

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
GE BUSINESS PRODUCTIVITY SOLUTIONS,)
INC. and BUSINESS PRODUCTIVITY)
SOLUTIONS, INC.)
)
For Expedited Approval of (i) The)
Transfer of Assets, Including The)
Customer Base, of GE Business)
Productivity Solutions, Inc.; (ii))
The Transfer of GE Business)
Productivity Solutions, Inc.'s)
Operating Authority in Hawaii to)
Business Productivity Solutions,)
Inc.; and (iii) GE Business)
Productivity Solutions, Inc.'s)
Discontinuance of Service in)
Hawaii.)
)
_____)

DOCKET NO. 04-0305

DECISION AND ORDER NO. 21565

Filed Jan. 27, 2005

At 11 o'clock A.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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Docket No. 04-0305
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DECISION AND ORDER

By this decision and order, the commission approves the transfer of GE BUSINESS PRODUCTIVITY SOLUTIONS, INC.'s ("GEBPS") certificate of authority ("COA") to BUSINESS PRODUCTIVITY SOLUTIONS, INC. ("BPS") to operate as a reseller of telecommunications services in the State of Hawaii ("State"), pursuant to Hawaii Revised Statutes ("HRS") § 269-19 and subject to certain conditions specifically stated herein. To the extent applicable, the commission, on its own motion also waives the requirements of HRS § 269-16.92.

I.

Introduction

GEBPS and BPS (collectively "Applicants") request that the commission grant them authority to consummate a transaction involving the transfer of substantially all of the assets of GEBPS, including GEBPS' customer base and COA, to BPS ("Proposed Transaction").¹ Applicants make their request, pursuant to HRS § 269-19.

Applicants served copies of the Application 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 December 6, 2004 ("Statement of Position"), that it does not object to the approval of the Proposed Transaction, described above.

II.

Background

A.

Overview of Subject Entities

GEBPS, a Georgia corporation, is a public utility that holds a commission-issued COA to provide intrastate telecommunications services on a resold basis within the State.²

¹Applicants' application, filed on October 21, 2004 ("Application"). Applicants also request that the commission approve GEBPS' request to voluntarily surrender its authority once its customers have been fully transferred to BPS and changes to GEBPS' tariff to reflect the name change from GEBPS to BPS.

²Decision and Order No. 18922, filed on September 28, 2001, in Docket No. 01-0128.

GEBPS is a wholly-owned subsidiary of General Electric Capital Corporation, which in turn, is a wholly-owned subsidiary of General Electric Company, a New York corporation headquartered in Fairfield, Connecticut.

BPS is a newly formed Minnesota corporation authorized to do business in the State as a foreign corporation. BPS is a wholly-owned subsidiary of Eschelon Operating Company, a Minnesota corporation, which in turn, is a wholly-owned subsidiary of Eschelon Telecom, Inc. ("ETI"), a Delaware corporation.

B.

Description of Proposed Transaction

The Proposed Transaction involves an Asset Purchase Agreement ("Agreement") executed between GEBPS and BPS on October 13, 2004. Pursuant to the Agreement, BPS' ultimate parent, ETI, will initially acquire substantially all of the assets of GEBPS and immediately transfer these assets to BPS.³ Following the completion of the Proposed Transaction, BPS will provide intrastate telecommunications services to the former customers of GEBPS as

³Based on Applicants' letter dated November 12, 2004 and filed on November 15, 2004, "the *only* assets being transferred in the [Proposed Transaction] in Hawaii are the GEBPS customers and [COA] to provide long distance resale services." The commission will not review and consider the proposed transfer of GEBPS' customers to BPS as it has traditionally held that the acquisition of a carrier's customers does not require commission approval. *In re Startec Global Licensing et al.*, Docket No. 04-0275, Decision and Order No. 21400 (December 20, 2004); and *In re Cable & Wireless USA, Inc. and Primus Telecommunications, Inc.*, Docket No. 02-0349, Decision and Order No. 19779 (November 18, 2002).

resellers.⁴ BPS has no plans to construct outside plant or loop distribution facilities or any other facilities at this time. In addition, BPS will adopt GEBPS' existing tariff without any changes to current rates, terms and conditions. It merely proposes to revise such tariff to reflect the name change from GEBPS to BPS.

