

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
WINSTAR OF HAWAII, LLC and)
GVC NETWORKS, LLC)
For Approval of an Indirect)
Transfer of Control.)
_____)

DOCKET NO. 05-0182

DECISION AND ORDER NO. 22075

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

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At 11 o'clock A.M.

Karen Higashi.
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi.

In the Matter of the Petition of)

WINSTAR OF HAWAII, LLC and)

GVC NETWORKS, LLC)

For Approval of an Indirect)

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Decision and Order No. 22075

By this Decision and Order, the commission waives the approval requirements of Hawaii Revised Statutes ("HRS") §§ 269-19 and 269-7(a) and Hawaii Administrative Rules ("HAR") chapter 6-61, to the extent applicable, with respect to the proposed indirect transfer of control of WINSTAR OF HAWAII, LLC ("Winstar") to GVC NETWORKS, LLC ("GVC").

Winstar and GVC ("Joint Petitioners") filed a joint petition on July 25, 2005, requesting commission approval of the proposed transaction which would result in the indirect transfer of control of Winstar to GVC ("Proposed Transaction") ("Petition"). Joint Petitioners make their request under HRS § 269-7 and HAR chapter 6-61.

The DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate") received copies of the Petition on August 16, 2005. On September 26,

2005, counsel for Joint Petitioners filed a letter requesting commission approval of their Proposed Transaction by October 14, 2005. On September 30, 2005, the Consumer Advocate filed its statement of position informing the commission that it does not object to the approval of the Proposed Transaction, and, in the alternative, recommends that the commission waives the applicable approval requirements regarding the matters of the Petition ("Statement of Position").

II.

Background

A.

Joint Petitioners

Winstar is a Delaware limited liability company ("LLC") with its principle business offices in Newark, New Jersey. It is a wholly-owned operating subsidiary of Winstar Communications, LLC (Winstar Communications), which in turn, is wholly-owned by Winstar Holdings. IDT Corporation, a publicly held Delaware corporation with its principle business offices in Newark, New Jersey, is the ultimate owner of Winstar Holdings. Winstar received commission authority to provide intrastate telecommunications in the State of Hawaii ("State" or "Hawaii") on a resold basis in 2002.¹

GVC is a Delaware LLC with its principal business offices in Detroit, Michigan. GVC is a subsidiary of

¹See, Decision and Order No. 19290, filed on April 9, 2002, in Docket No. 02-0017.

GVC Holdings and the parent of GVC NewCo, a company newly formed to facilitate in the consummation of the Proposed Transaction. GVC is a minority-owned enterprise formed to provide facilities-based local, long-distance, and high-speed data (broadband) communications services to business and multi-tenant residential customers in markets throughout the United States, including Hawaii. It is currently authorized to provide such services in Michigan.

B.

Proposed Transaction

Under their proposed Agreement and Plan of Merger, GVC intends to indirectly acquire one-hundred percent (100%) of Winstar's equity through a two (2)-part process. First, Winstar Holdings will form a wholly-owned subsidiary, Winstar NewCo, which will wholly-own Winstar Communications, Winstar's direct parent. During the second part of the transaction, Winstar NewCo will merge into GVC NewCo; and Winstar NewCo will be the surviving entity. Through the proposed merger, GVC will acquire one-hundred percent (100%) equity interest in Winstar NewCo; and thus, in turn, GVC will acquire one-hundred percent (100%) indirect ownership of Winstar.

The Joint Petitioners assert that the Proposed Transaction is in the public interest and should be approved since the Proposed Transaction will, among other things: (1) occur at the holding company level; (2) be seamless and transparent to Winstar's Hawaii customers; (3) not impact the

rates, terms, or conditions of Winstar's services; (4) infuse Winstar with additional capital; and (5) not result in a change of carrier for Winstar's Hawaii customers or any transfer of authorizations. The Joint Petitioners also represent that: (1) GVC will retain the majority of Winstar's current management team; (2) Winstar's current senior management is expected to continue to oversee Winstar's day-to-day operations; and (3) GVC is qualified to own Winstar. They declare that "Winstar will continue to be led by a well-qualified management team and Transferee [(GVC)] will have the managerial and technical expertise and resources necessary to own and continue the Winstar telecommunications business in Hawaii."²

Additionally, the Joint Petitioners contend that the proposed transaction will "ensure the continuation of Winstar's business and its position as a strong competitor in the telecommunications market, assuring that the benefits of competition generated by Winstar's presence will not be lost to customers."³ Moreover, the Joint Petitioners represent that GVC, as a minority-owned enterprise; will improve Hawaii's telecommunications infrastructure and economic opportunities as it fulfills its objective of extending its product line, including broadband communications, to the underserved and minority populations in Hawaii while serving Winstar's existing customers. In this regard, the Joint Petitioners also state that: (1) GVC's commitment to serve minority communities gives

²See, Joint Petition at 6.

