

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
DIRECT TELEPHONE COMPANY, INC. and)
SUMMIT COMMUNICATIONS, INC.)
)
For Expedited Exemptions or)
Waivers, and/or for Alternative)
Expedited Approvals Regarding)
§ 269-19 and § 269-7.5, Hawaii)
Revised Statutes.)
_____)

DOCKET NO. 03-0240

DECISION AND ORDER NO. 23552

Filed July 20, 2007
At 9 o'clock A.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.

Karen Higashi

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Docket No. 03-0240
Decision and Order No. 23552

DECISION AND ORDER

By this Decision and Order, the commission approves the transfer of SUMMIT COMMUNICATIONS, INC.'s ("Summit") shared tenant services ("STS") assets and operations to DIRECT TELEPHONE COMPANY, INC. ("DTC") and authorizes DTC to provide STS under the same terms and conditions and "tariff" as once offered by Summit, provided that DTC fully adheres to the regulatory conditions described herein.

I.

Background

A.

Description of Petitioners

DTC is a Texas corporation authorized to transact business in the State of Hawaii ("State"). In 2002, DTC received commission authority to operate in the State as a facilities-

based carrier and reseller of intrastate telecommunications services.¹

Summit, a Hawaii corporation, received commission exemptions from the requirements of Hawaii Revised Statutes ("HRS") chapter 269, on five separate occasions, to provide STS to various projects in the State.² In 1997,³ Summit's exemptions were automatically converted into a COA as a result of the promulgation of Hawaii Administrative Rules ("HAR") chapter 6-76.1,⁴ the commission's rules and regulations governing

¹By Decision and Order No. 19265, filed on March 25, 2002, in Docket No. 01-0460, the commission granted DTC a certificate of authority ("COA") to provide telecommunications services on a resold basis in the State. Later in the year, through Decision and Order No. 19840, filed on December 4, 2002, in Docket No. 02-0209, the commission amended DTC's COA to allow it to also provide intrastate telecommunication services as a facilities-based carrier.

²Summit requested and received exemptions to provide STS to the tenants and occupants of a: (1) residential apartment building located at 444 Nahua Street, in Honolulu (Decision and Order No. 15449, filed on March 13, 1997, in Docket No. 97-0049); (2) residential apartment building located at 1920 Ala Moana Boulevard, in Honolulu (Decision and Order No. 15581, filed on May 13, 1997, in Docket No. 97-0141); (3) senior living and skilled nursing facility located at 1314 Kalakaua Avenue, in Honolulu (Decision and Order No. 15624, filed on June 6, 1997, in Docket No. 97-0173); (4) commercial and professional facility located at 405 North Kuakini Street, in Honolulu (Decision and Order No. 16002, filed on October 7, 1997, in Docket No. 97-0337; and (5) residential apartment building located at 1551 Beretania Street, in Honolulu (Decision and Order No. 16040, filed on October 24, 1997, in Docket No. 97-0334).

³HAR chapter 6-76, the commission's "Rules Governing Shared Tenant Services," effective October 3, 1994, was repealed on September 22, 1997. In its place, HAR chapter 6-76.1, "Shared Tenant Service," was adopted, effective September 22, 1997.

⁴See HAR § 6-76.1-14(a).

STS.⁵ On February 13, 2002, Summit filed a Chapter 11 petition in the United States Bankruptcy Court for the District for Hawaii, and in February 2003, its bankruptcy trustee began efforts to sell Summit's business.

B.

Petition and Interim Order

On August 26, 2003, DTC and Summit (collectively, the "Petitioners") jointly filed a petition ("Petition")⁶ requesting commission waivers or exemptions to permit: (1) the transfer of Summit's STS assets and operations to DTC ("Proposed Transaction"), and (2) DTC to provide STS, pursuant to HRS § 269-16.9 and HAR §§ 6-76.1-45 and 6-80-135 ("Waiver/Exemption Requests"). In the alternative, if the commission determines that their Waiver/Exemption Requests cannot be granted, Petitioners requested that the commission approve the Proposed Transaction, pursuant to HRS § 269-19 and authorize DTC to provide STS, pursuant to HRS § 269-7.5 and HAR §§ 6-76.1-14(c) and 6-80-17(c). Petitioners requested that their Petition be treated on an expedited basis.⁷

⁵Two of the exemptions granted to Summit (405 North Kuakini and 1551 Beretania) remain in effect since they were granted after the adoption of HAR chapter 6-76.1. See Interim Decision and Order No. 20410, filed on August 29, 2003, at 4 n.3.

