

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6195

Petition of Level 3 Communications, LLC for a)
certificate of public good to operate as a local and)
long distance provider of telecommunications)
services in Vermont

Order entered: 5/28/99

I. INTRODUCTION

Level 3 Communications, LLC ("Level 3" or the "Company" or "Petitioner") requests issuance of a certificate of public good ("CPG"), pursuant to 30 V.S.A. § 231, to provide intrastate telecommunications service in Vermont, including service to the local exchange. In this Proposal for Decision, I recommend that the Board issue a CPG to Level 3 as requested to allow the Company to begin operating as a telecommunications carrier within the state.

II. PROCEDURAL HISTORY

On December 22, 1998, Level 3, pursuant to 30 V.S.A. § 231 and the rules and regulations of the Board, filed a petition seeking a CPG to offer both facilities-based and resale of local and long distance telecommunications services in the State of Vermont.¹

I convened a prehearing conference on August 20, 1998, at which the following persons entered appearances: Sheldon Katz, Esq., for the Vermont Department of Public Service ("Department"); and Sue E. Wieske, Esq., for Level 3.² Prior to the hearing, the Independents filed a motion, pursuant to Vermont Public Service Board Rule 2.209, for leave to intervene in the above-captioned docket. The Motion was subsequently granted.

The Department and Level 3 filed a Joint Proposal for Decision and Stipulation on March 3, 1999, seeking Board approval of the petition without the need for hearing or investigation. Level 3 also has represented that following receipt of a CPG from the Board, it will file its formal tariff.

1. Petition at 1.

2. Prehearing Conference Memorandum at 1.

Section 231 of Title 30 requires that the Board provide an opportunity for hearing when a company requests a CPG or an amendment to a previously issued CPG. Level 3 asked that the Board not hold a hearing, but that I make recommendations, and the Board decide this matter, on the pleadings; none of the other parties or interested persons requested a hearing. Consequently, I established a schedule that did not contemplate technical hearings, unless a party made a formal request. As a result, newspaper publication is not required prior to issuance of a CPG. 30 V.S.A. § 231(a).

Based upon the petition and accompanying documents, pursuant to 30 V.S.A. § 8, I make the following findings of fact and recommend that the Board issue Level 3 a CPG in accordance with this petition.

III. FINDINGS

1. Level 3 is a limited liability company organized under the laws of the state of Delaware. Petition at 2 and Exhibit 1.
2. Level 3 has all the necessary authority to transact business in Vermont. Petition at 2 and Exhibit 1.
3. Level 3 proposes to provide local, intrastate, and interexchange telecommunications services. Petition at 1.
4. Level 3 is currently negotiating an interconnection agreement with Bell Atlantic. Stipulation at 2.
5. Level 3 has the managerial and technical ability necessary to provide service in Vermont. Petition at 3 and Exhibit 3.
6. Level 3 is financially qualified to provide the services it proposes to offer. Petition at 3-4 and Exhibit 2.
7. Customer service will be provided via a toll-free number at 1-877-453-8353. Petition at 2.

IV. DISCUSSION

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 Level 3 and all related materials, I conclude 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, I conclude that concerns for consumer protection have been sufficiently addressed. Concerns for consumer protection are, therefore, not cause for rejection of Level 3'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.³

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

3. 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.

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."⁴ 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.⁵

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.⁶ 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. As the Board stated in Docket 5909, these include "the minimum geographic service territory [the CLEC] should serve, carrier of last resort obligations, universal service support, service quality standards, and other basic service obligations, such as the minimum calling area for customers."⁷ In addition, the Board

4. Vermont Telecommunications Plan (dated December 1996) at iii.

5. 47 U.S.C.A. § 253(b).

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

7. Docket 5909, Order of 1/14/97 at 7.

has not evaluated whether it should adopt terms and conditions that apply to entry into the service territory of the Independents.

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. I see no reason to deviate from that policy here and recommend that the Board include a similar provision in Level 3's CPG.

