



City Council
Archie Hubbard, III, Mayor
Bill Hartley, Vice Mayor
Catherine Brillhart, Council Member
Guy P. Odum, Council Member
Jim Steele, Council Member



BRISTOL VIRGINIA CITY COUNCIL
300 Lee Street
Bristol, Virginia 24201
March 15, 2016

Called Meeting

6:30 p.m.
Call to order

AGENDA:

1. Consider Request from BVU to Approve the Sale of the Optinet Division to Sunset Digital Communications, Inc.
 - a. Staff Report
 - b. Public Comments
 - c. Council Motion and Second
 - d. Council Discussion
 - e. Roll Call

- A. Adjournment

**BRISTOL, VIRGINIA CITY COUNCIL
AGENDA ITEM SUMMARY**

Meeting Date: 3-15-2016

Department: City Manager

Bulk Item: Yes No X

Staff Contact: Tabitha Crowder

AGENDA ITEM WORDING:

Consider Request from BVU to Approve the Sale of the Optinet Division to Sunset Digital Communications, Inc.

ITEM BACKGROUND:

The Board of Directors of BVU Authority has provided the Bristol City Council with a Purchase Agreement dated February 5, 2016 between the BVU Authority and Sunset Digital Communications, Inc. This is a required transmittal pursuant to Section II(5) of the Transition Agreement dated November 2, 2009 between BVU Authority and the City of Bristol as it was reaffirmed by Council on February 9, 2016. City Council approval is required prior to the sale of any BVU division.

PREVIOUS RELEVANT ACTION:

Staff Recommendations:

DOCUMENTATION: Included Not Required

MOTION: _____

GEO. E. PENN (1895-1931)
WM. A. STUART (1922-1976)
G.R.C. STUART (1952-1991)

PENNSTUART

Since 1890

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March 11, 2016

Bristol Virginia City Council

Mayor Archie Hubbard
Vice-Mayor Bill Hartley
Councilman Jim Steele
Councilwoman Catherine Brillhart
Councilman Guy Odum
Pete Curcio, Esq.
300 Lee Street
Bristol, Virginia 24201

Dear Council and Mr. Curcio:

As you know, this firm represents BVU Authority. The purpose of this letter is to address several issues raised during the March 8, 2016 City Council meeting regarding the Asset Purchase Agreement (“APA”) between BVU Authority (“BVU”) and Sunset Digital Communications, Inc. (“Sunset”).

As the City is aware, BVU and Sunset have executed a binding agreement. Both parties are obligated to exercise good faith in moving the APA toward closing. There is no provision in the APA that allows BVU to consider other offers. In fact, the APA specifically prohibits BVU’s consideration of competing offers, a typical condition in transactions of this kind. BVU has not received any other actual offers in any event.¹

¹ A review of prior emails that were referenced at the Council meeting did not reveal any purchase offers. Further, to BVU’s knowledge, there has been no request from such third parties for a copy of the APA.

While I know that each of you has had an opportunity to review the APA in detail, for convenience I also enclose a “term sheet” that summarizes some of the key points of the APA for easier reference.

As Chairman Jim Clifton and CEO Don Bowman informed City Council, although the Board of course put significant emphasis on obtaining a fair price, the Sunset transaction has many other aspects that counseled acceptance of this deal. These include Sunset’s commitment to offer employment to at least seventy-five employees of BVU (§ 6.06), the network center and customer service lease agreement under which Sunset would lease and use roughly half of the network center campus (§ 2.02(h)), and the “anti-flip” provision under which if Sunset disposes of a material portion of the assets within three years after closing, it must pay \$1 million plus any outstanding amounts under the promissory note between the parties (§ 6.24).

As to the purchase price itself, BVU obtained an independent valuation of the Optinet business and the purchase price of \$50 million is within the range of the value placed on that business. Further, the APA contains as a condition to closing that BVU obtain an opinion that the value received under the APA be fair. BVU is working to obtain that opinion, along with satisfying many other conditions, prior to closing. Importantly, the purchase price amount will allow the resulting BVU Authority (electric, water and sewer) to become debt free.

