

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
YMAX COMMUNICATIONS CORP.)
For a Certificate of Authority to)
Provide Facilities-Based and)
Resold Local Exchange Service and)
Resold Intrastate Interexchange)
Telecommunications Services in)
Hawaii.)
_____)

DOCKET NO. 2006-0070

DECISION AND ORDER NO. 23071

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

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RECEIVED

Filed November 24, 2006
At 2 o'clock P.M.

For Brooke K. Kane
Chief Clerk of the Commission

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

services, but instead will provide local service using unbundled network elements and by reselling services from the incumbent local exchange carrier in the State.

A.

Applicant's Request

On March 24, 2006, Applicant filed its application for a COA to provide facilities-based and resold local exchange service and resold intrastate interexchange telecommunications services in the State ("Application"), pursuant to Title 6, Chapter 80, Competition in Telecommunications Services, Hawaii Revised Statutes ("HRS"), and Section 253 of the federal Telecommunications Act of 1996.¹ Applicant filed illustrative copies of its Competitive Local Exchange Tariff, Access Tariff, and Interexchange Services Tariff as attachments to the Application.

¹Applicant served copies of the Application on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to this docket pursuant to HRS § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62. On May 18, 2006, the commission advised Applicant that HAR § 6-80-17(c)(1)(E) requires an application for a COA to include the applicant's "most recent" available balance sheet and income statement (collectively, "Financial Statements"). Therefore, the commission requested that Applicant submit its latest Financial Statements (not older than three (3) months from the March 24, 2006 filing date of the Application) within thirty (30) days. On May 24, 2006, Applicant filed its updated Financial Statements with the commission, and served a copy on the Consumer Advocate.

Applicant seeks, pursuant to HAR § 6-80-135, commission waiver of:

1. The requirement that a separate, formal application for certification be filed with the commission for each new telecommunications service a carrier proposes to offer (HRS § 269-7.5; HAR § 6-61-86);
2. The requirement that a telecommunications carrier maintain its financial records in conformance with the uniform system of accounts (HRS § 269-8.5), instead allowing the carrier to maintain its financial records in accordance with generally accepted accounting principles;
3. The requirement that all records and books pertaining to the telecommunications carrier's intrastate operations be located in the State (HRS § 269-8.2), instead allowing the carrier to promptly provide copies of its out-of-state records and books to the commission upon the commission's request;
4. The requirement subjecting telecommunications carriers to rate of return regulation and to public and contested case hearings on proposed rate increases (HRS § 269-16), except that waiver of this requirement does not apply to basic service in high cost areas provided by carriers receiving a State or federal universal service fund subsidy or to non-competitive services;
5. Any other state requirement as may be helpful toward the goal of greater competition in the public interest.

In addition, Applicant requests waiver of the HAR § 6-80-63 requirement to publish local exchange directories.

B.

Consumer Advocate's Position

On June 23, 2006, the Consumer Advocate filed its Statement of Position ("SOP") informing the commission that it does not object to approval of Applicant's request. Specifically, the Consumer Advocate states that it does not object to the commission's issuance of a COA, nor does it object to the commission granting the waivers requested by Applicant. However, pursuant to HAR § 6-80-136, the Consumer Advocate recommends that Applicant be required to: (1) file a separate tariff for each proposed new service; (2) maintain its financial records in accordance with generally accepted accounting principles; (3) make information from its records and books pertaining to intrastate telecommunications operations in the State available to the commission and the Consumer Advocate upon request on a timely basis; and (4) comply with the other exception requirements set forth in the subject rule that are not waived. Finally, the Consumer Advocate also recommends several amendments to Applicant's tariffs, discussed in Section II.C below.

II.

Discussion

A.

COA to Provide the Proposed Services

HRS § 269-7.5 prohibits a public utility from commencing business in the State without first obtaining a certificate of public convenience and necessity ("CPCN") from the commission.² HAR § 6-80-18(a) states that:

The commission shall issue a certificate of authority to any qualified applicant, authorizing the whole or any part of the telecommunications service covered by the application, 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
- (3) The proposed telecommunications service is, or will be, in the public interest.

HAR § 6-80-18(a).

²On June 3, 1996, HAR ch. 6-80 took effect. HAR ch. 6-80, among other things, replaces the CPCN with a COA for telecommunications carriers, and establishes procedures for requesting and issuing a COA.