⁶Petitioners served copies of the Petition on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex-officio party to all proceedings before the commission. See HRS § 269-51; HAR § 6-61-62.

⁷Petitioners informed the commission that Summit voluntarily filed for Chapter 11 bankruptcy protection on February 13, 2002. According to Petitioners, Summit experienced "a major adverse

By Interim Decision and Order No. 20410, filed on August 29, 2003 ("Interim Order"),⁸ the commission: (1) denied Petitioners' Waiver/Exemption Requests; (2) approved the Proposed Transaction, on a temporary basis (valid from the date of the Interim Order until the issuance of the final decision and order in this docket); and (3) authorized DTC to provide STS on the same terms and conditions and using Summit's current "tariff," on a temporary basis (valid from the date of the Interim Order until the issuance of the final decision and order in this docket). In its Interim Order, the commission required DTC to, among other things: (1) file its 2002 annual financial report ("AFR") and pay its public utility fee, which was due on July 31, 2003 (within twenty (20) days of the date of the Interim Order) ("AFR/Fee Condition"); (2) make informational filings in lieu of a tariff that substantially conform with Summit's filings and reflect DTC's name as the provider of the STS ("Informational

swing" in finances towards the end of January 2003 and that: (1) Summit began incurring significant and on-going operating losses; and (2) by February 2003, Summit's Chapter 11 trustee began efforts to sell Summit's business. Petitioners represented that "[i]f a sale by Summit is not completed soon, Summit's creditors and vendors may force Summit to discontinue its operations, with a resulting loss in employment by Summit's employees and the termination of shared tenant services to Summit's customers." See Petition at 6.

⁸On August 28, 2003, the Consumer Advocate filed its Statement of Position recommending that the commission: (1) deny Petitioners' Waiver/Exemption Requests; and (2) due to the gravity of the situation, allow the Proposed Transaction and permit DTC to provide STS on the same terms and conditions and using the same "tariff" as currently being used by Summit. In its Statement of Position, the Consumer Advocate reserved its right to determine any regulatory qualifications or requirements that may be necessary to advance the interests of Summit's customers, as well as the public interest, through continued investigation.

Filing Condition"); and (3) along with Summit, monitor the quality of service provided to customers during their respective operations before and after the closing of the Proposed Transaction, and immediately notify the commission and the Consumer Advocate in the event of an interruption or upon the occurrence of an event that may cause a disruption or interruption in service (collectively, "Interim Regulatory Conditions").

On August 16, 2004, DTC and Integrated Communications, LLC ("Integrated") filed an application seeking waivers or exemptions to permit the restructuring and transfer of DTC's STS operations and business to Integrated.

On January 18, 2005, the Consumer Advocate filed its Supplemental Statement of Position ("Supplemental Statement") noting that while DTC appears to have complied with the AFR/Fee Condition, it had not, to date, received copies of DTC's 2003 AFR, as required under HAR § 6-80-91, and advised that DTC's filings submitted to comply with the Informational Filing Condition were not complete. The Consumer Advocate also noted that it had not received any information regarding DTC's service disruptions or interruptions and informed the commission that DTC had represented that it does not maintain a log of past service interruptions. According to the Consumer Advocate, "[w]ithout such information it is unclear how DTC is able to accurately gauge the condition of the system and the need for upgrades or maintenance."⁹ The Consumer Advocate further contended that it is important for DTC to develop policies that require

⁹See CA's Supplement Statement at 4.

the maintenance of outage statistics.¹⁰ Nonetheless, the Consumer Advocate stated that the need to impose additional regulatory conditions and/or reporting conditions on DTC would be moot should the commission approve the sale of assets in Docket No. 04-0259, in which DTC was seeking commission approval to sell the STS assets acquired from Summit to Integrated. Hence, the Consumer Advocate stated that it would not object to the issuance of the final decision and order to close the record in this proceeding if the commission authorized the transfer of STS assets in Docket No. 04-0259.

