

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6632

Joint Petition of Winstar Wireless, Inc. and)
Winstar Communications, LLC for Approval)
of Assignment of Assets and Related Transactions)

Order entered: 2/8/2002

I. INTRODUCTION

On January 18, 2002, Winstar Wireless, Inc. ("Old Winstar") and Winstar Communications, LLC ("New Winstar" or the "Company") (collectively "Petitioners") jointly filed a Telecommunications Merger and or Acquisition Request for Approval Form ("Petition") requesting authority from the Vermont Public Service Board ("Board"), pursuant to 30 V.S.A. §§ 107, 109, and 231, for a series of transactions arising out of Old Winstar's bankrupt status. Petitioners seek approval of the acquisition of Old Winstar's assets by the parent company of New Winstar and the assignment of those assets to New Winstar. Petitioners have also filed a Telecommunications Provider Registration Form requesting a Certificate of Public Good ("CPG") be issued to New Winstar. Finally, the Petitioners request that the CPG to provide telecommunications services in Vermont held by Old Winstar be revoked effective upon the date of the transaction's closing.

On January 30, 2002, the Vermont Department of Public Service ("Department") filed a letter with the Board recommending the Board approve the transactions because they should be transparent to existing customers of Old Winstar and would not detrimentally impact Vermont consumers or cause them inconvenience or confusion. The Department further recommended the Board approve the petition without further investigation or hearing.

The Board has reviewed the Petition and the accompanying documents and agrees that approval should be granted without hearing.

II. FINDINGS OF FACT

Based upon the Petition and accompanying documents, we hereby make the following findings of fact.

1. Old Winstar is a Delaware corporation authorized to provide facilities-based and resale telecommunications services in Vermont pursuant to a Certificate of Public Good granted by the Board on December 17, 1999, in Docket No. 6075. Old Winstar is an indirect subsidiary of Winstar Communications, Inc. Petition at 1, 4.

2. New Winstar is a recently formed Delaware limited liability company. New Winstar was formed specifically in conjunction with the proposed acquisition of Old Winstar and affiliated companies. New Winstar is an indirect subsidiary of Winstar Holdings, LLC, which is in turn an indirect subsidiary of IDT Corporation. Petition at 3.

3. New Winstar has certification applications pending in several states throughout the northeast and mid-Atlantic United States. Exhibit B at 3.

4. New Winstar was granted its articles of organization to transact business in Vermont on January 15, 2002. New Winstar has provided the necessary documentation regarding management structure and financial information. Exhibit B, H and attachments.

5. New Winstar has not filed for bankruptcy and has never been the subject of an investigation by a state or federal authority. Exhibit B at 4.

6. New Winstar intends to provide intrastate, interexchange services throughout the State of Vermont. Exhibit B at 3.

7. New Winstar intends to serve all the counties in Vermont within twenty-four months of obtaining authorization. Exhibit B at 3.

8. Pursuant to this transaction, IDT corporation through its holding company, Winstar Holdings, LLC, is acquiring the assets of Old Winstar pursuant to section 363 of the United Bankruptcy Code, 11 U.S.C. § 363, and will operate those assets through certain newly formed subsidiaries. In order to complete the transaction, Winstar Communications, Inc. and Winstar Holdings, LLC and Old Winstar, have entered into an asset purchase agreement whereby all the operating assets of Old Winstar will be sold to Winstar Holdings, LLC and in turn, transferred to New Winstar to operate. Petition at 6-8.

9. As a result of the transactions, Old Winstar will no longer operate as a telecommunications provider in Vermont and consequently Petitioners request revocation of Old Winstar's CPG. The customers of Old Winstar will be served by New Winstar and the services offered will be incorporated into the tariff of New Winstar. Accordingly, the transactions will

not cause any inconvenience for Vermont consumers. Petition at 2; and Exhibit A.

