

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAIIAN TELCOM SERVICES COMPANY,)
INC. and HAWAIIAN TELCOM, INC.)
For Approval of Proposal to Market)
Bundled Services Offered in)
Connection with Qualifying Local)
Services.)

DOCKET NO. 2007-0062

DECISION AND ORDER NO. 23443

Filed May 17, 2007
At 1 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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Chief Clerk, Public Utilities
Commission, State of Hawaii.

Karen Higashi

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_____)

Docket No. 2007-0062
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DECISION AND ORDER

By this Decision and Order, the commission: (1) waives the requirement, pursuant to Hawaii Administrative Rules ("HAR") § 6-80-35(e), that HAWAIIAN TELCOM SERVICES COMPANY, INC. ("HTSC") and HAWAIIAN TELCOM, INC. ("HTI") (collectively, "Applicants") obtain the commission's "express approval" of any bundled services offering, and (2) establishes a modified process in which an application for a bundled services offering takes effect thirty days after the filing of an application with the commission, unless said application is suspended by the commission, as described herein.

I.

Background

A.

Applicants

HTSC holds a certificate of authority to provide intrastate telecommunications services in the State of Hawaii

("State") as a reseller,¹ and a certificate of registration to provide wireless telecommunications services on a resold basis.² It was formed upon the merger transaction between certain subsidiaries of Verizon Communications Inc. and an entity now known as Hawaiian Telcom Communications, Inc.³

HTI is a Hawaii corporation originally chartered in 1883. It is a public utility regulated by the commission, which provides local and long distance telecommunications services on a statewide basis. HTI is an incumbent local exchange carrier within the meaning of section 252 of the Telecommunications Act of 1996.

B.

Application

On March 8, 2007, Applicants filed an application seeking express commission approval to offer consumers jointly marketed partially and fully competitive services and/or interstate, international, or other services not within the commission's jurisdiction, with qualifying local noncompetitive services (the "Bundled Services").⁴ The Bundled Services offering

¹See In re Paradise MergerSub, Inc., et al., Docket No. 04-0140, Decision and Order No. 21696, filed on March 16, 2005 ("Decision and Order No. 21696") at 58.

²See In re Hawaiian Telcom Services Company, Inc., Docket No. 05-0097, Decision and Order No. 21892, filed on June 24, 2005.

³See Decision and Order No. 21696.

⁴Application, Verification and Certificate of Service, filed on March 8, 2007 ("Application"). On March 8, 2007, the Application was served upon the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate") (together with Applicants, the "Parties"), an ex officio party to 2007-0062

would give consumers the option to subscribe to "bundles" of services, paying a single consolidated price rather than subscribing to the same services individually and paying a higher total price. Applicants state that the specific services included in a particular Bundled Services offering will be determined at the time of the future bundle offering, but that it would include the joint marketing of some combination of interstate, international, partially and fully competitive, and other non-jurisdictional services (collectively, the "Other Services") with noncompetitive services, such as local basic exchange service, offered by HTI.⁵ Applicants assert that the types of Bundled Services offerings that Applicants are planning to provide under this proposal would be similar to bundled service offerings filed with the commission in the past by HTSC and HTI's predecessor, Verizon Hawaii.⁶

In the Application, Applicants specifically ask for commission approval, pursuant to HAR § 6-80-35(e), of the Bundling Services offerings under this proposal, such that Applicants can market, sell, and advertise the specific Bundled Services offerings under this proposal without the need

this docket, pursuant to HRS § 269-51 and HAR § 6-61-62. No persons moved to intervene or participate without intervention in this docket.

⁵Applicants state that a Bundled Services offering could include (1) a combination of the Other Services offered by HTSC with noncompetitive services offered by HTI, or (2) a combination of noncompetitive services and Other Services offered solely by HTI. Application at 5 n.4.

