

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAIIAN TELCOM, INC.)
For Approval of Changes to its)
Tariff. Transmittal No. 07-16.)
_____)

DOCKET NO. 2007-0233

ORDER NO. 23693

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

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for Borlee K. Kane
Chief Clerk of the Commission

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

for Borlee K. Kane

In the Matter of the Application of)
HAWAIIAN TELCOM, INC.)
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Tariff. Transmittal No. 07-16.)

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By this Order, the commission grants the Motion to Intervene filed by TIME WARNER TELECOM OF HAWAII, L.P. ("TWT" or "TWTC") on August 31, 2007.¹ The Parties are instructed to submit for the commission's review and consideration: (1) a Stipulated Protective Order that includes TWTC as a signatory and the reference to any consultants retained by the commission as a "qualified person" who is entitled to review any information filed under confidential seal, by October 24, 2007; and (2) a stipulated procedural order by October 31, 2007, provided that if the Parties are unable to agree on a joint procedural order, each party shall submit its own proposal by the same date.

¹TWTC's Motion to Intervene; Verification; and Certificate of Service, filed on August 31, 2007 (collectively, "Motion to Intervene"). The Parties are HAWAIIAN TELCOM, INC. ("HT" or "Hawaiian Telcom"), TWTC, and the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

II.

Background

Hawaiian Telcom is the incumbent provider of telecommunications services within the State of Hawaii ("State"). Time Warner Telecom of Hawaii, L.P., is a facilities-based, competitive provider of interstate and intrastate telecommunications services, including dedicated access (private line) and local exchange services. TWTC "is the Hawaii operating entity of Time Warner Telecom, Inc., which provides facilities-based local telecommunications services in over 70 markets throughout the United States."² TWTC purchases unbundled network elements ("UNE"), including DS1 loop elements, from Hawaiian Telcom as part of its provisioning of competitive telecommunications services within the State. TWTC currently provides telecommunications services to the State Judiciary ("Judiciary").

On July 20, 2007, Hawaiian Telcom filed Transmittal No. 07-16, seeking to establish rates and charges for an Integrated Services Digital Network Services ("ISDN") custom arrangement for Customer ID #2007-500220.³ The proposed monthly recurring charges range from \$4,800 to \$14,400, depending

²TWTC's Motion to Intervene, at 4.

³Transmittal No. 07-16; Exhibit I; Verification; Certificate of Service; and the Cost Support Letter, enclosing under confidential seal the cost support for Transmittal No. 07-16 (i.e., Attachments I and II), filed on July 20, 2007 (collectively, "Transmittal No. 07-16").

upon the number of units.⁴ The term of the agreement is for one-year, "that is renewable at the same rate, on a year-by-year basis, for an additional four years, for a total [of] five years."⁵ The proposed effective date of Hawaiian Telcom's transmittal was August 20, 2007.

On August 3, 2007, TWTC filed its Protest of Hawaiian Telcom's Transmittal No. 07-16, recommending that the commission suspend and investigate Hawaiian Telcom's transmittal.⁶ In its Protest, TWTC asserted that "the rates set forth in the Proposed Tariff may be unjust and unreasonable,

⁴As set forth in Exhibit I of Transmittal No. 07-16:

	Customer/Rates/Charges
Provision of ISDN-PRI	ID#: 2007-500220
Port Access System Switched Facilities -	
DS1 Service within the State of Hawaii	
	MRC:
PRI Port Access System Switch Facilities	
Flat Voice w/DS1 Service	\$4,800.00 -
	\$14,400.00*
	TLA: 1 Year (See Note 1)
	MRC:
DID Number Charge, Per Number	\$0.095

NOTE 1: Refer to PUC Tariff No. 20, Section 1.29.7.

Transmittal No. 07-16, Exhibit I, at Original Sheet 135.6.

⁵Hawaiian Telcom's Reply; and Certificate of Service, filed on August 10, 2007 (collectively, "Reply"), at 4.