10. The proposed transactions should prevent a discontinuance of service to Old Winstar customers and will be conducted in a transparent manner to these customers. The transactions should also result in a more efficient corporate structure, thus enhancing the ability of the New Winstar to offer competitively priced services in the Vermont interexchange telecommunications marketplace and promoting the public interest. Petition at 10.

III. DISCUSSION

The proposed transaction requires approval by the Board under 30 V.S.A §§ 107, 109 and 311. These statutes condition approval of a proposed transfer of control upon findings that the transfer of control will promote the public good (30 V.S.A § 107). The statutes also condition approval of a merger upon a finding that the merger or sale of assets will promote the public good (30 V.S.A. § 109) and will not obstruct or prevent competition (30 V.S.A § 311). These standards are met in this case.

Pursuant to 30 V.S.A. § 109, "a foreign corporation subject to the jurisdiction of the [Board], shall not . . . merge nor consolidate . . ." without approval of the Board. 30 V.S.A. § 311 states that "[a] consolidation or merger . . . shall not become effective without the approval of the [Board] . . ." Under 30 V.S.A. § 107(a), "[n]o company shall directly or indirectly acquire a controlling interest in any company subject to the jurisdiction of the [Board] . . . without the approval of the [Board]." "Controlling interest" is defined as "ten percent or more of the outstanding voting securities of a company" or such other interest as the Board determines "to constitute the means to direct or cause the direction of the management or policies of a company." 30 V.S.A. § 107(c)(1).¹ In order to approve the acquisition of such a controlling interest, the Board must first find that it will "promote the public good." 30 V.S.A. § 107(b).

After reviewing the Petition, we conclude that 30 V.S.A §§ 109 and 311 apply to the sale of assets of Old Winstar, which is a certificated telecommunications carriers in Vermont. We

1. The statute also provides that "[t]he presumption that ten percent or more of the outstanding voting securities of a company constitutes a controlling interest may be rebutted by a company under procedures established by the board by rule." 30 V.S.A. § 107(c)(1).

further conclude that the asset sale will not affect the services that the Old Winstar currently provides to customers in Vermont because New Winstar will offer the same services and rates to these customers. The customers of Old Winstar will be served by New Winstar under its tariff offerings which will be consolidated into New Winstar's tariff. The sale of assets, therefore, will promote the public good. For all of these reasons, we conclude that the proposed transaction meets the standards set forth in 30 V.S.A. §§ 107,109, and 311 and should be approved.

Petitioners have also requested that the Board revoke the CPG held by Old Winstar, in that this company will, as a result of the asset sale to New Winstar, no longer operate in Vermont. No opposition to this request has been raised. The Board finds the reasons articulated by the Petitioners in support of the request to be convincing. This finding, together with the fact that no opposition to the filing has been registered with the Board, leads us to conclude that Old Winstar's CPG should be revoked. While 30 V.S.A. §§ 102(c) and 231(a) require that a hearing be held before revocation of a CPG is allowed, we note that Rule 56 of the V.R.C.P. provides that where no genuine issue of material fact exists, a hearing is not necessary. We find that the requirements of V.R.C.P. Rule 56 are met in this case and, therefore, grant the Petitioners' request without a hearing.

Sections 102 and 231 of Title 30, V.S.A., require that a CPG be issued before a company can offer telephone service to the public in Vermont. Such entry regulation statutes were traditionally designed for two purposes. The first is to protect consumers against incompetent or dishonest businesses. The second was to protect existing providers by limiting or eliminating their competitors. See, e.g., Docket No. 5012, *Petition of Burlington Telephone Company*, Order of 5/27/86.

The first rationale for entry regulation -- "consumer protection" -- remains one of the Board's policy objectives. Having reviewed the petition of Burlington and all related materials, the Board concludes that the evidence does not demonstrate that the technical, managerial and financial resources are inadequate. When combined with alternatives available in a competitive marketplace and recognizing that consumers are free to use another competitor's services with minimal transaction cost, we conclude that concerns for consumer protection have been sufficiently addressed. Concerns for consumer protection are, therefore, not cause for rejection of Burlington's petition nor do they warrant an investigation at this time.

