

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of )  
 )  
TIME WARNER TELECOM OF HAWAII, )  
L.P., dba OCEANIC COMMUNICATIONS )  
 )  
For a Declaratory Ruling or to )  
Reclassify Certain Services as )  
Partially Competitive. )  
\_\_\_\_\_ )

DOCKET NO. 04-0082

DECISION AND ORDER NO. 21326

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

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KAREN HIGASHI  
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Commission, State of Hawaii.

K. Higashi

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DECISION AND ORDER

I.

Background

TIME WARNER TELECOM OF HAWAII, L.P., dba OCEANIC COMMUNICATIONS ("Oceanic"), is a limited partnership organized under the laws of the State of Delaware and is authorized to do business in the State of Hawaii (the "State"). Oceanic is a provider of interstate and intrastate telecommunications services, including dedicated access (private line) and local exchange services in the State.

Oceanic initially requested a declaratory ruling that certain business services it provides are inherently partially competitive, or in the alternative, the reclassification of these services as partially competitive.<sup>1</sup> Oceanic identifies these services as: (1) standard business lines; (2) analog PBX trunk service; (3) digital PBX trunk service; (4) primary rate ISDN service; (5) private line; and (6) the line features associated

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<sup>1</sup>Oceanic's Petition, filed on April 28, 2004.

with these services, such as call forwarding, speed dialing, multi-way calling, and caller ID (collectively, Oceanic's "Network Services").

Oceanic made its request for declaratory relief in accordance with Hawaii Administrative Rules ("HAR") chapter 6-61, subchapter 16. Subsequently, Oceanic: (1) withdrew its request for a declaratory ruling, or in the alternative, the reclassification of its Network Services as partially competitive; and (2) amended its Petition to seek a waiver, pursuant to Hawaii Revised Statutes ("HRS") § 269-16.9(e), of the commission's cost study requirement.<sup>2</sup>

Oceanic served copies of its Petition and Amendment upon the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"). On June 10, 25, 28, 29, and July 9, 2004, Oceanic responded to the Consumer Advocate's information requests.

On June 29, 2004, Verizon Hawaii Inc., the incumbent local telecommunications carrier, filed a motion to intervene, in response to Oceanic's Amendment. On July 8, 2004, Oceanic filed its memorandum in opposition to Verizon Hawaii Inc.'s motion to intervene. The commission denied Verizon Hawaii Inc.'s motion to intervene.<sup>3</sup>

On July 9, 2004, the Consumer Advocate filed its position statement, and on July 16, 2004, Oceanic filed its

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<sup>2</sup>Oceanic's Amendment to Petition, filed on June 10, 2004 ("Amendment").

<sup>3</sup>Order No. 21229, filed on August 9, 2004.

response. Both pleadings were timely filed in accordance with the Parties' agreed-upon procedural schedule.<sup>4</sup>

This decision and order addresses Oceanic's request for waiver.

## II.

### HAR and HRS

HAR chapter 6-80 governs competition in the State's telecommunications marketplace. HAR § 6-80-1. HAR chapter 6-80, subchapter 4, sets forth rules for the costs, rates, and pricing of telecommunications services.

HAR §§ 6-80-35 and 6-80-42 provide in respective part:

§6-80-35 Cross-subsidization prohibited.

(a) Noncompetitive services offered or provided by any telecommunications carrier must not cross-subsidize the telecommunications carrier's competitive services.

(e) A telecommunications carrier may not offer a noncompetitive telecommunications service jointly with any fully or partially competitive service or with any interstate, international, or other service not within the jurisdiction of the commission, except upon the commission's express approval. The commission's approval is subject to a satisfactory showing by the telecommunications carrier seeking to offer such joint services that the costs of the fully or partially competitive service or the costs of the interstate, international, or other non-jurisdictional service are not subsidized by the noncompetitive service. An application for approval must be filed with the commission not less than thirty days before the joint services are marketed, sold, or advertised.

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<sup>4</sup>See Order No. 21077, filed on June 23, 2004.

§6-80-42 Cost studies. (a) The incumbent telecommunications carrier shall complete and submit a cost study for all tariffs of noncompetitive services, unless ordered otherwise by the commission.

(b) A non-incumbent telecommunications carrier need not submit a cost study for any tariff, whether for fully competitive, partially competitive or noncompetitive service, unless ordered otherwise by the commission.

(c) The commission may, on its own initiative or at the request of a telecommunications carrier or the consumer advocate, order any telecommunications carrier to complete and submit a cost study to the commission for any service.

(d) Any cost study, where required, must include an analysis of the total service long run incremental cost underlying the service, unless ordered otherwise by the commission.

