

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
SPRINT COMMUNICATIONS COMPANY, L.P.,)
SPRINT PAYPHONE SERVICE, INC. AND)
ASC TELECOM, INC.)
)
For a Declaratory Order, for Waiver,)
Or in the Alternative, for)
Authorization of the Merger of)
Applicants' Parent Corporation.)
_____)

DOCKET NO. 05-0045

DECISION AND ORDER NO. 21715

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

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Brooke K. Kane
for Chief Clerk of the Commission

ATTEST: A True Copy
BROOKE K. KANE
Administrative Director
Public Utilities Commission
State of Hawaii

Brooke K. Kane

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OF THE STATE OF HAWAII

In the Matter of the Application of)	
SPRINT COMMUNICATIONS COMPANY, L.P.,)	
SPRINT PAYPHONE SERVICE, INC. AND)	Docket No. 05-0045
ASC TELECOM, INC.)	Decision and Order No. 21715
For a Declaratory Order, for Waiver,)	
Or in the Alternative, for)	
Authorization of the Merger of)	
Applicants' Parent Corporation.)	
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DECISION AND ORDER

By this Decision and Order, the commission:

(1) declares, under the facts and circumstances of this case, that SPRINT COMMUNICATIONS COMPANY, L.P. ("Sprint Communications"), SPRINT PAYPHONE SERVICE, INC. ("Sprint Payphone") and ASC TELECOM, INC. ("ASC Telecom") (collectively, "Applicants") are required to obtain commission approval of the proposed merger of their holding company parent, SPRINT CORPORATION ("Sprint"), with NEXTEL COMMUNICATIONS, INC. ("Nextel") ("Proposed Merger"), pursuant to Hawaii Revised Statutes ("HRS") § 269-7(a); (2) denies Applicants' request for a waiver of the requirements of HRS § 269-7(a); and (3) approves the Proposed Merger, as described in Application,¹ pursuant to HRS § 269-7(a), subject to the conditions that Applicants notify

¹ Applicants' application, filed on February 16, 2005 ("Application").

the commission and the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate") in writing of the date the Proposed Merger was consummated and that Applicants provide the commission and the Consumer Advocate a copy of the certificate of merger.

I.

Introduction

Applicants request that: (1) the commission issue an order declaring that the Proposed Merger does not require commission approval; or (2) if the commission determines such approval is required, the commission issue an order waiving such requirement, pursuant to HRS § 269-16.9(e) and Hawaii Administrative Rules ("HAR") § 6-80-135; or (3) if the commission determines that such approval is required, and the commission declines to waive such requirement, the commission issue an order approving the Proposed Merger no later than May 1, 2005. Applicants make their requests pursuant to HRS §§ 269-7(a) and 269-16.9(e); HAR chapter 6-61, subchapters 10 and 16, and HAR § 6-80-135.

Applicants served the Consumer Advocate with copies of the Application. The Consumer Advocate, by its Preliminary Statement of Position, filed on March 8, 2005, ("Preliminary Statement of Position") indicates that it has questions and concerns regarding: (1) the information provided to support Applicants being non-dominant carriers, (2) the impact to Hawaii's wireline customers due to the spin off of Sprint's local

telecommunications business after the Proposed Merger, and (3) the benefits to Hawaii's wireline customers if the Proposed Merger is primarily to benefit Sprint's and Nextel's wireless customers. The Consumer Advocate stated that it issued information requests ("IRs") to Applicants on March 2, 2005.

On March 14, 2005, the commission issued Protective Order No. 21694. On March 22, 2005, Applicants submitted their responses to the Consumer Advocate's IRs, subject to Protective Order No. 21694.

On March 29, 2005, the Consumer Advocate filed its Final Statement of Position indicating that it does not object to the commission's approval of the Application.

II.

Background

A.

Description of Applicants and Related Entities

Sprint, Applicants' parent company, is a publicly-traded Kansas corporation with headquarters in Overland, Kansas. Sprint is a global company providing wireless, long distance and local communications services.

