

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
 )  
MANHATTAN TELECOMMUNICATIONS )  
CORPORATION, dba METROPOLITAN )  
TELECOMMUNICATIONS and BUSINESS )  
PRODUCTIVITY SOLUTIONS, INC. )  
 )  
For Grant of the Authority )  
Necessary to Complete a Transfer of )  
Control. )  
\_\_\_\_\_ )

DOCKET NO. 05-0201

DECISION AND ORDER NO. 22495

RECEIVED  
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DIV. OF CONSUMER AFFAIRS  
DEPT. OF COMMERCE  
HONOLULU, HI

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2006 MAY 32 A 9:28  
DIV. OF CONSUMER AFFAIRS  
DEPT. OF COMMERCE  
HONOLULU, HI

Filed May 31, 2006  
At 2 o'clock P.M.

Karen Higashi  
Chief Clerk of the Commission

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

K. Higashi



Transaction, through which MetTel will acquire 100% of the stock of BPS.<sup>1</sup>

Applicants served copies of the Joint Application on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate").<sup>2</sup> On September 1, 2005, the Consumer Advocate filed its Statement of Position ("Consumer Advocate Statement of Position"), which stated that it does not object to approval of the Proposed Transaction.<sup>3</sup>

## II.

### Background

#### A.

#### Overview of Subject Entities

MetTel is a privately-held corporation organized under the laws of the state of Delaware, and is a direct, wholly owned subsidiary of Metropolitan Telecommunications Holding Company ("MTHC"), also a Delaware corporation. MetTel presently provides, either directly or through wholly owned subsidiaries, local exchange, domestic interexchange (both interLATA and intraLATA), international and advanced data and internet services to customers residing in 22 states and the District of Columbia. The commission recently granted MetTel a Certificate of Authority ("COA") to provide competitive resold and facilities-based / UNE

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<sup>1</sup>See Joint Application at 1.

<sup>2</sup>The Consumer Advocate is an *ex officio* party to this docket pursuant to HRS § 269-51 and Hawaii Administrative Rules § 6-61-62.

<sup>3</sup>See Consumer Advocate Statement of Position at 1.

local exchange and interexchange telecommunications services in Hawaii through one of its wholly owned subsidiaries, Metropolitan Telecommunications of Hawaii, Inc. ("MTHI").<sup>4</sup>

BPS is a privately-held corporation organized under the laws of the State of Minnesota, and is a direct, wholly owned subsidiary of Eschelon Operating Company ("OPCO"), also a Minnesota corporation that functions as a holding company. OPCO, in turn, is a direct, wholly owned subsidiary of Eschelon Telecom, Inc. ("ETI"), a Delaware corporation, and the ultimate parent corporation. BPS is authorized to provide resold intrastate and interstate telecommunications throughout the contiguous United States and the District of Columbia, and local exchange services in various states including Hawaii. BPS is also authorized to provide long distance telecommunications services in the State of Hawaii pursuant to Decision and Order No. 21565, filed on January 27, 2005, in Docket No. 04-0305.

B.

Description of Proposed Transaction

The Proposed Transaction involves a Purchase Agreement ("Purchase Agreement") executed between MetTel, BPS, and OPCO on August 10, 2005. Pursuant to the Purchase Agreement, MetTel will acquire 100% of the stock of BPS. The closing of the Proposed

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<sup>4</sup>See Decision and Order No. 22005, filed on Sept. 2, 2005, in Docket No. 05-0121 at 3. Although both BPS and MTHI are authorized to provide telecommunications services in Hawaii, MetTel asserts that it will continue to serve existing BPS customers through BPS and new customers through MTHI. See Joint Application at 6 n.4.

Transaction is contingent upon Applicants obtaining all required governmental approvals and satisfaction of other standard conditions.

In support of their Joint Application, Applicants represent that

1. The Proposed Transaction "will be completed at the holding company level and will not result in any transfer or assignment of BPS'[s] operating authority or customers."<sup>5</sup> Applicants explain that "the only change will be MetTel and MTHC taking direct and ultimate control of BPS from OPCO and ETI, respectively."<sup>6</sup>
2. "Upon consummation of the [Proposed] Transaction, BPS will continue to provide services to customers under its existing name."<sup>7</sup>
3. "Furthermore, BPS will continue to conduct its operations in substantially the same manner in which those operations are currently conducted."<sup>8</sup>
4. "Immediately after the Proposed Transaction is completed, BPS'[s] customers will continue to receive end user service under the same rates, terms and conditions that currently apply."<sup>9</sup>
5. "All existing tariffs will remain in place."<sup>10</sup>

Thus, Applicants conclude that the Proposed Transaction will be entirely transparent to BPS's customers because it will: (1) be

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<sup>5</sup>See Joint Application at 6.