A question was raised at the Council meeting regarding the process leading to the APA. Initially, as a legal matter, pursuant to the BVU Authority Act, Virginia Code § 15.2-7207(16), BVU has the power “to own, purchase...or otherwise acquire any property, real or personal...and dispose of any or all such properties as is deemed appropriate by the Board.” Neither § 15.2-7207 nor any other Virginia law requires BVU to follow any particular process such as a request for proposals or public bidding when exercising this power.

Although BVU has the power to enter into an agreement without a public bidding process, there is also a practical reason why such a process is not appropriate here. As has been previously described, Sunset approached BVU with an unsolicited offer. As part of that process, the parties entered into a letter of intent under which the parties were committed to dealing exclusively with one another to reach an agreement within an agreed upon price range and there were penalties if an agreement with standard terms was not reached. The parties also agreed to nondisclosure and confidentiality.

The practical reason behind this approach as opposed to a public bidding process, is that Optinet operates in a highly-competitive market place. Its internal financial information, customers, infrastructure and many other details are essential to continued successful operation of the business. A public bidding process would contemplate receipt and review of this competitively sensitive information by current or future competitors of Optinet. However, unlike an agreement with a particular party who has agreed to be bound by a letter of intent, a non-disclosure agreement and other confidentiality restrictions, a public bidding process would essentially open up all of Optinet's sensitive internal information to competitors with no assurance of reaching a suitable agreement or protection of Optinet's competitive position. Moreover, the sale and transfer contemplated by the APA is simply too complicated, with multiple contingencies, variables, technical aspects, and interested parties to be offered as a simple bid to the "highest bidder."

There were also some questions raised regarding the due diligence in this process. The technical team from BVU and representatives from Sunset, along with legal counsel and financial advisors, have worked extensive hours over the past few months compiling information and pouring through documents, financial data and technical information to assure both sides that the agreement that was ultimately reached was feasible and reasonable. Only after that exhaustive effort did the parties agree upon the terms of the APA.

BVU is satisfied that Sunset (with substantial assistance from BVU's current employees who will become Sunset employees) can operate the system at a high level that current customers have come to expect. Likewise, Sunset completed exhaustive due diligence of Optinet. Frankly, it is impractical and unrealistic for a third party to come forward --without having done any of the due diligence that BVU and Sunset have completed -- to say that it would be willing to pursue Optinet on better terms.

Pursuant to the Transition Agreement, which has been incorporated into the APA, a condition of the closing is that the City approve the APA. BVU believes that the APA represents a fair and reasonable deal for the assets of Optinet, and BVU encourages the City to support it.

Because of current restrictions and likely future additional restrictions upon BVU, BVU believes it to be imperative that Optinet assets be taken over by a private entity as soon as possible. Sunset is not only committed to operating the current Optinet system,

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but it is also committed to expanding the network into businesses and homes throughout the region in ways that BVU cannot.

BVU urges Council to place the APA approval on the agenda for the next Council meeting and to vote to approve it.

If you need further information, please let me know.

Sincerely,

PENNSTUART

By:  Cameron S. Bell

CSB/ct

cc: Donald L. Bowman, CEO
Board of Directors of BVU Authority

Asset Purchase Agreement

Term Sheet

The following summary is for informational purposes only and does not reflect all of the many terms and conditions of the Asset Purchase Agreement. The terms and conditions of the Asset Purchase Agreement govern and control.

1. Date: February 5, 2016
2. Parties: BVU Authority (“BVU”) as seller, and Sunset Digital Communications, Inc. (“Sunset”) as buyer.
3. BVU OptiNet: BVU’s OptiNet division and related assets – providing fiber-optic broadband telecommunication and information services – are *included* in the sale. (Section 2.01.)
4. BVU Essential Services: BVU’s Essential Services division and related assets – providing electricity, water, wastewater and related services – are *excluded* from the sale. (Section 2.02.)
5. Purchase Price: \$50 million, including \$48 million in wired funds due at Closing and \$2 million promissory note providing for interest at the prime rate and payment over five years. (Section 2.05.) The Purchase Price will be adjusted after Closing to provide Sunset with Target Working Capital of \$650,000. (Section 2.06.)
6. Closing: Closing will take place within two business days of June 1, 2016 or the earlier date that all conditions to Closing are met, and the Closing Date may be

