

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
AT&T INC. AND BELLSOUTH)
CORPORATION)
For an Exemption and/or Waiver or,)
in the Alternative, Approval of a)
Merger Transaction.)

DOCKET NO. 2006-0076

DECISION AND ORDER NO. 22581

Filed June 29, 2006
At 2 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

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

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

per

Charles R. Luasasapo

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Docket No. 2006-0076
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DECISION AND ORDER

By this Decision and Order, the commission: (1) denies the request of AT&T INC. ("AT&T") and BELLSOUTH CORPORATION ("BellSouth") (collectively, "Applicants") for an exemption and/or waiver of Hawaii Revised Statutes ("HRS") § 269-19 or any other applicable provisions of HRS ch. 269 regarding the proposed merger of Applicants ("Proposed Merger"); and (2) approves Applicants' alternative request for approval of the Proposed Merger, pursuant to HRS § 269-7(a).

I.

Background

A.

Application

Applicants filed their Application on March 31, 2006 ("Application"), (a) requesting an exemption and/or waiver from the provisions of HRS § 269-19 or any other applicable provisions of HRS ch. 269, pursuant to HRS § 269-16.9

and Hawaii Administrative Rules ("HAR") § 6-80-135; and (b) alternatively requesting commission approval of the Proposed Merger in the event that the commission determines that HRS § 269-19 or any other provisions of HRS ch. 269 do apply and that an exemption and/or waiver is inappropriate.

The Application was served on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate").¹ By Statement of Position filed on April 28, 2006, the Consumer Advocate informs the commission that it does not support Applicants' request for waiver of the requirements of HRS § 269-19 or any other applicable provisions of HRS ch. 269. The Consumer Advocate does not object, however, to approval of the Proposed Merger.

B.

Description of Applicants

In Decision and Order No. 21801, filed on May 3, 2005, in SBC Communications Inc. and AT&T Corp., Docket No. 05-0050, the commission approved a merger between SBC Communications Inc. and AT&T Corp. These companies merged to form AT&T, a Delaware corporation that provides IP-based communications services to businesses worldwide and provides local and long distance voice and data networking services. AT&T also provides wireless service through a 60 percent ownership interest in Cingular Wireless. AT&T is the holding parent of subsidiaries SBC Long Distance, LLC, dba AT&T Long Distance ("AT&T

¹No "person" moved to intervene in this proceeding.

Long Distance") and AT&T Communications of Hawaii, Inc. ("AT&T Hawaii") (collectively, the "AT&T subsidiaries"), who are both authorized by the commission to provide telecommunications services in Hawaii.²

BellSouth is a Georgia holding corporation and holds a 40 percent ownership interest in Cingular Wireless as a co-owner and equal voting partner of AT&T. BellSouth is also the holding parent company of BellSouth Long Distance ("BSLD"), a Delaware corporation and commission-authorized telecommunications provider in Hawaii.³

C.

Proposed Merger Transaction

Applicants entered into an Agreement and Plan of Merger ("Merger Agreement") on March 4, 2006, in which BellSouth will become a wholly-owned subsidiary of AT&T. Applicants contend

²AT&T Long Distance, a Delaware corporation, was granted a Certificate of Authority ("COA") in Decision and Order No. 15728, filed on July 28, 1997, in Docket No. 97-0212, which was extended to facilities-based and resold intrastate telecommunications services in Hawaii in Decision and Order No. 20894, filed on Apr. 28, 2004, in Docket No. 03-0416. AT&T Hawaii was granted a COA to provide intrastate "add-ons" to its interstate service in Decision and Order No. 13128, filed on Feb. 11, 1994, in Docket No. 7719, which was extended to facilities-based and resold local exchange telecommunications services in Decision and Order No. 14872, filed on Aug. 9, 1996, in Docket No. 96-0251.