³See, Joint Petition at 6-7.

rise to the potential for new or enhanced infrastructure in underserved areas; and (2) GVC anticipates that the Proposed Transaction will result in the provision of more advanced telecommunications services to a broader customer base in the State.

C.

Consumer Advocate's Position

The Consumer Advocate states that it does not object to the Proposed Transaction. This recommendation is based on the Consumer Advocate's review of the Petition in which it determined, among other things, that the Proposed Transaction is not expected to negatively impact Winstar's Hawaii customers. The Consumer Advocate also "accepts the [Joint] Petitioners' representation that they possess the necessary technical, financial and managerial abilities to provide the telecommunications services related to this subject transaction."⁴

In addition, the Consumer Advocate finds the Proposed Transaction as being in the public interest. This assessment is based on, in part, Joint Petitioners' representation that the Proposed Transaction will serve the public interest by ensuring the continuation of Winstar's business and that Winstar's business will be strengthened through GVC's managerial and financial support. In this regard, the Consumer Advocate recognizes that the "existence of multiple telecommunications service providers in the Hawaii market will

⁴See, Statement of Position at 4.

serve to mitigate any traditional public utility regulatory concerns that may result from the proposed transfer of control."⁵

In the alternative, the Consumer Advocate recommends that the Commission, on its own motion, could elect to waive the regulatory requirements with regards to the Proposed Transaction under HRS § 269-16.9 and HAR § 6-80-135.⁶ In support of this recommendation, the Consumer Advocate notes that Winstar is a non-dominant telecommunications provider in the State. The Consumer Advocate states that Winstar reported having little or no customers in the State and only approximately seventy-nine-dollars (\$79) in intrastate revenues in 2004 in Hawaii.

Additionally, this recommendation is also based on the Consumer Advocate's determination that the Proposed Transaction is: (1) not expected to negatively impact Winstar's Hawaii customers; and (2) expected to be in the public interest. Further, the Consumer Advocate contends that "since many telecommunications service providers are authorized to provide resold telecommunications services in the Hawaii market, it is assumed that competition will serve the same purpose as public interest regulation for the [P]roposed [T]ransaction."⁷

Moreover, if the commission decides to waive the approval requirements of this case, the Consumer Advocate

⁵See, Statement of Position at 5.

⁶The Consumer Advocate states that this recommendation is based on the specific facts and circumstances of this case and that it should not be construed to indicate general support of waivers of approval requirements for all competitive local exchange telecommunications providers.

⁷See, Statement of Position at 6.

recommends that we also waive the filing requirements associated with this Petition.⁸ The Consumer Advocate states that it is unnecessary to review and maintain copies of the asset purchase agreement for record keeping purposes if the need to review the transaction is waived.

III.

Findings and Conclusions

HRS § 269-19 provides in part that no public utility corporation shall, "directly or indirectly, merge or consolidate with any other public utility corporation without first having secured from the . . . commission an order authorizing it so to do." Emphasis added. The statute also states that "[e]very such sale . . . merger, or consolidation, made other than in accordance with the order of the commission shall be void." The purpose of HRS § 269-19 is to safeguard the public interest.⁹

Moreover, under HRS § 269-7(a), the commission is empowered to examine the condition of a public utility, the manner in which it is operated with reference to the safety or accommodation of the public, "and all matters of every nature

⁸Specifically, the Consumer Advocate recommends that we waive the filing of the: (1) stock purchase agreement between Winstar and GVC required under HAR § 6-61-101(b)(2); and (2) plan of merger between Winstar and GVC required pursuant to HAR § 6-61-105(c)(2). On the other hand, if the commission is not inclined to waive the HRS § 269-7(a) approval requirements, the Consumer Advocate recommends that we require Joint Petitioners to file copies of the documents within thirty (30) days of the date of this Decision and Order. See, Statement of Position at 6-7.