The second -- or "franchise protection" -- rationale was rejected by the Board, after careful consideration in Docket No. 4946. In that Docket's Order of February 21, 1986, the Board concluded that, despite all its dangers and inherent drawbacks, the public benefits of competition outweighed any flaws, and that competition should be permitted in Vermont's markets for message telephone service and other communications services.

Vermont policy, established by the Board and enunciated through the State Telecommunications Plan ("Plan") (adopted by the Department), has firmly supported opening the local exchange market to competition. This policy has been reaffirmed by the Board in Docket 5713, the Board's investigation into competition in the telecommunications arena and Docket 5909, in which the Board authorized Hyperion Telecommunications of Vermont, Inc. ("Hyperion") to provide local exchange competition.²

The Board's support for competitive entry is consistent with the state's telecommunications policies as set out in the State Telecommunications Plan. That Plan clearly states that competition is the preferred strategy to achieve Vermont's goals of reasonable price, availability and high quality of service provided that there is adequate assurance that the needs of all consumers will be met. The Plan also encourages the Board to create a "framework to facilitate competition, while assuring affordable basic service rates, high quality of service, consumer protection, and universal service via interconnection agreements and Docket No. 5713 investigation and decisions."³ The Board has moved to establish such a framework in various rulings over the last several years.

Federal law also applies to the broader questions of competitive entry. Under Section 253(a) of the Telecommunications Act of 1996 ("Act") which amended the Communications Act of 1934, states may not "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." States retain authority, however, to:

impose, on a competitively neutral basis and consistent with Section 254 [47 U.S.C.A. § 254], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the

2. Docket 5713, Order of 5/29/96 at 13 (later stages of that proceeding will further define the framework for telecommunications competition within the state); Docket 5909, Order of 1/14/97.
3. Vermont Telecommunications Plan (dated December 1996) at iii.

continued quality of telecommunications services, and safeguard the rights of consumers.⁴

Thus, federal law makes clear that states cannot bar competitive entry. State commissions may still require new service providers to obtain franchises (or, in Vermont, CPGs), although they may not use that authority to prohibit all competitive entry.⁵ Vermont also may continue to impose competitively neutral conditions to achieve the purposes enunciated in Section 253(b).

At the present time, however, the Board has not fully investigated the conditions that should apply to entry into local exchange competition. In Docket 5909, the Board concluded that, in general, conditions related to competitive entry could be deferred to Docket 5713 (and its successor dockets). In Docket 5909, the Board included a specific condition in Hyperion's CPG making clear that Hyperion must comply with any conditions related to competitive entry imposed in subsequent Board proceedings. The Board sees no reason to deviate from that policy here and recommends inclusion of a similar provision in New Winstar's CPG.

The Company should also be aware of the Board's policy regarding the provision of operator services, should the Company, in the future, choose to offer these services. As a substantive matter, the Board has previously found that, for carriers such as the Company that do not possess market power, there is little need for cost-of-service or rate-of-return regulation in order to meet the statutory criterion of just and reasonable rates. There is an exception regarding regulation of rates, however, with respect to rates for operator services. In our Order of 1/6/95 in Docket No. 5566, Generic Investigation into the Regulation of Public Telephone and Operator Service Providers in Vermont, we noted that "customers who are not expert in the rapidly changing field of telecommunications . . . stand to be taken advantage of in an imperfect market, where rates are unregulated, may be extraordinarily high and may be incurred by the end user without the equivalent of his knowledgeable consent." Docket No. 5566, Order of 1/6/95 at 101. Consequently, we mandated rate caps for operator services, set at the rates charged by New England Telephone and Telegraph Company, now known as Verizon New England Inc. ("Verizon"). No reseller may authorize or bill surcharges not set out in Verizon's tariff. We limited this requirement, however, as follows: "(1) the rate cap shall apply to calls (except dial-

4. 47 U.S.C.A. § 253(b).

