

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
TIME WARNER TELECOM OF HAWAII, L.P.,)
dba OCEANIC COMMUNICATIONS)
)
For Expedited Review and/or)
Approval Regarding Proposed)
Acquisition by Time Warner Telecom)
Inc. of Xspedius Communications, LLC)
And Financing, or for Waiver.)
_____)

DOCKET NO. 2006-0332

DECISION AND ORDER NO. 22967

Filed Oct. 20, 2006
At 3 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

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

2006 OCT 24 A 9:09

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

Michelle S.U.M. Kae

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Docket No. 2006-0332
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DECISION AND ORDER

By this Decision and Order, the commission approves TIME WARNER TELECOM OF HAWAII, L.P., dba OCEANIC COMMUNICATIONS' ("Applicant") request for approval of TIME WARNER TELECOM, INC.'s ("TWTC") proposed acquisition of XSPEDIUS COMMUNICATIONS, LLC ("Xspedius") and the issuance by TWTC of certain financing guaranteed by Applicant, pursuant to Hawaii Revised Statutes ("HRS") §§ 269-7(a), 269-17, and 269-19 ("Proposed Transaction"), subject to the conditions described below. To the extent that the proposed uses of the proceeds of the Proposed Transaction are not within the permitted purposes of HRS § 269-17, the commission waives the HRS § 269-17 requirement.

I.

Background

A.

Description of Subject Entities

Applicant is a limited partnership organized under the laws of the State of Delaware and authorized to do business in the State of Hawaii. It is a provider of interstate and intrastate telecommunications services, including dedicated access (private line) and local exchange services. Applicant's limited partner is TWTC,¹ a publicly held Delaware corporation. Time Warner Telecom Holdings Inc. is the general partner of Applicant, and is itself wholly owned by TWTC.

TWTC is a Delaware corporation headquartered in Colorado. It is "a leading provider of managed networking solutions to businesses" in twenty-four (24) states and forty-four (44) metropolitan areas in the United States, including Hawaii.² TWTC also provides "dedicated Internet access, and local and long distance voice services for long distance carriers, wireless communications companies, incumbent local exchange carriers, and enterprise organizations in the healthcare, finance, higher education, manufacturing and hospitality industries."³

¹TWTC owns Time Warner Telecom Holdings Inc., which owns Time Warner Telecom Holdings II LLC and Time Warner Telecom General Partnership, which maintains a one percent general partnership interest in Applicant. Application at 3 n.3.

²Application at 5.

³Id.

Xspedius is a Delaware limited liability company headquartered in the State of Missouri. Applicant states that "Xspedius brings integrated telecommunications services to small and medium-sized enterprise customers in 20 states across the Southern and Southwestern United States."⁴ Xspedius does not do business in Hawaii and no Xspedius entity is certified by the commission to provide service in the state.

XPD Acquisition, LLC ("XPD") is a Delaware limited liability company, which is a wholly owned subsidiary of TWTC, established solely for the purpose of completing the Proposed Transaction.

B.

Application

On August 14, 2006, Applicant filed its application⁵ for expedited approval of the Proposed Transaction, pursuant to HRS §§ 269-7(a), 269-17 and 269-19. To the extent that any proposed use of the proceeds of the proposed financing are not within the permitted purposes contained in HRS § 269-17, Applicant also seeks a waiver of the HRS § 269-17 requirement.

⁴Id.

⁵Application of Time Warner Telecom of Hawaii, L.P., dba Oceanic Communications; Exhibits "A" through "C"; Verification of Edward Murley; and Certificate of Service, filed on August 14, 2006 ("Application"). On August 14, 2006, the Application was served upon the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"). Pursuant to Hawaii Administrative Rules ("HAR") § 6-61-62, the Consumer Advocate is an ex officio party to any proceeding before the commission.

In the alternative, Applicant requests a waiver of all statutory requirements, pursuant to HRS § 269-16.9(e).

According to Applicant, on July 27, 2006, TWTC and Xspedius (and certain equity holders) entered into an Agreement and Plan of Merger ("Agreement"), which provides that Xspedius will become a wholly owned subsidiary of TWTC. To facilitate the Proposed Transaction, TWTC created XPD, which, under the Agreement, will merge with and into Xspedius, with Xspedius continuing as the surviving entity and as a wholly owned subsidiary of TWTC ("Merger"). At the time of the Merger, all of the ownership interests of Xspedius immediately prior to the Merger shall cease to exist in exchange for \$531 million in total consideration, consisting of TWTC stock and cash received by the owners of Xspedius pursuant to the terms of the Agreement.⁶ The consideration will consist of \$212.5 million of cash and \$319 million in shares of TWTC's Class A common stock.⁷ TWTC will not assume any Xspedius debt through the Proposed Transaction and as a result of XPD merging into Xspedius, TWTC will own one hundred percent of the membership interest of Xspedius.⁸

To finance the Proposed Transaction, TWTC intends to enter into financing facilities, the proceeds of which will be used to finance the cash portion of the consideration to be paid

⁶Application at 6.