Sprint Communications is a Delaware limited partnership wholly-owned by subsidiaries of Sprint and currently authorized to provide intrastate telecommunications services within the State of Hawaii ("State" or "Hawaii") as a

facilities-based carrier and reseller.² Furthermore, in 2003, Sprint Communications became the exclusive provider of intrastate telecommunications relay services ("TRS") in Hawaii from July 1, 2003 to June 30, 2006.³

Sprint Payphone, a Florida corporation, is a wholly-owned subsidiary of Sprint and presently holds a commission-issued certificate of registration to provide intrastate pay telephone services in the State.⁴

ASC Telecom, a Kansas corporation, is an indirect, wholly-owned Sprint subsidiary, and currently authorized to provide intrastate telecommunications services within the State as a reseller.⁵

Nextel is a publicly-traded Delaware corporation with headquarters in Reston, Virginia. Nextel's predecessor, Fleet Call, Inc., was founded in 1987, and the company took its current name, Nextel Communications, Inc. in 1993. Nextel provides a wide range of digital wireless voice and data communications services over its packet-based platform, the Integrated Digital Enhanced Network technology developed in

² Decision and Order No. 13262, filed on May 17, 1994, in Docket No. 94-0005; and Decision and Order No. 14868, filed on August 9, 1996, in Docket No. 96-0061.

³ Decision and Order No. 20163, filed on April 30, 2003, in Docket No. 03-0058.

⁴ Decision and Order No. 16108, filed on December 4, 1997, in Docket No. 97-0388.

⁵ Decision and Order No. 14831, filed on August 1, 1996, in Docket No. 96-0090.

conjunction with Motorola, Inc. Presently, Applicants represent that no Nextel entity provides intrastate telecommunications services in the State.

B.

Description of the Proposed Merger

Through a merger agreement entered into as of December 15, 2004, by Sprint and Nextel, Applicants summarize the Proposed Sprint/Nextel Merger Transaction as follows:

Subject to the terms and conditions of the merger agreement, and in accordance with Delaware law, at the effective time of the merger, Nextel will merge with and into S-N Merger Corp., a wholly owned Delaware subsidiary of Sprint formed for the purpose of the merger. S-N Merger Corp. will survive the merger as a wholly-owned subsidiary of Sprint, and Sprint will be renamed Sprint-Nextel Corporation [("Sprint Nextel")] upon completion of the merger. The merger will become effective upon the filing of a certificate of merger immediately upon the closing of the merger, which is expected in the second half of 2005. The Sprint Nextel Board will consist of 12 directors, six from each company, including two co-lead outside directors, one from Sprint and one from Nextel.

When the merger is complete, Sprint shareholders will own approximately 51 percent and Nextel shareholders will own approximately 49 percent of the stock of Sprint Nextel. Accordingly, there will be no change of control of Sprint, the ultimate parent of Hawaii regulated subsidiaries.

Sprint Nextel will maintain its executive headquarters in Reston, Virginia, and its operational headquarters in Overland Park, Kansas. The new company's common stock will be listed on the New York Stock Exchange.

The merger is subject to shareholder and federal and state regulatory approvals, as well as other customary closing conditions.

On February 8, 2005, Sprint and Nextel filed an application for FCC approval of the merger.⁶

III.

Discussion

A.

Request for Declaratory Order

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."

In their Application, Applicants recognize that the commission, in prior decisions, reviewed "certain transactions involving the holding company of an entity certificated by the [c]ommission to provide telecommunications services in Hawaii."⁷ Applicants assert, however, that the Proposed Merger does not meet "the minimum threshold that should be required to trigger invocation of [HRS § 269-7(a)]."⁸ To support their "minimum threshold" argument, Applicants state as follows:

Although [HRS § 269-7(a)] is broadly framed, some minimum impact on Hawaii customers or on certificated carriers in Hawaii should be present before the [c]ommission expends scarce resources reviewing a transaction pursuant to this provision. In this case, the proposed transaction does not approach such a threshold. The proposed merger at the parent company level will be transparent to Applicants' wireline customers in

⁶Application at 4-5.