⁶Applicants cite plans including, but not limited to, the myChoice, Plan L, the Go Local (fka Local Package) and the Go Local Plus (fka Local Package Plus) offerings. Application at 5.

to obtain separate commission approval for each offering, and for commission confirmation that, subject to the commission approval referenced above, Applicants have complied with the other requirements set forth in HAR § 6-80-35(e) through the filing of the Application and through their agreement to comply with certain criteria, as follows:

1. Each Bundled Services offering will comply with the specific criteria that the commission has identified and utilized in its prior approvals for bundles sought by Applicants (or their affiliates or predecessors). Specifically,

a. Any Bundled Services offering will not result in improper cross subsidization.

b. While a subscribing customer will pay a combined rate for the Bundled Services, any noncompetitive services included with the Bundled Services offering will be recorded on the books of the provider at the full tariffed rate.

c. Any discount from the total price of the Bundled Services provided to a subscribing customer will be borne solely by the provider of the Other Services and not by reducing any noncompetitive service tariffed rates.

d. The net revenue derived (after deduction of the discount) will be properly recorded on the books of the applicable provider by jurisdiction, provided that the noncompetitive services will be recorded at the full tariffed rate.

e. Notwithstanding the discounts which will be provided to the subscribing customer by the provider of the

Other Services, such discounts will not violate the cross-subsidization standards set forth in HAR § 6-80-35.

2. Applicants will submit a notification to the commission detailing the specific details of the proposed Bundled Services offering no less than five (5) days prior to the marketing, selling, or advertising of the specific offering. This notification, which Applicants represent is similar to existing promotional tariff notice requirements, will provide the commission with advance notice of the proposed Bundled Services offering and "an opportunity to initiate any action prior to the effective date if there is a question of whether the offering complies with the preset criteria."⁷ Applicants contemplate that the particular Bundled Services offering will automatically be allowed to go into effect following the five (5)-day period unless the commission decides to suspend the offering or take other action.

In the alternative, to the extent that the commission denies Applicants' request as described above, Applicants seek an exemption or waiver from the commission, pursuant to HRS § 269-16.9 and HAR § 6-80-135(a), from the specific requirements of HAR § 6-80-35(e), to the extent necessary to allow Applicants to begin marketing, selling and advertising its specific Bundled Services offerings without the need to: (1) submit an application requesting approval for each specific Bundled Services offering before that particular offering can be marketed, sold or advertised; (2) obtain commission approval for each such specific offering; and (3) provide a showing of

⁷Application at 7-8.
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non-subsidization for each such specific offering so long as Applicants comply with the criteria set forth above.

Applicants cite competition in the telecommunications marketplace as the primary justification for their request to the commission. In particular, Applicants rely on the following: (1) the robust and dynamic nature of competition in the Hawaii telecommunications marketplace; (2) the need to provide bundled offerings in a more timely manner than is possible under the current application process; (3) the established criteria by which the commission and the Consumer Advocate can base their approval of the instant Application; and (4) the fact that the five (5)-day notice period is "essentially identical" to that already in use for promotions by Applicants.

B.

Consumer Advocate's Statement of Position

On April 10, 2007, the Consumer Advocate filed its Statement of Position in which it objected to commission approval of the Application.⁸ According to the Consumer Advocate: (1) Applicants did not demonstrate a need to waive the HAR § 6-80-35(e) requirement for commission approval of a bundled service offering pursuant to a thirty-day application filing, and (2) Applicants' representations were not sufficient to demonstrate that cross subsidization of non-regulated, fully or

⁸On March 20, 2007, the Consumer Advocate filed information requests to Applicants regarding their "prior ability to offer bundled services in 2002 and 2003, and the ability to offer the same 'lightly regulated' or nonregulated services of their competitors." Consumer Advocate's Statement of Position at 3. Applicants responded to the information requests on March 28, 2007.

partially competitive services by non-competitive services will not occur in all future bundled filings. In the alternative, the Consumer Advocate stated that it would not oppose a request by Applicants to submit a thirty-day tariff transmittal in lieu of an application, for future bundled service offerings, that offer the type and composition of services previously provided in the service offerings approved by the commission, based on criteria set forth in the Application ("Consumer Advocate's Alternative Proposal").⁹

C.

