "still look[] like the City getting a loan and then loaning BT $10 Million." Mr. Ellis further added that he would "leave the financing nuances to" Mr. Leopold.

On December 15, 2008, Mr. Ellis once again raised the issue of Condition 60 and recommended that Burlington Telecom "deal with this issue head on and take whatever additional penalty theDPS may want to foist upon us now as opposed to down the road."

The next time the issue of Condition 60 arises is on April 3, 2009 when Mr. Ellis, writing to Mr. Leopold, Ms. Thibeault, and Mr. Burns, noted that Discovery questions from Comcast in the Condition 17 litigation indicated that Comcast was "on to the fact that the City has used its funds to prop up BT in violation of the CPG." Ms. Thibeault appears to respond to this issue when she writes to Mr. Ellis five days later noting that the question was for Mr. Leopold, "unless we can object on relevance grounds." Mr. Ellis replied the same day in an e-mail, which went to Ms. Thibeault and Mr. Leopold, to express concern that "fighting [the discovery requests] is likely to cast even more light on the City's non-compliance on this issue and could result in the Board's broadening of the scope of this proceeding." Mr. Ellis followed this concern up with an e-mail to Mr. Leopold the following day indicated that Mr. Ellis wanted to speak to Mr. Leopold about Burlington Telecom because it was "pretty important from [Mr. Ellis'] perspective."

It is unclear whether or not that meeting took place, but Mr. Ellis and his partner, Joe McNeil felt compelled to issue a memorandum to Mr. Leopold, Mr. Schatz, and Bob Kiss, the Mayor, five days later on April 14, 2009 about Condition 60. This memorandum reviews several critical pieces of the City's actions concerning the funding of Burlington Telecom and the City's position within the regulatory process with the Public Service Board. Among the important highlights of the memorandum are:

1. The timeframe when the Condition 60 violation became apparent to Mr. Ellis;
2. The on-going nature of the violation;
3. Notice that the Department of Public Service has not picked up on the Condition 60 violation and the decision by Mr. Ellis and/or City members to not raise the issue with the Department;
4. The pending discovery requests from the Department of Public Service and Comcast that indicate their awareness of the Condition 60 non-compliance issue;
5. The City's strategy up to that point of objecting to any discovery requests touching upon Condition 60 and the less-than-likely possibility of that this strategy would succeed;
6. A recommendation to Burlington Telecom to deal with the issue now because it "will eventually become public and the City will need to deal with it";

The City's response to this memo is not recorded in this e-mail packet, and it is unclear if the City officials agreed, disagreed, or ignored Mr. Ellis's recommendations.

On April 28, 2009, Ms. Thibeault e-mailed Mr. Ellis regarding discovery responses to Comcast. Her e-mail appears to indicate that Burlington Telecom was responding to inquiries on Condition 60 in that she notes "Jonathan will have to answer these questions but with condition 60 these are relevant."

On May 6, 2009, Mr. Ellis wrote to Mr. Leopold to ask whether he should be "copying in any City Councilors on our filings in this matter" as he had learned that at least one City Councilor had gone to the Department of Public Service about Burlington Telecom. Mr. Leopold's response was "do not copy anyone, tell DPS not to discuss anything confidential or provide any of our confidential info & see if you can find out who it was."

Six days later, a series of e-mails were generated between Mr. Ellis, the Department of Public Service, and City officials. These e-mails began when City Council President Bill Keogh invited the Department of Public Service to a city council meeting to discuss Burlington Telecom. The Department appears to have been confused by this invitation that they considered an "odd situation" and a "strange dynamic." This confusion stems from the fact that the City through Burlington Telecom was essentially litigating against the Department and parties on opposite sides usually do not call their opponents for a public briefing on the issues. The issue was resolved when the Department requested Mr. Keogh consult with Mr. Ellis, the City's attorney, before the Department attended any meetings.