⁷Id. at 8.

⁸Id.

Hawaii. The rates and terms and conditions of service for these customers currently in effect in the state will not be affected in any way by the merger, i.e., the merger will be fully "transparent" to the customers. As discussed above, there will be no changes to the Applicants.

Applicants will not merge or combine directly with any other entity. Applicants will continue to hold the certificates, authorizations and licenses issued to them by the [c]ommission. Further, the merger will have no impact on the provisions of TRS services in Hawaii by Sprint Communications. Because the proposed merger will have no material impact whatsoever on customers in Hawaii or on certificated entities operating in Hawaii, the transaction does not warrant review under [HRS § 269-7(a)].⁹

In its Final Statement of Position, the Consumer Advocate states that although Sprint is not a "public utility" per se, it is the holding company parent of the Applicants who are "public utilities" under the definition of HRS § 269-1.¹⁰ Therefore, the Consumer Advocate asserts that transactions of Sprint in this docket would fall under the purview of the commission pursuant to HRS § 269-7(a). In addition, the Consumer Advocate claims that because "transactions of the holding company parent may result in Applicants becoming guarantors or providers of security in their assets," HRS §§ 269-18 and 269-19 should also apply to these transactions.¹¹

⁹ Id. at 9.

¹⁰ Consumer Advocate's Final Statement of Position at 4.

¹¹ Id. Pursuant to HAR § 6-61-164, the commission declines to issue a declaratory order relating to the applicability of HRS §§ 269-18 and 269-19 because the assertion by the Consumer Advocate is clearly speculative and does not involve existing facts or facts that can be expected to exist in the near future.

In light of the commission's prior rulings that it has jurisdiction to review proposed financial transactions of the parent entity, related subsidiaries or holding company of a regulated public utility under HRS § 269-7(a) 12, we are not convinced by Applicants' arguments that the Proposed Merger should not be reviewed under HRS § 269-7(a) for commission approval. Applicants also failed to provide sufficient support to substantiate the establishment of a "minimum threshold" standard for reviewing transactions of the parent entity, related subsidiaries or the holding company of a regulated public utility under HRS § 269-7(a). We agree with the Consumer Advocate that no such "minimum threshold" is described or implied in the statute. Furthermore, as stated in *In re Network Plus, Inc.*, we again emphasize the following additional reasons for reviewing these types of transactions under HRS § 269-7(a):

[T]he holding company structure presents the potential for abuse, particularly in the public utility industry. In other jurisdictions, for example, public utility holding companies formed for purposes of limiting the public utility commission's authority over the utility, and as a result,

¹²*In re Paradise Mergersub, Inc., et al.*, Docket No. 04-0140, Decision and Order No. 21696 (March 16, 2005, reconsideration period pending) (holding that the commission has authority to examine any and all transactions of the public utility that affect or may affect the public that it serves); *In re DSLnet Communications, LLC*, Docket No. 03-0250, Decision and Order No. 20632 (November 13, 2003) (indirect transfer of control); *In re Business Telecom, Inc., dba BTI*, Docket No. 03-0200, Decision and Order No. 20389 (August 22, 2003) (indirect transfer of control); *In re Network Plus, Inc.*, Docket No. 98-0374, Decision and Order No. 16831 (February 16, 1999) ("*In re Network Plus*") (holding that commission approval of Network Plus, Inc.'s reorganization is required under HRS § 269-7(a)); *Cf.*, *In re Voicestream PCS II Corporation et al.*, Docket No. 01-0210, Decision and Order No. 18699 (July 27, 2001).

the utility ratepayers and the public interest were harmed due to the non-utility operations of the holding company or its non-utility subsidiaries. For these reasons, Congress enacted in 1935 the Public Utility Holding Company Act (15 U.S.C. §79) to combat and correct such past utility holding company abuses.¹³

Finally, we believe that *In re Public Utilities Commission*, Docket No. 03-0186, Decision and Order No. 20890 (April 7, 2004) ("Decision and Order No. 20890"), which Applicants cited in support of their declaratory order request, to be inapposite to the instant matter. Although the commission waived numerous regulatory requirements in Docket No. 03-0186 for commercial mobile radio service providers (aka, CMRS or wireless providers) including, without limitation, certain aspects of HRS § 269-7(a), we must emphasize that the findings and conclusions rendered in that docket relating to wireless carriers are substantially different from the findings in this particular docket relating to wireline carriers.