³BSLD, a Delaware corporation, is authorized to provide local exchange and interexchange service in Hawaii pursuant to Docket Nos. 97-0053, 97-0336, and 04-0076. BSLD was granted a COA in Decision and Order No. 15564, filed on May 7, 1997, in Docket No. 97-0053. BellSouth BSE was granted a COA in Decision and Order No. 16001, filed on Oct. 6, 1997, in Docket No. 97-0336. The commission approved a merger of BSLD and BellSouth BSE, Inc. in Decision and Order No. 21084, filed on June 25, 2004, in Docket No. 04-0076.

that the Proposed Merger will be transparent and seamless for the customers of BSLD and the AT&T subsidiaries (collectively, the "Hawaii subsidiaries") because the Proposed Merger will occur at the parent company level and cause no change in ownership to the Hawaii subsidiaries.⁴ Applicants also contend that the Hawaii subsidiaries will continue to hold their COAs previously issued by the commission, and that there will be no transfer of the assets of the Hawaii subsidiaries in connection with the Proposed Merger.⁵ Applicants state that the Proposed Merger will not adversely affect the availability or quality of the service offered by the Hawaii subsidiaries,⁶ that the Hawaii subsidiaries will continue to exist in their current form,⁷ and that the Proposed Merger will not affect the rates, terms, or conditions of service of the Hawaii subsidiaries.⁸

D.

Applicants' Requests and Representations

Applicants contend that the requirements of HRS § 269-19 obligating a public utility to obtain commission approval prior to merging are not triggered by the Proposed Merger. This argument is based on the fact that the

⁴See Application at 7.

⁵See Application at 7.

⁶See Application at 14.

⁷See Application at 7.

⁸See Application at 7.

Proposed Merger will occur at the parent company level and cause no change in ownership to the Hawaii subsidiaries.

Applicants also contend that if the commission determines that HRS § 269-19 or any provision of HRS ch. 269 is applicable, the interest of the public will be served by an exemption under HRS § 269-16.9(a) or waiver under HRS § 269-16.9(e) from the commission's approval requirements, or in the alternative, approval of the Proposed Merger.⁹ Applicants contend that an exemption, waiver, or approval is appropriate because (1) the services provided by the Hawaii subsidiaries are competitive; (2) the Hawaii subsidiaries are non-dominant carriers in Hawaii; (3) the Proposed Merger is in the public interest; and (4) competition will serve the same purpose as regulation in this instance.¹⁰

In support of their contention that the Proposed Merger is in the public interest, Applicants contend that "[t]he merger will have no adverse impact on competition or service in Hawaii."¹¹ Applicants state that "the merger will benefit customers by better positioning the combined organization to improve efficiency and to promote the development and deployment of new and improved services, particularly IP-based services."¹² Applicants intend to integrate their separate IP-based networks and eliminate redundant IP expenditures, infrastructure, and

⁹See Application at 8.

¹⁰See Application at 9.

¹¹See Application at 9.

¹²See Application at 9.

organizations.¹³ Applicants expect that they will be able to provide more efficient, more reliable, more innovative and more secure IP-based services, enhance network security, and better protect customer data and privacy.¹⁴ In addition, Applicants maintain that the consolidation of the networks will result in faster and more economical introduction of new services and features like VoIP (Voice over Internet Protocol).¹⁵

Furthermore, Applicants contend that the Proposed Merger will allow them to (1) create a greater pool of R&D (Research & Development) human capital and intellectual property, and a greater customer base over which to spread R&D costs; (2) produce synergies such as the sharing of "best practices;" and (3) reduce procurement costs, staff and administrative expenses, network operating costs, billing and other operating support systems costs, and marketing, advertising, and branding costs.¹⁶ Applicants also contend that the Proposed Merger will benefit the public by enhancing the merged company's ability to prepare for, and respond to natural disasters and other emergencies.¹⁷

Applicants maintain that the Proposed Merger will not reduce or impede competition in Hawaii.¹⁸ Applicants explain that

¹³See Application at 10.

¹⁴See Application at 10.

¹⁵See Application at 11.

¹⁶See Application at 11-13.

¹⁷See Application at 11.

¹⁸See Application at 13.

BSLD's presence in Hawaii is extremely small (less than \$650 in revenue in 2005) and that BSLD has no local exchange customers, no local exchange revenues, no employees, no assets, and no long-distance residential customers in Hawaii.¹⁹ Thus, Applicants contend that the Proposed Merger will not eliminate any significant source of competition in Hawaii, particularly because the Hawaii subsidiaries are "but a few of the competitive telecommunications service providers already operating in Hawaii."²⁰ Indeed, Applicants represent that the Proposed Merger should promote competition by creating more robust, efficient competitors and encourage faster and broader deployment of new and improved services and service bundles.²¹

Finally, Applicants maintain that approval of the Proposed Merger is appropriate because the Proposed Merger is like the SBC-AT&T merger approved by the commission in Docket No. 05-0050.²² Applicants state that the Proposed Merger "will result in a more operationally and financially stronger company" that "will be in a better position to financially support its subsidiaries."²³

¹⁹See Application at 2, 13.

