

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
ITC^DELTACOM, COMMUNICATIONS, INC. )  
AND BUSINESS TELECOM, INC. )  
For Approval of Guarantee of )  
Indebtedness. )  
\_\_\_\_\_ )

DOCKET NO. 05-0076

DECISION AND ORDER NO. 21890

Filed June 24, 2005  
At 2 o'clock P.M.

Karen Higashi  
Chief Clerk of the Commission

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K. Higashi

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In the Matter of the Application of)  
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DECISION AND ORDER

By this Decision and Order, the commission waives the requirements of Hawaii Revised Statutes ("HRS") §§ 269-7(a), 269-17 and 269-19 and Hawaii Administrative Rules ("HAR") §§ 6-61-101 and 6-61-105, to the extent applicable, in relation to the Proposed Financial Transactions described in ITC^DELTACOM COMMUNICATIONS, INC.'s ("DeltaCom") and BUSINESS TELECOM, INC.'s ("BTI") (collectively, "Applicants") Application, filed on March 28, 2005, subject to certain conditions, described below.

I.

Introduction

Applicants jointly request commission approval such that DeltaCom and BTI can both guarantee the increase in indebtedness of INTERSTATE FIBERNET, INC. ("IFN") ("Proposed Financial Transactions").<sup>1</sup>

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<sup>1</sup>Applicants' application, filed on March 28, 2005 ("Application"). The Application is sparse, to say the least, and fails to adequately describe whether the proposed guarantees

Applicants served the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate") copies of the Application. The Consumer Advocate, by its Statement of Position, filed on May 27, 2005, indicates, among other things, that it does not object to the commission waiving the requirements of HRS §§ 269-17 and 269-19 and HAR §§ 6-61-101 and 6-61-105, to the extent applicable, in relation to the Proposed Financial Transactions.

## II.

### Background

#### A.

##### Description of Applicants and Related Entities

ITC^DELTACOM, INC. ("ITCD") is a publicly traded Delaware holding company, and through its three (3) operating subsidiaries, DeltaCom, BTI and IFN provides voice and data telecommunications services on a retail basis to business and residential customers in the southern United States and regional telecommunications transmission services over its network on a wholesale basis to other telecommunications companies.<sup>2</sup>

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provided by DeltaCom and BTI involve the issuance of loans, notes or other evidence of indebtedness payable at periods of more than twelve (12) months within the meaning of HRS § 269-17 or whether such guarantees is an "encumbrance" within the meaning of HRS § 269-19. See also, *Jones v. Hawaiian Electric Company, Inc.*, 64 Haw. 289, 639 P.2d 1103 (1982). Nonetheless, because Applicants represent that separate guarantees will be provided by DeltaCom and BTI, we will view them as two (2) separate transactions (aka, Proposed Financial Transactions).

<sup>2</sup>Application at 2. See also, Decision and Order No. 21471, filed on November 24, 2004, in Docket No. 04-0280.

BTI is a North Carolina corporation that is presently authorized to provide intrastate telecommunications services in the State of Hawaii ("State" or "Hawaii") on a resold basis.<sup>3</sup> DeltaCom is an Alabama corporation and a wholly-owned subsidiary of IFN. IFN, a provider of wholesale fiber optic transmission, is wholly-owned by ITCD, DeltaCom's ultimate parent holding company.<sup>4</sup> DeltaCom is also authorized to provide telecommunications services in the State.<sup>5</sup>

WELSH, CARSON, ANDERSON, & STOWE VIII, L.P. ("Welsh Carson") is one of the oldest and largest private equity investment firms in the United States that holds ownership interests in telecommunications companies, as well as other companies in the information services and healthcare industries.<sup>6</sup> Presently, Welsh Carson is a major stockholder of ITCD. Accordingly, both DeltaCom and BTI are indirectly controlled by Welsh Carson.<sup>7</sup>

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<sup>3</sup>Decision and Order No. 16358, filed on June 2, 1998, in Docket No. 98-0143. See also, Decision and Order No. 20839, filed on August 22, 2003, in Docket No. 03-0200; and Decision and Order No. 20859, filed on March 22, 2004, in Docket No. 04-0032.

<sup>4</sup>Decision and Order No. 20859, filed on March 22, 2004, in Docket No. 04-0032. The commission also takes official notice, pursuant to HAR § 6-61-48, of any other commission records relating to Applicants and their related entities.

<sup>5</sup>DeltaCom is authorized to provide intrastate telecommunications services in the State on a resold basis. Decision and Order No. 16931, filed on April 6, 1999, in Docket No. 98-0408.

<sup>6</sup>Application at 3.

<sup>7</sup>See, Decision and Order No. 20389, filed on August 22, 2003, in Docket No. 03-0200.

B.

Description of Proposed Financial Transactions

The Proposed Financial Transactions involve Welsh Carson's proposal to lend an additional twenty million dollars (\$20,000,000) to IFN (the "Debt"), which would result in DeltaCom and BTI becoming guarantors of the Debt as part of the Proposed Financial Transactions.

Applicants represent, among other things, that the Proposed Financial Transactions (1) will "serve the public interest by ensuring that operational needs are funded and that the companies have sufficient liquidity[;]" and (2) will "directly benefit consumers by facilitating the continued provision of innovative, high-quality telecommunications services to the public, thereby promoting competition in the State's telecommunications service market."<sup>8</sup>

C.