⁹See, *In re Honolulu Rapid Transit Co.*, 54 Haw. 402, 409, 507 P.2d 755, 759 (1973).

affecting the relations and transactions between it and the public or persons or corporations." The commission, under HRS § 269-7(a), has the authority to examine any and all transactions of the public utility that affect or may affect the public that it serves.

Under HRS § 269-16.9(e), "[t]he commission may waive other regulatory requirements under this chapter applicable to telecommunications providers when it determines that competition will serve the same purpose as public interest regulation." Similarly, HAR § 6-80-135 allows the commission to grant an exemption from or waive the applicability of any of the provisions of HRS chapter 269 or any rule (except provisions related to HRS § 269-34), upon a determination that an exemption or waiver is in the public interest.

Upon review of the record¹⁰ in this docket, we find the following: (1) the telecommunications services provided by Winstar in the State are competitive¹¹; (2) Winstar is a non-dominant carrier in Hawaii¹²; (3) the Proposed Transaction, based on the Joint Petitioners' representations, is consistent

¹⁰The commission also takes official notice, pursuant to HAR § 6-61-48, of any other commission records relating to Winstar.

¹¹Winstar is authorized under its commission issued certificate of authority to provide telecommunications services in the State on a resold basis. Under HAR § 6-80-25(f)(2), specific telecommunication services provided through resale are fully competitive for the reseller of the service, unless otherwise ordered by the commission.

¹²As the Consumer Advocate noted, Winstar reports to having little or no customers in the State and only approximately seventy-nine-dollars (\$79) in Hawaii intrastate revenues in 2004. See, Statement of Position at 6-7.

with the public interest¹³; and (4) competition, in this instance, will serve the same purpose as public interest regulation.

Based on the forgoing, the commission finds the Consumer Advocate's recommendation that the commission, on its own motion, should waive the regulatory approval requirements for the matters of this docket, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135 to be reasonable and consistent with the public interest.¹⁴ We also find the Consumer Advocate's recommendation that we waive the filing requirements of HAR §§ 6-61-101(b)(2) and 6-61-105(c)(2) to also be reasonable. Similarly, we find it in the public interest to waive, on our own motion, other various applicable rules of HAR chapter 6-61 to the extent that the Joint Petition is inconsistent with those rules, see HAR § 6-61-105, among other sections.

Accordingly, the commission concludes that the approval requirements of HRS §§ 269-7(a) and 269-19 should, to the extent applicable, be waived with respect to the Proposed Transaction. Moreover, to the extent that the Joint Petition does not fully

¹³The commission's determination is based on Joint Petitioners' representation that the Proposed Transaction, among other things: (1) will be seamless to Winstar's Hawaii customers; (2) not affect the rates, terms, or condition of Winstar's services; and (3) will ensure the continuation of Winstar's business in the State and be strengthened through GVC's managerial support and infusion of additional capital.

¹⁴Nonetheless, the commission will continue to examine and assess a utility's application (or petition) on a case-by-case basis to determine whether the approval requirements of HRS §§ 269-7(a) and 269-19 or any other related provisions governing utility transactions should be waived. The commission's decision with regards to the matters of this docket shall not be construed by any utility, subject to the commission's jurisdiction, as a basis for not filing an application (or petition) for commission approval involving similar transactions and matters.

comply with the filing requirements of HAR chapter 6-61, we conclude that the applicable filing requirements of HAR chapter 6-61, including those of HAR §§ 6-61-101(b)(2) and 6-61-105(c)(2), should also be waived.

IV.

Orders

THE COMMISSION ORDERS:


1. The approval requirements of HRS §§ 269-7(a) and 269-19, to the extent applicable, are waived with respect to the proposed indirect transfer of control described in the Petition filed on July 25, 2005.

2. To the extent that the Petition does not fully comply with the filing requirements of HAR chapter 6-61, the applicability of those requirements, including those of HAR §§ 6-61-101(b)(2) and 6-61-105(c)(2), are waived.

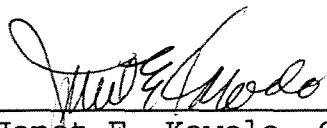
3. This docket is closed unless otherwise ordered by the commission.

DONE at Honolulu, Hawaii OCT 14 2005.

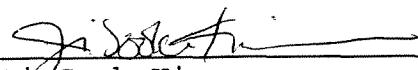
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

05-0182.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22075 upon the following Petitioners, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: OCT 14 2005