<sup>6</sup>See id. at 6-7.

<sup>7</sup>See id. at 7; see also id. at 8.

<sup>8</sup>See id. at 7.

<sup>9</sup>See id.

<sup>10</sup>See id. at 8.

completed at the holding company level, (2) not change the rates, terms or conditions of BPS's services, and (3) result in MetTel continuing to provide service to BPS customers under the "Business Productivity Solutions, Inc." brand name following consummation of the Purchase Agreement.<sup>11</sup>

In addition, Applicants assert that the Proposed Transaction serves the public interest.<sup>12</sup> Applicants contend that the Proposed Transaction will increase competition in the telecommunications market by strengthening MetTel's position as an effective and multifaceted telecommunications carrier.<sup>13</sup> Applicants also contend that the transaction will achieve economies of scale and scope that will enhance MetTel's ability to deploy new products and services and expand the competitive market in Hawaii.<sup>14</sup>

### C.

#### Consumer Advocate's Position

In its Statement of Position, the Consumer Advocate states that it does not object to the commission's approval of the proposed request for transfer of control should the commission deem MetTel financially fit after receiving the requested updated financials in Docket No. 05-0121.<sup>15</sup> In

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<sup>11</sup>See id. at 1.

<sup>12</sup>See id. at 7.

<sup>13</sup>See id. at 8.

<sup>14</sup>See id. at 9.

<sup>15</sup>Consumer Advocate Statement of Position at 7.

addition, the Consumer Advocate recommends that copies of MetTel and OPCO's stock purchase agreement and the plan of merger between MetTel and BPS be submitted to the commission and the Consumer Advocate to complete the record in the instant proceeding pursuant to HAR § 6-61-101(b)(2) and HAR § 6-61-105(c)(2), respectively.<sup>16</sup> The Consumer Advocate recommends that the requested documentation be filed within thirty days from the date on which the commission issues its Decision and Order in the instant proceeding.<sup>17</sup>

D.

Waiver of Financial Statement

The commission waives the financial statement requirement under HAR § 6-61-105(c)(1).

II.

Discussion

HRS § 269-19 specifically provides, in relevant part, that "no 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

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<sup>16</sup>See id.

<sup>17</sup>See id.

do." The purpose of HRS § 269-19 is to safeguard the public interest.<sup>18</sup>

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 affecting the relations and transactions between it and the public or persons or corporations." Accordingly, 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.

The commission will first evaluate whether the Proposed Transaction is expected to have a negative impact on BPS's customers in the State of Hawaii. Second, the commission will evaluate the factors under Haw. Admin. R. § 6-80-18(a). Pursuant to Haw. Admin. R. § 6-80-18(a), the commission shall issue a certificate of authority to a telecommunications service if it finds that:

- (1) The applicant possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed telecommunications service in the State;
- (2) The applicant is fit, willing, and able to properly perform the proposed telecommunications service and to conform to the terms, conditions, and rules prescribed or adopted by the commission; and

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<sup>18</sup>See In re Honolulu Rapid Transit Co., 54 Haw. 402, 409, 507 P.2d 755, 759 (1973).

- (3) The proposed telecommunications service is, or will be, in the public interest.

As described herein, the commission finds that Applicants have successfully demonstrated that the above criteria are met.

A.

The Proposed Transaction Is Not Expected to Have a Negative Impact on BPS's Customers in the State of Hawaii

As described above, Applicants represent that under the Proposed Transaction (1) there will be no transfer or assignment of BPS's operating authority or customers, (2) BPS will continue to operate under the same name as at the present, (3) BPS will continue to conduct its operations in substantially the same manner as at the present, (4) BPS's customers will continue to receive end user service under the same rates, terms, and conditions that currently apply, and (5) all existing tariffs will remain in place.<sup>19</sup> Thus, Applicants conclude that the Proposed Transaction will be entirely transparent to BPS's customers.<sup>20</sup> Based on the above representations, the Consumer Advocate stated that "the proposed transfer of ownership in BP[S] is not expected to have a negative impact on BPS's customers."<sup>21</sup>

Upon reviewing the record and taking official notice of all pertinent documents in the commission's records, pursuant to HAR § 6-61-48, we find that the Proposed Transaction is not

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<sup>19</sup>See section II.B., supra.

