

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6075

Joint Petition for approval of the transfer of)
assets of MIDCOM Communications, Inc. to)
WinStar Wireless, Inc.; and petition of WinStar)
Wireless, Inc. for a certificate of public good to)
provide telecommunications services in Vermont)

Order entered: 12/17/99

I. REPORT

On March 4, 1998, WinStar Communications, Inc. ("WinStar") and WinStar Wireless, Inc. ("WinStar") (jointly "the Petitioners") filed a petition ("Petition") *nunc pro tunc* for Board approval of: (1) MIDCOM Communications, Inc.'s ("MIDCOM") transfer of its assets to WinStar, through a transaction closing on January 21, 1998, pursuant to 30 V.S.A. § 109; and (2) issuance to WinStar of a certificate of public good ("CPG") to provide intrastate telecommunications service in Vermont, pursuant to 30 V.S.A. § 231(a).¹ The transfer of assets, which already has been completed, was precipitated by voluntary Chapter 11 bankruptcy petitions filed by MIDCOM and two of its subsidiaries with the United States Bankruptcy Court of the Eastern District of Michigan, Detroit Division (the "Bankruptcy Court").²

On July 9, 1999, the Department of Public Service ("Department"), submitted a letter to the Board indicating that the Department had no objection to the transfer of assets of MIDCOM to WinStar, which had already been completed through voluntary Chapter 11 bankruptcy. The Department noted that the transaction has not adversely affected the services received by customers of MIDCOM, which had received notification of this petition through a billing insert. The Department also noted that WinStar has provided information regarding its marketing and

1. The parties' petition 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.

2. These cases are being jointly administered by the Bankruptcy Court as Bankruptcy Case No. 97-59044-S.

billing practices to the Department which meet with its satisfaction. Further, the Department also had no objection to the issuance of an order without hearing or further investigation, as provided under 30 V.S.A. § 109.

II. FINDINGS

1. WinStar is a publicly-held Delaware corporation that is headquartered at 230 Park Avenue, Suite 3126, New York, New York, 10169. WinStar is the ultimate corporate parent of the WinStar family of companies, including Winstar Wireless. WinStar, through its subsidiaries, operates as a facilities-based and resale provider of wireless private line and switched local and interexchange services throughout the United States. WinStar's customers are predominately small and medium-sized businesses. Petition at 3.

2. The WinStar companies are authorized to provide intrastate telecommunications services in at least 37 states and the District of Columbia. Petition at 3.

3. MIDCOM is a publicly-held Washington corporation headquartered at 26899 Northwestern Highway, Suite 120, Southfield, Michigan 48034. MIDCOM is a reseller provider of intrastate interexchange telecommunications services in 48 states, including Vermont pursuant to CPG No. 117, issued March 12, 1993. MIDCOM also provides interstate and international telecommunications services pursuant to authority granted by the FCC. Petition at 3-4.

4. In compliance with the terms of the Bankruptcy Court order dated January 7, 1998, a closing was held on or about January 21, 1998, at which time MIDCOM transferred substantially all of the assets used in the conduct of its business, free and clear of all liens, claims, encumbrances, rights of first refusal, and other interest (except those expressly assumed by WinStar) to a special-purpose, wholly-owned subsidiary of WinStar MIDCOM Acquisition Corp. ("WinStar Acquisition"). Simultaneously, MIDCOM's physical assets were transferred to WinStar Wireless, another wholly-owned subsidiary of WinStar. In addition, customer accounts were transferred to WinStar's primary operating subsidiary in each state. In Vermont, those customer accounts were transferred to WinStar Wireless. Petition at 2.

5. The transfer of assets was accomplished in a seamless fashion that should not have adversely affected the provision of telecommunications services to MIDCOM's former customers

in Vermont. MIDCOM's former customers should not experience any adverse effects as a result of this acquisition. WinStar has represented that it will take whatever steps are necessary to ensure that no MIDCOM customer experience either a material change in service or an increase in rates. Thus, the transfer will not detrimentally impact consumers in Vermont. In addition, all of MIDCOM's former customers in Vermont were notified of this Petition, by bill insert, soon after this Petition was filed. Petition at 6.

6. The Petitioners request that the Board grant a Certificate of Public Good to WinStar that is identical in scope to the authority currently held in MIDCOM. Thus, WinStar Wireless requests that the Board authorize it to provide long distance services throughout the state of Vermont. WinStar Wireless's service offerings will allow former MIDCOM customers to receive the same services at the same rates previously received pursuant to MIDCOM's tariffed service offerings. Petition at 6-7.

7. WinStar Wireless has a certificate of authority to do business in the State of Vermont dated March 31, 1998. See Petitioners' letter to the Board dated December 31, 1998.