The commission is authorized to waive certain regulatory requirements under HRS chapter 269 and HAR chapter 6-80 applicable to telecommunications providers when it determines that competition will serve the same purpose as public interest regulation. HRS § 269-16.9(e); and HAR § 6-80-135.

### III.

#### Oceanic's Request

Oceanic seeks to introduce in the State certain bundled service offerings that include its Network Services, without submitting supporting cost studies. Hence, Oceanic seeks to "waive the requirement set forth in H.A.R. § 6-80-35(e) that [Oceanic] submit cost studies for its bundled offerings that

include its Network Exchange Services[,] . . . pursuant to Section 269-16.9(e), H.R.S."<sup>5</sup>

Oceanic contends that its request for waiver is consistent with the public interest. Specifically:

1. The intent of HAR § 6-80-35(e) is to address concerns about cross-subsidization involving the incumbent telecommunications carrier. These concerns do not apply equally to competitive, non-dominant telecommunications carriers, such as Oceanic.

2. Oceanic faces competition from Verizon Hawaii Inc. and Pacific Lightnet, Inc., for all of its Network Services.

3. Unlike Verizon Hawaii Inc., Oceanic does not offer any rate of return regulated telecommunications services. Oceanic is therefore unable to charge unreasonable rates to customers who have no other choice, or to subsidize the rate of return regulated services with other services.

4. The requirement that Oceanic submit cost studies in support of its bundled service offerings is unnecessarily burdensome. In other states where Oceanic provides bundled services, none "requires that competitive carriers submit cost support studies for bundled offerings, and the cost support

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<sup>5</sup>Oceanic's Amendment, at 3. See also *id.* at 5, prayer for relief number 2 (Oceanic requests that the commission grant an exemption from the requirement under HAR § 6-80-35(e) that it submit cost support studies for its bundled services that include its Network Services).

requirement effectively prevents [Oceanic] from making such offerings in Hawaii."<sup>6</sup>

"States have taken different approaches to the regulation of non-dominant carriers, ranging from exempting them from traditional rules to creating new rules for such carriers. Several states have very clear and distinct rulings that differentiate CLEC [competitive local exchange carrier] and ILEC [incumbent local exchange carrier] requirements for tariffing, cost support and promotional bundled offering[s]."<sup>7</sup>

5. Because Oceanic faces competition for all of its services, its rates are based on market forces. "[I]f it attempts to charge unreasonable rates for a service, customers of that service can simply choose another provider."<sup>8</sup> Thus, "as a non-dominant provider of competitive services, Oceanic doesn't have sufficient market power to price services below cost and remain profitable."<sup>9</sup>

6. Many of Oceanic's nationwide bundled service promotions are: (A) typically offered for a three (3) or four (4) month period; and (B) "in response to competitive pressures and are developed and released in the shortest time frame possible."<sup>10</sup>

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<sup>6</sup>Oceanic's Amendment, at 4. See also Oceanic's responses to CA-SIR-3(b), CA-SIR-4, and CA-SIR-5.

<sup>7</sup>Oceanic's response to CA-SIR-4(b).

<sup>8</sup>Oceanic's response to CA-SIR-2(c).

<sup>9</sup>Id.

<sup>10</sup>Oceanic's response to CA-SIR-7.

Since Oceanic is unable to adjust its national schedule to meet the commission's cost study requirement, Oceanic, since late 2003, has opted to exclude Hawaii from these national promotions.

For these reasons, Oceanic asserts that competition will serve the same purpose as public interest regulation. HRS § 269-16.9(e); and HAR § 6-80-135.

#### IV.

##### Consumer Advocate's Position

###### A.

##### HAR § 6-80-35(e)

The Consumer Advocate contends that Oceanic misreads HAR § 6-80-35(e). Specifically:

1. HAR § 6-80-35(e) does not *per se* require that Oceanic submit a cost study. Instead, Oceanic's satisfactory showing of no cross-subsidization under HAR § 6-80-35(e) can be made through the submission of a cost study in support of its bundled service offering.

2. Oceanic, as a non-incumbent telecommunications carrier ("non-ILEC"), is not required to "submit a cost study for any tariff, whether for fully competitive, partially competitive or noncompetitive service, unless ordered otherwise by the commission." HAR § 6-80-42(b). The commission, at its option, may instruct Oceanic "to complete and submit a cost study . . . for any service." HAR § 6-80-42(c).