In support of their Application, Applicants represent the following:

1. "The proposed transfer of customers from GEBPS to BPS will have no adverse impact on customers"⁵;
2. "GEBPS customers will continue to receive their existing services at the same rates, terms and conditions that they have prior to the transfer and any future changes in the rates, terms and conditions of service will be made consistent with the [c]ommission's requirements"⁶; and
3. "To ensure a seamless transition and avoid customer confusion or inconvenience, Applicants will provide advance written notice to the affected customers at least thirty (30) days prior to the transfer, explaining the change in service provider in accordance

⁴Applicants represent that GEBPS presently has approximately seven (7) customers in the State.

⁵Application at 6.

⁶Id.

with applicable Federal Communications Commission ("FCC") and state requirements for changing a customer's prescribed carrier."⁷ See Exhibit C (for business customers) and Attachment B (for residential customers) of the Application.

Thus, in light of the above representations, Applicants assert that the Proposed Transaction is in the public interest as "[i]t is expected that the [Proposed Transaction] will increase competition in the Hawaii telecommunications market[.]"⁸ Applicants further contend that GEBPS' customers will now be served by a stronger ETI family of companies, all of which are focused exclusively on telecommunications services.

B.

Consumer Advocate's Position

As stated in its Statement of Position, the Consumer Advocate concludes that the Proposed Transaction will be in the public interest. "This conclusion is based on BPS' assertion that it will be better able to provide reliable competitive telecommunications service because it will have the combined financial, technical and market resources of its parent company and affiliates."⁹ Furthermore, the Consumer Advocate notes

⁷Id.

⁸Id. at 10.

⁹Consumer Advocate's Statement of Position at 5.

that "since GEBPS intends to discontinue providing telecommunications service in Hawaii, BPS' desire to provide telecommunications service and to serve existing GEBPS customers without interruption is in the public interest."¹⁰ As such, the Consumer Advocate states that it does not object to GEBPS transferring its COA and customer base to initially ETI and ultimately to BPS.

III.

Discussion

A.

Proposed Transfer of GEBPS's COA to BPS

HRS § 269-19 also specifically provides, in relevant part, that: "[N]o public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of . . . any franchise or permit, or any right thereunder . . . without first having secured from the public utilities commission an order authorizing it so to do."

Applicants contend that BPS is financially qualified to provide telecommunications services in Hawaii. Specifically, BPS, with the financial backing of its ultimate parent company, ETI, has access to financing and capital necessary to conduct its telecommunications operations and to fulfill any obligation it may undertake with respect to the operation and maintenance of its services. Moreover, Applicants claim that BPS has the technical

¹⁰Id.

and managerial qualifications to provide telecommunications services in Hawaii. Its "management team possesses significant experience in successfully running a telecommunications business."

Upon reviewing the record and taking official notice of all pertinent documents in the commission's records relating to GEBPS, pursuant to HAR § 6-61-48, we find that BPS has fulfilled the requirements of HAR § 6-80-18. Concerning Applicants' request for approval of their proposed revision to GEBPS' tariff, we will reserve any decision, if necessary, on this matter until after BPS files its initial tariff with the commission incorporating the change in name from GEBPS to BPS in accordance with HAR §§ 6-80-39 and 6-80-40.¹¹ Accordingly, in light of the above, we conclude that the transfer of GEBPS' COA to BPS should be approved, pursuant to HRS § 269-19, subject to the following conditions¹²:

1. Within thirty (30) days of the date of this decision and order, BPS shall file its initial tariff, incorporating the change in name from GEBPS to BPS; and
2. BPS shall continue to be accountable for any and all of GEBPS' unpaid public utility fees due to the commission, pursuant to HRS § 269-30, and any and all of GEBPS' annual

¹¹HAR § 6-80-40(a) states, in relevant part, that "[a] tariff for a fully competitive service is effective upon filing with the commission."

