

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
QUANTUMSHIFT COMMUNICATIONS, INC.)
AND VCOM SOLUTIONS, INC.)
)
For Exemption, or in the)
Alternative, for Authorization to)
Consummate Certain Stock Transfers)
Resulting in the Change in Control)
Of the Parent Entity.)
_____)

DOCKET NO. 04-0190

DECISION AND ORDER NO. 21426

Filed Oct. 21, 2004
At 2 o'clock P.M.

Karen Higashi.
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
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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DECISION AND ORDER

I.

Introduction

QUANTUMSHIFT COMMUNICATIONS, INC. ("QuantumShift") and VCOM SOLUTIONS, INC. ("VCOM") (collectively, "Applicants") jointly request the commission to issue an order waiving any requirement for approval of the consummated stock transaction resulting in the change in control of QuantumShift from its former parent entity, QuantumShift, Inc., to its new parent entity, VCOM ("Consummated Financial Transaction").¹ Applicants make their request, pursuant to Hawaii Revised Statutes ("HRS") § 269-16.9(e) and Hawaii Administrative Rules ("HAR") § 6-80-135. In the alternative, Applicants request that the commission approve the Consummated Financial Transaction *nunc pro tunc*.

¹Applicants' application, filed on August 2, 2004, for Exemption, or in the Alternative, for Authorization to Consummate Certain Stock Transfers Resulting in the Change in Control Of the Parent Entity ("Application").

Applicants served the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate") a copy of the Application. The Consumer Advocate, by its Statement of Position, filed on October 12, 2004, recommends that Applicants' request for waiver should be denied. However, it does not object to the approval of the Consummated Financial Transaction, described above, subject to certain qualifications, discussed below.

II.

Background

A.

Description of Applicants and Related Entities

QuantumShift (fka, MVX.Com Communications, Inc.) is a California corporation that holds a certificate of authority to provide intrastate telecommunications services within the State of Hawaii ("State" or "Hawaii") as a reseller. It currently offers a full spectrum of voice and data telecommunications services in forty-seven (47) states including Hawaii. QuantumShift Inc. ("QuantumShift Parent"), QuantumShift's sole shareholder and parent entity, is a privately held California corporation with its principal place of business located in Novata, California.²

²QuantumShift's operating authority to provide intrastate telecommunications services in the State as a reseller originates from the authority granted to QuantumShift (fka, MVX.Com Communications, Inc.) in Decision and Order No. 17650, filed on March 31, 2000, in Docket No. 99-0351.

VCOM, a California corporation, operates as a facilities-based and resale interexchange and competitive local exchange carrier in California, pursuant to the authority granted by the California Public Utilities Commission. VCOM specializes in providing a full spectrum of voice and data telecommunications services, conferencing services, internet hosting and access, and other services designed specifically to meet the needs of small and medium sized businesses. Nonetheless, Applicants represent that VCOM will not engage in any intrastate business in Hawaii except indirectly through QuantumShift, as described further below.

B.

Description of Consummated Financial Transaction

On May 28, 2004, VCOM, through a Stock Purchase Agreement, acquired one hundred per cent (100%) of the existing and issued stock of QuantumShift from QuantumShift's Parent. Accordingly, the ultimate control of QuantumShift will transfer to VCOM ("transfer of control"). Applicants represent, among other things, that the transfer of control (1) will enable QuantumShift's existing telecommunications services to be continued, without modification of its services, rates or terms and in a manner that is transparent to QuantumShift's existing customers, and (2) will not result in a change in the day-to-day management of QuantumShift and will not have a negative impact on QuantumShift's technical ability to continue to operate, maintain and expand its existing service offerings in Hawaii. They contend that the Consummated Financial Transaction will place QuantumShift in a position whereby

it can continue to provide high quality service with no disruption or adverse effects on its existing customers.

C.

Consumer Advocate's Position

In its October 12, 2004 Statement of Position, the Consumer Advocate contends that Applicants' request for a waiver should be denied, and that the commission should assert authority over the Consummated Financial Transaction for the purpose of protecting the public interest.