Upon review of the Application, the commission makes the following findings pursuant to HAR § 6-80-18(a):

1. Applicant possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed services, as evidenced by the management profiles and Financial Statements submitted in support of the Application.

2. Applicant is fit, willing, and able to properly perform the telecommunications services and to conform to the terms, conditions, and rules prescribed or adopted by the commission, as evidenced by Applicant's representations in its Application. Moreover, the commission's grant of a COA to Applicant to provide the proposed services will be conditioned upon Applicant's conformity to the terms, conditions, and rules prescribed or adopted by the commission as discussed below.

3. Applicant's proposed telecommunications services are in the public interest. The commission recognizes that additional service providers in the industry increase competition and provide the consumer with options in Hawaii's telecommunications market. As noted by the Consumer Advocate, Applicant's proposed services are in the public interest as "[t]he introduction of effective competition in the telecommunications industry is desirable to achieve certain benefits that would not be present in a monopolistic environment."³

³Consumer Advocate SOP at 6.

Accordingly, the commission concludes that Applicant should be granted a COA to provide facilities-based and resold local exchange service and resold intrastate interexchange telecommunications services in the State, subject to Sections II.B and C below.

B.

Waivers Requested Pursuant to HAR § 6-80-135

Applicant requests various waivers pursuant to HRS § 6-80-135.⁴ However, HAR § 6-80-136 already authorizes the waivers requested by Applicant pursuant to HAR § 6-80-135. Specifically, HAR § 6-80-136 states, in relevant part:

Unless ordered otherwise by the commission, the following regulatory requirements of chapter 269, HRS, for the provision of intrastate telecommunications services by telecommunications carriers other than the incumbent carrier are waived⁵

In the present docket, Applicant seeks to provide facilities-based and resold local exchange service and resold

⁴Section 6-80-135(a) states, in relevant part:

The commission may, upon its own motion or upon the written request of any person or telecommunications carrier, exempt or waive a telecommunications carrier or telecommunications service from the provisions of chapter 269, HRS, this chapter, or any other telecommunications-related rule, in whole or in part, upon the commission's determination that the exemption or waiver is in the public interest . . .

HAR § 6-80-135(a).

⁵(Emphasis added.)

intrastate interexchange telecommunications services in the State, and is not the incumbent carrier. Because the waivers requested by Applicant pursuant to HAR § 6-80-135 are fully contemplated by HAR § 6-80-136, specific authorization or waiver of these requirements is not necessary.

The Consumer Advocate recommends that Applicant be required to: (1) file a separate tariff for each proposed new service; (2) maintain its financial records in accordance with generally accepted accounting principles; (3) make information from its records and books pertaining to intrastate telecommunications operations in the State available to the commission and the Consumer Advocate upon request on a timely basis; and (4) comply with the other exception requirements set forth in the subject rule that are not waived. The first two recommendations are incorporated in HAR § 6-80-136, and therefore, commission consideration of these recommendations is unnecessary. The third recommendation essentially modifies the otherwise applicable language of HAR § 6-80-136(3) to require Applicant to provide copies of its records and books upon the Consumer Advocate's request, in addition to the commission's request. The commission determines that because the Consumer Advocate has several discovery mechanisms available to it, an order that allows the Consumer Advocate to request copies of Applicant's records and books in conjunction with the waiver

provisions of HAR § 6-80-136 is not necessary or warranted at this time. With respect to the Consumer Advocate's fourth recommendation, because this requirement would exist regardless of a commission order containing such an instruction, the commission determines that a commission order on this issue is not necessary.

Based on the foregoing, the commission determines that Applicant's waiver requests pursuant to HAR § 6-80-135 are denied, and that to the extent that Applicant avails itself of the waivers authorized pursuant HAR § 6-80-136, Applicant shall be required to comply with all relevant terms, conditions, and rules contained in HAR § 6-80-136.

C.

Proposed Tariff Terms and Regulations

Based on the commission's review of Applicant's proposed tariffs, the commission agrees with the Consumer Advocate's concerns and recommended revisions, in part. Accordingly, we conclude that Applicant's proposed tariff should be revised as follows:

1. HI P.U.C. Tariff No. 1, Preface, Original Page 5.
HI P.U.C. Tariff No. 2, Original Page 1.
HI P.U.C. Tariff No. 3, Original Page 1.