¹²We do not deem it necessary to rule on GEBPS' request to voluntarily surrender its COA as such request is moot in light of this decision and order approving the transfer of GEBPS' COA to BPS.

financial reports that are required to be filed with the commission in accordance with HAR § 6-80-91.

B.

HRS § 269-16.92 Requirements

HRS § 269-16.92 provides that a telecommunications carrier shall not initiate a change in a subscriber's selection or designation of a long distance carrier without first obtaining authorization from the affected subscriber. Furthermore, HAR § 6-80-123 states, in relevant part, that "[a] telecommunications carrier intending or seeking to abandon or discontinue offering or providing a fully or partially competitive service shall, not later than thirty [(30)] days before the proposed date of abandonment or discontinuance, provide a written notice of its intent to the commission, the consumer advocate and its affected customers. HAR § 6-80-123(a).

As previously stated, Applicants represent that they will provide advance written notice to the affected customers at least thirty (30) days prior to the transfer in accordance with the applicable FCC and State requirements. In light of this representation, we find and conclude that Applicants appear to have satisfied the requirements of HAR § 6-80-123.

Moreover, we find that: (1) much of the telecommunications services currently provided by GEBPS are competitive; (2) GEBPS is a non-dominant carrier; and (3) competition, in this instance, will serve the same purpose as

public interest regulation. Thus, we will also, on our own motion, waive the requirements of HRS § 269-16.92, to the extent applicable, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.¹³

IV.

Orders

THE COMMISSION ORDERS:

1. The transfer of GEBPS' COA to BPS to operate as a reseller of telecommunications services in the State is approved, pursuant to HRS § 269-19 and subject to the following conditions:

- a. Within thirty (30) days of the date of this decision and order, BPS shall file its initial tariff, incorporating the change in name from GEBPS to BPS;
- b. BPS shall continue to be accountable for any and all of GEBPS' unpaid public utility fees due to the commission, pursuant to HRS § 269-30, and any and all of GEBPS' annual financial reports that are required to be filed with the commission in accordance with HAR § 6-80-91.

¹³At 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 § 269-16.92 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.

2. The requirements of HRS § 269-16.92, to the extent applicable, are waived.

3. As the holder of a COA, BPS shall be subject to all applicable provisions of HRS chapter 269, HAR chapters 6-80 and 6-81, any other applicable State laws and commission rules, and any orders that the commission may issue from time to time.

4. BPS shall file its tariffs in accordance with HAR §§ 6-80-39 and 6-80-40. Said tariffs shall comply with the provisions of HAR chapter 6-80. In the event of a conflict between any tariff provision and State law, State law shall prevail. An original and eight (8) copies of the initial tariff shall be filed with the commission with additional copies served on the Consumer Advocate. BPS shall ensure that the appropriate issued and effective dates are reflected in its tariffs.

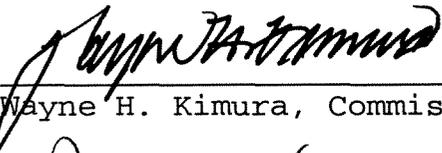
5. Applicants shall promptly comply with the requirements set forth above. Failure to promptly comply with these requirements may constitute cause to void this decision and order, and may result in further regulatory action, as authorized by law.

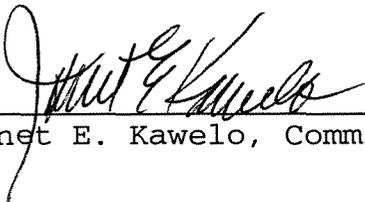
DONE at Honolulu, Hawaii

JAN 27 2005

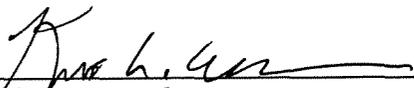
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Kris N. Nakagawa
Commission Counsel

04-0305.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21565 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

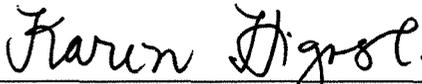
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Karen Higashi

DATED: **JAN 27 2005**