Consumer Advocate's Position

The Consumer Advocate states that because the Proposed Financial Transactions may "result in DeltaCom and BTI becoming directly responsible for the \$20 million debt or encumber their assets[,]" commission approval is required under HRS §§ 269-17 and 269-19.<sup>9</sup> Consequently, it recommends that, pursuant to HRS § 269-16.9 and HAR § 6-80-135, the commission should waive the regulatory requirements under HRS §§ 269-17 and 269-19, and

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<sup>8</sup>Application at 4.

<sup>9</sup>Consumer Advocate's Statement of Position at 5.

that the commission need not exercise its investigative authority under HRS § 269-7(a).<sup>10</sup> In support of the waiver, the Consumer Advocate states, in relevant part:

1. Since neither Applicant is a facilities-based carrier in the State, the encumbrance of their assets is not expected to harm Applicants' customers, should IFN, ITCD or Applicants' ultimate parent or affiliates be unable to meet their respective debt obligations resulting from the consummation of the Proposed Financial Transactions.<sup>11</sup>
2. Based on its review of the Annual Reports of Resellers and Various Telecommunications Services filed with the commission, DeltaCom and BTI are non-dominant telecommunications carriers in Hawaii.<sup>12</sup>
3. Since many telecommunications service providers are authorized to provide resold telecommunications service in the Hawaii market, it is assumed that competition will serve the same purpose as public interest regulation for the proposed guarantee affecting DeltaCom and BTI. In other words, the encumbrance of the assets should not

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6

adversely affect customers because the services offered are competitive.<sup>13</sup>

### 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 proposed financial transactions if it is reasonable and consistent with the public interest.<sup>14</sup>

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

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<sup>13</sup>*Id.*

<sup>14</sup>See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

described purposes. Furthermore, pursuant to HRS § 269-17, "[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 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, we find and conclude that the Proposed Financial Transactions fall under the purview of, at the minimum, HRS §§ 269-7(a) because it involves transactions with DeltaCom's and BTI's parent entity.<sup>15</sup> Notwithstanding the regulatory requirements discussed above, however, HRS § 269-16.9

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<sup>15</sup>As indicated above, because the record is unclear as to whether the Proposed Financial Transactions involve a loan, note or other evidence of indebtedness not payable within twelve (12) months within the meaning of HRS § 269-17 or whether they result in encumbrances within the meaning of HRS § 269-19, we are unable to determine whether the guarantees trigger the requirements of HRS §§ 269-17 and 269-19. Nonetheless, because the commission will be waiving these requirements, further inquiry regarding these transactions is not necessary at this time. We will, however, require Applicants to inform the commission and the Consumer Advocate in writing of the date the Proposed Financial Transactions are consummated and submit within thirty (30) days of the consummation date, copies of the applicable debt financing agreements. For future applications, we also expect Applicants to describe in more detail and attach to the extent feasible the debt financing agreements or other documents relating to the proposed financial transactions so that the commission and the Consumer Advocate can adequately complete their review.



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 (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.

In this docket, we find, at this time, the telecommunications services currently provided by DeltaCom and BTI are fully competitive, and DeltaCom and BTI are non-dominant carriers 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, the commission concludes that the applicable requirements of HRS §§ 269-7(a), 269-17 and 269-19, to the extent applicable, should be waived with regards to the matters in this docket, pursuant to HRS § 269-16.9 and HAR § 6-80-135.<sup>16</sup> Similarly, based on these findings and conclusions stated above, we will also waive the provisions of HAR

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<sup>16</sup>See 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 §§ 269-7(a), 269-17 and 269-19 should be waived. The commission's determination, in the instant case, of the applicability of HRS §§ 269-7(a), 269-17 and 269-19 is based on our review of Applicants' Application only. Thus, our waiver in this instance of the applicability of HRS §§ 269-7(a), 269-17 and 269-19 and their applicable administrative rules should not be construed by any public utility, including Applicants, as a basis for not filing an application or petition regarding similar transactions that fall within the purview of these statutes.

§§ 6-61-101 and 6-61-105, to the extent that the Application fails to meet any of these filing requirements.

Finally, our review of the record indicates that Applicants are delinquent in the filing of their annual telecommunications relay service contributions for the period July 1, 2004 to June 30, 2005, established pursuant to: (a) Act 50, Session Laws of Hawaii 2003; and (2) Order No. 21049, filed on June 10, 2004, in Docket No. 04-0070. Accordingly, we conclude that our waiver in this Decision and Order should be subject to the condition that Applicants timely satisfy this delinquency within thirty (30) days of the date of this Decision and Order.

#### IV.

##### Orders

##### THE COMMISSION ORDERS:

1. The requirements of HRS §§ 269-7(a), 269-17 and 269-19, to the extent applicable, are waived with respect to the Proposed Financial Transactions described in the instant Application, subject to the conditions noted below.

2. HAR §§ 6-61-101 and 6-61-105 filing requirements, to the extent applicable, are waived, subject to the conditions noted below.

3. Applicants shall promptly inform the commission and the Consumer Advocate in writing of the date the Proposed Financial Transactions are consummated and submit within thirty

(30) days of the consummation date, copies of the applicable debt financing agreements.

4. Within thirty (30) days of this Decision and Order, Applicants shall timely satisfy the delinquency, noted in Section III, above.

5. 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.

6. This docket is closed unless otherwise ordered by the commission.

DONE at Honolulu, Hawaii JUN 24 2005.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By Wayne H. Kimura  
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

Kris N. Nakagawa  
Kris N. Nakagawa  
Commission Counsel

By Janet E. Kawelo  
Janet E. Kawelo, Commissioner

05-0076.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21890 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: JUN 24 2005