

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)

NUI TELECOM, INC.)

DOCKET NO. 03-0382

For Authority to Transfer)
Control or Ownership of NUI)
Telecom, Inc. to Telecom)
Acquisition Company, LLC.)
_____)

DECISION AND ORDER NO. 20772

Filed Jan. 20, 2004

At 2:30 o'clock P.M.

Karen Higuchi
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

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DECISION AND ORDER

I.

Introduction

NUI TELECOM, INC. ("NUI Telecom, Inc." or "Petitioner") requests commission approval for a proposed transfer of control of NUI Telecom, Inc. from its current shareholder, NUI Capital Corp., to Telecom Acquisition Company, LLC ("TAC") through the sale of all of NUI Telecom, Inc.'s stock ("Proposed Transaction").¹

Petitioner served the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate") copies of the petition. The Consumer Advocate, by its position statement filed on December 19, 2003, indicates that it does not object to the approval of the Proposed Transaction, described above, subject to one qualification.

¹Petitioner's petition, filed on October 29, 2003, as amended on November 24, 2003.

II.

Background

A.

Petitioner and Related Entities

NUI Telecom, Inc. is a New Jersey corporation and maintains its principal office in Bedminster, New Jersey. NUI Telecom, Inc. is presently authorized to operate as a reseller of intrastate telecommunications services in the State of Hawaii ("State").² NUI Capital Corp., a Florida corporation, is NUI Telecom, Inc.'s current shareholder.³

TAC is a New Jersey limited liability company and also maintains its principal office in Bedminster, New Jersey.⁴

B.

Proposed Transaction

The Proposed Transaction involves a Stock Purchase Agreement ("Agreement") entered between NUI Capital Corp. and TAC. Under the Agreement, TAC proposes to acquire all outstanding shares of NUI Telecom, Inc.'s capital stock from NUI Capital Corp., its current shareholder ("transfer of control").

²NUI Telecom, Inc. was granted a certificate of authority to provide intrastate telecommunications services in the State on a resold basis. Decision and Order No. 19838, filed on December 2, 2002, in Docket No. 02-0195.

³See amended petition, filed on November 24, 2003.

⁴Petitioner represents that Richard Boudria initially organized NUI Telecom, Inc on April 14, 1994. In April 2000, he sold NUI Telecom, Inc. to NUI Capital Corp. On May 21, 2003, Mr. Boudria organized TAC to repurchase NUI Telecom, Inc.

Petitioner represents, among other things, that the transfer of control: (1) will neither result in a change in name, rates, terms, or conditions of its service offerings, and (2) "will be transparent to, and will have no adverse impact upon [NUI Telecom Inc.'s] customers."

C.

Consumer Advocate's Position

The Consumer Advocate does not object to Petitioner's request for approval of the Proposed Transaction pursuant to Hawaii Revised Statutes ("HRS") § 269-7(a).⁵ It asserts, among other things, that it "recognizes the entry of many telecommunications service providers in the Hawaii market." The Consumer Advocate further states that "[t]he market place, it is assumed, will then serve to mitigate any traditional public utility regulatory concerns regarding the [P]roposed [T]ransaction. Therefore, if there are any adverse consequences from the [P]roposed [T]ransaction, Hawaii consumers will have the option of selecting another service provider." Nonetheless, it recommends that the Petitioner be required to provide the commission and the Consumer Advocate with copies of the executed Agreement between NUI Capital Corp. and TAC prior to the commission issuing its decision and order in this docket, pursuant to Hawaii Administrative Rules ("HAR") § 6-61-105(c)(2).

⁵The Consumer Advocate states that it "believes that HRS § 269-7(a) is applicable since the [P]roposed [T]ransaction is not an issuance of securities under HRS § 269-17; an acquisition of another public utility's stock under HRS § 269-18; or a merger between two public utilities under HRS § 269-19."

III.

Discussion

Based on Petitioner's representations, we agree with the Consumer Advocate that although HRS §§ 269-17 through 269-19 are inapplicable to the Proposed Transaction, the Proposed Transaction falls under our purview, pursuant to HRS § 269-7(a). HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations." Under HRS § 269-7(a), the commission will approve the proposed financial transaction if it is reasonable and consistent with the public interest.⁶

HRS § 269-16.9 also permits us to waive regulatory requirements applicable to telecommunications providers if we determine that competition will serve the same purpose as public interest regulation. Specifically, HAR § 6-80-135 permits us to waive the applicability of any of the provisions of HRS chapter 269 or any rule, upon a determination that a waiver is in the public interest.

Upon review of the record in this docket, particularly Petitioner's representations in this docket, we find the following: (1) much of the telecommunications services currently provided by NUI Telecom, Inc. are considered competitive; (2) NUI Telecom, Inc. is a non-dominant carrier in Hawaii; (3) the Proposed Transaction appears to be consistent with the public interest; and

⁶See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

(4) competition, in this instance, will serve the same purpose as public interest regulation.

Based on the foregoing, the commission, on its own motion, will waive the requirements of HRS § 269-7(a), to the extent applicable, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.⁷ Similarly, we also find that it is in the public interest to waive the applicability of HAR § 6-61-105 in this petition. Accordingly, we conclude that the requirements of HAR § 6-61-105 that are not satisfied by the information provided in the petition should also be waived for purposes of reviewing and considering the petition. Nonetheless, we will adopt the Consumer Advocate's recommendations, in part,⁸ by requiring Petitioner to submit a copy of the executed Agreement between NUI Capital Corp. and TAC within thirty (30) days of the date of this decision and order.

⁷At the same time, the commission will continue to examine a utility's application or petition on a case-by-case basis to determine whether the applicable requirements of HRS § 269-7(a) or any other related provision governing utility transactions, should be waived. The commission's waiver in this decision and order shall not be construed by any utility as a basis for not filing an application involving similar transactions or circumstances.

⁸In lieu of requiring the submission of a copy of the executed Agreement between NUI Capital Corp. and TAC to the commission and the Consumer Advocate prior to the commission issuing its decision and order in this docket, we will require such submission within thirty (30) days of the date of this decision and order.

IV.

THE COMMISSION ORDERS:

1. The requirements of HRS § 269-7(a), to the extent applicable, are waived with respect to the Proposed Transaction described in the instant petition.


2. To the extent that the petition does not contain all of the information required under HAR § 6-61-105, the applicability of this provision is waived.

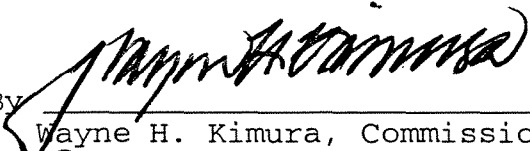
3. Within thirty (30) days of the date of this decision and order, Applicant shall submit to the commission and the Consumer Advocate a copy of the executed Agreement between NUI Capital Corp. and TAC.

4. NUI Telecom, Inc. shall conform to all of the commission's orders set forth above. Failure to adhere to the commission's orders shall constitute cause to void this decision and order, and may result in further regulatory actions, as authorized by law.

DONE at Honolulu, Hawaii this 20th day of January, 2004.

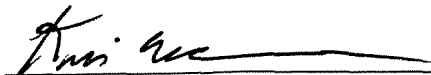
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Kris N. Nakagawa
Commission Counsel
03-0382.ac

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 20772 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

PATRICK D. CROCKER, ESQ.
EARLY, LENNON, CROCKER & BARTOSIEWICZ, P.L.C.
900 Comerica Building
Kalamazoo, MI 49007



Karen Higashi

DATED: January 20, 2004