

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. 05-0133

DECISION AND ORDER NO. 22007

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

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Karen Higashi.
Chief Clerk of the Commission

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

K. Higashi.

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Docket No. 05-0133
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DECISION AND ORDER

By this Decision and Order, the commission waives the requirements of Hawaii Revised Statutes ("HRS") §§ 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 transaction described in ITC^DELTACOM COMMUNICATIONS, INC.'s ("DeltaCom") and BUSINESS TELECOM, INC.'s ("BTI") (collectively, "Applicants") Application, filed on June 2, 2005 ("Application"), subject to certain conditions, described below.

I.

Introduction

Applicants jointly request commission approval of a transaction whereby DeltaCom and BTI both guarantee the \$239 million indebtedness of DeltaCom's parent and BTI's affiliate, Interstate Fibernet, Inc. ("IFN") ("Proposed Financial Transaction").

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 June 30, 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 Transaction.

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.¹

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.² DeltaCom is an Alabama corporation and a wholly-owned subsidiary of IFN. IFN, a provider of wholesale fiber optic transmission,

¹Application at 2. See also, Decision and Order No. 21471, filed on November 24, 2004, in Docket No. 04-0280.

²Decision 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.

is wholly-owned by ITCD, DeltaCom's ultimate parent holding company.³ DeltaCom is also authorized to provide telecommunications services in the State.⁴

Tennebaum Capital Partners ("TCP"), founded in 1996, is a leading private investment firm with over \$3.5 billion in capital under management and specializes in crafting unique financial solutions tailored to a company's needs. TCP's management includes professionals with a strong telecommunications background.

B.

Description of Proposed Financial Transaction

The Proposed Financial Transaction involves TCP's proposal to lend approximately \$239 million to ITCD (the "Debt"), and would result in DeltaCom and BTI becoming guarantors of the Debt as part of the Proposed Financial Transaction. Specifically, on May 27, 2005, ITCD entered into a binding commitment letter with TCP whereby TCP will provide ITCD with approximately \$239 million in original principal of secured loans. IFN will serve as the primary obligor of the Debt while

³Decision 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.

⁴DeltaCom 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.

DeltaCom, BTI and ITCD will serve as guarantors.⁵ The Debt will also be secured by the assets of IFN, ITCD, DeltaCom and BTI.

Applicants represent, among other things, that the Proposed Financial Transaction: (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."⁶

C.

Consumer Advocate's Position

The Consumer Advocate states that because "DeltaCom and BTI are guarantors of the [D]ebt" and they will both "encumber their assets as security for the [D]ebt," commission approval is required under HRS §§ 269-17 and 269-19.⁷ However, it recommends that, pursuant to HRS § 269-16.9 and HAR § 6-80-135, the commission should waive the regulatory requirements under

⁵Specifically, TCP will make a \$209 million senior secured loan to IFN and the proceeds will be used to repay in full all amounts outstanding under the Company's existing credit facility, which has a maturity date of June 30, 2006. Additionally, TCP will make a \$30 million subordinated secured loan to IFN with a maturity date of July 1, 2009, and the proceeds will be used for general corporate purposes.

⁶Application at 5.

⁷Consumer Advocate's Statement of Position at 3.

HRS §§ 269-17 and 269-19.⁸ In support of the waiver, the Consumer Advocate states, in relevant part:

1. DeltaCom and BTI are non-dominant telecommunications carriers in Hawaii.⁹
2. The Proposed Financial Transaction will serve the public interest by ensuring that the "companies operational needs are funded and sufficient liquidity is available to allow Applicants to continue providing innovative and high-quality telecommunications services in Hawaii."¹⁰
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 adversely affect customers because the services offered are competitive.¹¹

⁸*Id.* at 4.

⁹*Id.*

¹⁰*Id.* at 4-5.

¹¹*Id.*

III.

Discussion

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 expended for the foregoing 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: "[e]very 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 Transaction falls under the purview of HRS

§§ 269-17 and 269-19.¹² Notwithstanding the regulatory requirements discussed above, however, HRS § 269-16.9 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 Transaction is 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 regulatory requirements of HRS §§ 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 § 6-80-135.¹³

¹²Thus, because the record indicates that the Proposed Financial Transaction involves a loan, note or other evidence of indebtedness not payable within twelve (12) months within the meaning of HRS § 269-17 and will result in encumbrances to DeltaCom and BTI within the meaning of HRS § 269-19, the Proposed Financial Transaction triggers the requirements of HRS §§ 269-17 and 269-19.

¹³See 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

Similarly, based on these findings and conclusions stated above, we will also waive the provisions of HAR §§ 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 DeltaCom is delinquent in filing its 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 the delinquency, noted above, within thirty (30) days of the date of this Decision and Order.

IV.

Orders

THE COMMISSION ORDERS:

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

HRS §§ 269-17 and 269-19 should be waived. The commission's determination, in the instant case, of the applicability of HRS §§ 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 §§ 269-17 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.

2. The 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 Transaction is 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.

DONE at Honolulu, Hawaii SEP - 2 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:

By Janet E. Kawelo
Janet E. Kawelo, Commissioner

Ji Sook Kim
Ji Sook Kim
Commission Counsel
05-0133.eh

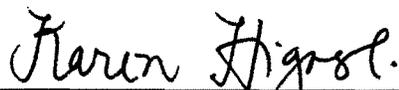
CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22007 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
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DATED: SEP - 2 2005