²⁰See Application at 13.

²¹See Application at 13.

²²See Application at 14-15.

²³See Application at 15 (citing Decision and Order No. 21801 at 14).

E.

Consumer Advocate's Position

In its Statement of Position, the Consumer Advocate states that it does not support Applicants' request for waiver of the requirements of HRS § 269-19 or any other applicable provision of HRS ch. 269.²⁴

With respect to Applicants' request for waiver of HRS § 269-19, the Consumer Advocate states that "HRS § 269 does not apply directly to the [Proposed Merger]" because Applicants are holding parent companies that "are not authorized to operate in the State of Hawaii under this Commission's jurisdiction."²⁵ The Consumer Advocate, therefore, finds Applicants' request for an exemption and/or waiver of HRS § 269-19 to be moot because the merging entities are not subject to HRS § 269-19.²⁶

The Consumer Advocate addresses the commission's authority to review and approve the Proposed Merger pursuant to the provisions of HRS § 269-7(a).²⁷ The Consumer Advocate cites the commission's findings in Decision and Order No. 21801 and the numerous mergers taking place involving AT&T.²⁸ In a separate discussion, the Consumer Advocate also notes that:

The Consumer Advocate is aware of opponents to the proposed transaction at the national level as it relates to the perception that a

²⁴See Statement of Position at 1.

²⁵See Statement of Position at 4.

²⁶See Statement of Position at 4.

²⁷See Statement of Position at 5.

²⁸See Statement of Position at 5-6.

return to the concentration of power exerted by AT&T pre-1984 is apparent. While these may be valid concerns at the national level, these concerns do not appear relevant at this time as it relates specifically to Hawaii.²⁹

The Consumer Advocate submits that "it is somewhat premature to determine if competition will serve the same purpose as public interest regulation" and that "a waiver of the investigative authority under HRS § 269-7(a) may not be appropriate at this time."³⁰ Thus, the Consumer Advocate proposes that the commission "take a cautious position in the instant application at this time" and recommends findings similar to those set forth in Decision and Order No. 21801.³¹

The Consumer Advocate does not object, however, to the commission's approval of the Proposed Merger of Applicants as described in the Merger Agreement.³² Based on Applicants' representations, "the Consumer Advocate does not currently expect the [Proposed Merger] to have a negative impact on Applicants' subsidiaries' customers in Hawaii."³³ Based on Applicants' representations and their filings³⁴, the Consumer Advocate

²⁹See Statement of Position at 7 n.10.

³⁰See Statement of Position at 6.

³¹See Statement of Position at 6.

³²See Statement of Position at 1-2.

³³See Statement of Position at 7.

³⁴As noted by the Consumer Advocate, "[i]n support of their financial ability, Applicants filed their respective Federal Communications Commission ('FCC') Form 10-K reports for the period ending December 31, 2005 with the instant application. These reports disclosed that for 2005 AT&T and BellSouth had operating revenues of approximately \$43.8 billion and \$20.5 billion respectively." See Statement of Position at 8.

"accepts Applicants' representation that they possess the necessary technical, managerial, and financial abilities to support their subsidiaries in [the] provision of telecommunications services in Hawaii."³⁵ Finally, since Applicants claim that the Proposed Merger will be transparent to the Hawaii subsidiaries' customers, and BSLD has no local exchange customers in Hawaii, the Consumer Advocate finds "no potential negative market-share impact to the Hawaii telecommunications market" and concludes that "the transaction is in the public interest."³⁶

III.

Discussion

A.

Request for Exemption and/or Waiver

Applicants seek an exemption and/or waiver from the provisions of HRS § 269-19, or any other applicable provisions of HRS ch. 269. HRS § 269-19 provides:

No public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit, or any right thereunder, nor by any means, directly or indirectly, merge or consolidate with any other public utility commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation, made other than in accordance

³⁵See Statement of Position at 8.