On September 13, 2006, DTC and Integrated filed a request to withdraw their application stating that they no longer seek to have DTC's STS assets transferred to Integrated in Docket No. 04-0259. By Order No. 22936, filed on October 13, 2006, in Docket No. 04-0259, the commission approved the withdrawal of the application and closed the proceeding.

By letter dated November 20, 2006, issued to Petitioners and the Consumer Advocate, the commission summarized the relevant developments, described above, and requested that the Consumer Advocate file an Updated Supplemental Position Statement ("Updated Statement") regarding: (1) DTC's current compliance with the Interim Regulatory Conditions; (2) any additional conditions or reporting requirements being requested and the reasons for such recommendations; and (3) any other matters that the commission should consider in its final decision and order in this docket. The commission informed

¹⁰Id.

Petitioners that it would only entertain a response to the Consumer Advocate's Updated Statement if it was filed within fifteen (15) days of the filing of the Updated Statement.

C.

CA's Updated Statement

On December 20, 2006, the Consumer Advocate filed its Updated Statement in response to the commission's November 20, 2006 letter. In its latest statement, the Consumer Advocate states that the status of the outstanding filings remains unchanged since the submission of its Supplemental Statement, meaning that the Consumer Advocate has "no records that indicate that DTC has made the appropriate filings."¹¹ Nonetheless, due to the passage of time since the filing of the Petition and the events in Docket No. 04-0259, the Consumer Advocate contends that a decision and order could be issued in this proceeding, provided that the commission requires the following¹²:

1. "DTC should be required to make the informational filings that are still outstanding. If it is DTC's assertion that it is unable to do so, it should be required to explain what it has done since October 8, 2003 to try to 'piece together the information relating to such filings' and why DTC asserts that it would be unreasonable to expect those filings to be completed."
2. "DTC should also be required to file a copy of its written procedures that outline the measures to be taken to assess and address service problems and quality issues. These measures should include how outage and service statistics are kept to facilitate the provision of reliable and quality service to DTC's customers."

¹¹See Updated Statement at 2-3.

¹²Id. at 3.

According to the Consumer Advocate, should the above recommendations be completed successfully, no further investigation is necessary, at this time. It notes that the original events causing the urgent need for an expedited ruling regarding the Proposed Transaction "appear to be an aberration" caused largely by some unfamiliarity with or unwillingness to follow the commission's rules governing STS. In conclusion, the Consumer Advocate represents that "[a]ny additional requirements, sanctions or monetary penalties levied at this time would not serve the public interest."¹³

D.

DTC's Response

On January 4, 2007, DTC filed its response to the Consumer Advocate's Updated Statement ("Response"). In sum, DTC contends that the Consumer Advocate's recommendations, as set forth in its Updated Statement, are not necessary. First, with regards to the informational filings, DTC asserts that these "missing" filings were previously updated and filed by DTC in Docket No. 04-0259 on March 28, 2005, in response to the Consumer Advocate's Statement of Position filed in that docket. Due to the length and confidential nature of the filing, DTC states that it incorporates that filing by reference in this docket. Second, with regards to the recommendation to require DTC to file written procedures concerning disruptions or

¹³Id. at 4.

interruptions of service to its customers, DTC argues that "[t]he market, rather than reports and written procedures, ensures that . . . [DTC] is doing its utmost to provide reliable and quality services to its STS customers."¹⁴ DTC surmises that the competitive environment of the STS business requires DTC to provide reliable service to its customers to forestall them from migrating to other providers of competitive telecommunications services. Finally, since the transfer of Summit's operations to DTC, DTC states:

1. Aside from the service disruptions caused by the island-wide blackout following the October 2006 earthquake, DTC has not experienced any disruptions in its STS;
2. DTC has received no complaints concerning the reliability of its STS; and
3. DTC received only two (2) complaints in the past three (3) years concerning billing issues that totaled approximately \$20.00.

Accordingly, DTC requests that the commission "simply" issue the permanent authorizations and/or such waivers or exemptions necessary to permit: (1) the previously completed transfer of Summit's STS assets to DTC; and (2) DTC to provide STS on the same terms and conditions and using the same "tariff" used by Summit.

II.

Discussion

In its Interim Order, the commission stated that it would issue its final decision and order in this docket:

¹⁴See Response at 4.

