

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of )  
MCCC ICG HOLDINGS LLC and )  
ICG COMMUNICATIONS, INC. )  
To Complete a Transfer of )  
Control of an Authorized Carrier )  
and Related Financing )  
Arrangements. )  
\_\_\_\_\_ )

DOCKET NO. 04-0185

DECISION AND ORDER NO. 21363

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

Karen Higashi  
Chief Clerk of the Commission

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DIV. OF CONSUMER ADVOCACY  
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CONSUMER AFFAIRS  
STATE OF HAWAII

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KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.  
K. Higashi

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Docket No. 04-0185  
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DECISION AND ORDER

I.

Introduction

MCCC ICG HOLDINGS LLC ("Buyer") and ICG COMMUNICATIONS, INC. ("ICG") (collectively, referred to as "Petitioners"), by a Petition filed on July 28, 2004, request commission approval to: (1) transfer control of ICG Telecom Group, Inc. ("ICG Telecom") to Buyer, pursuant to Hawaii Revised Statutes ("HRS") § 269-19 ("Proposed Transfer of Control"); and (2) enter into financing arrangements for up to \$20 million to be secured by ICG Telecom's assets, pursuant to HRS §§ 269-17 and 269-19 ("Proposed Financing") (collectively, the two (2) transactions above will be hereinafter referred to as "Proposed Transactions").

Petitioners served a copy of the Petition on the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Consumer Advocate stated in its Statement of Position, filed on August 31, 2004,

that it does not object to the approval of the Proposed Transactions, subject to certain qualifications, as described in more detail below.

## II.

### Background

#### A.

##### Overview of Subject Entities

Buyer is a newly formed Delaware limited liability company that is owned by investment funds managed by (a) M/C Venture Partners, ("M/C Venture"),<sup>1</sup> and Columbia Capital, LLC ("Columbia Capital").<sup>2</sup> Each of the groups of funds managed by M/C Venture and Columbia Capital will hold a fifty per cent (50%) interest in Buyer.<sup>3</sup>

ICG is a Delaware corporation and its principal place of business is in Englewood, Colorado. ICG is the ultimate

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<sup>1</sup>M/C Venture's interest in Buyer will be held principally by M/C Venture Partners V, L.P., a Delaware limited partnership, and the remaining minority interests will be held by M/C Venture Investors, L.L.C. and Chestnut Venture Partners, Inc.

<sup>2</sup>Columbia Capital's interest in Buyer will be held principally by Columbia Capital Equity Partners III(QP), L.P., a Delaware limited partnership and Columbia Capital Equity Partners III (Cayman), a Cayman Island limited partnership. The remaining minority interests will be held by Columbia Capital Equity Partners III (AI), L.P., Columbia Capital Investors III, LL.C. and Columbia Capital Employee Investors III, L.L.C.

<sup>3</sup>As part of the Proposed Transactions described in this docket, Petitioners represent that management of Buyer will also receive options, the exercise of which could reduce the beneficial interests of M/C Venture and Columbia Capital in ICG to as low as 41.25 per cent each.

holding company of the ICG companies, and through various operating subsidiaries including its Hawaii operating subsidiary, ICG Telecom, ICG "provides communications and information services over a nationwide fiber-optic data and voice network." In particular, "ICG, through its operating subsidiaries, offers a range of resold and facilities-based services, including service over a managed fiber-optic network with numerous points of presence nationwide, including coverage of over 4,000 rate centers." Presently, ICG Telecom is authorized by a commission-issued certificate of authority ("COA") to provide resold and facilities-based intrastate telecommunications services within the State of Hawaii ("State").<sup>4</sup>

B.

Description of Proposed Transactions

1.

Proposed Transfer of Control

First, the Proposed Transfer of Control will result in an indirect transfer of control of ICG Telecom. In particular, through an Agreement and Plan of Merger entered into as of July 19, 2004, Buyer's newly created, wholly-owned subsidiary, MCCC Merger Corp. ("MCCC"), will be merged with and into ICG,

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<sup>4</sup>Decision and Order No. 16594, filed on October 6, 1998, in Docket No. 98-0213 (expanding ICG Telecom's COA to include the provisioning of facilities-based services in the State); and Decision and Order No. 16388, filed on June 22, 1998, in Docket No. 98-0159 (granting ICG Telecom a COA to provide intrastate resold telecommunications services in the State).

with ICG becoming the surviving entity. As a result, ICG will become a wholly-owned subsidiary of Buyer and Buyer will indirectly control ICG Telecom.

2.

Proposed Financing Arrangements

Second, concerning the Proposed Financing Arrangements consummated in connection with the Proposed Transfer of Control, "Buyer and ICG have entered into certain short-term financial arrangements designed to maintain ICG's financial stability." In particular, Buyer has loaned ICG \$2.4 million in the form of a term loan and has agreed to provide ICG with a revolving credit facility under which advances in excess of \$15 million may be made. The total amount borrowed by ICG under the Proposed Financing Arrangements is expected to not exceed \$20 million. In connection with these Proposed Financing Arrangements, Petitioners represent that ICG and its subsidiaries, including ICG Telecom, will for a period of less than twelve months, grant a security interest in their assets and will guarantee the obligations of ICG.

3.

Effect of Proposed Transactions

Petitioners represent that the consummation of the Proposed Transactions, described above, "will not result in any transfer or assignment of the operating authority held by ICG Telecom or its customers or result in a name change by

ICG Telecom." In fact, immediately following the consummation of the Proposed Transactions, Petitioners state that "ICG Telecom expects to continue to conduct its operations in substantially the same manner in which those operations are currently conducted and customers of ICG Telecom will continue to receive service under the same rates, terms and conditions that currently apply to those services." Thus, Petitioners assure the commission that the Proposed Transactions "will be transparent to customers served in Hawaii by ICG Telecom in terms of the services that they receive."

