

SPECIAL CITY COUNCIL MEETING
CONTOIS AUDITORIUM, CITY HALL
TUESDAY, OCTOBER 20, 2009
7:08 P.M.

PRESENT: Councilors Adrian, Bushor, Berezniak, Mulvaney-Stanak, Caldwell (via phone), Davis, Kaplan, Shannon, Keogh, Kehoe, Paul (via Skype), Decelles, Dober and Mayor Kiss

ABSENT: Councilor Ellis

OFFICE OF THE CITY ATTORNEY: Ken Schatz

OFFICE OF THE CLERK/TREASURER’S OFFICE: Jonathan P.A. Leopold, Jr., Lori Olberg and Sue Trainor

PRESIDENT KEOGH PRESIDING:

1. AGENDA

Councilor Kehoe requested the agenda be amended to include a public forum. Council President Keogh suggested that the item be placed as item 3 on the agenda. Councilor Decelles suggested it would be more appropriate to place it as item 1.5 on the agenda prior to the reports. The agenda was approved unanimously.

1.5. PUBLIC FORUM

President Keogh opened the public forum at 7:12 p.m.

<u>Name</u>	<u>Ward/Affiliation</u>	<u>Subject</u>
John Franco	1	Deeply concerned; move forward effectively with BT
David Mar		Not supportive of BT
Jerry Marmelstein	Telecommunication Consultant	Supportive of BT; no expansion right now; need to resolve current issues
Michael Seaver		Misrepresentation by the Administration; trust has been lost by many in the City

There being no one coming forward, President Keogh closed the public forum at 7:22 p.m.

2. REPORT: Mayor Bob Kiss, Jonathan P.A. Leopold, Jr. CAO & Burlington Telecom General Manager Chris Burns, re: Update on Burlington Telecom (oral)

Mayor Kiss began by speaking about the importance of the long term economic development investment that Burlington Telecom represented, as well as the green infrastructure that was being recognized by

Burlington being called one of the 10 greenest cities across the country. As things change, the City will be able to adapt because of the infrastructure of Burlington Telecom.

The Mayor explained that in 2007 when the previous General Manager left, a consultant was brought in. There were three performance levels outlined by the consultant. Based on that business plan, Burlington Telecom was at the highest level of performance. The Mayor believed that Telecom and the City were on the right track. He noted the ongoing conversations with the Public Service Board and stated he believed that was the arena in which to deal with compliance of the CPG.

Burlington Telecom General Manager Chris Burns outlined the variety of services that were being provided to Burlington residents through Burlington Telecom and the national recognition it had received. At the end of the first quarter of Fiscal Year 2010, BT's revenues were within 4% of a target set in December of 2007. Operating expenditures in Fiscal Year 2009 came in at 1.8% below budget. The service goals set by the Public Service Board have been met or exceeded. BT's financial goals have been met within a 3 ½ year period as a start-up organization, explaining that most fiber to the home projects take 5 to 7 years to be independently successful.

CAO Leopold spoke about pooled cash, noting that it operated like a checking account for all departments except Burlington Electric and the School Department. Fifty different accounts were tracked. He explained the history of Burlington Electric's recent use of the pooled cash due to the financial market collapse, resulting in a significant deficit to the cash pool and the subsequent recent reimbursement once financing could be secured. He noted this was similar to the Burlington Telecom situation. He then outlined BT's financial history which highlighted Telecom's assets and deficits, noting the Board of Finance and City Council's involvement in decisions on financing over the last three years. CAO Leopold then read excerpts written by management (the CAO's Office) in 2008 from the financial statements of the City outlining the negative balance in the pooled cash as a result of Burlington Telecom, the plan to remedy the situation, and the results if unable to do so.

CAO Leopold then discussed the petition to the Public Service Board and outlined the information that was provided to the Council relative to financing and the CPG. He explained the discussions that occurred with the Department of Public Service. At that DPS meeting the top line of the balance sheet was a negative balance. When asked, the City informed the Department staff it was a result of a short term financing from the pooled cash. They explained that because of the financial collapse, the City had been unable to do a refinancing to replace the pooled cash funds.

CAO Leopold explained that in 2009 it was determined that a member of the Board of Finance, acting in his capacity as the attorney for Valley Net, had filed a CPG with the State as a competitor of Burlington Telecom. In February of 2009 it was decided by the Board of Finance to postpone any discussion of Burlington Telecom finances until there was a new Board of Finance. As of April 1 of that year, five new Councilors came on board and all members of the previous Board of Finance retired. When a new Council President was elected in mid-April, the Mayor and the CAO met with President Keogh to discuss the Administration's priorities, noting that one of the Administration's highest priorities was meeting with the full Council to discuss issues related to Burlington Telecom. That meeting then occurred in May. The Council was fully informed at that time about all issues related to Burlington Telecom.