(1) upon completion of its review; (2) the lapse of the 20-day intervention/participation period; and (3) satisfaction of the AFR/Fee and Informational Filing Conditions. The commission also conditioned its temporary approval authorizing DTC to provide STS in the State under the same terms and conditions and utilizing Summit's "tariff" upon DTC's "compliance with the commission's laws, rules, and regulations, any other terms, conditions, and requirements imposed subsequent to the commission's and the Consumer Advocate's review of the instant [P]etition[.]"¹⁵

While the intervention period has lapsed and the commission has completed its review, the Informational Filing Condition has not been satisfied. Nonetheless, it appears that a final resolution of the matters of this docket is warranted at this time.

In making the commission's final determinations, the commission fully adopts the substantive findings and conclusions set forth in the Interim Order regarding the Proposed Transaction and DTC's authorization to provide STS services in the State on the same terms and conditions and using the same "tariff" as Summit. Thus, the commission approves the Proposed Transaction wherein Summit's STS assets and operations were transferred to DTC and will authorize DTC to provide STS in the State under the same terms and conditions and utilizing Summit's "tariff"; provided that DTC adheres to the conditions described in the paragraphs below.

¹⁵See Interim Order at 11.

First, while DTC complied with the AFR/Fee Condition, DTC appears to have failed to fully comply with commission's regulations regarding the filing of annual financial reports. Specifically, commission regulations governing all certificated telecommunications carriers require that each carrier serve a copy of its AFR on the Consumer Advocate,¹⁶ which, according to the Consumer Advocate, DTC has not done. Moreover, under the commission's general rule regarding copies, each party is required to file an original and eight (8) copies of any filings with the commission and serve two (2) copies on the Consumer Advocate, unless directed otherwise.¹⁷ Petitioners must comply with these rules and all other applicable laws, rules, regulations, and any additional conditions and requirements imposed by the commission.

Second, in its Updated Statement, the Consumer Advocate recommends that DTC be required to submit the informational filings that are still outstanding. In response, DTC contends that these filings were previously updated and filed in Docket No. 04-0259 on March 28, 2005, and, rather than filing the information in this docket, DTC incorporates the previously submitted filings by reference for the proceedings herein. Upon review, the commission finds DTC's incorporation of the informational filings made in Docket No. 04-0259 to be inadequate. The filings made in Docket No. 04-0259 on March 28, 2005, are Integrated's draft tariff and related informational

¹⁶See HAR § 6-80-91(d).

¹⁷See HAR § 6-61-18.

filings for the provision of Integrated's proposed STS in Docket No. 04-0259. These documents reflect Integrated's name as opposed to DTC's as the provider of STS and they also appear to reflect certain services that Integrated intended to provide as opposed to services that DTC is authorized to provide in accordance with the Interim Order. DTC's incorporation by reference of the documents filed in Docket No. 04-0259 on March 28, 2005, is, thus, inconsistent with the Interim Order.

Accordingly, the commission, at this time, finds it reasonable to require DTC to file the "tariff" and informational filings made in Docket No. 04-0259, on March 28, 2005, with the amendments prescribed herein. These filings shall be amended to reflect: (a) DTC's name as opposed to Integrated's as the provider of the STS; (b) only services that DTC had been authorized to provide under the Interim Order; and (c) appropriate issued and effective dates, as applicable. With regards to this filing, the commission notes that an active protective order is in place¹⁸ and that rather than the required original and eight (8) copies, the filing of an original and three (3) copies with the commission will suffice; however, DTC must serve two (2) copies of the same on the Consumer Advocate.

Third, in its Updated Statement, the Consumer Advocate recommended that the commission require DTC to file written procedures that outline measures to be taken to assess and address service problems and quality issues. In response, DTC contends that competitive forces require DTC to provide its

¹⁸See Protective Order No. 20404, filed on August 28, 2003.

customers with reliable and quality service, as opposed to written procedures and reports. Thus, DTC contends that imposition of this requirement is unnecessary.