C.

Consumer Advocate's Position

In its Statement of Position, the Consumer Advocate recognizes that "many telecommunications service providers have entered the market in Hawaii", and that the "competitive market place is thus assumed to serve the same purpose as public interest regulation." Therefore, if there are any adverse consequences from the Proposed Transactions, "Hawaii consumers will be protected through the option of selecting another service provider."

Based on the above, the Consumer Advocate states that it does not object to Petitioners' request for commission approval of the Proposed Transactions, provided copies of the following documents are submitted to the commission and the Consumer Advocate within thirty (30) days from the issuance date of this decision and order:

1. A copy of ICG Telecom's revised Hawaii PUC Tariff No. 1, as required by Decision and Order No. 16388;
2. A copy of ICG Telecom's revised Hawaii PUC Tariff No. 2, as required by Decision and Order No. 16594;
3. A copy of ICG Telecom's 2002 and 2003 annual financial reports, as required by HAR § 6-80-91;
4. An executed copy of the Agreement and Plan of Merger between Buyer and ICG, pursuant to HAR § 6-61-105(c)(2);
5. A copy of the \$2.4 million loan agreement and \$15 million revolving credit facility documents, pursuant to HAR §§ 6-61-101(b)(2) and 6-61-1-5(c)(2); and
6. A list and description of ICG Telecom's assets in Hawaii that will be used to secure the Proposed Financing Arrangements, pursuant to HAR § 6-61-105(b)(2).

### III.

#### Discussion

##### A.

#### Approval of Proposed Transactions

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." Thus, the commission has jurisdiction to review the proposed financial transactions of the parent entity of a regulated public utility under HRS § 269-7(a). Under this section, the commission will approve the proposed financial transactions if they are reasonable and consistent with the public interest.<sup>5</sup>

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. Moreover, HRS § 269-17 requires a public utility to obtain the commission's approval before issuing stocks and stock certificates, bonds, notes, and other evidence of indebtedness payable at periods of more than twelve (12) months.

Because the Proposed Transactions, as a whole, concern transactions of TCG Telecom's parent entities, such transactions fall under our purview under HRS § 269-7(a). Furthermore, because the Proposed Financing Arrangements, in particular, will be short-term or for a period of less than twelve (12) months, and ICG Telecom will grant a security interest in its assets in Hawaii, we conclude that such transactions will only trigger HRS § 269-19 as either the issuance of "notes" or "other evidence of indebtedness."

Nonetheless, HRS § 269-16.9(e) also permits us to waive regulatory requirements applicable to telecommunications

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<sup>5</sup> See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.



providers if we determine that competition will serve the same purpose as public interest regulation. Similarly, HAR § 6-80-135 permits us to waive the applicability of any of the provisions of HRS chapter 269 or any rule (except provisions of HRS § 269-34 or provisions of HAR chapter 6-80 that implement HRS § 269-34), upon a determination that a waiver is in the public interest.

Upon review of the record<sup>6</sup> in this docket, we find the following: (1) that much of the telecommunications services currently provided by ICG Telecom are competitive; (2) that ICG Telecom is a non-dominant carrier in Hawaii; (3) that the Proposed Transactions are consistent with the public interest; and (4) that competition, in this instance, will serve the same purpose as public interest regulation.

Based on the foregoing, the commission will, on its own motion, waive the requirements of HRS §§ 269-7(a) and 269-19, to the extent applicable, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.<sup>7</sup> Similarly, based on the findings stated above, we will also waive the filing requirements of HAR § 6-61-105, to the extent that Petitioners' petition fails to meet all of the filing requirements.

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<sup>6</sup> The commission also takes official notice of any other commission records relating to ICG Telecom, under HAR § 6-61-48.

<sup>7</sup> At 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), HRS § 269-19 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 or petition involving similar transactions or circumstances.

Notwithstanding the waiver of the various requirements, noted above, we will adopt the Consumer Advocate's recommendations by requiring Petitioners to submit copies of the documents listed in Section II.C. to the commission and the Consumer Advocate within thirty (30) days from the issuance date of this decision and order.

#### IV.

##### Orders

###### THE COMMISSION ORDERS:

1. The requirements of HRS §§ 269-7(a) and 269-19, to the extent applicable, are waived with respect to the Proposed Transactions, 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 section is waived.


3. Within thirty (30) days of the date of this decision and order, Petitioners shall submit copies of the documents listed in Section II.C. of this decision and order to the commission and the Consumer Advocate.

4. Petitioners 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.

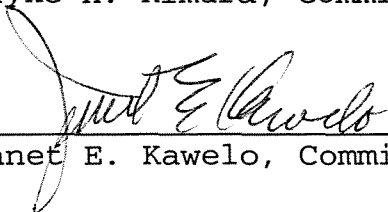
SEP 27 2004

DONE at Honolulu, Hawaii \_\_\_\_\_.

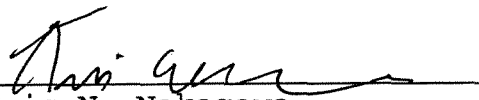
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By \_\_\_\_\_  
Wayne H. Kimura, Commissioner

By   
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

  
Kris N. Nakagawa  
Commission Counsel


04-0185.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21363 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  
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Karen Higashi

DATED: SEP 27 2004