These tariffs should clearly state that in the event of a conflict between any of Applicant's tariff provisions (including provisions governing the duty to defend, indemnification, hold harmless, and limitation of

liability) and State of Hawaii law, State of Hawaii law shall prevail.⁶

2. HI P.U.C. Tariff No. 1, Original Page 22, Section 2.5.3.

Section 2.5.3 should include a description of the terms, conditions, and procedures to be used in resolving billing disputes, consistent with the provisions of HAR § 6-80-102.⁷

3. HI P.U.C. Tariff No. 1, Original Page 24, Sections 2.5.5.D and 2.5.5.E.

These sections should be revised to reflect a minimum interest rate of six (6) percent on deposits held thirty (30) days or longer, consistent with HAR § 6-80-105(b).

4. HI P.U.C. Tariff No. 1, Original Page 27, Sections 2.5.6.C.4 and 2.5.6.C.5.

Sections 2.5.6.C.4 and 2.5.6.C.5 should be moved to Section 2.5.6.B, in compliance with HAR § 6-80-106.⁸

⁶See Order No. 22255, filed on February 1, 2006, in Docket No. 05-0173.

⁷The Consumer Advocate offers the following example:

Upon notification of a dispute, the company will notify the customer within five (5) working days of its receipt of the dispute notice and shall undertake an investigation of the dispute charges. At the conclusion of the investigation, the company will notify the customer of any amount determined by the company to be correctly charged and customer shall pay such amount to the company within fifteen (15) days. The company may suspend/terminate service if the customer fails to pay the amount determined by the company to be properly charged. Amounts determined by the company to be correctly charged will not be assessed a late payment charge as specified in Section 2.5.2.E. of this tariff.

See Consumer Advocate SOP at 8.

⁸In Section 2.5.6.C.4, Applicant states that service may be disconnected without notice "in the event of tampering with the equipment or services furnished by the Company." Furthermore, in

5. HI P.U.C. Tariff No. 1, Original Page 27,
Section 2.5.6.C.6.

Section 2.5.6.C.6 should be (a) moved to Section 2.8 because it is not a reason for discontinuance of service under HAR § 6-80-106, and (b) revised because, as worded, it is an impermissible punitive or liability fee in violation of HAR § 6-80-129(13). To remedy the latter, Applicant should include a statement that this provision is only applicable to the extent that a special contract or written service agreement specifically includes a penalty or liability for early termination of service.⁹

The commission also has its own concerns and recommended revisions. Accordingly, in addition to the foregoing, we conclude that Applicant's proposed tariff should also be revised as follows:

Section 2.5.6.C.5, Applicant states that "[u]pon the Customer's insolvency, assignment for the benefit of creditors, filing for bankruptcy or reorganization, or failing to discharge an involuntary petition within the time permitted by law, the Company may immediately discontinue or suspend service without incurring any liability." The commission notes that the Consumer Advocate recommends that Section 2.5.6.C.5 be moved to Section 2.5.6.B, and does not comment on Section 2.5.6.C.4.

⁹In this section, Applicant seeks a possible additional remedy for Customers disconnected under Sections 2.5.6.A or 2.5.6.B: "all future monthly and other charges that would have been payable by the Customer during the remainder of the term for which such services would have otherwise been provided to the Customer to be immediately due and payable (discounted to a present value at six percent)." Although the Consumer Advocate does not reference HAR § 6-80-129(13), the Consumer Advocate states that it "is not aware of any commission statute or rule that supports a tariff regulation that makes customers liable for services that they have not received unless a customer has committed to a contracted service period." See Consumer Advocate SOP at 9.

6. HI P.U.C. Tariff No. 1, Original Page 36, Section 2.8.1.

Section 2.8.1, which describes a customer's termination liability for cancellation of service, should be revised to be consistent with HAR § 6-80-129(13), which disallows penalty or liability fees, except under special contract or written service agreements that specifically include a penalty or liability for early termination of service.

7. HI P.U.C. Tariff No. 2, Original Page 15, Section 2.6.2 B.

Section 2.6.2 B, which provides information on disputed charges, should be revised to include the toll-free number for Applicant's Customer Service department, consistent with HAR § 6-80-107(1).

