

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6263

Petition of ATCALL, Inc. for)
Approval of a Transfer of Control)

Order entered: 12/15/99

I. INTRODUCTION

This case involves a petition filed on July 13, 1999, by ATCALL, Inc. ("ATCALL" or "Petitioner"), seeking Vermont Public Service Board ("Board") approval *nunc pro tunc*, under 30 V.S.A. §§ 107, 109, and 311, of a corporate reorganization whereby ATCALL amended its holding company structure by creating a new first tier holding company, and merging ATCALL and an affiliate into their common parent company.¹

On November 22, 1999, the Vermont Department of Public Service ("Department") submitted a letter to the Board indicating that the Department had no objection to the corporate reorganization and merger. The Department noted that the transaction has not affected the services received by customers of ATCALL or caused inconvenience or confusion to the customers of ATCALL, in that the rates and management structure of ATCALL has not changed. The Department also noted that ATCALL has provided information regarding its marketing and 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. §§ 107 and 109.

II. FINDINGS OF FACT

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

1. ATCALL is a Delaware corporation with principal offices at 8401 Old Courthouse Road, Suite 300, Vienna, Virginia. ATCALL is authorized to provide interexchange telecommunications services in Vermont as a telecommunications reseller in Vermont since July 18, 1996 (CPG No. 215). Petition at 2.

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.

3. ATCALL and an affiliated corporation, Lifesaver Communications, Inc., were merged with and into their common parent company, Indigo Light, Inc. ("Indigo"), a Delaware corporation. The surviving entity, Indigo, concurrently changed its name to ATCALL, Inc. ("New ATCALL"). Following the merger, the owners of New ATCALL exchanged their shares in New ATCALL and ATCALL for shares in a newly formed first tier holding company, ATCALL Communications, Inc. ("ACI"). Thus, ATCALL was subsumed by New ATCALL, which through the stock transfer became a wholly-owned subsidiary of ACI. Petition at 3.

4. Following completion of the transaction, ATCALL became a wholly-owned subsidiary of ACI. ATCALL will continue to operate in all respects as it currently operates, pursuant to its present operating authority and tariff rate structure, and will continue to provide service to its current customers in Vermont as a wholly-owned subsidiary of ACI. Accordingly, neither the name of, nor the terms and conditions of service offered by ATCALL, have been affected by the transaction. The proposed transaction simply changed the ultimate corporate parent of ATCALL. As such, the transaction has not caused inconvenience or confusion to ATCALL's customers and in fact has 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 5.

5. Upon completion of the transaction, ATCALL will continue to rely on its existing management and operations staff to provide service. ATCALL will be able to draw upon the financial, marketing and technical expertise of its new parent company, ACI. Petition at 5.

6. The corporate reorganization will allow ATCALL to pursue its 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 ATCALL with the opportunity to strengthen its competitive position and to pursue its marketing and business plans more effectively. Petition at 5.

III. CONCLUSIONS OF LAW AND 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).² 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 corporate reorganization and transfer of control from the time of its completion in 1998, 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 ATCALL, which became a wholly-owned subsidiary of ACI, into the control of ACI, and thus results in the transfer of more than ten percent of the shares of ATCALL 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 ATCALL 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.

The previously completed 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.³

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).

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

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 ATCALL will have access to a larger pool of managerial, technical and financial resources due to the relatively larger resources of its new owner, ACI. 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 will not result in any rate increase to existing customers of ATCALL.

For all of the above reasons, the proposed transfer of control of ATCALL to ACI, through their corporate reorganization, should be approved.

ORDER

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

1. A Certificate of Consent to the merger of ATCALL with and into Indigo shall be issued.
2. The transfer of control of ATCALL to ACI promoted the public good and, therefore, is approved.

DATED at Montpelier, Vermont, this 15th day of December, 1999.

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

OFFICE OF THE CLERK

Filed: December 15, 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.