<sup>20</sup>See id.

<sup>21</sup>Consumer Advocate Statement of Position at 4.

expected to have a negative impact on BPS's customers in the State of Hawaii.

B.

MetTel Has the Technical, Financial, and Managerial Resources and Abilities to Ensure the Continued Service to BPS's Customers (HAR § 6-80-18(a)(1))

Pursuant to HAR § 6-80-18(a)(1), telecommunications carriers that are issued certificates of authority should have "sufficient technical, financial, and managerial resources and abilities to provide the proposed telecommunications service in the state." Therefore, generally, it is important to ascertain the technical, financial, and managerial abilities of the acquiring company's management and staff to ensure that quality service continues to be provided at a reasonable rate.

As recognized by the Consumer Advocate, "[t]he [Joint] Application states that MetTel provides various telecommunications services in 22 states and the District of Columbia, and BPS is authorized to provide resold intrastate, interstate, and local service in various states including Hawaii."<sup>22</sup> The Consumer Advocate also noted that MTHC, MetTel's parent company, provided brief biographies of their executive officers in Exhibit D of the Application filed in Docket No. 05-0121.<sup>23</sup> Based on this information, the Consumer Advocate stated that it "accepts the Applicants' representation that they

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<sup>22</sup>See Consumer Advocate Statement of Position at 4; see also Joint Application at 3.

<sup>23</sup>See Consumer Advocate Statement of Position at 4-5; see also Joint Application at 3.

possess the necessary technical and managerial abilities to provide the telecommunications services related to this subject transaction."<sup>24</sup>

Upon reviewing the record and taking official notice of all pertinent documents in the commission's records, pursuant to HAR § 6-61-48, we agree with the Consumer Advocate, and find that MetTel has the technical, financial, and managerial resources and abilities to ensure the continued service to BPS's customers, and that Applicants therefore meet the criteria under HAR § 6-80-18(a)(1).

C.

MetTel Is Fit, Willing, and Able to Properly Perform the Proposed Telecommunications Service and to Conform to the Terms, Conditions, and Rules Prescribed or Adopted by the Commission (HAR § 6-80-18(a)(2))

Pursuant to HAR § 6-80-18(a)(2), a certificate of authority should not be issued unless the telecommunications carrier demonstrates that it is "fit, willing, and able to properly perform the proposed telecommunications service and to conform to the terms, conditions, and rules prescribed or adopted by the commission." Therefore, generally, it is important to ascertain the acquiring company's fitness, willingness, and ability to properly perform the proposed telecommunications service and to conform to the commission's terms, conditions, and rules.

As discussed above, the Consumer Advocate states that it does not object to the commission's approval of the Proposed

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<sup>24</sup>See Consumer Advocate Statement of Position at 5.

Transaction provided that the commission deems "MetTel financially fit after receiving the requested updated financials in Docket No. 05-0121."<sup>25</sup> In Decision and Order No. 22005, filed on September 2, 2005, in Docket No. 05-0121, the commission explained in a footnote that "[MTHI] submitted updated financial statements pursuant to the commission's August 8, 2005 directive."<sup>26</sup> Thus, the commission determines that the Consumer Advocate's recommendation is moot.<sup>27</sup>

Upon reviewing the record and taking official notice of all pertinent documents in the commission's records, pursuant to HAR § 6-61-48, we find that MetTel is fit, willing, and able to properly perform the proposed telecommunications service and to conform to the commission's terms, conditions, and rules, and that Applicants therefore meet the criteria under HAR § 6-80-18(a)(2).

D.

The Proposed Transaction Is, or Will Be, in the Public Interest  
(HAR § 6-80-18(a)(3))

Pursuant to HAR § 6-80-18(a)(3), a certificate of authority should not be issued unless "[t]he proposed telecommunications service is, or will be, in the public interest." Therefore, generally, it is important to ascertain

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<sup>25</sup>See Section I.C., supra (citing Consumer Advocate Statement of Position at 7).

