

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

KRS DEVELOPMENT, INC. and)
HALE KANANAI ASSOCIATES, INC.)
Complainants) DOCKET NO. 2008-0017
vs.)
HAWAIIAN TELCOM, INC.)
Respondent.)

ORDER NO. 24115

Filed March 31, 2008
At 10 o'clock A .M.

Karen Higashi
Chief Clerk of the Commission

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Commission, State of Hawaii

Karen Higashi

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

KRS DEVELOPMENT, INC. and)
HALE KANANAI ASSOCIATES, INC.)
Complainants) Docket No. 2008-0017
vs.) Order No. 24115
HAWAIIAN TELCOM, INC.)
Respondent.)

)

ORDER

By this Order, the commission, in response to the Amended Complaint filed by Complainants KRS DEVELOPMENT, INC., and HALE KANANI ASSOCIATES, LLC (collectively, "KRS"), against Respondent HAWAIIAN TELCOM, INC. ("HTI" or "Company"):¹ (1) instructs the Parties to participate in nonbinding mediation prior to the commencement of a commission hearing on this matter, subject to the guidelines and conditions set forth in Section II,

¹Complaint; Exhibits A - O, filed on January 31, 2008; and Verification and Certificate of Service, filed on February 19, 2008 (collectively, the "Amended Complaint").

The Parties in this proceeding are KRS and HTI. The DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), is an ex officio party to all commission proceedings, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a). Here, however, the Consumer Advocate, on February 8, 2008, informed the commission of "its decision to not participate in this proceeding. The Consumer Advocate would, however, appreciate receiving a copy of the documents filed in the proceeding to ensure that the Consumer Advocate's docket file is current." Consumer Advocate's Statement of Position, filed on February 8, 2008, at 2.

below; and (2) suspends all further proceedings in this matter pending the outcome of nonbinding mediation.

I.

Background

"KRS Development, Inc. is the Member/Manager of Hale Kanani Associates, LLC. Hale Kanani Associates, LLC was the owner of a condominium development located at 44 Kanani Road, Kihei, Hawaii 96753."² "KRS is a Hawaii Corporation that, at all relevant times did business in the County of Maui, State of Hawaii."³ HTI is the incumbent provider of telecommunications services in the State of Hawaii.

On January 31, 2008, as amended on February 19, 2008, KRS filed their Amended Complaint with the commission, alleging the following two counts against HTI:

COUNT I
SPECIFIC PERFORMANCE

28. KRS incorporates by reference the allegations of fact contained in paragraphs 1 through 28 above.

29. HTI entered into an express contract to provide the work specified in the Agreement dated November 10, 2004.

30. By reason of the acts, omissions and conduct alleged herein, HTI breached [its] express Agreement with KRS by not performing the required services in a timely fashion and not providing a detailed accounting of the expenses incurred for this project.

²Amended Complaint, Paragraph No. 2, at 2.

³Amended Complaint, Paragraph No. 1, at 1.

31. KRS performed all obligations under the Agreement and did so in a timely and responsible fashion.

32. The Agreement does not provide a mediation or arbitration clause. Therefore remedy must be sought through the PUC formal complaint rules HAR §6-62-67 and Hawaii Administrative Rules, Title 6, Chapter 61, Subchapter [5].

COUNT II
BREACH OF CONTRACT

33. KRS incorporates by reference the allegations of fact contained in paragraphs 1 through 28 above.

34. KRS relied upon the Agreement which references Verizon Hawaii PUC Tariff No. 1, Section 2 governing the recovery of the actual cost.

35. Verizon Hawaii PUC Tariff No. 1, Section 2.11.1 states that the Company (HTI) may require customers (KRS) to make deposits to guarantee . . . payment of charges before credit is established. The Company shall pay interest on deposits pursuant to applicable rules and regulations. Section 2.11.2 states that a deposit shall not exceed the estimated charges for two months service and shall be returned within thirty (30) days of the Customer[] establishing credit pursuant to applicable rules and regulations.

36. HTI references this tariff within the body of the Agreement then later stated that it only applied to "Consumers" and not "Developers".