⁶Protest of Time Warner Telecom of Hawaii, L.P.; Verification of Edward Murley; Exhibits A to C; and Certificate of Service, filed on August 3, 2007 (collectively, "Protest"), at 2. TWTC identifies Customer ID #2007-500220 as the Judiciary. Hawaiian Telcom neither admits nor denies that the Judiciary is Customer ID #2007-500220. Because three telecommunications carriers submitted bids for the contract with the Judiciary, TWTC assumed for purposes of its Protest that the DS1 service Hawaiian Telcom proposes to offer to the Judiciary is a partially competitive telecommunications services, as least as it relates to the Judiciary.

because (1) they appear to be below the total service long run incremental cost . . . of providing the service, and (2) they appear to be discriminatory."⁷

On August 10, 2007, Hawaiian Telcom filed its Reply to TWTC's Protest. In its Reply, Hawaiian Telcom countered that: (1) its cost support, filed under confidential seal, demonstrates that its proposed rates and charges are not below its total service long run incremental cost ("TSLRIC") and are non-discriminatory; and (2) TWTC's claims are unpersuasive and without supporting basis.

On August 16, 2007, the commission: (1) suspended Transmittal No. 07-16 and opened this investigation to examine the merits of Hawaiian Telcom's transmittal; and (2) instructed "[a]ny interested person seeking to intervene or participate in this proceeding [to] file a timely motion with the commission, within twenty days from the date of this Order, with copies served on Hawaiian Telcom and the Consumer Advocate."⁸ On August 29, 2007, the Consumer Advocate issued information requests to Hawaiian Telcom.

On August 31, 2007, TWTC filed its Motion to Intervene. On September 10, 2007, Hawaiian Telcom filed its Memorandum in Opposition to TWTC's Motion to Intervene.⁹ On September 12, 2007, Hawaiian Telcom filed its partial responses to the

⁷Protest, at 3.

⁸Order No. 23606, filed on August 16, 2007, at 7.

⁹Memorandum of Hawaiian Telcom in Opposition to Time Warner Telecom of Hawaii, L.P.'s Motion to Intervene; and Certificate of Service, filed on September 10, 2007 (collectively, "Memorandum in Opposition").

Consumer Advocate's information requests, explaining that certain of its responses "contain confidential information which will be filed upon the issuance of a protective order in this proceeding."¹⁰ Thereafter, on September 17, 2007, Hawaiian Telcom and the Consumer Advocate jointly submitted their Stipulated Protective Order for the commission's review and consideration.¹¹

B.

TWTC's Motion to Intervene

In seeking to intervene, TWTC asserts:

1. TWTC has an interest in this proceeding as a competitor of Hawaiian Telcom and as one of the three telecommunications carriers that submitted a bid for the Judiciary contract that TWTC believes is the subject of Transmittal No. 07-16.

2. TWTC's interest as a competitor of Hawaiian Telcom in general, and specifically for the Judiciary contract, differs from that of the general public and the Consumer Advocate. "Except by intervening in the present proceeding, therefore,

¹⁰Hawaiian Telcom's letter, dated September 12, 2007, at 1.

¹¹Due to TWTC's status as a movant on September 17, 2007, TWTC did not review or sign the Stipulated Protective Order.

The commission also notes that under Paragraph 12 of the Stipulated Protective Order, any consultant retained by the Consumer Advocate specifically to review the confidential information covered under this protective order is identified as a "qualified person," but any consultant retained by the commission is not similarly identified.

there are no other means available whereby TWTC's interest may be represented."¹²

3. TWTC, through its parent entity, Time Warner Telecom, Inc., "has expertise in the areas of the telecommunications industry systems, processes, and procedures. TWTC can thus assist the Commission in the development of a sound record by assisting the Commission in evaluating HT's pricing of the proposed services."¹³

4. TWTC's participation will not broaden the issues or delay the proceeding.

5. While TWTC has not yet developed a position for or against Hawaiian Telcom's transmittal, TWTC has a number of concerns, as expressed in its Protest and Motion to Intervene.