The Parties' Stipulation

On May 1, 2007, the Parties filed a Stipulation of Settlement Agreement in Response to Division of Consumer Advocacy's Statement of Position ("Stipulation"). The Stipulation documents the Parties' agreement on all issues, after analyses and discussions, for the purposes of the instant proceeding. In the Parties' discussions, Applicants sought clarification of the Consumer Advocate's Alternative Proposal, and in particular (1) whether a formal commission decision and order is required pursuant to the "express approval" provision in HAR § 6-80-35(e), and (2) whether a request for bundled services approval should be submitted via a formal application, or whether it could also be submitted via transmittal or letter as a non-docketed matter. During discussions, the Consumer Advocate clarified that the intent of its Proposed Alternative was to (1) allow a request for a bundled services offering to be

⁹See Application, Section III.
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reviewed under the timelines set forth in HAR § 6-61-111, such that the proposed offering, unless suspended by the commission, shall automatically become effective thirty days after filing, and (2) allow a request for a bundled services offering to be submitted by formal application, or transmittal or letter as a non-docketed matter, as appropriate. In addition, in the event the commission takes the position that the HAR § 6-80-35(e) "express approval" requirement requires a decision and order from the commission, the Consumer Advocate agreed that a waiver of the HAR § 6-80-35(e) application and express approval requirements would be appropriate in light of its clarifications, discussed above.

Based on the Parties' discussions, they stipulated to the following:

1. In lieu of filing an application and obtaining the commission's "express approval" under HAR § 6-80-35(e), and subject to a demonstration that the non-competitive services are not subsidizing the competitive services in the Bundled Services offering, Applicants shall have the right to have any Bundled Services offering request reviewed under the process established under HAR § 6-61-111, i.e., allowing the Bundled Services offering to automatically become effective thirty days after Applicants file a request, unless suspended by the commission¹⁰;

¹⁰The Consumer Advocate maintains its right to file written protests not less than fifteen days before the effective date of the proposed tariff change, and Applicants maintain their right to file a reply to written protests not less than five days before the effective date of the proposed tariff change, in accordance with HAR §§ 6-61-61 and 6-80-40(c). Stipulation at 7 n.8.

2. Each Bundled Services offering will comply with the specific criteria that the commission has identified and utilized in its prior approvals for bundles sought by Applicants (or their affiliates or predecessors), or any additional criteria that may be applicable to demonstrate that the non-competitive services are not subsidizing the competitive services. Specifically, the criteria are:

- a. any Bundled Services offering will not result in improper cross-subsidization;
- b. while a subscribing customer will pay a combined rate for the Bundled Services, any non-competitive services included with the Bundled Services offering will be recorded on the books of the provider at the full tariffed rate;
- c. any discount from the total price of the Bundled Services provided to a subscribing customer will be borne solely by the provider of the Other Services, and not be reducing any non-competitive service tariffed rates;
- d. the net revenue derived, after deduction of the discount, will be properly recorded on the books of the applicable provider by jurisdiction, provided that the non-competitive services will be recorded at the full tariffed rate;

e. notwithstanding the discounts which will be provided to the subscribing customer by the provider of the Other Services, such discounts will not violate the cross-subsidization standards set forth in HAR § 6-80-35.

3. Any Bundled Services offering request submitted pursuant to the above criteria may be submitted by formal application, or by a transmittal or letter as a non-docketed matter, consistent with past practice; and

4. The requirements under HAR Chapter 6-80 should be specifically waived, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135, to the extent consistent with the above agreements.

II.

Discussion

Hawaii Revised Statutes ("HRS") § 269-16(b) states, in pertinent part:

No rate, fare, charge, classification, schedule, rule, or practice, other than one established pursuant to an automatic rate adjustment clause previously approved by the commission, shall be established, abandoned, modified, or departed from by any public utility, except after thirty days' notice as prescribed in section 269-12(b) to the commission and prior approval by the commission for any increases in rates, fares, or charges. The commission may, in its discretion and for good cause shown, allow any rate, fare, charge, classification, schedule, rule, or practice to be established, abandoned, modified, or departed from upon notice less than that provided for in section 269-12(b)

HRS § 269-16(b) (emphasis added).

In addition, HAR § 6-80-35(e) states:

A telecommunications carrier may not offer a noncompetitive telecommunications service jointly with any fully or partially competitive service or with any interstate, international, or other service not within the jurisdiction of the commission, except upon the commission's express approval. The commission's approval is subject to a satisfactory showing by the telecommunications carrier seeking to offer such joint services that the costs of the fully or partially competitive service or the costs of the interstate, international, or other non-jurisdictional service are not subsidized by the noncompetitive service. An application for approval to offer any such joint services must be filed with the commission not less than thirty days before the joint services are marketed, sold, or advertised.