3. Thus, "existing rules do not always require a formal cost study, rather, if the situation justifies, the Commission may impose that requirement."<sup>11</sup>

In particular, consistent with previous dockets, "the telecommunications carrier could assert in its tariff application for bundled service that the costs of the fully or partially competitive services, or the costs of the non-jurisdictional services are not subsidized by the noncompetitive services. This assertion could be combined with a statement by the telecommunications carrier indicating that it would account for the revenues and costs of the different services, regulated and unregulated, in separate books or by different Company affiliates providing the services."<sup>12</sup>

That said, the Consumer Advocate recognizes that, in one (1) instance, the commission instructed Oceanic to submit supporting cost data for its proposed bundled service packages.<sup>13</sup>

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<sup>11</sup>Consumer Advocate's position statement, at 11, footnote 10 (underscore omitted). See also *id.* at 7 ("Oceanic, a non-ILEC, could file a tariff change or bundled service proposal without a cost study, unless the Commission considers otherwise.")

<sup>12</sup>*Id.* The Consumer Advocate cites to two (2) dockets as examples: (1) Decision and Order No. 20589, filed on October 23, 2003, in Docket No. 03-0128, *In re Bell Atlantic Comm., Inc., dba Verizon Long Distance*; and (2) Decision and Order No. 19553, filed on September 10, 2002, in Docket No. 02-0188, *In re Bell Atlantic Comm., Inc.*

<sup>13</sup>Docket No. 03-0049, *In re Time Warner Telecom of Hawaii, L.P., dba Oceanic Comm.*

B.

Cost Support

While Oceanic is not required to submit cost study support for every bundled service package it may offer in the future, the Consumer Advocate objects to a blanket, prospective waiver that exempts Oceanic from submitting cost support for all future bundled service offerings. Such a broad waiver for all future bundled service offerings, the Consumer Advocate maintains, is extreme, unreasonable, and inconsistent with the public interest.

In particular:

1. Oceanic is a facilities-based carrier that offers a broad range of competitive and noncompetitive telecommunications services and is affiliated with the dominant provider of cable television service in the State. While measures have been taken to separate the operations of these affiliates, there may be instances when cross-subsidization occurs.

2. Oceanic fails to: (A) explain why it is unable to submit the generic cost information it does produce; and (B) identify the additional costs that will be incurred, or the magnitude of such costs, if it is required to produce a cost study. Thus, the Consumer Advocate is unable to ascertain whether the filing of cost support poses an unreasonable administrative and cost burden, as Oceanic claims.

3. The Consumer Advocate disagrees with Oceanic's interpretation that HAR § 6-80-35(e) is intended to apply only to

Verizon Hawaii Inc. Instead, under a plain reading, HAR § 6-80-35(e) applies to all telecommunications carriers. Furthermore, HAR § 6-80-42 clearly distinguishes between the incumbent telecommunications carrier and non-ILECs, while HAR § 6-80-35(e) does not.

4. A blanket waiver will enable Oceanic to roll out joint service offerings without a demonstration that the noncompetitive services are not subsidizing the partially or fully competitive services.

5. In certain instances, Oceanic is able to: (A) provide acceptable information under HAR § 6-80-35(e) as an alternative to a formal cost study; or (B) seek a case specific exemption.

## V.

### Oceanic's Reply

#### A.

#### Consumer Advocate's Concerns

In response, Oceanic states:

1. The Consumer Advocate's concerns about cross-subsidization between Oceanic and Oceanic Cable are unfounded:

A. None of Oceanic's bundled service offerings include any services offered by Oceanic Cable. Thus, cross-subsidization with Oceanic Cable is unlikely to occur.

B. Since 1988, Time Warner Telecom, Inc. ("TWTI"), Oceanic's parent company, has been financially and operationally separate from Time Warner Entertainment Company ("TWEA"), which

owns Oceanic Cable. Although Time Warner, Inc. ("TWI") owns and operates Oceanic Cable, it only has an equity interest in TWTI.

C. TWTI and TWI are traded separately, have separate shareholders, and are financially and operationally separate.

D. Under federal law, Oceanic is required to disclose any special arrangements with Oceanic Cable.

2. While it concurs that HAR § 6-80-35(e) does not require a cost study in every case, and the commission has not required a cost study in every case, the commission has required that Oceanic submit supporting cost data for at least one of Oceanic's bundled service offering, Docket No. 03-0049.

3. Oceanic's typical bundled service packages are promotional offerings that are: (A) normally introduced on relatively short notice; and (B) in effect for only three (3) to six (6) months. If Oceanic requests a specific waiver for each package, there is no assurance that the waiver will be granted in time to meet the nationwide roll-out date.