8. HI P.U.C. Tariff No. 2, Original Page 21, Section 2.9.1.

Section 2.9.1 should be revised by adding the underlined: "The Company may terminate service to a Customer or Subscriber for nonpayment of undisputed charges upon five (5) days written notice to the Customer or Subscriber without incurring any liability for damages due to loss of telephone service to the Customer or Subscriber. If the notification is mailed to the Customer or Subscriber, the Customer or Subscriber shall be allowed an additional two (2) days to respond."¹⁰

9. HI P.U.C. Tariff No. 2, Original Pages 26-28, Section 3.

Section 3, Service Descriptions and Rates, does not appear to include all of Applicant's rates. To the extent that the rates for the services that were described in Tariff No. 2 are not included in this tariff, Applicant must file any absent rates in accordance with HAR § 6-80-39(c)(4), which states, "[a]ny tariff filed with the commission by a telecommunications carrier must, at minimum, . . . "[c]ontain the price of the service[.]"

¹⁰See HAR § 6-80-106(c).

10. HI P.U.C. Tariff No. 3, Original Page 28,
Section 2.10.4.

Section 2.10.4 should be expanded to include information regarding the customer's option to contact the commission if the customer is unable to resolve a dispute with the company. This information should include the commission's address and telephone number.¹¹ Section 2.10.4 should also include a toll-free number, which customers may use to file trouble reports twenty-four hours a day and file complaints during the company's normal business hours.¹²

11. HI P.U.C. Tariff No. 3, Original Page 35,
Section 2.14.2.

Section 2.14.2 should be revised to be consistent with HAR § 6-80-106(a) (e.g., Applicant states that it may refuse or discontinue service without notice for violation of its tariff, which is inconsistent with HAR § 6-80-106(a) and HAR § 6-80-106(b)(5)-(6)).

12. HI P.U.C. Tariff No. 3, Original Page 35,
Section 2.14.3.

Section 2.14.3 should be revised by adding the underlined: "The Company may refuse or discontinue service provided that, unless otherwise stated, the Customer shall be given five (5) days written notice to comply with any rule or remedy any deficiency. If the notification is mailed to the Customer, the Customer shall be allowed an additional two (2) days to respond."¹³

13. HI P.U.C. Tariff No. 3, Original Page 36,
Section 2.14.3 A.

Section 2.14.3 A should be revised by adding the underlined: "The Company, by written notice to the

¹¹See HAR § 6-80-107(4).

¹²See HAR § 6-80-107(1). In order to comply with the above, Applicant could use, as an example, the language in HI P.U.C. Tariff No. 1, Sections 2.5.3.B and 2.5.3.D.

¹³See HAR § 6-80-106(c).

Customer and in accordance with applicable law, may refuse, suspend or cancel service without incurring any liability when there is an unpaid balance that is not in dispute for service that is past due."¹⁴

14. HI P.U.C. Tariff No. 3, Original Page 42, Section 2.20.1.

Section 2.20.1 should be revised by including the requirements of HAR § 6-80-103(b), which states, "[i]f service is interrupted by a natural or other disaster beyond the control of the telecommunications carrier, the carrier shall make adjustments and refunds to its affected customers if service is not restored within forty-eight hours."

15. HI P.U.C. Tariff No. 3, Original Page 45, Section 2.21.3.

Section 2.21.3 should be revised to state that the notice of proposed discontinuance will state the reason for and date of the scheduled discontinuance of service, and the actions that the customer may take to avoid discontinuance of service.¹⁵

16. HI P.U.C. Tariff No. 3, Original Page 68, Section 6.1.

Section 6.1, regarding Special Contract Arrangements, should be revised by omitting the strikethrough language as follows: "Service shall be available to all similarly situated Customers ~~for a fixed period of time~~ following the initial offering to the first contract Customer as specified in each individual contract."¹⁶ In addition, Section 6.1 should be revised

¹⁴See HAR § 6-80-106(b)(1).

¹⁵See HAR § 6-80-106(c). Applicant's proposed language violates HAR § 6-80-106(c) because it states that notice of a pending disconnection of a customer's service "**may** contain the reason for the notice, the date of the notice, a description of any remedies the Customer may make, the time allotted for the Customer to make remedies (if any), and a toll free customer service number the Customer may call to obtain additional information." (Emphasis in original.)