HAR § 6-80-35(e) (emphasis added).¹¹

HRS § 269-16.9(e) and HAR § 6-80-135, however, allow the commission to waive the requirements of HRS Chapter 269 and HAR Chapter 6-80. Specifically, HRS § 269-16.9(e) permits the commission to waive the regulatory requirements applicable to telecommunications providers when it determines that competition will serve the same purpose as public interest regulation and HAR § 6-80-135 permits the commission to waive the applicability of any of the provisions of HRS Chapter 269, or any rule, upon a determination that a waiver is in the public interest.

¹¹HRS § 269-39(a) and HAR § 6-80-35(a) also specifically prohibit the cross-subsidization of a telecommunications carrier's competitive services by its noncompetitive service offerings. HAR § 6-80-35(b) clarifies that cross-subsidization "is deemed to have occurred if: (1) [a]ny fully competitive or partially competitive service is priced below the total service long run incremental cost of providing the service; (2) [f]ully competitive services, taken as a whole, fail to cover their direct and allocated joint and common costs; or (3) [i]f fully competitive and partially competitive services, taken as a whole, fail to cover the direct and allocated joint and common costs."

Here, the commission finds that a waiver of the "express approval" provision of HAR § 6-80-35(e), as set forth in the Parties' Stipulation, is appropriate, as competition will serve the same purpose as public interest regulation, and waiver under these circumstances is in the public interest. The commission, however, is unwilling to adopt the Parties' proposed process for allowing Bundled Services offerings to automatically become effective, as set forth in the Stipulation. The Parties' agreement to give the commission notice of a Bundled Services offering via a tariff filing pursuant to HAR § 6-61-111, does not provide the commission with sufficient opportunity to review any Bundled Services offering to ensure that cross-subsidization does not occur. The commission receives a number of tariff filings each month. It is unclear from the Stipulation how a tariff filing for a Bundled Services offering would be differentiated so that the commission could provide a full review of the offering scrutinizing it for any inappropriate cross-subsidization.¹²

However, in recognition of the competition HTSC and HTI face in the telecommunications marketplace, and their efforts to comply with all of the commission's laws and rules, the commission finds that a more streamlined modified process of reviewing Bundled Services offerings should be established for HTSC and HTI, as follows:

¹²While the Consumer Advocate notes that it "maintains its right to file written protests not less than 15 days before the effective date of the proposed tariff change," it is unclear whether, under Applicants' proposed tariff filing, the Consumer Advocate would be notified of a Bundled Services offering that included a non-competitive service so that it could proceed with a review. See Stipulation at 7 n.8.

1. Requests for approval of Bundled Services offerings shall be filed via application to the commission. The application must contain information sufficient to determine whether each Bundled Services offering complies with the specific criteria that the commission has identified and utilized in its prior approvals of bundled services, or any additional criteria that may be applicable to demonstrate that the non-competitive services are not subsidizing the competitive services.¹³
2. Such applications before the commission will take effect thirty days from filing of the application, unless suspended by the commission for further review.

III.

Orders

THE COMMISSION ORDERS:

1. The Parties' Stipulation is approved only to the extent that requirement for the commission's express approval, pursuant to HAR § 6-80-35(e), is waived, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.

¹³The information that will be required by the commission includes those criteria set forth in Section II.2 of the Stipulation, and discussed above, at Section I.B.1.

2. A modified process of reviewing proposed bundled services offerings, as described above in Section II, is hereby established.

DONE at Honolulu, Hawaii MAY 17 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Benedyne S. Stone
Benedyne S. Stone
Commission Counsel

2007-0062.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23443 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
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

JOEL K. MATSUNAGA
VICE PRESIDENT-EXTERNAL AFFAIRS
HAWAIIAN TELCOM SERVICES COMPANY, INC.
HAWAIIAN TELCOM, INC.
P. O. Box 2200
Honolulu, HI 96841

LESLIE ALAN UEOKA, ESQ.
ASSISTANT GENERAL COUNSEL
HAWAIIAN TELCOM SERVICES COMPANY, INC.
HAWAIIAN TELCOM, INC.
1177 Bishop Street
Honolulu, HI 96813

MICHAEL H. LAU, ESQ.
KENT D. MORIHARA, ESQ.
KRIS N. NAKAGAWA, ESQ.
MORIHARA LAU & FONG LLP
841 Bishop Street, Suite 400
Honolulu, HI 96813

ATTORNEYS FOR APPLICANT



Karen Higashi

DATED: MAY 17 2007