6. TWTC expresses its concern over whether Hawaiian Telcom's cost support complies with HAR § 6-80-32(a)(4), governing TSLRIC. Specifically, if the commission finds that the ISDN PRI DS1 service at hand is a partially competitive service, Hawaiian Telcom must then price the service above the aggregate TSLRIC associated with the service.

7. "TWTC does not believe that the costs of the DS1 loops HT will use to serve the customer differ significantly from those costs and network characteristics used to develop TWTC's UNE DS1 loop price. In most cases, a DS1 loop is a DS1 loop. In this case, the customer is simply buying normal [DS1s] to 37 different locations, all over the state The

¹²TWTC's Motion to Intervene, at 3.

¹³TWTC's Motion to Intervene, at 4.

customer's requirements are certainly not unique enough to justify such a low price per [DS1]."¹⁴

8. "Further, HT's suggestion that TWTC['s] UNE DS1 rates have 'no bearing' to HT's costs is entirely contrary to [the] underlying basis for pricing unbundled elements and fails to recognize why HT's price floor is based on the same long-run incremental cost standard Simply put, if HT can price services using a cost basis that is substantially below a competitor's costs to provide the same service, HT can engage in predatory pricing, which is particularly harmful to competition since HT can readily cross-subsidize such pricing with revenues from its non-competitive services."¹⁵

9. "HT cannot have it both ways - either it is charging competitors too much for UNE DS1s or it is not including enough costs for DS1 in its cost support."¹⁶

10. Contrary to Hawaiian Telcom's claim, "the contract in question is only for one year, with options on the part of the customer to extend for four additional years Pricing for such a contract should be based on the one-year fixed term, not the potential 5 year term, since HT cannot know whether the customer will exercise its options to extend."¹⁷

11. "The only unique aspect of the service relates to the aggregate quantity being purchased by the customer, but such

¹⁴TWTC's Motion to Intervene, at 5.

¹⁵TWTC's Motion to Intervene, at 5.

¹⁶TWTC's Motion to Intervene, at 5.

¹⁷TWTC's Motion to Intervene, at 6.

a fact does not in any way affect the costs of the DS1 loops element of the service."¹⁸

C.

Hawaiian Telcom's Opposition

In opposing TWTC's Motion to Intervene, Hawaiian Telcom contends:

1. TWTC's motion fails to meet the requirements set forth in HAR § 6-61-55(b) and also fails to set forth allegations that are reasonably pertinent to and do not unreasonably broaden the issues already presented. Instead, "granting TWT intervenor status will unduly broaden what should otherwise be a straightforward examination by the Consumer Advocate and the Commission of the single issue of whether or not Hawaiian Telcom's confidential cost support for the instant [individual case basis] meets the requirements of HAR Section 6-80-33 into a docket that examines at least the following additional issues: (1) whether or not Hawaiian Telcom's ISDN PRI services should be reclassified from the current classification as non-competitive services to partially competitive services so that, as TWT[C] argues, HAR Section 6-80-32(b) should instead be applied; (2) whether or not the Commission should reexamine the UNE pricing that it

¹⁸TWTC's Motion to Intervene, at 6.

previously approved under Docket No. 7702; and (3) whether or not Hawaiian Telcom is engaged in alleged 'predatory pricing[.]'"¹⁹

2. TWTC's "claim that its 'expertise' would assist in reviewing Hawaiian Telcom's confidential cost support is nothing more than a bad attempt to learn Hawaiian Telcom's price floor for such services in order to gain an unfair competitive advantage both in future competitive bid situations and for purposes of pricing its generally available ISDN PRI service offerings."²⁰ Conversely, the commission and Consumer Advocate regularly review the confidential cost support submitted by Hawaiian Telcom in many of its individual case basis filings, without the need for assistance from any other telecommunications providers, including TWTC.