<sup>26</sup>See Decision and Order No. 22005, filed on Sept. 2, 2005, in Docket No. 05-0121 at 2 n.2.

<sup>27</sup>See also id.

whether the proposed transfer of control is, or will be, in the public interest.

As described by the Consumer Advocate, Applicants represent that

The proposed transaction is in the public interest for the following reasons:

- MetTel has the technical, managerial and financial capabilities to acquire and operate BPS.
- The transaction will benefit competition in the telecommunications market by enabling MetTel to continue to develop as an effective competitor in Hawaii.
- The transaction will not result in any anti-competitive effects because BPS and MetTel do not presently have a dominance in Hawaii's telecommunication market. Furthermore the transaction will enhance MetTel's ability to deploy new products and services and expand into new markets.<sup>28</sup>

The Consumer Advocate also noted "Applicants' affirmation that after the consummation of the transaction BPS will continue to operate under its same name with no change to the services, rate, terms and conditions of service it provides to its customers."<sup>29</sup> Thus, the Consumer Advocate stated that it "accepts Applicants' representation that the transaction will enhance MetTel's ability to provide reliable, competitively priced services to customers

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<sup>28</sup>See Consumer Advocate Statement of Position at 5.

<sup>29</sup>See id. at 6.

by allowing it to combine its financial, technical and market resources and expertise with that of BPS."<sup>30</sup>

In addition, the Consumer Advocate stated its recognition that "the existence of multiple telecommunications service providers in the Hawaii market will serve to mitigate any traditional public utility regulatory concerns that may result from the proposed transfer of control affecting BPS and MetTel."<sup>31</sup> The Consumer Advocate concluded that "if there are any adverse consequences from the proposed transaction, consumers in Hawaii will have the option of selecting another service provider."<sup>32</sup>

With respect to market share concerns, Applicants state that "[a]lthough BPS and MetTel both provide similar services in a few overlapping markets, neither has significant market share in any of these markets and the combined market share post-closing will not exceed 10 percent in any market."<sup>33</sup> The Consumer Advocate concurred with Applicants that the transfer of control of BPS to MetTel will not degrade the competitive nature of the Hawaii telecommunications market.<sup>34</sup>

Upon reviewing the record and taking official notice of all pertinent documents in the commission's records, pursuant to HAR § 6-61-48, we agree with the Consumer Advocate, and find that the Proposed Transaction is or will be in the public interest,

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<sup>30</sup>See id. at 5-6.

<sup>31</sup>See id. at 6.

<sup>32</sup>See id.

<sup>33</sup>See Joint Application at 9.

<sup>34</sup>See Consumer Advocate Statement of Position at 7.

and that Applicants therefore meet the criteria under HAR § 6-80-18(a)(3).

Accordingly, based on the foregoing, the commission finds that Applicants have sufficiently demonstrated that they should be granted the authority to complete the Proposed Transaction, through which BPS will become a direct wholly owned subsidiary of MetTel.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. The proposed transfer of control, through which BPS will become a direct wholly owned subsidiary of MetTel (the "Proposed Transaction"), is approved, pursuant to HRS §§ 269-7(a) and 269-19, and subject to the following condition.

2. Within thirty (30) days of this Decision and Order, Applicants shall file copies of MetTel and OPCO's stock purchase agreement pursuant to HAR § 6-61-101(b)(2) and the plan of merger between MetTel and BPS pursuant to HAR § 6-61-105(c)(2) with the commission, with additional copies served on the Consumer Advocate.

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

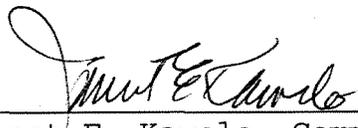
DONE at Honolulu, Hawaii

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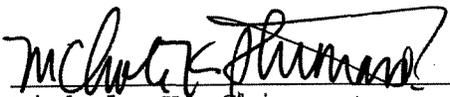
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By (EXCUSED)  
Wayne H. Kimura, Commissioner

By   
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

  
Nichole K. Shimamoto  
Commission Counsel  
05-0201.ac

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22495 upon the following, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

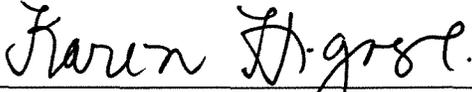
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Karen Higashi

DATED: MAY 31 2006