

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
GLOBALCOM, INC., dba)
GCI GLOBALCOM, INC.)
)
For Approval of a Financing)
Transaction.)
_____)

DOCKET NO. 04-0265

DECISION AND ORDER NO. 21362

Filed Sept. 27, 2004
At 11 o'clock A.M.

Karen Higashi.
Chief Clerk of the Commission

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

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ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi.

II.

Background

A.

Description of Globalcom

Globalcom is an Illinois corporation and a wholly-owned subsidiary of GCI Globalcom Holdings, Inc., a privately held corporation. Globalcom is presently authorized to provide facilities-based and resold interexchange telecommunications services in thirty-one (31) states including the State of Hawaii ("State").²

B.

Proposed Financial Transactions

The Proposed Financial Transactions involve Globalcom's issuance of loans in an aggregate amount of up to \$8.3 million and a security interest in Globalcom's assets as collateral for such loans. Specifically, Globalcom represents that it entered into a Loan and Security Agreement, that provides for (1) a revolving loan in an amount of up to \$5.9 million with a maturity date of June 30, 2009, and (2) a term loan in an amount of up to \$2.4 million with a maturity date of December 31, 2006. Both loans are secured by a first priority security interest in all of Globalcom's tangible and intangible property.

²Globalcom is authorized to provide intrastate telecommunications services in the State as a reseller. See Decision and Order No. 17852, filed on July 24, 2000, in Docket No. 00-0183.

Globalcom represents that the above-described transactions were consummated on July 27, 2004 and such transactions (1) "will not result in a change in Globalcom's management or its day-to-day operations in Hawaii; nor will it adversely [a]ffect Globalcom's current or proposed operations in Hawaii"; and (2) "will enable Globalcom to better utilize its available funds to bring its services to new markets and allow more consumers to benefit from its competitive services more quickly and efficiently."

C.

Consumer Advocate's Position

The Consumer Advocate states in its Statement of Position that it does not object to Globalcom's request for commission approval of the Proposed Financial Transactions, described above, subject to certain qualifications. In particular, the Consumer Advocate recommends that the commission require Globalcom to submit copies of the following documentation to the commission and the Consumer Advocate within thirty (30) days of the date of this decision and order:

1. A copy of Globalcom's initial tariff including tariff revisions required by Decision and Order No. 17852, filed on July 24, 2000, in Docket No. 00-0183; and
2. A copy of the Loan and Security Agreement, pursuant to Hawaii Administrative Rules ("HAR") §§ 6-61-101(b)(2) and 6-61-105(c)(2).

In its Statement of Position, the Consumer Advocate further mentions that it recognizes: (1) "the telecommunications service Globalcom is authorized to provide is fully-competitive;" (2) "the entry of many telecommunications service providers in the Hawaii market;" and (3) "[t]he market, it is assumed, will then serve to mitigate any traditional public utility regulatory concerns regarding the [Proposed Financial Transactions] affecting Globalcom." Therefore, if there are any adverse consequences from the Proposed Financial Transactions, "consumers in Hawaii will have the option of selecting another service provider."

III.

Discussion

HRS § 269-17 requires a public utility to obtain the commission's approval before issuing stocks and stock certificates, bonds, notes, and other evidences of indebtedness payable at periods of more than twelve (12) months. This section permits the proceeds of such debt to be used only for the acquisition of property or for the construction, completion, extension, or improvement of or addition to the utility's facilities or service, or for the discharge or refunding of its obligations or reimbursement of funds expending for the foregoing described purposes. Furthermore, "[a]ll stock and every stock certificate, and every bond, note, or other evidence of indebtedness of a public utility corporation not payable within

twelve [(12)] months, issued without an order of the commission authorizing the same, then in effect, shall be void."

HRS § 269-19 requires a public utility corporation to obtain our consent prior to, among other things, mortgaging, encumbering, or otherwise disposing of its property. Similar to HRS § 269-17, HRS § 269-19 also states: "Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation, made other than in accordance with the order of the commission shall be void."