CAO Leopold noted that reporting of this issue through the press indicated that the pooled cash issue was kept secret. He outlined the many times all of this information had been provided to the Board of Finance and the Council. He noted the impact of losing five senior Councilors had had a much greater impact than he had anticipated on this issue. He then outlined the refinancing options available and the costs associated with making quick decisions at this point. He stated financial consultants had been hired to review financing options. This would not be a quick fix and the issue had been pending since the May meeting with the Council. He reminded the Council that BT was a start-up venture and no start-ups were cash flow positive early on. He felt Burlington Telecom was on a path to success.

Mayor Kiss then went over his letter to the Council dated October 19, 2009 which addressed a number of items. The first item dealt with continuing to request clarification from the DPS on build-out requirements. The Mayor then recommended that an independent audit be done on Burlington Telecom each year, much like Burlington Electric had its own annual audit. The third item requested that the CAO report current refinancing options to the City Council no later than November 16th. The Mayor then stated he would be requesting an expedited hearing on Condition 60 with the Public Service Board in order to move forward on this issue more swiftly. The last recommendation was that a protocol be put in place making the use of pooled cash clear and predictable so that no one can misunderstand the use of the funds.

Councilor Kehoe noted the number of inquiries she had received and the concerns she has had to listen to from Ward 6. She noted that everyone's taxes went up recently and despite these taxes being supported at the polls, it had put strain on the taxpayers. She thought the Administration should honor the commitment to keep the taxpayers free of risk. She noted that, based on information from the DPS, on the high end Burlington Telecom was worth \$14 million which was frightening to her. Councilor Kehoe noted that the CAO had not explained why the cash outlay had increased from \$8 million to \$16 million. She also asked why the CAO waited until the new inexperienced Council was in place to explain the pooled cash issue.

CAO Leopold replied that the estimate provided by the DPS was incorrect for the type of service that Burlington Telecom provided and he did not know what they were referencing. He outlined the three benchmarks that should be looked at when determining the potential financial value of the company. He again outlined the continued growth and expansion despite the difficult financial times and the enormous potential of the system. CAO Leopold then reported that the deficit as of July 2008 was \$8.5 million. Sixteen months later, \$7 million revenue generating capital expenditures were required to hook residents up to the system. If BT refused to hook someone up, that would be a violation of the CPG. As to why the Administration waited to speak to the Council prior to May, he explained again the history noted above. He also spoke about DPS's primary focus being more about Condition 17 at the time.

Councilor Dober asked if the City felt they had overextended itself by purchasing a system that could handle over 100,000 customers. If a smaller system had been built, would it have been required to go into the cash pool? Burlington Telecom General Manager Burns stated he did not feel the City had overextended itself. A requirement was to be able to service the City and a smaller system could have required constant reconfigurations to add customers. CAO Leopold expanded on the response stating that the hub was expandable to 100,000.

Councilor Dober then asked about the interpretation of the City Charter relative to Burlington Telecom. City Attorney Schatz explained that language included by the Legislature indicated that the Public Service Board shall insure that no losses incurred by BT shall be borne by the taxpayers.

Council President Keogh asked Burlington Telecom General Manager Burns if he had read the Certificate of Public Good when he started in his position: he said that he had not. President Keogh asked when he became aware of Conditions 17 and 60. GM Burns explained it was at the same time that CAO Leopold had outlined. BT's main focus was on the 100% build-out requirement (Condition 17).

Councilor Adrian informed the Council that he had asked the Mayor to put CAO Leopold on unpaid administrative leave until this investigation was completed. He then pressed CAO Leopold for financial details on the amount spent from pooled cash since July of 2008. CAO Leopold explained that at the end of FY 2009, the amount spent was \$15 million. He noted at this time he did not have an audited statement he could use to compare fiscal year figures. Councilor Adrian then asked if the auditors read the Certificate of Public Good. CAO Leopold said he knew they had made recommendations to the City regarding compliance maintenance.

Following additional questions from Councilor Adrian regarding oversight of the finances of Burlington Telecom, CAO Leopold explained that he had been more actively involved upon the departure of the previous Burlington Telecom General Manager because the City at that point had already had to deal with two refinancings and he was concerned about protecting the City's interests. He believed BT was now on target with its business plan. Following another question from Councilor Adrian, CAO Leopold went into greater detail about the history of Mr. Nulty's expenditures and the efforts made by the administration to bring BT into a better financial position.