⁷Applicant states that a portion of the cash consideration to be paid for the Merger will be paid with proceeds from the financing portion of the Proposed Transaction. Id. at 6 n. 5.

⁸Id. at 6.

for Xspedius, to fund ongoing operations, and to refinance certain existing debt ("Financing"). With regard to the Financing portion of the Proposed Transaction, Applicant states:

In 2004, TWTC issued \$200 million of 9.25% Senior Notes due in 2014 and \$240 million of Secured Floating Rate Notes due in 2011, and entered into a five year Senior Secured Revolving Credit Facility in the amount of \$150 million ("2004 Credit Agreement"). In 2005, TWTC entered into a \$200 million incremental term loan B credit facility ("Term Loan B Credit Facility") under the 2004 Credit Agreement. The revolving commitments under the 2004 Credit Facility were reduced from \$150 million to \$110 million. The obligations under the Term Loan B Credit Facility, as with the 2004 Credit Agreement, were guaranteed by each state level operating subsidiary, including Applicant, via a guarantee and pledge of the stock, interests and assets of each operating subsidiary.⁹

Application at 6-7 (footnotes omitted).

TWTC seeks commission approval to restructure these debt instruments, which were previously approved by the commission, and which would increase TWTC's consolidated long term debt by \$231 million.

Applicant contends that (1) "the proposed Financing will strengthen TWTC's ability to compete and expand in the highly competitive local exchange market for telecommunications customers in Hawaii by giving TWTC access to greater financial

⁹Applicant notes that the 2004 Credit Agreement and the restructure of the existing debt instruments were previously approved by the commission in Decision and Order No. 20880, filed on March 31, 2004, in Docket No. 04-0036 and Decision and Order No. 22166, filed on December 6, 2005, in Docket No. 05-0272. Application at 6-7.

resources,"¹⁰ and (2) that TWTC's overall competitive and financial position will be reinforced, and that "the proceeds will allow Applicant and TWTC's other operating subsidiaries to provide expanded, competitive and efficient telecommunications services in Hawaii and elsewhere."¹¹ Applicant states that the Proposed Transaction "will create a combined competitive carrier able to more effectively compete on a national basis against established . . . providers and long distance companies."¹² Moreover, it contends that the Merger, which will result in the acquisition of Xspedius' assets and resources, "will improve and expand Applicant's services to Hawaii's consumers,"¹³ and will be transparent to Applicant's customers.

C.

Consumer Advocate's Statement of Position

On October 13, 2006, the Consumer Advocate filed its statement of position ("Statement of Position") informing the commission that it does not object to the commission's approval of the Proposed Transaction, including the Merger, Financing and guarantee of the Financing, and to the waiver of the restriction on the use of the Financing proceeds, pursuant to HRS § 269-17. The Consumer Advocate, however, does not support Applicant's request for a waiver of the investigative requirements set forth

¹⁰Id. at 8.

¹¹Id. at 11.

¹²Id. at 3.

¹³Id. at 11.

in HRS § 269-7(a), and of the approval requirements set forth in HRS §§ 269-17 and 269-19.

With regard to the waiver of the requirements of HRS § 269-17, the Consumer Advocate notes that the commission has previously waived the HRS § 269-17 restriction where the proposed financing: (1) has little effect on Applicant's Hawaii customers; (2) will not have a material adverse effect on Applicant's telecommunications operations; (3) is consistent with the public interest; and (4) where the commission found that competition will serve the same purpose as public interest regulation.¹⁴

Similarly, regarding the guarantee of TWTC's increased and restructured debt by Applicant, the Consumer Advocate notes that a number of telecommunication services providers have been authorized by the commission to provide services similar to that provided by Applicant. Therefore, any adverse consequences that may result from the proposed Financing should be mitigated by having other providers in the market available to consumers.

II.

Discussion

A.

Request for Waiver

As the commission often grants waivers in applications for approval of telecommunications financing transactions, the

¹⁴Statement of Position at 5, citing Decision and Order No. 20880, filed on March 31, 2004, in Docket No. 04-0036.

commission will first address Applicant's alternative waiver request.