On this matter, the commission is satisfied that the nature of STS and the regulations governing STS provide sufficient incentive to DTC to provide its customers with reliable and quality service. For instance, State regulations require STS carriers to provide all end-users access to the public switched network, allow any authorized telecommunications carrier with reasonable access to any end-user who desires telecommunications services directly from that carrier, and inform end-users that they have the option of obtaining telecommunications service directly from a telecommunications carrier in addition to or in lieu of service furnished by the STS provider.¹⁹ Moreover, providers of STS are required to provide information regarding, among other things, the name of the telecommunications carrier that interconnects with the premises and evidence that the conduits, inside wire, and equipment rooms are sufficient to provide individual line service to all units in the event that STS arrangements are terminated.²⁰

In Docket No. 04-0259, DTC argued that end-users can readily convert to another telecommunications carrier.²¹ As an example, DTC stated that end-users in the Ceridian building

¹⁹See HAR §§ 6-76.1-22, 6-76.1-23, and 6-76.1-33.

²⁰See HAR § 6-76.1-14(c).

²¹See Response of Applicants DTC and Integrated to the Consumer Advocate's Statement of Position filed in Docket 04-0259 on March 28, 2005, at 5.

discontinued STS with DTC upon a change in ownership of the building.²² Thus, it appears that the competitive environment for DTC's services would require that it provide reliable and quality service to preclude its customers from seeking services from other competitive providers.

Additionally, in its Response, DTC made several representations regarding the quality and reliability of its service since the transition from Summit to DTC. Thus, while no formal procedures may currently be in place, sufficient monitoring of DTC's STS appears to have occurred to make such representations possible to gauge the quality of DTC's system and its service to its customers, in compliance with the Interim Order. Moreover, the commission notes that the central issues of this Petition concern the Proposed Transaction and the quality of service to customers during the transition.²³ Due to the above, the passage of time since the filing of the Petition, and upon review of DTC's representations, the commission finds that imposition of the Consumer Advocate's recommendation regarding the filing of written procedures is not warranted at this time. Nonetheless, the commission does encourage DTC to develop and utilize written procedures that outline the measures to be taken to assess and address service problems and quality issues, as recommended by the Consumer Advocate.

²²Id.

²³See Interim Order at 13.

Finally, under HAR § 6-80-91, each telecommunications carrier authorized by the commission to provide telecommunications service in the State is required to file an AFR with the commission by March 31 of each year for the preceding calendar year. Our records indicate that DTC is delinquent in filing its 2006 AFR which was due on March 31, 2007. As DTC has not complied with the requirements of HAR § 6-80-91, the commission finds it reasonable and in the public interest to require DTC to file its 2006 AFR within thirty (30) days of the date of this Decision and Order.

III.

Orders

THE COMMISSION ORDERS:

1. The Proposed Transaction, wherein Summit's STS assets and operations were transferred to DTC, is approved.
2. DTC is authorized to provide STS on the same terms and conditions and utilizing the same "tariff" as once used by Summit for the provision of STS.
3. Within thirty (30) days from the date of this Decision and Order, DTC shall submit to the commission an original and three (3) copies of the "tariff" and informational filings made in Docket No. 04-0259, on March 28, 2005, as amended, to satisfy the Interim Order's Informational Filing Condition. The filings shall be amended to reflect: (a) DTC's name as opposed to Integrated's as the provider of the STS; (b) only services that DTC had been authorized to provide in the

Interim Order; and (c) appropriate issued and effective dates, as applicable. Two (2) copies of the filings shall be served on the Consumer Advocate.

4. The "temporary" authority granted under the Interim Order regarding the Proposed Transaction and DTC's authorization to provide STS in the State shall be terminated from the date of this Decision and Order, as set forth in the Interim Order.²⁴

5. Within thirty (30) days of the date of this Decision and Order, DTC shall fully comply with the requirements of HAR § 6-80-91 by submitting its 2006 AFR.

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

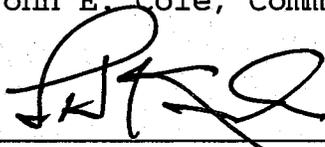
DONE at Honolulu, Hawaii JUL 20 2007.

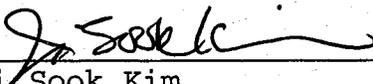
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
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By: (RECUSED)
John E. Cole, Commissioner

APPROVED AS TO FORM:

By: 
Leslie H. Kondo, Commissioner


Ji Sook Kim
Commission Counsel
03-0240.eh

²⁴Id. at 12.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23552 upon the following Petitioners, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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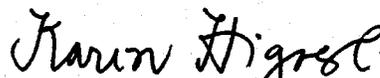
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DATED: JUL 20 2007