

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7007

Joint Petition of XO Long Distance Services, Inc.,)
and XO Communications Services, Inc., for Approval)
of a Merger and Related Transactions)

Order entered: 10/18/2004

I. INTRODUCTION

On August 25, 2004, XO Long Distance Services, Inc. ("XOLD"), and XO Communications Services, Inc. ("XOCS") (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. § 109, for the merger of XOLD with and into XOCS. Petitioners have also filed a Telecommunications Provider Registration Form ("Registration Form"), requesting a Certificate of Public Good ("CPG") be issued to XOCS.

On September 30, 2004, the Vermont Department of Public Service ("Department") filed a letter with the Board recommending the Board approve the merger and issue a CPG because it would not detrimentally impact Vermont consumers or cause them inconvenience or confusion. The Department further recommended the Board approve the Petition and request for CPG 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. XOLD is authorized to provide telecommunications services in Vermont pursuant to an Amended CPG 484 issued by the Board on January 4, 2002.¹ Petition at 1.

2. XOCS is a Delaware company which is seeking authorization to provide telecommunications services in Vermont. Registration Form at 1.

1. Nextlink Long Distance Services, Inc. was the holder of the original CPG 484; it was granted permission to change its name to XOLD on February 16, 2000. On August 19, 2003, the CPG was further amended to include local exchange service.

2. XOCS and XOLD are the Vermont operating subsidiaries of XO Communications, Inc. Petition at 1.
3. XOCS is not currently certified to provide service in any other state. Registration Form at 4.
4. XOCS has provided the necessary documentation regarding management structure and financial information. Registration Form at 5 and Attachments.
5. XOCS has not filed for bankruptcy and has never been the subject of an investigation by a state or federal authority. Registration Form at 4.
6. Pursuant to an internal corporate reorganization, XOLD will be merged with and into XOCS with XOCS as the surviving entity. Petition at 1 and Attachment A.
7. Following the completion of the transaction and the authorization of XOCS as a telecommunications carrier in Vermont, the customers of XOLD will be served by XOCS at the same rates and service arrangements. Accordingly, the transaction will not cause any inconvenience for Vermont consumers. Petition at 1-2.
8. The proposed reorganization and consolidation will improve the overall efficiency of XOCS, which should result in a business better able to expand its service offerings to Vermont consumers, thereby promoting the public interest. Petition at 3.

III. DISCUSSION

The proposed transaction requires approval by the Board under 30 V.S.A. § 109. The statute conditions approval upon a finding that the merger will promote the public good (30 V.S.A. § 109). This standard is met in this case.

Pursuant to 30 V.S.A. § 109, "a foreign corporation subject to the jurisdiction of the [Board], shall not make a sale . . . in any one calendar year constituting ten percent or more of the company's property located within this state . . . nor merge nor consolidate . . ." without approval of the Board.

After reviewing the Petition, we conclude that 30 V.S.A § 109 applies to the merger of XOLD into XOCS, because XOLD is a certificated telecommunications carrier in Vermont. We further conclude that the merger and the authorization of XOCS as a telecommunications carrier in Vermont, will avoid any disruption of services that XOLD currently provides to customers in

Vermont, because XOCS will offer the same services at the same rates to these customers. The merger, 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. § 109 and should be approved.

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 XOCS 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 XOCS'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 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

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.

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).

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 XOCS's CPG.

XOCS should also be aware of the Board's policy regarding the provision of operator services, should XOCS, in the future, choose to offer these services. As a substantive matter, the Board has previously found that, for carriers such as XOCS 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., d/b/a Verizon Vermont ("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-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, XOCS 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 XOCS that should it decide to include the provision of debit cards among its service offerings, it will be required to 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 XOCS, 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 merger of XOLD with and into XOCS should be approved and a CPG issued to XOCS, because the transaction will promote the public good of the State of Vermont and will not result in obstructing or preventing competition.

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.

V. ORDER

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

1. The merger of XO Long Distance Services, Inc., into XO Communications Services, Inc., will promote the public good and, therefore, is approved.
2. The ownership and operation of a telecommunications service by XO Communications Services, Inc., will promote the general good of the State, subject to the conditions in the attached Certificate of Public Good.
3. Petitioners shall file a letter notifying the Board of the completion of the transaction within one week of such completion.
4. A Certificate of consent to the merger of XO Long Distance Services, Inc., and XO Communications Services, Inc., shall be issued.

DATED at Montpelier, Vermont, this 18th day of October, 2004.

<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: October 18, 2004

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 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.