4. It has never been required to prepare any type of cost study for any of its regulated services, let alone its non-regulated services and its Federal Communications Commission-regulated services. Thus, it is unable to quantify the cost of preparing a cost study, "and to do so would require the development of new processes and procedures as well as unwarranted expense."<sup>14</sup>

5. Oceanic, as a non-dominant provider of competitive services, does not have sufficient market power to price its

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<sup>14</sup>Oceanic's response, at 4.

services below cost and remain profitable. Thus, a waiver of HAR § 6-80-35(e) for Oceanic's bundled service packages is justified based on the fact that competition serves the same purpose as subsection (e), i.e., public interest regulation.

B.

Alternative Relief

Oceanic concludes by stating that if its request for a waiver of the cost study requirement for all of its future bundled service packages is too broad, the commission, at a minimum, should exempt the bundling of voice, Internet, and toll, as well as any promotional offerings associated with these services.

VI.

Discussion

While HAR § 6-80-35(e) does not *per se* require that Oceanic submit a cost study for its bundled service packages, Oceanic's reading of subsection (e) is susceptible to such an interpretation.<sup>15</sup> Thus, the commission proceeds to address Oceanic's request for a waiver of the cost study requirement to offer and provide in the State its bundled service packages that include its Network Services.

In August 1995, the commission issued Oceanic its certificate of public convenience and necessity ("CPCN"), by

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<sup>15</sup>See Docket No. 03-0049.

Decision and Order No. 14145, filed on August 17, 1995, in Docket No. 94-0093.<sup>16</sup> The commission addressed the Consumer Advocate's and GTE Hawaiian Telephone Company Inc.'s ("GTE Hawaiian Tel") concerns over potential cross-subsidization (including Oceanic Cable's possible subsidization), as follows:

We have in the past required [long-run incremental cost] LRIC studies of certain telecommunications providers. The purpose of requiring LRIC studies is to ensure that non-competitive services do not subsidize competitive services. Pricing a competitive service below LRIC requires subsidization of the service by other services. Act 225, Session Laws of Hawaii 1995, effective June 29, 1995, deems a competitive service to be cross-subsidized if the service is priced below total service LRIC of providing the service. Ultimately, the concern here is to guard against discriminatory pricing and predatory arrangements that would inhibit competitive growth. However, where justified, we may exempt providers from this requirement.

Here, Oceanic is a new competitive intrastate carrier. It does not possess market power, as yet, in any single segment of the intrastate telecommunications market. Cross-subsidization of the rates of one service or customer by the revenues of another, is, thus, not anticipated at this time. It is, therefore, reasonable to exempt Oceanic from the LRIC study requirement. We reiterate, however, as we did in Docket No. 95-0038, Order No. 13838 (March 31, 1995), that LRIC is an appropriate measure by which to evaluate the rates of any provider where cross-subsidization or other forms of unfair pricing are suspected. Thus, in the future, as appropriate or necessary, we may require Oceanic to provide LRIC information. For the present, we accept Oceanic's rates as reasonable.

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<sup>16</sup>See also Decision and Order No. 14488, filed on January 23, 1996, in Docket No. 94-0265 (amended CPCN); Decision and Order No. 14395, filed on November 27, 1995, in Docket No. 95-0316 (amended CPCN); and Order No. 14842, filed on August 5, 1996, in Docket No. 95-0329 (referring to HAR § 6-80-17(e)).

Decision and Order No. 14145, at 8 - 9 (footnote and text therein omitted).<sup>17</sup>

Oceanic, by its CPCN, is also exempt from the requirements of HRS § 269-16(b), relating to rate of return regulation and the holding of public and contested case hearings for rate increases.<sup>18</sup>

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<sup>17</sup>The commission, by Order No. 13838, filed on March 31, 1995, in Docket No. 95-0038, exempted Sprint Communications Company, L.P. ("Sprint"), from the LRIC support requirement, over the Consumer Advocate's and GTE Hawaiian Tel's objections.

The commission held:

As a general rule, it is reasonable to require providers to file LRIC cost support information when submitting tariff proposals in order to ensure that they are not reducing their rates below their LRIC to provide the proposed services, and to encourage the fair and equitable treatment of all providers. Ultimately, our concern is to guard against discriminatory pricing and predatory arrangements that would inhibit competitive growth. However, where justified, we may exempt providers from this requirement. We find that, in this case, because Sprint is a new competitive intrastate carrier and does not possess the market power in any single segment of the intrastate market to cross-subsidize the rates of one service or customer with the revenues of another, it is reasonable to exempt Sprint from the LRIC cost support requirement. However, we reiterate that the LRIC standard is appropriate in evaluating the rates of any company where unreasonable cross-subsidies or other forms of unfair pricing are suspected, and if such concerns should subsequently arise with respect to Sprint, we will invoke that standard and require Sprint to provide LRIC cost support information.