On May 14, 2009, there are a series of e-mails from Mr. Keogh to Mr. Ellis and to other City officials concerning Burlington Telecom and a planned City Council meeting for Monday, May 18, 2009. Among the issues that Mr. Keogh sought to discuss were Burlington Telecom's "financial statuse, [sic] build-out status," and any general questions that the councilors might have. An e-mail from the 14th at 10:52 pm from Mr. Keogh to Mr. Leopold and Mr. Ellis appears to expand on these issues. Financial status meant the borrowing situation and whether there were available funds and if they were enough to meet its needs. Build-out status meant to explore the physical process of the remaining build-out in ledge areas. Mr. Keogh also asked if the City was in compliance with the certificate of public good, what role Comcast plays, and what "proprietary information" concerns they needed to be aware of at the meeting.

In response to Mr. Keogh's e-mail, Mr. Leopold drafted and circulated an outline that broke down Burlington Telecom's issues and history into eight discrete areas of presentation. None of these topics mention Condition 60, but several would have conceivably discussed Condtion 60, including the first presentation on the history of Burlington Telecom, the fourth on Post Refinancing, and the seventh on Revision to CPG. It is impossible to tell from this information what was actually discussed at the meeting, or even whether the councilors received a copy of the outline at the meeting. No other communications discussing the meeting or taking any action as a result of the meeting exist in the packet. The remaining documents do not appear to reference Condition 60, but rather resume the details of the continuing litigation in front of the Public Service Board.

Legal Analysis

The discrete question for this memorandum is whether the release of these documents to the public "should occur." The answer depends upon several policy considerations.

1. *Authority to Waive Attorney—Client Privilege*

As a threshold matter, there is a question of whether the Council can release these documents to the public. Mr. Ellis gave the packet of documents to the Council in its capacity as City Officials. This is because Mr. Ellis is an attorney for the City, rather than any individual officer or official. As a municipal corporation, the attorney--client privilege is held by the City as a corporate entity. An individual officer or official of the City can waive the privilege, but only if that officer or official has the authority to do so. Within the City of Burlington's Charter there is no express grant of authority to a particular officer or official granting it the authority to oversee, audit, or control the City Attorney.

As a corporation counsel, the City Attorney serves the City, but Section 148, which lays out the attorney's role does not define who he answers to and who is responsible for making these decisions. Looking in a broader sense, three sections, 36, 48, and 116 appear to vest the general oversight authority with the City Council and the Mayor. Under Section 36, the Charter vests all "administration of all the fiscal, prudential and municipal affairs of the city and the government thereof" in the Mayor and the City Council. In Section 48 (60), the Charter authorizes the City Council "[t]o exercise any powers now or hereafter granted to municipalities under the laws of the state, and not inconsistent with the provisions of this charter." Finally, the Mayor can claim oversight of the city attorney through the Mayor's powers granted by Section 116. As the executive with the power to hire, fire, and direct, the Mayor has a strong argument to assert control over the city attorney and the city attorney's work product.

Under the general law of municipalities in Vermont, the power to oversee a municipal attorney is vested in the selectboard. Under 24 V.S.A. § 934, they have an explicit grant to perform this function. Furthermore, selectboards have a general grant of power under 24 V.S.A. § 872, which is a general grant of power.

Given that Burlington through its charter has adopted a stronger mayorial system and vested a great deal of executive authority in the mayor that would otherwise be held by the council/selectboard, it would be difficult to judge whether the right to control the work of the city attorney was vested solely in one branch or the other. In that respect, both sides may make a legitimate claims, and under Section 36 may do so legitimately. The answer is that both branches appear to have a separate roles as administrators of the city's affairs.

Just as the oversight of a private corporation's attorney falls to both the individual officer and the board of directors, so too does oversight of the city attorney fall to the mayor and the city council. Under Vermont law, the Council has an inherent right to oversee, audit, and make decisions regarding legal matters involving the City. While this power is not exclusive, it is not, by any charter provision, dependant on the Mayor. Thus, the Council may vote to waive its attorney client privilege as one of the city entities authorized under statute and charter to hold the privilege.

