

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 6202

Petition of Qwest Communications Corporation )  
for Approval of Agreement and Plan of Merger )  
between Amerifax, Inc. d/b/a AmeriConnect )  
and Phoenix Network, Inc. and Request for )  
Revocation of the Certificate of Public Good for )  
Amerifax, Inc. d/b/a AmeriConnect )

Order entered: 7/27/99

INTRODUCTION

On January 26, 1999, Qwest Communications Corporation ("Qwest") filed a petition ("Petition") requesting authority from the Vermont Public Service Board ("Board"), pursuant to 30 V.S.A. §§ 107, 109 and 311, for approval of an Amended and Restated Agreement and Plan of Merger ("Merger") of Phoenix Network, Inc. ("Phoenix") and Amerifax, Inc. d/b/a AmeriConnect ("AmeriConnect"), which occurred in September of 1996. The Petition also requests revocation of AmeriConnect's Certificate of Public Good ("CPG") pursuant to 30 V.S.A. §§ 102(c) and 231(a), due to its cessation of business in Vermont subsequent to the Merger. Phoenix was acquired by Qwest Communications Corporation ("Qwest") on March 30, 1998.<sup>1</sup>

By letter dated July 9, 1999, the Vermont Department of Public Service ("Department") notified the Board that the Department recommends approval of the proposed merger and revocation of CPG without the need for hearings or investigation.

The Department also commented that since the merger did not appear to have caused any inconvenience or confusion to the customers of AmeriConnect, the transaction was apparently transparent in terms of service. Further, the Department noted that approval of the Merger would allow Phoenix to continue operating in Vermont under its current name and service offerings.

The Department also noted that Qwest and Phoenix should, in the future, request regulatory approval *prior* to completion of such transactions.

The Board has reviewed the Petition and the accompanying documents and agrees that

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1. See Docket 6057 Order of April 2, 1998.

approval should be granted without hearing.

#### FINDINGS OF FACT

Based upon the Petition and accompanying documents, we hereby make the following findings of fact.

1. Phoenix is a Delaware corporation and is authorized to provide intrastate interexchange telecommunications services pursuant to a Certificate of Public Good granted by the Board on March 12, 1993 (C.P.G. No. 120). Amended and Restated Agreement and Plan of Merger at 1.

2. AmeriConnect is a Delaware corporation and is authorized to provide intrastate interexchange telecommunications services pursuant to a Certificate of Public Good granted by the Board on August 13, 1996 (C.P.G. No. 269). Petition at 1 and Amended and Restated Agreement and Plan of Merger at 1.

3. AmeriConnect became a wholly-owned subsidiary of Phoenix under the terms of the Merger agreement in September of 1996. Subsequent to the merger, all of AmeriConnect's customers were transferred to Phoenix and AmeriConnect ceased conducting business in Vermont. Petition at 1.

4. The reorganization was accomplished through a transaction whereby AmeriConnect merged with and into a newly formed subsidiary of Phoenix, Phoenix Merger Corp., a Delaware corporation, with AmeriConnect as the surviving company. Following the reorganization, Phoenix began serving customers of AmeriConnect under existing service arrangements pursuant to AmeriConnect's certification. Accordingly, the reorganization was virtually transparent to customers of AmeriConnect. Petition at 1 and Amended and Restated Agreement and Plan of Merger at 1.

5. Completion of the Merger served the public interest in promoting competition among providers of interexchange telecommunications services by combining the financial resources and complementary managerial skills and experience of Phoenix and AmeriConnect in providing telecommunications services to the public. Petitioners represent that the reorganization resulted in a company better equipped as a competitive telecommunications service provider. The reorganization will allow AmeriConnect access to Phoenix's significant financial resources and enhanced significantly Phoenix's operational flexibility and efficiency. These enhancements inured

directly to the benefit of Vermont customers, who also benefitted from the innovative array of services offered by Phoenix. The reorganization, therefore, ensured the continued provision of telecommunications services to AmeriConnect's existing customers and promoted competition in the Vermont telecommunications service market. In sum, the reorganization benefitted the public interest by enhancing the ability of Phoenix to offer competitively priced services in the Vermont interexchange telecommunications marketplace. Petition at 1.