5. *In the Matter of Classic Telephone, Inc.*, Memorandum Opinion and Order, FCC CCBPol 96-10 at paragraph 28 (October 1, 1996).

around calls) made from aggregator and other transient locations; (2) the rate cap shall not apply to calls from those locations where the subscriber selecting the presubscribed OSP carrier is also the person or entity who will be paying the bill; and (3) the rate cap will not apply to dial-around calls, which involve services selected by the caller and outside the control of the presubscribed AOS provider." *Id.*

Additionally, the Company should be aware of the Board's policy in connection with the provision of prepaid calling card service. The Board has imposed such a requirement on new entrants into the Vermont market that provide only debit prepaid calling card services. *See* C.P.G. No. 145, Order of 7/13/94, and C.P.G. No. 146, Order of 8/17/94. As we noted in our Orders in C.P.G. Nos. 145 and 146, the public utilities commissions of several states have expressed concern about the potential risks to consumers associated with payment in advance of receipt of service, and we have the same concern.⁶ Consequently, we ordered World Telecom Group and Quest Telecommunications Inc. to post a bond, payable to the Board, in an amount equal to their projected Vermont intrastate revenues for the first 12 months of operation. We also stated that we would examine the issue of whether this requirement should be instituted on an industry-wide basis in our informal rulemaking proceeding.

We make a distinction, however, between new entrants into the Vermont market that provide only debit card service, and long-term participants that offer a multitude of services and that simply seek to add debit card service to their choice of service offerings. For this latter group, we do not impose a bond requirement, on the theory that the provider is already established in Vermont, offers several services that are provided on an on-going basis, and would be unlikely to "take the money and run."

Since we do not know how much of its business will be devoted to prepaid calling card services, we conclude that the most sensible approach is to inform the Company that should it decide to include the provision of debit cards among its service offerings, it will be required to

6. In this regard, we note that the DPS has asked several other prospective providers of debit cards to comply with more than 30 separate suggested requirements designed to protect consumers. *See, e.g.*, C.P.G. #156, Petition of IDB WorldCom Services, Inc., Letter from DPS to IDB WorldCom Services, Inc. dated May 26, 1994. In its letter to IDB WorldCom, the DPS states that its suggested requirements are "merely a guideline to certain consumer protection concerns" and are not required by the Public Service Board. *Id.* at 3. We confirm that we have not endorsed the requirements suggested by the DPS. However, we will review the DPS' proposed requirements and, if appropriate, may consider including some of them in our draft rules.

post a bond, payable to the Board, in an amount equal to its projected Vermont intrastate revenues from its prepaid calling card services, for the first 12 months of operation. This approach will be fair to the Company, fair to the public, and consistent with the theory that underlies the Board's treatment of other telecommunications providers offering debit card services.

IV. CONCLUSIONS

The sale of assets of Old Winstar and the related transactions should be approved because the transactions will promote the public good of the State of Vermont and will not result in obstructing or preventing competition. 30 V.S.A. §§ 107(b), 109, 311.

V. ORDER

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

1. The sale of assets of Winstar Wireless, Inc., will promote the public good and, therefore, is approved.
2. Effective with the completion of the sale of assets of Winstar Wireless, Inc., the Certificate of Public Good issued to Winstar Wireless, Inc., on December 17, 1999, is revoked.
3. The ownership and operation of a telecommunications service by Winstar Communications, LLC, will promote the general good of the State, subject to the conditions in the attached Certificate of Public Good issued to Winstar Communications, LLC.
4. Petitioners shall file a letter notifying the Board of the completion of the transactions within one week of such completion.
5. Winstar Communications, LLC, shall file its tariff, including the existing service offerings of Winstar Wireless, Inc., prior to offering service in Vermont.
6. A Certificate of consent to the sale of assets of Winstar Wireless, Inc., shall be issued.

DATED at Montpelier, Vermont, this 8th day of February, 2002.

<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: February 8, 2002

Attest: s/Judith C. Whitney

Deputy 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.