2. Potential Penalties or Negative Impacts

This all leads to the central question of what effect such disclosure is likely to have on the City and particularly on the City's petition to the Public Service Board. In performing this analysis, I am relying explicitly on communication that I received from the Council that Bill Ellis had no objections to making this communication public. As the attorney who has overseen and directed Burlington Telecom's petitions before the Public Service Board, he is in a better position to analyze the actual impact a release of this material may have and whether it would be harmful to release it at this time. My understanding is that Mr. Ellis does not object or recommend against making these communications public and does not feel that their disclosure would hurt the City's pending petition before the Public Service Board.

When we talk about the potential impacts that the communications might have on the City's petition, we are talking about the issues raised by the communications concerning Condition 60. Outside of these areas, the remaining communications do not appear to raise any significant issues. Despite the fact that these are attorney-client communications, which were made at the beginning of litigation that is still active, the statements in the e-mail can be characterized as housekeeping communications where approval is being given or minor alterations are being made. Very little if anything appears to involve Burlington Telecom litigation strategy or reveal much beyond what is already known to the other parties and to the Board. It is important to note, that as an attorney, I do not generally recommend the clients to waive their attorney-client privilege during litigation. Once the privilege is waived it cannot be regained. A document made public will forever be public. Therefore, there is an inherent reason not to disclose out of fear that you may be compromising or giving away your privilege. But this recommendation is a general one that must compete with the Council's obligation under Vermont law to make municipal documents public where possible. I will talk more to this issue in the next sub-section.

The major issue raised by the Condtion 60 communicaitons is that it proves, quite strongly, that the City knew it was in violation as early as the fall of 2008. When a telecommunications entity is in violation of its certificate of public good, the Public Service Board has a number of different options to deal with the violation. These range from a revocation of the certificate of public good to incremental fines (not to exceed $20,000 per offence) to greater control over the entity. 30 V.S.A. §§ 502–509.[1]

[1] It is the experience of this firm that the Public Service Board is loathe to levy fines against municipal owned utilities. While private companies like VELCO or Comcast have been subject to fines, these costs are born by the shareholders. In the case of Burlington Telecom, it has no shareholders, and any fines will, by necessity, be passed along to the citizens and taxpayers of Burlington. It is this firm's experience that the Board will simply not create such situations where the penalties are born by ratepayers or taxpayers. In this case, it would seem that such a fine would be in conflict with whole underlying charter provisions that require the Board to prevent Burlington taxpayers from bearing any expense of Burlington Telecom.

If these communications are released, the Public Service Board, the Department of Public Service, and Comcast will be interested in them and will use them in any proceeding. The inference that at least Comcast is likely to suggest is that this is evidence of a knowing and willful violation of Condition 60 and a subsequent cover-up by the City. While the City can argue against this interpretation, it does follow the evidence. Either way, the Board is likely to take notice of this information and is likely to use it in any decision.

The problem for the Council is that this information is not likely to change and is already, at least in part, in the public arena already. On September 30, 2009, the City amended its petition to include review and modification of Condition 60. The release of this information does not change that position, nor does it remove any argument that the City might have to seek modification. It does take away the City's ability to represent that this is a new development, but the City could not make that argument in the first place.

In considering possible impacts that the City is likely to face in light of the information contained in the communications, it is critical to remember that this situation was created by the City before the communications took place. At some point in early 2008, the City made the decision to "loan" money to Burlington Telecom in excess of what Burlington Telecom could repay on a 60-day cycle. The City made this decision with full knowledge of the Certificate of Public Good and with notice of its conditions. While Mr. Ellis appears to have become aware of this situation in the fall of 2008, the violation begins at the point that the City decides to loan money to Burlington Telecom. This is violation of Condition 60 that the Board is going to review first and foremost.