#### DISCUSSION

The previously completed transaction requires approval by the Board under 30 V.S.A §§ 107, 109 and 311. These statutes condition approval of a proposed transfer of control upon findings that the transfer of control will promote the public good (30 V.S.A § 107). The statutes also condition approval of a merger upon a finding that the merger will promote the public good (30 V.S.A. § 109) and will not obstruct or prevent competition (30 V.S.A § 311). These standards are 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).<sup>2</sup> In order to approve the acquisition of such a controlling interest, the Board must first find that it will "promote the public good." 30 V.S.A. § 107(b).

Under 30 V.S.A. § 107(c)(1), "[i]f any company acquires such a controlling interest without the prior approval of the public service board, the board may then, after due notice and hearing, approve the acquisition..." While 30 V.S.A. § 107(c) requires that a hearing be held before approval of an acquisition which has taken place prior to requesting board approval, we note that Rule 56 of the V.R.C.P. provides that where no genuine issue of material fact exists, a hearing is not necessary. Since there has been no objection to the Merger from the time of its completion in 1996 and the surviving company, Phoenix, was, itself, acquired in March of 1998 by

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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).

Qwest, we find that the requirements of V.R.C.P. Rule 56 are met in this case and, therefore, grant approval of the merger without a hearing.

After reviewing the Petition, we conclude that 30 V.S.A. § 107 applies because the merger involved the transfer of controlling interest of AmeriConnect, which became a wholly-owned subsidiary of Phoenix, into the control of Phoenix, and thus results in the transfer of more than ten percent of the shares of AmeriConnect to another company. We further conclude that the merger allowed both companies to operate more efficiently in the current telecommunications marketplace and that the reorganization did not adversely affect the services that Phoenix provides to customers in Vermont. The reorganization, therefore, promoted the public good. For all of these reasons, we conclude that the transaction meets the standards set forth in 30 V.S.A. §§ 107, 109 and 311, and should be approved.

Qwest, the current parent company of Phoenix, has also requested that the Board revoke CPG No. 269 issued to AmeriConnect on August 13, 1996, due to AmeriConnect's cessation of business in Vermont following the merger with Phoenix in 1996. The Board finds the reasons articulated by Qwest in support of its request to be convincing. This finding, together with the fact that no opposition to Qwest's filing has been registered with the Board, leads us to conclude that AmeriConnect's CPG should be revoked. While 30 V.S.A. §§ 102(c) and 231(a) require that a hearing be held before revocation of a CPG is allowed, we note that Rule 56 of the V.R.C.P. provides that where no genuine issue of material fact exists, a hearing is not necessary. We find that the requirements of V.R.C.P. Rule 56 are met in this case and, therefore, grant Qwest's request without a hearing.

#### CONCLUSIONS

We agree with the Department of Public Service that Qwest and Phoenix should, in the future, request regulatory approval *prior* to completion of such transactions.

The transfer of control of AmeriConnect to Phoenix should be approved because it promoted the public good of the State of Vermont and did not result in obstructing or preventing competition in the provision of the services they were currently offering. 30 V.S.A. §§ 107(b), 311. The CPG issued to AmeriConnect should be revoked due to AmeriConnect's cessation of business in Vermont. 30 V.S.A. §§ 102(c) and 231(a).

#### ORDER

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

1. The Amended and Restated Agreement and Plan of Merger of Phoenix and AmeriConnect is approved.
2. A Certificate of Consent to the merger of AmeriConnect with and into Phoenix Merger Corp. shall be issued.
3. The transfer of control of AmeriConnect to Phoenix promoted the public good and, therefore, is approved.
4. The CPG (No. 269) issued to AmeriConnect on August 13, 1996, is hereby revoked.

DATED at Montpelier, Vermont, this 27<sup>th</sup> day of July, 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: July 27, 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.*