³⁶See Statement of Position at 9.

with the order of the commissions shall be void.

Applicants contend that

[T]he merger transaction will occur at the parent company level. As a result, BSLD and the AT&T subsidiaries currently regulated by the Commission will not be affected by the merger transaction and no change in the ownership of these affiliates will occur. Accordingly, Applicants believe that the requirements of HRS § 269-19 requiring prior Commission approval for mergers of public utility corporations are not triggered.³⁷

As discussed in Decision and Order No. 21801, HRS § 269-19 is not applicable in situations where the applicants are holding companies that do not hold certificates of authority to operate in the State.³⁸ In the present docket, Applicants are holding companies and do not hold COAs to operate in the State. Accordingly, the commission finds that HRS § 269-19 does not apply to the Proposed Merger.

In their request for an exemption and/or waiver from the provisions of HRS ch. 269, Applicants fail to identify HRS § 269-7(a), which is the applicable section in this docket. HRS § 269-7(a) provides the commission with the authority 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." As discussed in Decision and Order No. 21801, pursuant to HRS § 269-7(a), the commission has the authority to

³⁷See Application at 7 (footnotes omitted).

³⁸See, e.g., Decision and Order No. 21801 at 10.

review and approve transactions involving holding companies of State-certificated entities.³⁹ In the present docket, Applicants are holding parent companies of wholly-owned subsidiaries that provide services in the State and that are under the commission's regulatory purview. Therefore, pursuant to HRS § 269-7(a), the commission has the authority to review and approve the Proposed Merger.

Under HRS § 269-16.9(a), the commission, "upon its own motion or upon the application of any person, and upon notice and hearing, may exempt a telecommunications provider or a telecommunications service from any or all of the provisions of this chapter, except the provisions of section 269-34, upon a determination that the exemption is in the public interest."⁴⁰

In Decision and Order No. 21801, the commission stated:

We will disregard Applicants' request for an exemption under HRS § 269-16.9(a) because an exemption under this sub-section requires the commission to hold a hearing on the matter before making its determinations. Our decision is based on the following factors: (1) Applicants did not request that the commission hold a hearing, pursuant to HRS § 269-16.9(a); (2) Applicants request that we "permit the [Proposed M]erger to proceed as expeditiously as possible" (emphasis added; see, Application at 7) is inconsistent with a hearing on HRS § 269-16.9(a) because holding a hearing would impede an expeditious determination of the matters of the Application; and (3) the commission's ultimate determination regarding Applicants' Proposed Merger herein.

³⁹See Decision and Order No. 21801 at 10 ("The commission has traditionally reviewed transactions involving holding companies of State certificated entities under the requirements of HRS § 269-7(a)." (citations omitted)).

⁴⁰HRS § 269-16.9(a) (emphasis added).

Consistent with Decision and Order No. 21801, and for the same reasons discussed in Decision and Order No. 21801, the commission disregards Applicants' request for an exemption under HRS § 269-16.9(a) in the present docket.

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."⁴¹ Similarly, HAR § 6-80-135 allows the commission to grant an exemption from or waive the applicability of any of the provisions of HRS ch. 269 or any rule (except provisions related to HRS § 269-34), upon a determination that an exemption or waiver is in the public interest. In Decision and Order No. 21801, the commission stated:

Upon review, we find that AT&T Hawaii, AT&T's wholly-owned subsidiary, played an integral role in the development and advancement of Hawaii's telecommunications industry. For instance, AT&T Hawaii has been and continues to be a party in Docket No. 7702, the commission's on-going generic proceeding investigating the State's communications infrastructure. Through its involvement in Docket No. 7702, AT&T Hawaii was also involved in the development and the eventual ratification of HAR ch. 6-80, the State's administrative rules governing competition in telecommunications services. Additionally, AT&T Hawaii continues to provide the U.S. Department of Defense with telecommunications services in the State under its Hawaii Information Transfer System contract.

As in Docket No. 05-0050, in support of their request for an exemption and/or waiver, Applicants refer to Decision and

⁴¹HRS § 269-16.9(e) (emphasis added).