Based on the foregoing, the commission declares that, under the facts and circumstances of this case, Applicants are required to obtain commission approval of the Proposed Merger, as described in the Application, pursuant to HRS § 269-7(a).

¹³*In re Network Plus, Inc.* at 3-4.

B.

Request for a Waiver

HRS § 269-16.9(e) 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 grant an exemption from or 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 an exemption or waiver is in the public interest.

Upon review of the record,¹⁴ we find that, Applicants, specifically Sprint Communications, have played an integral role in participating in the development of the intrastate wireline telecommunications industry in Hawaii. For example, in Docket No. 7702, Sprint Communications has been and continues to be a party in this generic proceeding investigating the communications infrastructure of the State.¹⁵ In addition and as stated previously, on April 30, 2003, Sprint Communications

¹⁴We take official notice, pursuant to HAR § 6-61-48, of all records relating to Applicants, Sprint and Nextel.

¹⁵In support of its request for a waiver, Applicants cite to *In re ITC^DeltaCom, Inc.*, Docket No. 04-0280, Decision and Order No. 21471 (November 24, 2005) ("*In re ITC^DeltaCom*") and *In re QuantumShift Communications, Inc. et al.*, Docket No. 04-0190, Decision and Order No. 21426 (October 21, 2004) ("*In re QuantumShift*"). The commission waived the requirements of HRS § 269-7(a) in both *In re ITC^DeltaCom* and *In re QuantumShift*. However, unlike Applicants, the regulated carriers in these dockets have not played an integral role in participating in the development of the intrastate wireline telecommunications industry in Hawaii.

became the exclusive provider of intrastate TRS within the State from July 1, 2003 to June 30, 2006.

Accordingly, we are unable to find, in this instance, that competition will serve the same purpose as public interest regulation under HRS § 269-16.9(e), and that a waiver of the requirements of HRS § 269-7(a) is in the public interest under HAR § 6-80-135. Therefore, we conclude that Applicants' request for a waiver of the requirements of HRS § 269-7(a) should be denied.

C.

Request for Approval Under HRS § 269-7(a)

Under HRS § 269-7(a), the commission will approve the proposed financial transaction if it is reasonable and consistent with the public interest.¹⁶ The transaction is reasonable and consistent with the public interest if it will not adversely

¹⁶ *In re ITC^DeltaCom Communications, Inc. et al.*, Docket No. 02-0345, Decision and Order No. 19874 (December 13, 2002); *In re Time Warner Telecom of Hawaii, L.P., dba Oceanic Communications et al.*, Docket No. 00-0354, Decision and Order No. 18220 (November 30, 2000); and *In re Time Warner Telecom of Hawaii, L.P., dba Oceanic Communications*, Docket No. 00-0047, Decision and Order no. 17662 (April 10, 2000). Sprint's subsidiary, SprintCom, Inc., presently holds a certificate of registration ("COR") to provide CMRS or intrastate wireless telecommunications in the State. *In re SprintCom, Inc.*, Docket No. 98-0359, Decision and Order No. 16697 (November 10, 1998). Moreover, Nextel's subsidiary, Nextel West Corp., also held a COR to provide CMRS until its voluntary surrender of its COR in 2004. *In re Nextel West Corp.*, Docket No. 96-0328, Order No. 21384 (September 30, 2004). Pursuant to Decision and Order No. 20890, CMRS providers are waived from the requirements of HRS § 269-7(a) to the extent of obtaining prior commission approval for transactions affecting the relations and transactions of its parent and/or affiliated entities.

affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in the State, as authorized by the commission.¹⁷ In its Final Statement of Position, the Consumer Advocate makes the following observations:

The Consumer Advocate finds that both Sprint and Nextel, individually, have substantial financial resources, expansive networks, and large customer bases. The merger would make the resultant entity, which will become the holding company parent of the Applicants, stronger both financially and operationally. The board of directors of both organizations have unanimously approved a definitive agreement for a merger. The Consumer Advocate, therefore, finds that both Sprint and Nextel are fit, willing, and able to enter into the merger and will be a solid, viable holding company for the Applicants in Hawaii.

* * *

The Consumer Advocate finds that the merger is reasonable since it would result in a stronger holding company parent for the Applicants, and in possible benefits from economies of scale that may be realized. There would be no changes to the Applicants, and, as previously stated, the transaction would be transparent to the customers in Hawaii. The Applicants would continue to provide their same services in Hawaii at the same (or possibly lower) rates and with the same conditions for the public interest of giving customers a choice. In addition, the Applicants would continue to serve the public interest by continuing the provision of TRS in Hawaii.¹⁸

¹⁷ See, *In re Ionex Telecommunications, Inc., et al.*, Docket No. 99-0223, Decision and Order No. 17369 (November 8, 1999).

¹⁸ Consumer Advocate's Final Statement of Position at 8-9.

Upon review of the record in this docket, particularly Applicants' representations¹⁹, we find that the Proposed Merger will not adversely affect Applicants' fitness, willingness, and ability to provide intrastate telecommunications services in the State, as authorized by the commission. The Proposed Merger is therefore reasonable and in the public interest. Accordingly, we conclude that the Proposed Merger should be approved, pursuant to HRS § 269-7(a), subject to the conditions that Applicants notify the commission and the Consumer Advocate in writing the date the Proposed Merger was consummated and that Applicants provide the commission and the Consumer Advocate a copy of the certificate of merger.

IV.

Declaration and Orders

A.

Declaration

THE COMMISSION DECLARES that, under the facts and circumstances of this case, Applicants are required to obtain commission approval of the Proposed Merger, as described in the Application, pursuant to HRS § 269-7(a).

¹⁹Applicants represent, among other things, that the Proposed Merger "will be transparent to Applicants' wireline customers in Hawaii" and the "rates and terms and conditions of service for these customers currently in effect in the [S]tate will not be affected in any way by the [Proposed Merger.]" Application at 9.

B.

Orders

THE COMMISSION ORDERS:

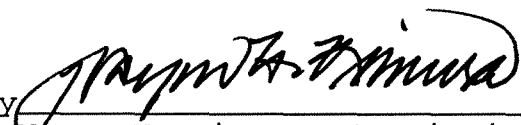
1. Applicants' request for a waiver of the requirements of HRS § 269-7(a) is denied.

2. The Proposed Merger, as described in the Application, is approved, pursuant to HRS § 269-7(a), subject to the conditions that Applicants notify the commission and the Consumer Advocate in writing the date the Proposed Merger was consummated and that Applicants provide the commission and the Consumer Advocate a copy of the certificate of merger. Applicants shall promptly comply with the conditions, noted above. Failure to promptly comply with these conditions may constitute cause to void this decision and order, and may result in further regulatory action, as authorized by law.

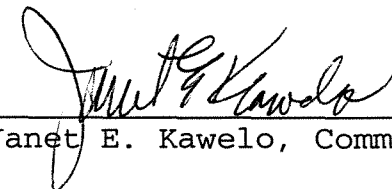
DONE at Honolulu, Hawaii April 4, 2005.

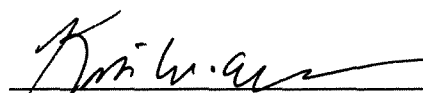
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

By 
Janet E. Kawelo, Commissioner


Kris N. Nakagawa
Commission Counsel

05-0045.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21715 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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for Karen Higashi

DATED: April 4, 2005