8. WinStar Wireless's financial, managerial and technical qualifications to operate as a telecommunications provider in Vermont are evidenced by its financial statements and Managerial Qualifications submitted as part of the Petition. Petition at Attachments E and F.

III. DISCUSSION

The proposed transfer of MIDCOM's assets requires the issuance of a certificate of consent and a finding by the Board that the transfer will promote the general good of the State pursuant to 30 V.S.A. § 109. The "general good" of the State requires that the Board ensure that the established service is not abandoned or curtailed. Joint Petition of Burlington Telephone Co. d/b/a Long Distance North to Sell its Assets to RCI Long Distance, Docket No. 5472, Order at 11-12 (Dec. 24, 1990) (herein "Docket No. 5472"). In this case no services will be abandoned or curtailed. The transfer of assets by MIDCOM and the operation of the telecommunications services by WinStar Wireless will ensure that services are maintained.

The terms and conditions for WinStar Wireless's telecommunications services will reflect the existing practices of MIDCOM, which have been in effect in Vermont for several years. These practices are consistent with present statutory and regulatory requirements.

We conclude that the general good of Vermont would be promoted by the transfer of MIDCOM's assets as proposed in the Petition. The public good is further promoted by the resources and technical expertise with which WinStar Wireless supports its services.

By purchasing MIDCOM's assets, WinStar Wireless will operate a "business" in Vermont as defined in Chapter 5 of Title 30. In order to issue a CPG to the company, pursuant to 30 V.S.A. § 231(a), the Board is required to find that WinStar Wireless's operation of an intraLATA toll service, will promote the general good of the State. 30 V.S.A. §231(a).

Because the long distance telephone market is competitive, certification requirements are limited. See Generic Investigation Into the Regulation of Cellular Telecommunications Service in Vermont, Docket No. 5454, Order at 35 (1/8/92) (herein "Docket No. 5454").

WinStar Wireless's services are also offered in a competitive market in which it will be a non-dominant carrier. Consumer protection is the basis for entry regulation of intraLATA service. WinStar asserts that it has the managerial expertise to provide customers with service in Vermont. Its financial resources as a publicly-traded company also support the proposition that its operation as a telecommunications carrier will serve the general good.

Therefore, the Board will grant the certificate of consent to MIDCOM to transfer its assets, and issue a CPG to WinStar Wireless authorizing it to provide telecommunications services in Vermont.

IV. ORDER

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

1. The acquisition of ownership of the assets of MIDCOM by WinStar Wireless will promote the public good of the State of Vermont and a consent certificate shall issue.
2. Based upon the above findings, conclusions, and discussion, the provision of intrastate telecommunications service by WinStar Wireless will promote the general good of the State of Vermont pursuant to the provisions of 30 V.S.A. §§ 102 and 231. A certificate of public good shall be issued to that effect, subject to the applicable terms and conditions.
2. WinStar Wireless shall file a tariff for intrastate service within sixty days. WinStar Wireless shall publish, in two newspapers of general circulation, tariff summaries approved by the Department of Public Service, within fifteen days of filing such a tariff, in compliance with

30 V.S.A. § 225(a). Such tariff shall become effective thirty days from the date of filing, absent appropriate motions by the Department or affected parties.

3. If WinStar Wireless at any time in the future proposes to offer operator services, it shall be required to comply with the Board's Order of 1/6/95 in Docket No. 5566, Generic Investigation into the Regulation of Public Telephone and Alternative Operator Services in Vermont, and any future orders in that docket.

4. If WinStar Wireless intends to do business in the State of Vermont under a name that differs from the name in use on the date of the Order in this Docket, it shall file a notice of the new trade name with the Clerk of the Board and the Department of Public Service at least fifteen (15) days before commencing business under the new trade name.³

5. The Company shall be subject to all rules and orders lawfully adopted or to be adopted by the Board, and its certificate of public good shall incorporate those rules and orders by reference. The Company's CPG shall be subject to revocation upon good cause, including a substantial or continuous failure to abide by its material terms.

DATED at Montpelier, Vermont, this 17th day of December, 1999.

<u>s/Michael H. Dworkin</u>)	
)	PUBLIC SERVICE
)	
<u>s/Suzanne D. Rude</u>)	BOARD
)	
)	OF VERMONT
<u>s/David C. Coen</u>)	

OFFICE OF THE CLERK

Filed: December 17, 1999

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 of any technical errors, in order that any necessary corrections may be made.

3. For a corporate name change, see 11 V.S.A. § 4.01 and 30 V.S.A. § 231. Petitioner may wish to contact the Clerk of the Board for assistance.

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.