3. The issue of whether Hawaiian Telcom's cost support meets the pricing requirements of HAR § 6-80-33 is a matter of interest to the general public that the Consumer Advocate already protects. In this regard, "the Commission has in the past denied intervention to prospective parties whose basis for intervention was their status as a competitor of a party involved in a proceeding."²¹ Thus, TWTC's "status as a competitor of Hawaiian Telcom does not translate

¹⁹Hawaiian Telcom's Memorandum in Opposition, at 3-4 (footnotes and text therein omitted).

²⁰Hawaiian Telcom's Memorandum in Opposition, at 5 (footnote and text therein omitted).

²¹Hawaiian Telcom's Memorandum in Opposition, at 6. Hawaiian Telcom cites to two past commission orders, In re WorldCom, Inc., Docket No. 97-0377, Order No. 16101, filed on November 25, 1997, and In re GTE Hawaiian Tel. Co. Inc., Dockets No. 94-0298 and 95-194 (consolidated), Order No. 14461, filed on January 12, 1996.

into an interest that is unique from the interest of the general public. Therefore, TWT's argument on this point fails."²² Moreover, "even if the Commission were to disapprove of the [individual case basis] arrangement that Hawaiian Telcom proposes[,] TWT would not automatically become the service provider to the Judiciary. As Exhibit 'A' to TWT's protest makes clear, the next lowest bidder was Pacific Lightnet, not TWT. Therefore, TWT's speculative interest as a competitor cannot justify granting it intervenor status in this docket."²³

4. TWTC's motion, if granted, will result in significant and undue delay in resolving this matter, which will also result in service delays to the detriment of Customer ID #2007-500220.

II.

Discussion

The standard for granting intervention is set forth in HAR § 6-61-55, which requires the movant to state the facts and reasons for the proposed intervention, and its position and interest thereto. HAR § 6-61-55 provides:

§6-61-55 Intervention. (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.

²²Hawaiian Telcom's Memorandum in Opposition, at 7.

²³Hawaiian Telcom's Memorandum in Opposition, at 8.

- (b) The motion shall make reference to:
- (1) The nature of the applicant's statutory or other right to participate in the hearing;
 - (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
 - (3) The effect of the pending order as to the applicant's interest;
 - (4) The other means available whereby the applicant's interest may be protected;
 - (5) The extent to which the applicant's interest will not be represented by existing parties;
 - (6) The extent to which the applicant's participation can assist in the development of a sound record;
 - (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
 - (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
-
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

(c) The motion shall be filed and served by the applicant in accordance with sections 6-61-21 and 6-61-57.

(d) Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.

HAR § 6-61-55. Intervention "is not a matter of right but a matter resting within the sound discretion of the commission." In re Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

TWTC was an unsuccessful bidder for the contract at issue, and represents that it is "the current provider of such service to the customer."²⁴ Without having the benefit of accessing and reviewing the confidential cost data filed by Hawaiian Telcom in support of Transmittal No. 07-16, TWTC states that it is unable to state a position at this time but nonetheless identifies certain concerns. In essence, TWTC contends that if the commission finds that the ISDN PRI DS1 service at issue is a partially competitive service, Hawaiian Telcom must price the service above the aggregate TSLRIC associated with this service. TWTC intimates that Hawaiian Telcom's proposed rates may be less than the combined cost for the relevant UNE components that are used to provide the service.

Hawaiian Telcom counters that TWTC is seeking to unduly broaden the issue already presented to include the reclassification of a non-competitive service to a partially competitive service, as well as a review of the prices charged by Hawaiian Telcom to other carriers for the UNE DS1 loop components. In addition, Hawaiian Telcom asserts that TWTC's intervention will unduly delay the proceeding and delay the provisioning of service to Customer ID #2007-500220, TWTC is unable to assist the commission in developing a sound record, and that TWTC's status as a competitor is an insufficient basis for intervention.

²⁴TWTC's Motion to Intervene, at 6.