Councilor Adrian asked CAO Leopold when he discovered that Mr. Nulty was mismanaging Burlington Telecom. He responded stating he did not want to characterize Mr. Nulty's performance in such a way, as Mr. Nulty helped the City to succeed in creating a valuable asset. However, the estimates the City was working on were not being met. Councilor Adrian then asked if CAO Leopold remembered how he characterized Mr. Nulty in executive session in October.

Councilor Davis raised a point of order noting that Councilor Adrian was speaking about items that were discussed in executive session which he felt should remain confidential. Councilor Davis believed this was a violation of executive session protocol. Council President Keogh stated the point was well taken. Councilor Adrian asked for a ruling from the City Attorney about the matter. City Attorney Schatz spoke to this issue, noting that items dealing with litigation related to BT were no longer of as much concern. However, other matters that were discussed in executive session related to BT should remain confidential.

Councilor Adrian asked CAO Leopold about Tim Nulty's performance when he was the General Manager for Burlington Telecom. CAO Leopold replied that he believed the entire venture would have benefited from a more complete analysis of the requirements for building the system and more analysis of anticipated costs should have been done prior to commencing the project. Councilor Adrian then asked CAO Leopold why he continued to pull money from the cash pool in violation of the CPG. CAO Leopold explained again the sequence of events for him, maintaining that the issue the DPS and the City were working on was the build-out issue and it had been assumed that the City would refinance, returning the money to the cash pool upon completion of the financing. Again, he noted the conflict of interest that resulted from a Board of Finance member also being the lawyer for Valley Net. He reminded Councilor Adrian that in February at a Board of Finance meeting that he was attending, the Board (which was responsible for dealing with financial matters related to BT) voted unanimously to not take up Burlington Telecom matters until there was a new Board of Finance. The City would have been happy to meet with the new Board of Finance. However, there was not a meeting of the new Board until mid-April. It was then determined that the full Council wanted to be briefed, which pushed the matter back to May.

Councilor Adrian again asked the CAO why he did not notify the Council that the City was in violation of the CPG and stated that the CAO was only providing excuses. The CAO stated in hindsight it was a mistake, secondly, the City believed the focus was on Condition 17. Condition 60 was not focused upon until April when the City's counsel noted questions were being raised about it. Thirdly, he believed he had already explained in detail that the issue being dealt with all along was Condition 17 (the build-out).

Councilor Adrian then argued about whether the doors of BT would be closed if the Council decided not to use pooled cash. CAO Leopold stated if the Council told him to stop using pooled cash and pay the money back immediately he believed BT would have to stop operating. Councilor Adrian then asked if Telecom was sold for less money, how it would be reflected. CAO Leopold stated that ultimately, it would hit the fund balance of the General Fund.

Councilor Paul stated that an appraisal of Burlington Telecom was needed and independent answers were required.

Councilor Berezniak stated he believed that Burlington Telecom was a wonderful thing that the City was undertaking. However, he believed that the Council should have been brought up to speed about the issues and everyone needed to be able to trust the information they receive.

Councilor Decelles noted for the record that he would never sign on to Burlington Telecom, as he did not believe a city should run a business. He stated that his constituents did not believe him now and had lost trust in both the Administration and the Council.

Councilor Bushor supported Burlington Telecom and commented that she had been on board since its inception. She supported the appraisal or evaluation of the financial value of Burlington Telecom. She noted that she believed that the Council did not get involved enough in reviewing budgets and that was why she had wanted to hire a budget consultant. She mentioned that the Council had never been able to jointly hire a budget consultant which was disappointing. She believed that there were now lessons learned by the Council in this process. Having been on the Board of Finance when Mr. Nulty left, she remembered that there were significant underestimations of cost. While Councilor Bushor noted she was not defending the CAO, she did acknowledge the skill level of the CAO and what he had been able to accomplish for the City. Additionally, decisions on the management plan for Burlington Telecom were not made in a vacuum, as the City and the Council hired a consultant to review the viability of BT. She thought it would be important to bring that consultant back to review the present state of BT as well as its viability.