HRS § 269-16.9(e) permits the commission to waive regulatory requirements applicable to telecommunications providers if the commission determines that competition will serve the same purpose as public interest regulation.¹⁵ Additionally, HAR § 6-80-135 permits 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 of HRS § 269-34 or provisions of HAR chapter 6-80 that implement HRS § 269-34), upon a determination that an exemption or waiver is in the public interest. Where, however, the commission finds that an applicant plays a significant role in the telecommunications industry, the commission may deny a request for a waiver under HRS § 269-16.9(e).¹⁶

Here, the commission notes that Applicant: (1) was a participant in Docket No. 7702, a proceeding investigating the communications infrastructure in Hawaii; (2) has a major presence in the telecommunications and cable industry in Hawaii; and

¹⁵See e.g., In re Broadwing Communications, LLC, Docket No. 05-0271, Decision and Order No. 22187 (December 14, 2005) (finding that while the applicant's proposed financial transaction fell under the purview of HRS §§ 269-7(a), 269-17, and 269-19, HRS § 269-16.9 allowed the commission to waive regulatory requirements applicable to telecommunications providers if the commission determined that competition will serve the same purpose as public interest regulation).

¹⁶See e.g., In re Sprint Long Distance, Inc., Docket No. 2006-0060, Decision and Order No. 22462 (May 11, 2006) (the commission denying a waiver request because it was unable to find that competition would serve the same purpose as public interest regulation pursuant to HRS § 269-16.9(e)).

(3) is one of the State's significant telecommunications providers. Thus, Applicant is unlike competitive local exchange carriers that have previously obtained commission waivers of applicable approval requirements. As such, the commission finds that the standards in HRS § 269-16.9(e) and HAR § 6-80-135, which allow the commission to waive certain provisions in HRS chapter 269, are not met in this case. Accordingly, the commission concludes that Applicant's request for a waiver of the approval requirements of HRS §§ 269-7(a), 269-17 and 269-19 should be denied.

B.

Request for Approval

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." Under HRS § 269-7(a), the commission will approve the Proposed Transaction if it is reasonable and consistent with the public interest.¹⁷ A transaction is reasonable and in the public interest if it will not adversely affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in Hawaii, as authorized by the commission.¹⁸

¹⁷See Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

¹⁸See Decision and Order No. 21715, filed on April 4, 2005, in Docket No. 05-0045 at 11-12.

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 months, issued without an order of the commission authorizing the same, then in effect, shall be void."

HRS § 269-19 provides that a public utility corporation must obtain the commission's 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 in this docket,¹⁹ the commission finds the Proposed Transaction to be reasonable and in the public interest. Applicant represents that the proposed Financing will strengthen TWTC's position in the Hawaii

¹⁹Pursuant to HAR § 6-61-48, the commission takes official notice of all records relating to Applicant and TWTC.

telecommunications industry by giving it greater financial resources and by replacing a significant portion of TWTC's debt with debt at a lower rate and an extended maturity date. It further represents that the Proposed Transaction will strengthen TWTC's fitness and ability to provide competitive telecommunications services to its Hawaii customers through improved delivery of services and reduced network costs. Applicant asserts that the "post-merger TWTC" will emerge strengthened in its position nationwide as an independent competitive provider of telecommunications and broadband services. In addition, Applicant contends that the Proposed Transaction will improve and expand Applicant's services to Hawaii's consumers and will be transparent to Applicant's customers. Accordingly, the commission concludes that the Proposed Transaction should be approved, pursuant to HRS §§ 269-7(a), 269-17, and 269-19, subject to the condition that Applicant be required to provide the commission and the Consumer Advocate with written notice of the date when the Proposed Transaction is consummated.

In addition, based on the foregoing, to the extent that any of the proposed uses of the proceeds of the Proposed Transaction are not within the permitted purposes contained in HRS § 269-17, the commission concludes that Applicant's request for waiver of that HRS § 269-17 requirement should be approved.

III.

Orders

THE COMMISSION ORDERS:

1. Pursuant to HRS §§ 269-7(a), 269-17, and 269-19, the Proposed Transaction, as described in the Application, is approved, subject to the condition that Applicant notify the commission and the Consumer Advocate in writing of the date when the Proposed Transaction is consummated. Failure to promptly comply may constitute cause to void this Decision and Order, and may result in further regulatory action, as authorized by law.

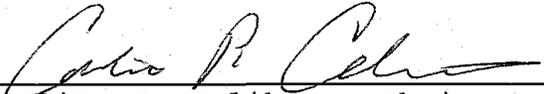
2. To the extent that the proceeds from the Proposed Financing are used for purposes aside from those permitted under HRS § 269-17, the applicability of that requirement of the section is waived, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.

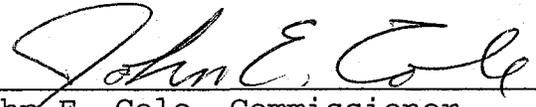
3. Applicant's alternative request for a waiver of the approval requirements of HRS §§ 269-7(a), 269-17, and 269-19 is denied.

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

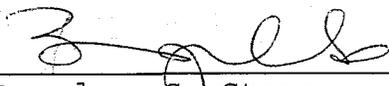
DONE at Honolulu, Hawaii OCT 20 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:


Benedyne S. Stone
Commission Counsel

2006-0332.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22967 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI, EXECUTIVE DIRECTOR
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DATED: OCT 20 2006