- extended by mutual agreement. Closing will be at the offices of PennStuart in Abingdon, Virginia. (Sections 3.01(a) and 9.01(b)(ii) and (c)(ii).)
7. Employees: Sunset shall offer employment to all or substantially all and in any event at least 75 employees of BVU's OptiNet division. (Section 6.06.)
 8. Post-Closing Agreements: The parties will enter into the following agreements:
 - (i) a Network Center and Customer Service Lease Agreement from BVU to Sunset for a portion of BVU's building on Lee Highway, (ii) a Transition Services Agreement for collections, cashiers, and other mutually agreed upon services by BVU to Sunset, (iii) a BVU Essential Services Telecommunication Agreement for services from Sunset to BVU, and (iv) a BVU Essential Services License for the license or sublicense by BVU to Sunset of real property, poles, and right-of-way, pole attachment, and other infrastructure agreements that are used by both the OptiNet and Essential Services divisions. (Sections 2.02(h), 4.10(b), 6.18, 6.19, 7.02(i) to (l).)
 9. Separation Plan: The parties will agree on a Separation Plan fifteen days prior to Closing. (Section 6.17.)
 10. Conditions to Closing: Conditions to Closing include without limitation (i) consent or approval from the City of Bristol, Cumberland Plateau Company ("CPC"), and the EDA, NTIA, Tobacco Commission, and other entities providing grant monies, (ii) CPC's waiver or failure to exercise its right of first refusal, (iii) repayment and defeasance of BVU's 2010 Build America Bonds, (vi) consent from third parties to assignment of various assumed contracts, (v) Sunset's receipt

- of financing on terms acceptable to it (Sunset must provide a written commitment for financing by May 1, 2016), (vi) delivery of all Transaction Documents, and (vii) other customary conditions. (Article VII.)
11. Reps and Warranties: BVU is making certain customary representations and warranties regarding its organization and authority and the OptiNet assets and liabilities. (Article IV.) Sunset is making certain customary representations and warranties regarding its organization and authority. (Article V.) BVU is not warranting the sufficiency of its rights under any right-of-way, pole attachment, and other infrastructure agreements and is quitclaiming such rights. (Section 4.29(d).)
 12. Assumed liabilities: Sunset will assume liabilities related to the OptiNet division, including without limitation liabilities with respect to (i) various grants from the EDA, NTIA, and Tobacco Commission, (ii) right-of-way, pole attachment, and other infrastructure agreements, and (iii) BVU's agreement with CPC. (Section 2.03.)
 13. Excluded liabilities: BVU will retain liabilities related to the Essential Services division and certain liabilities related to the OptiNet division, including without limitation liabilities with respect to (i) certain ongoing governmental investigations, (ii) certain pending actions, (iii) certain obligations to employees, (iv) certain debts to financial institutions. (Section 2.04.)
 14. Covenants: BVU is making certain covenants related to conducting its business prior to Closing (Section 6.02), providing access to information (Section 6.03),

refraining from soliciting or accepting other proposals to acquire the OptiNet division (Section 6.04), and providing notice of certain events (Section 6.05). The parties will maintain the confidentiality of shared information. (Section 6.07.) The parties will permit inspection of books and records for periods following Closing. (Section 6.10.) The parties will cooperate to obtain required consents and approvals. (Section 6.09.)

15. **Limits on Certain Liabilities:** There is no time or dollar limits on Assumed Liabilities and Excluded Liabilities. Most other representations and warranties survive for two years after Closing (Section 8.01). Neither party is liable for the other representations, warranties, and covenants until the aggregate amount of losses to the other party exceeds \$150,000, and each party's aggregate liability for such losses will not exceed \$2 million. (Section 8.04.)
16. **Non-Compete:** For a period of five years after Closing, BVU will not compete with Sunset or solicit Sunset's employees, and Sunset will not solicit BVU's employees. (Section 6.08.)
17. **Sale by Sunset:** In the event Sunset disposes of a material portion of the assets acquired under the Agreement within three years after Closing, Sunset is required to pay BVU \$1 million plus any outstanding amounts under the promissory note. (Section 6.24.)