¹⁶See HAR § 6-80-87(1), which does not contain a time limit for a telecommunications carrier to provide telecommunications

to state that these Special Contract Arrangements will be filed with the commission in accordance with applicable commission rules and regulations.¹⁷

17. HI P.U.C. Tariff No. 3, Original Page 68, Section 6.2.

Section 6.2, regarding Special Service Arrangements, should be revised to state that any Special Service Arrangements will be filed with the commission in accordance with applicable commission rules and regulations.¹⁸

In addition to the foregoing, for the purpose of clarity, the commission concludes that the following revisions should be made:

18. HI P.U.C. Tariff No. 1, Original Page 2, Section 1.

The acronym "NPA-NXX," which is used in the definition of the word "End Office," should be defined.

19. HI P.U.C. Tariff No. 1, Original Page 5, Section 1.

The acronym "PBX," which is used in the definition of the word "Subscriber," should be defined.

20. HI P.U.C. Tariff No. 1, Original Page 1, Section 10.

Section 10.1 should be revised to refer to "Hawaii Public Utilities Commission," rather than "Hawaii Public Service Commission."

21. HI P.U.C. Tariff No. 2, Original Page 29, Section 4.2.

Section 4.2 should be revised to refer to "Commission" where it currently references "Department."

services on a non-discriminatory basis to all customers similarly situated or within a reasonable constituted class.

¹⁷See HAR § 6-80-39.

¹⁸See HAR § 6-80-39.

22. HI P.U.C. Tariff No. 3, Original Page 6, Section 1.

The definition of "Commission" should be changed from "Hawaii Public Service Commission" to "Hawaii Public Utilities Commission."

III.

Orders

1. Applicant is granted a COA to provide facilities-based and resold local exchange service and resold intrastate interexchange telecommunications services in the State.

2. As a holder of a COA, Applicant shall be subject to all applicable provisions of HRS ch. 269; HAR chs. 6-80 and 6-81; any other applicable State laws and commission rules; and any orders that the commission may issue from time to time.

3. Applicant shall file its tariffs in accordance with HAR §§ 6-80-39 and 6-80-40. Applicant's tariffs shall comply with the provisions of HAR ch. 6-80. In the event of a conflict between any tariff provision and State law, State law shall prevail.

4. Applicant shall conform its initial tariff to the applicable provisions of HAR ch. 6-80, by, among other things, incorporating the tariff revisions set forth in Section II.C of this Decision and Order. An original and eight (8) copies of the new tariff shall be filed with the commission, and two (2) additional copies shall be served on the Consumer Advocate.

Applicant shall ensure that the appropriate issued and effective dates are reflected in its tariffs.

5. Within thirty (30) days from the date of this Decision and Order, Applicant shall pay a public utility fee of \$60, pursuant to HRS § 269-30. The business check shall be made payable to the Hawaii Public Utilities Commission, and sent to the commission's office at 465 S. King Street, Room #103, Honolulu, HI, 96813.

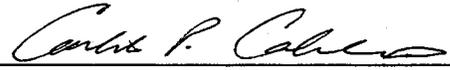
6. Within thirty (30) days from the date of this Decision and Order, Applicant shall also pay a telecommunications relay service ("TRS") contribution of \$10.00, established pursuant to: (A) HRS § 269-16.6; and (B) Decision and Order No. 22536, filed on June 16, 2006, in Docket No. 2006-0126. The business check shall be made payable to "Hawaii TRS," and sent to the Hawaii TRS Administrator, Solix, Inc.,¹⁹ 80 S. Jefferson Road, Whippany, NJ 07981. Written proof of payment shall be sent to the commission.

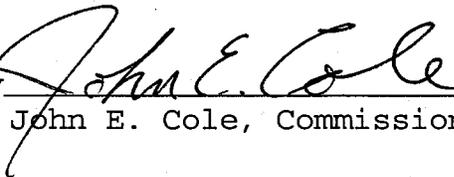
7. Applicant shall promptly comply with the requirements set forth above. Failure to promptly comply with these requirements may constitute cause to void this Decision and Order, and may result in further regulatory action, as authorized by law.

¹⁹Solix, Inc. was formerly known as NECA Services, Inc.

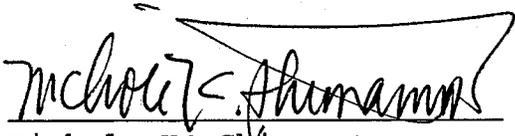
DONE at Honolulu, Hawaii NOV 24 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:


Nichole K. Shimamoto
Commission Counsel

2006-0070.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23071 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
DIVISION OF CONSUMER ADVOCACY
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for Karen Higashi

DATED: NOV 24 2006