To the extent that TWTC, implicitly or otherwise, seeks to reclassify the ISDN PRI DS1 service at issue or to reexamine the UNE rates charged by Hawaiian Telcom to other carriers, including TWTC, the commission finds that such action may appear to unduly broaden the issues already presented in this proceeding. Instead, in the commission's view, the underlying issues at this juncture are whether Hawaiian Telcom's proposal complies with HAR §§ 6-80-33 and 6-80-37, which state:

§6-80-33 Pricing - noncompetitive services.
Pricing for noncompetitive services:

- (1) Is subject to rate of return regulation or to such other form of pricing, as authorized by the commission;
- (2) Must be cost-based and just and reasonable;
- (3) Must conform to the applicable requirements of §§269-12 and 269-16, HRS; and
- (4) Must not cross-subsidize any competitive service as proscribed in §6-80-35.

.

§6-80-37 Nondiscrimination in the provision of telecommunications services. A telecommunications carrier shall not unreasonably discriminate among its customers in offering or providing any competitive or noncompetitive telecommunications services. It shall offer or provide its service under the same rates, terms, and conditions to all customers similarly situated or within a reasonably constituted class.

HAR §§ 6-80-33 and 6-80-37. See also HAR § 6-80-42 (cost studies).

Here, the commission finds that TWTC's status as a competitive facilities-based provider of intrastate telecommunications services, together with its industry expertise

and firsthand experience in providing the service at issue to Customer ID #2007-500220, should assist the commission in developing a sound record on the relevant issues stated herein, without unreasonably broadening said issues or unduly delaying this proceeding. Accordingly, the commission grants TWTC's Motion to Intervene, subject to the conditions noted below.

TWTC is expressly cautioned that its participation as an intervenor in this docket will be limited to the issues raised in this proceeding. The commission will preclude any effort by TWTC to unreasonably broaden the issues, or unduly delay the proceeding, and will reconsider its participation in this docket if, at any time during the course of this proceeding, the commission determines that TWTC is unreasonably broadening the pertinent issues raised or unduly delaying the proceeding.

The Parties shall submit for the commission's review and consideration: (1) a Stipulated Protective Order that includes TWTC as a signatory and the reference to any consultants retained by the commission as a "qualified person" who is entitled to review any information filed under confidential seal, by October 24, 2007;²⁵ and (2) a stipulated procedural order by October 31, 2007, provided that if the Parties are unable to agree on a joint procedural order, each party shall submit its own proposal by the same date.

²⁵At this time, no action will be taken by the commission on the Stipulated Protective Order jointly submitted by Hawaiian Telecom and the Consumer Advocate on September 17, 2007. Rather, the Parties shall reach a good-faith agreement on a Stipulated Protective Order, while remaining cognizant of Hawaiian Telcom's concerns that TWTC may seek to gain a future unfair competitive advantage if Hawaiian Telcom's confidential cost support for Transmittal No. 07-16 is disclosed to TWTC.

III.

Orders

THE COMMISSION ORDERS:


1. The Motion to Intervene of TWTC, filed on August 31, 2007, is granted, provided that TWTC shall not unreasonably broaden the issues, or unduly delay the proceeding, and it follows all applicable rules, orders, and other requirements imposed by the commission.

2. By October 24, 2007, the Parties shall submit a Stipulated Protective Order that includes TWTC as a signatory and the reference to any consultants retained by the commission as a "qualified person" who is entitled to review any information filed under confidential seal.

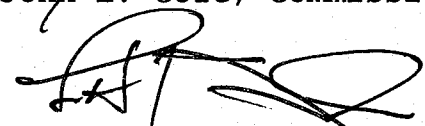
3. By October 31, 2007, the Parties shall submit a stipulated procedural order, provided that if the Parties are unable to agree on a joint procedural order, each party shall submit its own proposal by the same date.

DONE at Honolulu, Hawaii OCT - 3 2007.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

By 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Michael Azama
Commission Counsel

2007-0233.eh

CERTIFICATE OF SERVICE


I hereby certify that I have this date served a copy of the foregoing Order No. 23693 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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for Karen Higashi

DATED: OCT - 3 2007