Upon a review of the record, particularly Globalcom's representations, we find that the Proposed Financial Transactions fall under the purview of HRS §§ 269-17 and 269-19. Because Globalcom further acknowledges that the Proposed Financial Transactions have already been consummated, the commission concludes that it does not have the statutory authority under HRS chapter 269 to grant retroactive approvals under HRS §§ 269-17 and 269-19, as requested by Globalcom. See, *In re Sea Link of Hawaii, Inc.*, Docket No. 02-0212, Decision and Order No. 21085 (June 25, 2004). Accordingly, the commission concludes that Globalcom's request for approval, *nunc pro tunc*, of the Proposed Financial Transactions should be denied.

In the alternative, however, 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.

In this docket, we find, at this time, the telecommunications services currently provided by Globalcom are fully competitive, and Globalcom is a non-dominant carrier in Hawaii. We also find that the Proposed Financial Transactions are consistent with the public interest, and that competition, in this instance, will serve the same purpose as public interest regulation. Thus, on its own motion, the commission concludes that the applicable requirements of HRS §§ 269-17 and 269-19 should be waived with regards to the matters in this docket, pursuant to HRS § 269-16.9 and HAR § 6-80-135.³ Similarly, based on these findings and conclusions stated above, we will also waive the provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that Globalcom's Petition fails to meet any of these filing requirements.

As to the Consumer Advocate's recommendation concerning the filing of Globalcom's initial tariff including tariff revisions as required by Decision and Order No. 17852, we agree with the recommendation, in part. Our records indicate that

³See also, Decision and Order No. 18454, filed on March 28, 2001, in Docket No. 00-0443. The commission will continue to examine each application or petition and make determinations on a case-by-case basis as to whether the applicable requirements of HRS §§ 269-17 and 269-19 should be waived. The commission's determination, in the instant case, of the applicability of HRS §§ 269-17 and 269-19 is based on our review of Globalcom's instant Petition only. Thus, our waiver in this instance of the applicability of HRS §§ 269-17 and 269-19 should not be construed by any public utility, including Globalcom, as a basis for not filing an application or petition regarding similar transactions that fall within the purview of these statutes.

Globalcom submitted its revised tariff to the commission on August 2, 2000, in accordance with Decision and Order No. 17852. However, there is no certification or representation that Globalcom served the Consumer Advocate two (2) copies of such submission that same day, as required under HAR §§ 6-61-18 and 6-61-111. Therefore, concerning this particular recommendation, we will only require Globalcom to submit two (2) copies of its August 2, 2000 revised tariff to the Consumer Advocate within thirty (30) days of the date of this decision and order. Consistent with HAR § 6-61-18 and 6-61-111, Globalcom is further advised that, for any future tariff filings, two (2) copies of the "tariff page or pages, together with the transmittal letter, shall be served on the [Consumer Advocate]." Finally, we will adopt the Consumer Advocate's second recommendation, in its entirety, relating to the submission of copies of Globalcom's Loan and Security Agreement, and will direct Globalcom to submit copies of such document to the commission and the Consumer Advocate within thirty (30) days of the date of this decision and order.

IV.

Orders

THE COMMISSION ORDERS:

1. Globalcom's request for approval of the Proposed Financial Transactions, *nunc pro tunc* and described in Globalcom's Petition, filed on August 23, 2004, is denied.

2. The requirements of HRS §§ 269-17 and 269-19, to the extent applicable, are waived with respect to the Proposed Financial Transactions, described in Globalcom's Petition, filed on August 23, 2004, subject to the conditions noted below.

3. HAR §§ 6-61-101 and 6-61-105 filing requirements, to the extent applicable, are waived. Nonetheless, Globalcom shall submit two (2) copies of its August 2, 2000 revised tariff to the Consumer Advocate within thirty (30) days of the date of this decision and order, pursuant to HAR §§ 6-61-18 and 6-61-111. Furthermore, Globalcom shall submit copies of the Loan and Security Agreement to the commission and the Consumer Advocate within thirty (30) days of the date of this decision and order, pursuant to HAR § 6-61-18. Failure to promptly comply with these filing requirements may constitute cause to void this decision and order, and may result in further regulatory action, as authorized by law.

DONE at Honolulu, Hawaii SEP 27 2004.

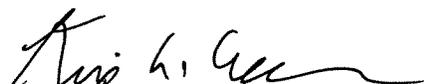
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By _____
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Kris N. Nakagawa
Commission Counsel

04-0265.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21362 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: SEP 27 2004