

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6915

Petition of KMC Telecom V, Inc.,)
and KMC Data LLC for Approval)
of a Transfer of Control)

Order entered: 12/31/2003

I. INTRODUCTION

This case involves a petition filed on August 22, 2003, by KMC Telecom V, Inc. ("KMC V") and KMC Data LLC ("KMC Data") (jointly the "Petitioners"), seeking Vermont Public Service Board ("Board") approval, under 30 V.S.A. § 107, of a corporate reorganization which will result in certain shareholders acquiring a controlling interest in the parent corporation of KMC V and KMC Data.¹

On December 26, 2003, the Vermont Department of Public Service ("Department") submitted a letter to the Board indicating that the Department had no objection to the *pro forma* transfer of control. Further, the Department stated no objection to the issuance of an order without hearing or further investigation, as provided under 30 V.S.A. § 107.

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. KMC V was issued a Certificate of Public Good (CPG No. 624) to provide intrastate telecommunications services on February 14, 2001. KMC V is a wholly-owned subsidiary of

1. The petition states that no Board approval of the transaction may be necessary. However, the Petitioners also request approval for the transactions should the Board determine that approval is necessary. Given the Petitioners' request for approval it is not necessary for the Board to resolve the jurisdictional issue at this time.

The petition also calls for approval of the transaction *nunc pro tunc*. That legal mechanism can only be applied to correct a record, to make an order relate back to a time when a case was ripe for decision and a decision should have been recorded, but was not. 49 C.J.S. §123 *et seq.* It is not the same as retroactivity, and cannot be used to make a decision effective before the time of the Order in this docket.

KMC Telecom Holdings, Inc. ("KTH"). KTH is not certificated as a telecommunications carrier in Vermont. Petition at 1-2.

2. KMC Data was issued a Certificate of Public Good (CPG No. 676) to provide intrastate telecommunications services on December 19, 2001. KMC V is also a wholly-owned subsidiary of KTH. Petition at 1-2.

3. KTH has undergone an internal corporate restructuring of its debt and equity. The restructuring has resulted in two entities: Wachovia Bank, NA and LT Holdco II LLC, acquiring slightly more than 10% of the voting stock of KTH. Petition at 4.

4. KMC V and KMC Data will continue to operate under their respective current names and tariffs. Accordingly, the transfer will not cause any inconvenience for Vermont consumers. Petition at 5.

5. The proposed transaction will promote the public interest in that it will allow KTH to improve the operational and cost efficiencies through the restructuring of its debt, thereby enhancing the ability of KTH and its Vermont operating subsidiaries to compete in the telecommunications market and ensuring the continued existence of telecommunications competition in Vermont. Petition at Exhibit A.

III. DISCUSSION

The proposed transaction requires approval by the Board under 30 V.S.A § 107. This statute conditions approval of a proposed transfer of control upon findings that the transfer of control will promote the public good (30 V.S.A § 107). This standard is met in this case.

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).² In order to approve the acquisition of such a controlling interest, the Board must

2. 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).

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. § 107 applies because the transaction contemplated will result in separate entities acquiring more than 10% of KTH, resulting in the indirect transfer of controlling interest of its subsidiaries: KMC V and KMC Data. We further conclude that the transfer of control will not affect the services that KMC V and KMC Data currently provide to customers in Vermont. KMC V and KMC Data will continue to operate under their respective current names and tariffs. The proposed transaction will also allow KMC V and KMC Data to operate more efficiently in Vermont, which will, in turn, result in competition among providers of telecommunications services in Vermont. The resulting transfer of control, 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 and should be approved.

IV. CONCLUSIONS

The transfer of control of KMC V and KMC Data should be approved because the transaction 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).

V. ORDER

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

1. The transfer of control of KMC Telecom V, Inc. and KMC Data LLC, will promote the public good and, therefore, is approved.

DATED at Montpelier, Vermont, this 31st day of December, 2003.

<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: December 31, 2003

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.