Notwithstanding its objection to Applicant's request for waiver, the Consumer Advocate does not object to commission approval of the Consummated Financial Transaction, pursuant to HRS § 269-7(a), provided the following documents are submitted to the commission and the Consumer Advocate within thirty (30) days from the date of this decision and order:

1. Copies of the May 28, 2004 Stock Purchase Agreement, pursuant to HAR §§ 6-61-101(b)(2) and 6-61-105(c)(2); and
2. QuantumShift's Annual Report of Resellers and Various Telecommunications Services for the year ending December 31, 2003, pursuant to HAR §§ 6-80-91 and 6-80-92 ("2003 Annual Financial Report").

As stated in its October 12, 2004 Statement of Position, the Consumer Advocate "recognizes the entry of many telecommunications service providers in the Hawaii market." It further states that

"[t]he market place, it is assumed, will then serve to mitigate any traditional public utility regulatory concerns regarding the proposed change in control of the parent entity. Therefore, if there are any adverse consequences from the [Consummated Financial] [T]ransaction, consumers in Hawaii will have the option of selecting another service provider."

III.

Discussion

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 transaction if it is reasonable and consistent with the public interest.³

HRS § 269-16.9(e) also permits the commission to waive regulatory requirements applicable to telecommunications 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

³See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

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 record⁴ in this docket, we find the following: (1) that much of the telecommunications services currently provided by QuantumShift are competitive; (2) that QuantumShift is a non-dominant carrier in Hawaii; (3) that the Consummated Financial Transaction is 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 finds and concludes that the requirements of HRS § 269-7(a) should be waived, to the extent applicable, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.⁵ We will not adopt the Consumer Advocate's recommendation to deny Applicants' request for waiver, particularly because the Consumer Advocate did not sufficiently state the reasons for denying such waiver.

Because we find the May 28, 2004 Stock Purchase Agreement to be directly related to the Consummated Financial Transaction, we will adopt the Consumer Advocate's first recommended qualification by requiring Applicants to submit copies of the Stock Purchase

⁴The commission also takes official notice, pursuant to HAR § 6-61-48, of any other commission records relating to QuantumShift.

⁵At the same time, the commission will continue to examine a utility's application 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.

Agreement to the commission and the Consumer Advocate within thirty (30) days of the date of this decision and order. Finally, our records indicate that QuantumShift neither filed its 2003 Annual Financial Report due on March 31, 2004, pursuant to HAR §§ 6-80-91 and 6-80-92, nor did it pay its public utility fee ("Fee") on July 31, 2004, pursuant to HRS § 269-30. Thus, in addition to adopting the Consumer Advocate's second recommended qualification requiring Applicants submit copies of the 2003 Annual Financial Report to the commission and the Consumer Advocate within thirty (30) days of the date of this decision and order, we will also require Applicants to pay its Fee to the commission within thirty (30) days of the date of this decision and order.

If necessary and in accordance with HAR § 6-61-50, any party in this docket may file a stipulation for protective order for commission review and approval to protect the confidentiality of information that is protected from disclosure under HRS chapter 92F, or any other law.

IV.

Orders

THE COMMISSION ORDERS:

1. The requirements of HRS § 269-7(a), to the extent applicable, are waived with respect to the Consummated Financial Transaction described in the instant application, filed on August 2, 2004.

2. Within thirty (30) days of the date of this decision and order, Applicants shall submit to the commission and the Consumer Advocate the following:

- a. Copies of the May 28, 2004 Stock Purchase Agreement.
- b. Copies of QuantumShift's 2003 Annual Financial Report.

Within thirty (30) days from the date of this decision and order, Applicants shall submit to the commission QuantumShift's Fee due on July 31, 2004. If necessary and in accordance with HAR § 6-61-50, any party in this docket may file a stipulation for protective order for commission review and approval to protect the confidentiality of information that is protected from disclosure under HRS chapter 92F, or any other law.

3. Applicants 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 OCT 21 2004

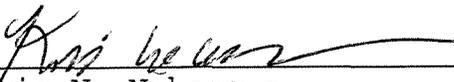
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Kris N. Nakagawa
Commission Counsel
04-0190.ac

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21426 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 J. O'CONNOR, ESQ.
STEEL HECTOR & DAVIS, LLP
200 South Biscayne Boulevard
Miami, FL 33131

Attorney for QUANTUMSHIFT COMMUNICATIONS, INC. and
VCOM SOLUTIONS, INC.

Karen Higashi

DATED: OCT 21 2004