

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6395

Investigation into the Issuance of a Certificate of)
Public Good, pursuant to Section 231 of Title 30,)
to Mountain Cable Company, Better TV, Inc. of)
Bennington, Lake Champlain Cable Television)
Corporation, Richmond Cable Television)
Corporation, Multi-Channel TV Cable Company,)
FrontierVision Operating Partners, L.P., Harron)
Communications Corporation and Young's Cable TV)
Corporation for the provision of telecommunications)
services)

Order entered: 4/5/2002

I. BACKGROUND

In 2000, the Public Service Board ("Board") renewed Certificates of Public Good ("CPG") for Mountain Cable Company and Better TV, Inc. of Bennington, both d/b/a Adelphia Cable Communications ("Adelphia" or "Company"), accepting Adelphia's commitment to a significant upgrade of the Company's existing infrastructure. Adelphia's upgrade would allow the Company to offer a broader range of programming, making available a large number of digital channels. Of more significance to this proceeding, the upgrade also made it possible for Adelphia to offer customers its two-way PowerLink service that provided high-speed access to the internet using cable modems. In the Order renewing the CPGs and accepting Adelphia's proposal, the Board stated that the PowerLink service appeared to be a telecommunications service under Vermont law (Section 203(5) of Title 30).

Accordingly, on June 22, 2000, the Board opened this investigation to examine whether under Vermont law, the two-way PowerLink service was a telecommunications service, whether Adelphia needed separate CPGs under Section 231 of Title 30 to offer these services and if required, whether the Board should issue those CPGs. The Board's Order observed: "Vermont law seems to require that Adelphia obtain a CPG under 30 V.S.A. § 231 authorizing the provision of telecommunications services." The Board directed the Hearing Officer to examine

six specific questions, as well as related issues such as possible unbundling obligations that would apply if the Board concluded that Adelphia provided telecommunications service:

1. Whether the two-way Powerlink service constitutes a telecommunications service under Vermont and/or federal law?
2. Whether Adelphia's existing cable CPGs (and the CPGs issued to other companies operating as Adelphia Cable Communications in Vermont) authorize the provision of telecommunications services?
3. Whether Vermont law requires Adelphia to obtain a separate CPG under Section 231 to offer telecommunications services?
4. If Vermont law does require a separate CPG, whether federal law preempts Vermont from requiring Adelphia to obtain that CPG?
5. Separate from the requirement to obtain the CPG, whether federal law preempts the State from regulating Adelphia as a telecommunications provider?
6. If Adelphia is required to obtain a CPG, does the issuance of a Section 231 CPG to Adelphia promote the general good of the state?

Soon after the Board initiated this proceeding, the Federal Communications Commission ("FCC") issued a Notice of Inquiry ("NOI") to "explore issues surrounding high-speed access to the Internet provided to subscribers over cable infrastructure."¹ Because FCC action could significantly affect the manner in which the Board would regulate cable modem service, the parties requested, and the Hearing Officer agreed, to defer action on this proceeding for a short period while awaiting FCC action.²

On March 14, 2002, without providing an opportunity to comment upon the proposed action, the FCC adopted a Declaratory Ruling and Notice of Proposed Rulemaking ("Declaratory Ruling").³ In the Declaratory Ruling, which sets out an expansive view of federal jurisdiction, the FCC rules that cable modem service is an information service, not a telecommunications service.⁴ In addition, the FCC concluded that the cable modem service is interstate in nature.

1. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287 (2000).

2. This period was extended several times.

3. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (2002).

4. Declaratory Ruling, ¶ 38.

After examining the record in this proceeding and the recent FCC action, I recommend that the Board close this investigation.⁵ The FCC's Declaratory Ruling and the Proposed Rulemaking make it clear that the federal law requirements and the extent to which they preempt Vermont legal requirements, will be uncertain for an extended period of time. The FCC's position is now more clear, but whether that position is valid remains unresolved for at least two reasons. It is likely that the Declaratory Ruling will be appealed, both (1) on substantive grounds, and (2) because the FCC issued it without prior notice of proposed rulemaking.⁶ In addition, the FCC has already taken nearly eighteen months to move from Notice of Inquiry to Notice of Proposed Rulemaking. Issuance of a final rule following comments could well take significant time (without taking into account the likely appeals).

Against this backdrop, it makes little sense to take action in this docket at the present time. Resolution of the validity of the FCC's position will require decisions by the Federal judiciary rather than by this Board (although state law on this issue may bind the Board absent a federal ruling to the contrary). It also does not seem reasonable to keep this docket open indefinitely, with no action, while the State awaits further guidance from the FCC. Instead, I recommend that the Board close the instant proceeding.⁷

I want to make clear that the decision to close this investigation does not represent a conclusion on any of the issues that the Board opened this investigation to consider. I do not reach any decision as to whether Adelphia must obtain a CPG for its cable modem service.⁸ Similarly, I do not find that the FCC's Declaratory Ruling has preempted all state jurisdiction over cable modem service. However, at this time, pursuing these issues does not appear to be worthwhile.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811. I note, however, that this Proposal for Decision is not adverse to any party

5. During a Status Conference on March 14, 2002, counsel for Adelphia requested that the Board close this docket.

6. FCC Commissioner Copps highlights this flaw in his dissent.

7. After the FCC and federal courts provide additional clarity on the applicable legal framework, it may be appropriate to initiate a new proceeding to examine the issues that the Board had intended to address in the case.

8. As the Board observed on several other occasions, the definition of telecommunications service in Section 203(5) appears to encompass the cable modem service.

— it in no way affects the rights of either Adelpia or the Vermont Department of Public Service (the parties to this proceeding) or Adelpia's obligations under Vermont law — and thus Section 811 does not require that the Board permit comments.

Dated at Montpelier, Vermont, this 3rd day of April, 2002.

George E. Young
George E. Young
Hearing Officer

II. BOARD DISCUSSION

We accept the Hearing Officer's recommendations and close this docket. The Federal Communications Commission's ("FCC") recent actions and the further rulemaking and litigation that is likely to follow, have created significant uncertainty as to the applicable regulatory framework for cable modem service. Indeed, we note that the FCC's Declaratory Ruling has already been appealed to the United States Circuit Court of Appeals. Although it appears that Adelphia's cable modem service falls within the definition of telecommunications service in Section 203(5) of Title 30, the present uncertainty leads to the conclusion that there is little reason to push for resolution of this issue immediately. Final resolution of this issue requires actions in the federal courts, rather than in the state regulatory process.

III. ORDER

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

1. The Hearing Officer's recommendations are accepted.
2. Pursuant to 30 VS.A. §§ 203(5) and 231, this investigation is closed.

Dated at Montpelier, Vermont, this 5th day of April, 2002.

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| <u>s/Michael H. Dworkin</u> |) | |
| |) | PUBLIC SERVICE |
| |) | |
| <u>s/David C. Coen</u> |) | BOARD |
| |) | |
| |) | OF VERMONT |
| <u>s/John D. Burke</u> |) | |

OFFICE OF THE CLERK

FILED: April 5, 2002

ATTEST: s/Susan M. Hudson
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 mail) 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.