One issue raised by Level 3's petition remains: whether the Board should adopt specific terms and conditions that apply to competitive entry into the service territory of the eight independent telephone companies of Vermont (the "Independents")⁸, an issue that was specifically reserved in Docket 5608.⁹ The Board has recently addressed this question in the context of CPG's issued to three companies seeking statewide authorization.¹⁰ In each of those proceedings, the Board granted the petitioner a CPG that contained no limitation on entry into the service territory of independent telephone companies. The Board concluded that allowing statewide competitive entry would create a competitively neutral framework and would be unlikely to adversely affect the Independents. The Board reasoned that no party had presented evidence that limitations on entry were needed to ensure universal service or other important Vermont policy goals. In addition, the Board concluded that if competitive entry in the

8. The eight independent telephone companies are: STE/NE Acquisition Corp. d/b/a Northland Telephone Company of Vermont; Perkinsville Telephone Company; Shoreham Telephone Company, Inc.; Waitsfield-Fayston Telephone Company, Inc. d/b/a Waitsfield Telecom and d/b/a Champlain Valley Telecom; Topsham Telephone Company; Franklin Telephone Company; Northfield Telephone Company; and Ludlow Telephone Company.

9. The Board originally issued Hyperion a CPG to offer intrastate telecommunications services in Docket 5608. The Petitioner has not clearly requested authorization to provide service in the territory of the Independents, but administratively, it makes little sense to limit the CPG (requiring amendment each time the Petitioner seeks to expand service) rather than establish a process to address specific concerns arising from prospective entry now. This view is reinforced by the limitations on the interconnection obligations of rural telephone companies embodied in Section 251(f) of the Act.

10. *Petition of Quintelco, Inc. for a certificate of public good to operate as a local and long distance non-facilities based reseller of telephone services in Vermont*, Docket 5994, Order of 8/10/98; *Petition of WorldCom Technologies, Inc. for authority to amend its Certificate of Public Good to provide local exchange telecommunications services in the State of Vermont*, Docket 6021, Order of 8/10/98; *Petition of AT&T Communications of New England, Inc. for authority to amend its Certificate of Public Good to provide local exchange telecommunications services in the state of Vermont*, Docket 6022, Order of 8/10/98.

Independents' service territories began to impose hardships, the Board could examine the issue further.¹¹

For the reasons set forth in the previous Orders, I recommend that the Board not include a condition limiting Level 3's entry into the Independents' service territories.

V. CONCLUSION

For the foregoing reasons, I recommend that the Board grant a CPG to Level 3 authorizing it to provide intrastate telecommunications service, including local exchange service, because its offering of proposed services will promote the general good of the State of Vermont. 30 V.S.A. § 231. Prior to providing intrastate services, Level 3 should file a tariff consistent with Vermont law, to be reviewed as provided by 30 V.S.A. § 225.

The Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

DATED at Montpelier, Vermont, this 19th day of May, 1998.

s/ Gregg C. Faber
Gregg C. Faber
Hearing Officer

11. The Board invited the Independents to present such evidence: "If the Independents believe that the Board needs to adopt competitively neutral conditions in future CPGs to redress particular concerns, we encourage them to present fact-based evidence outlining the harms and the appropriate remedies." Docket 5994, Order of 8/10/98 at 14; Docket 6021, Order of 8/10/98 at 14; Docket 6022, Order of 8/10/98 at 14.

VI. ORDER

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

1. The findings, discussion, and conclusion of the Hearing Officer are adopted.
2. Based on the above findings, discussion and conclusion, the provision of intrastate telecommunications services, including service to the local exchange, by Level 3 Communications, LLC ("Level 3") will promote the general good of the State of Vermont, pursuant to the provisions of 30 V.S.A. § 231. A certificate of public good ("CPG") shall be issued to that effect, subject to the conditions contained in the CPG.
3. Before offering telecommunications service in Vermont, Level 3 shall file a tariff for intrastate service. Level 3 shall publish, in two newspapers of general circulation, tariff summaries approved by the Department of Public Service, within such time as the Board directs, in compliance with 30 V.S.A. § 225(a). Level 3's tariff shall include terms and conditions making available unbundled service elements necessary for the provision of enhanced 911 service, as required by 30 V.S.A. § 7055(e). Such tariff shall become effective forty-five days from the date of filing, absent further order by the Board or appropriate motions by the Department of Public Service or affected parties.
4. If Level 3 at any time in the future proposes to offer operator services, it shall be required to comply with the 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.
5. If Level 3 intends to do business in the State of Vermont under any name other than 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 days before commencing business under the new trade name.¹²

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

Dated at Montpelier, Vermont, this 28th day of May, 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: May 28, 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.