

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6176

Petition of National Telephone)
& Communications, Inc. for)
Approval of a Transfer of Control)

Order entered: 8/30/99

I. INTRODUCTION

This case involves a petition filed on October 23, 1998, by National Telephone & Communications, Inc. ("NTC" or "the Company"), seeking Vermont Public Service Board ("Board") approval *nunc pro tunc*, under 30 V.S.A. § 107, for transfer of a minority interest in the stock of NTC's direct and ultimate parent company, Incomnet, Inc. ("Incomnet"). The transfer of control is the result of a series of transactions whereby John P. Casey has acquired a thirty percent interest in Incomnet.¹

On July 22, 1999, the Vermont Department of Public Service ("Department") submitted a letter to the Board indicating that the Department had no objection to the stock acquisition and resulting transfer of control. The Department expressed some concern with investigations of NTC's marketing practices by other state agencies in the past and recommended that NTC review Board Rule 4.700 concerning selection of a primary telecommunications carrier and applicable Vermont law. The Department noted that the transaction does not appear to change either the management structure, address, contact information, services, rates or terms and conditions of service of the Company. The Department also noted that NTC has amended its petition to address certain consumer protection issues as requested. Further, the Department had no objection to the issuance of an order without hearing or further investigation, as provided under 30 V.S.A. § 107.

1. The 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.

II. FINDINGS OF FACT

Based upon the petition and accompanying documents, the Board makes the following findings of fact.

1. NTC is a privately-held Delaware corporation headquartered at 2801 Main Street, Irvine, California 92614. NTC is authorized to provide resold intrastate interexchange telecommunications services throughout the State of Vermont pursuant to CPG No. 166 dated April 1, 1996. Petition at 1-2.

2. John P. Casey is senior vice president of Meridian Investments and maintains his business offices at 10220 River Road, Suite 115, Potomac, Maryland 20854. Petition at 2.

3. Mr. Casey has increased his investment in Incomnet, the parent company of NTC, to approximately 30 percent during the year prior to the petition and has become Incomnet's largest shareholder. Mr Casey has also been elected as chairman of the Incomnet board. Petition at 4.

4. Following the transaction, NTC has continued to operate in all respects as it previously operated, pursuant to its present operating authority and tariff rate structure, and has continued to provide service to its current customers in Vermont as a wholly-owned subsidiary of Incomnet. Accordingly, neither the name of, nor the terms and conditions of service offered by NTC, have been affected by the transaction. The proposed transaction simply changed the corporate structure of the ultimate and direct parent of NTC. As such, the transaction should not have caused inconvenience or confusion to NTC's customers and, in fact, should have been virtually transparent to such customers in terms of the services that they receive. Accordingly, the transaction should not have inconvenienced customers within the State of Vermont. Petition at 4.

5. Incomnet and NTC will, as a result of the stock transfer, be able to draw upon additional financial resources. Petition at 4- 5.

6. Mr. Casey's investment in Incomnet and NTC will allow them to pursue their marketing and business plans more effectively. Petition at 5.

7. Completion of the proposed transaction will serve the public interest in that it will promote competition among long distance carriers by providing NTC with the opportunity to strengthen its competitive position. Petition at 5.

III. CONCLUSIONS OF LAW AND DISCUSSION

The proposed transaction requires Board approval under 30 V.S.A. § 107, which applies to a direct or indirect acquisition of a controlling interest in a Vermont utility.² Section 107(e)(1) defines "controlling interest" as ten percent or more of the outstanding voting securities of a company. Section 107 requires a finding that the transfer of control will promote the public good. This standard is met in this case. The proposed transaction will promote the public good, because NTC will have access to a larger pool of managerial, technical and financial resources due to the investment made by Mr. Casey in its parent Incomnet. In the competitive arena of telecommunications, the overall effect of this merger may promote more customer choice in terms of services, with stronger competitors in the Vermont telecommunications market. It should also be noted that the transfer of control has not resulted in any rate increase to existing customers of NTC.

For all of the above reasons, the proposed stock acquisition and resulting transfer of control of Incomnet and its Vermont operating subsidiary NTC, should be approved.

Regarding the Company's past marketing practices involving unauthorized switching of consumers' interexchange carriers, the Company should become familiar with the Vermont Public Service Board Rule 4.700 pertaining to selection and changing of a primary interexchange carrier. In addition, the Company should be precluded from using any marketing scheme whereby consumers might unknowingly consent to switch their long distance carrier. The Company's marketing practices should be in strict compliance with Board rules.

2. Approval under 30 V.S.A. §§ 231 and 311 is not required because the current holder of the Certificate of Public Good, NTC, will continue to be the entity providing telecommunications service in Vermont.

IV. 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 National Telephone & Communications, Inc., is approved.

2. NTC is precluded from using any marketing practice or solicitation which is misleading to consumers or fraudulent. All marketing practices will comply with all applicable Federal Communications Commission and Vermont state laws and rules. The Company is further obligated to ensure that all marketing solicitations are made in clear and unambiguous fashion, and that express authorization is obtained before a change in the customer's interexchange carrier is accomplished or additional services are added to a consumer's account.

DATED at Montpelier, Vermont, this 30th day of August, 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: August 30, 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. 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.