The impact of the communications is one of worsening. The argument can be made that instead of searching for a way to end non-compliance with Condition 60, these communications reflect a pattern of either ignoring the violation or hiding it. Neither will sit well with the Board, which is charged with overseeing compliance and is, as Mr. Ellis points out, looking to see if the non-complying entity has a plan for compliance.

In this case, the City's strategy is to 1) either restructure Burlington Telecom's financing to payback the City or 2) to obtain relief from Condition 60 through modification of these terms. I will not, at this time, speculate on the success either strategy is likely to have, but I will note that Condition 60 comes directly from the City's Charter, which restricts the Board from allowing the City to finance or loan money to Burlingotn Telecom.

In light of this situation, the release of the communications will worsen the City's situation as it is likely to remove what doubts may linger with the Board about when the City realized it was in non-compliance, but this worsening is one of degree that does no go to the major issues before the Board: that the City is in non-complaince with Condition 60; that it has been in non-complaince for almost 2 years; and that it cannot come into compliance without restructuring its finances or waiving the condition. All of these issues are either known to the Board or are not affected by release of the communications.

3. Obligations to Make Documents Public

As a public Board, the City Council is under a common law and legislative mandate to act in the public eye. Under 1 V.S.A. §§ 315–320, governments are charged with disclosing records because such open examination is "in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment." 1 V.S.A. § 315. The argument that some may offer that these documents are not fit for the public record would be based on the limited exemption granted in 1 V.S.A. § 317. This exemption permits a government to withhold from the public "records which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation."

In this case, the subject of these communications are likely to be ruled discoverable by the Public Service Board now that the City has made Condition 60 an issue. These communications go to the City's knowledge of its no-complaince and its efforts to deal with the non-compliance. While the exact communications would be protected by attorney–client privilege, the substance is not only relevant but arguably the subject of the pending discovery requests. Thus, the only confidentiality that these documents are likely to enjoy from both the public and the Board is one of form rather than substance.

As any municipal government, the City Council needs to weigh its obligations to make its records open. This obligation is a large one and has been the subject of much litigation. In each case, the Vermont Supreme Court has ruled that a government's obligation to make records public is a strong and compelling obligation and one that must be interpreted liberally to allow the most imformation to pass to the public. In this case, there is no legal obligation on the Council to make this information public. It is arguably protected by exemptions, but this exemption is at best temporary and will not prevent the substance of these communications from becoming public. In that light, it is consistent with the principles and intent of public records law to disclose as much information as possible even if the release of such information may cause "some inconvenience or embarrassment."

Conclusion and Policy Consideration

There is a larger policy question here that the Board must decide. Much of the anger that the public has expressed in this case has arisen from the fact that the prior decisions to loan money to Burlington Telecom appear to have been made outside the spotlight of public scrutiny. Up and until May 18, 2009, the City Council appears to have been unaware of these decisions as well. In fact, some have argued that as late as September 2009 they were unaware of the scope of Condition 60 and the City's non-compliance. With these e-mails, the Council is now aware that other officials were aware as early as the fall 2008 and possibly earlier. The Council can under the legal terms of attorney–client privilege withhold this information from the public indefinitely. There is, to be clear, no legal obligation for the Council to waive and disclose.

There is, to be clear, no legal obligation for the Council to waive and disclose. There is, however, a larger question of effect. By withholding this information, the Council will not be blocking its eventual release, but it will participating in the delay and avoiding public scrutiny. Both of these are arguably contrary to public policy and the policy of open records law. The release of this information will have some negative impact on how the Public Service Board views the current petition, but this impact will come whether the information is disclosed through these communications or through discovery. The release of the communications will not change the fact that the City is in non-compliance with Condition 60 and looks to be in non-compliance for the immediate future. It is Council's decision in weighing these issues to decide if its public obligations outweigh the potential negatives and likely embarrassment that this disclosure will have.

Sincerely,

Daniel P. Richardson

DR/brq