Councilor Bushor then asked Joseph E. McNeil, Esq. and Bill Ellis, Esq. to respond to the question of when the Public Service Department was informed of the cash flow problem. Attorney McNeil outlined the difference between the Public Service Board (quasi-judicial) and the Public Service Department (public advocate). He also noted that at the meeting that CAO Leopold reported on, there were financial statements that reflected a \$10 million deficit and it was discussed to a degree. There were no specific references to Condition 60 or the status of being in compliance or non-compliance with it. He then went into greater detail about the legal advice that was provided to the City in November. Attorney Ellis noted that discussions with the Department about Condition 60 did not occur until April of 2009. He also explained the discovery questions and the role that Comcast had in attempting to open up the Certificate to be reviewed again.

Following a question from Councilor Bushor, Attorney McNeil and CAO Leopold noted that the Commissioner said he could find no evidence that the City met with DPS staff in November. In fact, five people from the City met with 3 staff members of the Public Service Department at that time.

Councilor Kehoe asked for a point of order, asking that Councilor Paul be allowed to sign off which she did at 9:50 p.m. EST.

Councilor Caldwell stated that Councilors were continuing to ask the same questions of the administration, being accusatory, and questioning the integrity of individuals rather than working toward a solution. She stated the questions being asked of Attorney Ellis and McNeil were already provided to Councilors. She asked that people step back from the politics of BT and that the tone of the discussion be changed. Additionally, she noted that not one of her constituents had contacted her about Burlington Telecom. She thought the Councilors were making this a political issue for their own political aspirations.

Councilor Kaplan expressed shock that Councilor Caldwell had heard from none of her constituents regarding BT. She reiterated that trust was in question and echoed the sentiment of the Mayor that an independent audit should be done of BT. She said that Burlington Telecom needed to move forward and needed a business plan with others overseeing the organization, i.e. commission, etc.

Councilor Mulvaney-Stanak agreed with Councilor Caldwell, stating that she had heard from only three of her constituents about Burlington Telecom. She noted that lessons had been learned by both the Administration and members of the Council. She believed that all Councilors had the responsibility to work toward moving forward with this tremendous asset. In order to restore confidence, she supported an independent audit/appraisal, as well as a business plan for Burlington Telecom.

Councilor Shannon stated she had heard from a variety of thoughtful individuals who had voiced serious concerns regarding BT and its future. She also had heard from people who understood the value of Burlington Telecom, particularly businesses. She noted that prior to Mr. Nulty leaving, much more information was shared. It may or may not have been correct information but at least it was shared. She then referred to the March 2007 Nulty discussion before the Council when funds were overspent and why more money was needed. At that time there was a lot of paperwork provided. However, after Mr. Nulty left and additional money was needed, no paperwork was provided to the Council. She believed it was imperative to determine what the oversight structure would be in the future because she did not believe the Council was the appropriate place to make these decisions. She also spoke about the fact that her constituents still did not have access to Burlington Telecom. She stated she desperately wanted a business plan that outlined the road to success.

CAO Leopold understood that people wanted to know when BT will build in Red Rocks and Northshore, noting that Mr. Burns dealt with that question all the time. Since November 2007, however, the position that had been taken was not to make a commitment until they knew how much it would cost. He outlined the project's history of being informed by the prior general manager of higher and higher costs. Since December of 2007, the plan the management had been pursuing had been adhered to and fulfilled without making pie in the sky promises. The City had gone to the Department stating they would fulfill Condition 17 when BT was cash flow positive which they anticipated would happen between January 2011 and January 2012. The Department was pushing for commitments that the City did not feel comfortable committing to and the City did not want to make promises it could not keep. There have been no overruns since 2007, expenses are on track, and the reporting was provided to the Board of Finance. He noted the problem again with handing out the information in the past as a lot of the proprietary information was used by Valley Net.

A motion was made by Councilor Adrian, seconded by Councilor Bushor, to suspend the rules with the request that it be further amended by Councilor Bushor, seconded by Councilor Mulvaney-Stanak to limit the extension to Councilors who had not already spoken. Councilor Adrian asked the City Attorney if a limitation of that sort was allowed, which was answered in the affirmative. The motion failed by a vote of 7 ayes; 4 nays: Councilors Bushor, Mulvaney-Stanak, Davis and Keogh). Councilor Bushor noted she had not seconded the original (without the limitation) which then prompted Councilor Kehoe to second the motion. The vote then to suspend the rules and extend the meeting failed, for lack of a 2/3 majority, by a vote of 7 to 4, with Councilors Kaplan, Bushor, Mulvaney-Stanak and Davis voting against.

The motion to adjourn was made at 10:30 p.m.

Attest:

Lori Olberg, Licensing, Voting and Records Coordinator and Sue Trainor, Assistant to the CAO