Id. at 3 - 4.

<sup>18</sup>Decision and Order No. 14145, at 9 - 11, 13, paragraph 5, and 15, paragraph 4. The commission noted that it granted the same exemption to AT&T Communications of Hawaii, Inc., MCI, and Sprint, when they applied for their respective CPCNs. Id. at 9. See also Decision and Order No. 14488, at 9 - 10, and 12, paragraph 7(b) (Oceanic's amended CPCN).

Oceanic currently provides Network Services to its business customers. Oceanic does not appear to provide local exchange services to any residential customers.

The underlying rationale for initially granting Oceanic an exemption from the LRIC support requirement holds true today. Oceanic does not possess market power in any single segment of the intrastate telecommunications market.<sup>19</sup> "Cross-subsidization of the rates of one service or customer by the revenues of another, is, thus, not anticipated at this time."<sup>20</sup> In addition, since Oceanic is exempt from cost-based, rate of return regulation, it is unable to use rate of return regulated services to cross-subsidize other services.<sup>21</sup>

The commission finds that the waiver of the cost study requirement for Oceanic to offer and provide in the State bundled service packages that include its Network Services is consistent with the public interest, and that under this scenario, competition will serve the same purpose as public interest regulation. Oceanic represents that:

1. It is not required to submit cost support in any other jurisdictions where it provides bundled service packages.

2. The commission's cost study ruling in Docket No. 03-0049 effectively precludes Oceanic from making such

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<sup>19</sup>Oceanic's estimated market share of the intrastate telecommunications market is set forth in confidential filings submitted to the commission pursuant to Stipulated Protective Order No. 21080, filed on June 24, 2004.

<sup>20</sup>Decision and Order No. 14145, at 8.

<sup>21</sup>See also HAR § 6-80-136(a)(4).



offerings in the State to its customers, thereby impeding the competitive market.

3. Many of Oceanic's nationwide bundled service packages are promotional offerings for a limited duration that are developed in response to the competitive marketplace, and since Oceanic is unable to adjust its national schedule to meet the commission's cost study requirement, it has opted to exclude Hawaii from its national promotions.<sup>22</sup>

4. Oceanic and Oceanic Cable are separate entities, none of Oceanic's bundled service offerings include any Oceanic Cable services, and thus, cross-subsidization with Oceanic Cable's services is unlikely to occur.

In waiving the cost study requirement, Oceanic shall nonetheless continue to abide by HAR § 6-80-35(e)'s requirements that it: (1) not offer its joint service packages without the commission's prior express approval; and (2) file an application not less than thirty (30) days before the joint services are marketed, sold, or advertised.<sup>23</sup> In addition, the commission, at its option, may require Oceanic to submit a cost study in support of an application filed under HAR § 6-80-35(e), consistent with HAR §§ 6-80-42(b) and (c).<sup>24</sup>

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<sup>22</sup>See Oceanic's response to CA-IR-5 (Oceanic's Power Drive Promo promotion excluded from the Hawaii market).

<sup>23</sup>In certain instances, the commission has approved Oceanic's proposed tariff changes on less than thirty (30) days notice. See, e.g., Order No. 17615, filed on March 21, 2000, in Docket No. 00-0084; Order No. 16805, filed on January 28, 1999, in Docket No. 99-0019; and Decision and Order No. 14458, filed on January 12, 1996, in Docket No. 96-0011.

<sup>24</sup>See also Decision and Order No. 14145, at 9.

VII.

Orders

THE COMMISSION ORDERS:

1. Oceanic's request for a waiver of the cost study requirement to offer and provide in the State its bundled service packages that include its Network Services is approved; provided that the commission, at its option, may require Oceanic to submit a cost study in support of an application filed under HAR § 6-80-35(e), consistent with HAR §§ 6-80-42(b) and (c).

2. Oceanic shall continue to abide by HAR § 6-80-35(e)'s requirements that it: (A) not offer its joint service packages without the commission's prior express approval; and (B) file an application not less than thirty (30) days before the joint services are marketed, sold, or advertised.

DONE at Honolulu, Hawaii AUG 31 2004.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By Wayne H. Kimura  
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

Michael Azama  
Michael Azama  
Commission Counsel

By Janet E. Kawelo  
Janet E. Kawelo, Commissioner

04-0082.cs

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21326 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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Karen Higashi

DATED: AUG 31 2004