Order No. 21084,⁴² filed on June 25, 2004, in In re Bell South BSE, Inc. ("Bell South"), Docket No. 04-0076, wherein we waived the approval requirements of HRS § 269-19, among other things.⁴³ Unlike Applicants, however, the regulated carriers in Bell South are not (and have never been) a party to Docket No. 7702 and did not participate in the development and eventual ratification of HAR ch. 6-80.

Based on the above, and consistent with Decision and Order No. 21801, the commission does not find, in this instance, that competition will serve the same purpose as public interest regulation; nor do we find that an exemption or waiver of the regulatory approval requirements of HRS § 269-7(a), in this instance, is in the public interest.⁴⁴ Accordingly, we conclude that Applicants' request for an exemption and/or waiver should be denied.

B.

HRS § 269-7(a) Review

Commission approval under HRS § 269-7(a) requires a finding that the Proposed Merger is "reasonable and consistent with the public interest."⁴⁵ A transaction is said to be reasonable and consistent with the public interest if, among

⁴²See Application at 9. In their Application, Applicants incorrectly reference the commission's decision in Docket No. 04-0076 as "Decision and Order No. 21085."

⁴³See Decision and Order No. 21084 at 4-5, 7.

⁴⁴See, e.g., Decision and Order No. 21801 at 12-13.

⁴⁵See Decision and Order No. 21801 at 13 (citations omitted).

other things, the transaction "will not adversely affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in the State, as authorized by the commission."⁴⁶

Upon review and based on Applicants' representations in the record, it appears that the Proposed Merger will not have a negative effect on the telecommunications services provided to customers in Hawaii through Applicants' Hawaii subsidiaries. In addition, Applicants' representation that the Proposed Merger "will result in a more operationally and financially stronger company" that "will be in a better position to financially support its subsidiaries" appears reasonable.⁴⁷ Furthermore, the commission concurs with the Consumer Advocate's finding that Applicants possess the necessary technical, managerial, and financial abilities to support their subsidiaries in provision of telecommunications services in Hawaii.⁴⁸ For these reasons, the commission finds the Proposed Merger to be reasonable and consistent with the public interest.

Based on the above, we conclude that Applicants' Proposed Merger should be approved, pursuant to HRS § 269-7(a). As a condition of our approval, Applicants are required to provide notice of the consummation of the Proposed Merger by

⁴⁶See Decision and Order No. 21801 at 13 (citations omitted).

⁴⁷See Application at 15 (citing Decision and Order No. 21801 at 14).

⁴⁸See Statement of Position at 8.

filing a copy of their Certificate of Merger with the commission and Consumer Advocate, as soon as practicable.

IV.

Orders

1. Applicants' request for an exemption and/or waiver of HRS § 269-19 or any other applicable provisions of HRS ch. 269 regarding the Proposed Merger is denied.

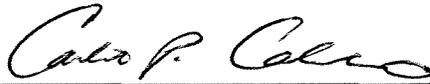
2. The Proposed Merger, as described in the Application, filed on March 31, 2006, is approved, pursuant to HRS § 269-7(a).

3. As soon as practicable, Applicants shall file a copy of their Certificate of Merger with the commission and the Consumer Advocate to provide notice of the consummation of their Proposed Merger.

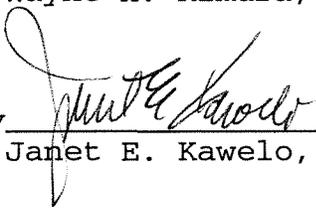
4. Applicants shall timely comply with the regulatory requirement set forth in ordering paragraph no. 3, above. Failure to timely comply with the requirement may constitute cause to void this Decision and Order, and may result in further regulatory action, as authorized by State law and commission rules and regulations.

DONE at Honolulu, Hawaii JUN 29 2006.

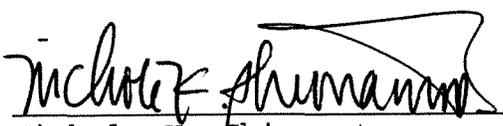
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
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By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Nichole K. Shimamoto
Commission Counsel

2006-0076.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22581 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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Certificate of Service

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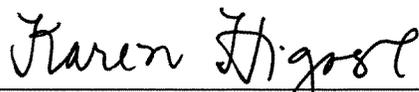
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