37. KRS relied upon this Tariff to protect them as a consumer and feel that HTI therefore breached its contract by not providing a detailed accounting and timely refund of their deposit.

38. HTI has failed and refused to perform under the Agreement and thereby causing damage to KRS in such amounts as shall be established at trial of this matter.

Amended Complaint, at 7-8.

By Order No. 24057, filed on February 26, 2008, the commission served a copy of the Amended Complaint upon HTI, and

instructed HTI to file an answer within twenty days after the date of service of Order No. 24057. On March 17, 2008, as amended on March 18, 2008, HTI filed its Amended Answer to the Amended Complaint.⁴ HTI, by its Amended Answer, asserts that the Amended Complaint: (1) fails to state a claim against HTI upon which relief can be granted; (2) fails to state any violation of Hawaii law or regulation; (3) fails to state any violation of HTI's approved tariffs or of the commission's rules; and (4) fails to comply with HAR § 6-61-67 relating to formal complaints.

II.

Discussion

HAR § 6-61-70 states in relevant part that "[w]hen a respondent has filed its answer, the commission shall set a hearing on the complaint." However, HRS § 269-15.6 provides that "[t]he commission may require the parties in any matter before the commission to participate in nonbinding arbitration, mediation, or other alternative dispute resolution process prior to the hearing."⁵ Moreover, HRS § 91-8.5 states:

⁴Answer to Complaint, filed on March 17, 2008, as amended on March 18, 2008 (collectively, the "Amended Answer"). The initial and amended pleadings filed by HTI both refer to an Exhibit 1, which is not attached to HTI's pleadings.

⁵The alternative dispute resolution process has been successful in resolving differences in other commission proceedings. See, e.g., Hoyt v. Kohala Ranch Water Co., Docket No. 04-0296 ("Docket No. 04-0296"), Order No. 21526, filed on January 4, 2005 (ordering the parties to participate in non-binding mediation prior to the commencement of the evidentiary hearing); and Order No. 21772, filed on April 22, 2005 (approving the mediation agreement and dismissing

Mediation in contested cases. (a) An agency may encourage parties to a contested case hearing under this chapter to participate in mediation prior to the hearing subject to conditions imposed by the agency in rules adopted in accordance with this chapter. The agency may suspend all further proceedings in the contested case pending the outcome of the mediation.

(b) No mediation period under this section shall exceed thirty days from the date the case is referred to mediation, unless otherwise extended by the agency.

(c) The parties may jointly select a person to conduct the mediation. If the parties are unable to jointly select a mediator within ten days of the referral to mediation, the agency shall select the mediator. All costs of the mediation shall be borne equally by the parties unless otherwise agreed, ordered by the agency, or provided by law.

(d) No mediation statements or settlement offers tendered shall be admitted into any subsequent proceedings involving the case, including the contested case hearing or a court proceeding.

(e) No preparatory meetings, briefings, or mediation sessions under this section shall constitute a meeting under section 92-2. Any mediator notes under this section shall be exempt from section 92-21 and chapter 92F. Section 91-10 shall not apply to mediation proceedings.

HRS § 91-8.5.

the complaint, without prejudice); cf. Berg v. Princeville Util. Co., Inc., Docket No. 04-0330 ("Docket No. 04-0330"), Order No. 21834, filed on May 20, 2005 (ordering the parties to participate in non-binding mediation prior to the commencement of the evidentiary hearing); and Order No. 22083, filed on October 28, 2005 (approving the parties' agreement reached through informal discussions, and dismissing the complaint, with prejudice). In both of these dockets, the commission instructed that, "[u]nless otherwise provided by law, ordered by the commission, or agreed to by the Parties, all costs of the mediation shall be borne equally by the Parties." Docket No. 04-0296, Order No. 21526, filed on January 4, 2005, at 5; and Docket No. 04-0330, Order No. 21834, at 7.

"[T]he commission recognizes that the next step is to set a hearing date for this matter, pursuant to HAR § 6-61-70."⁶ Nonetheless, here, KRS, in the Amended Complaint, describe their efforts in seeking to compromise and work out an "amicable settlement" with HTI. Thus, "upon review of the pleadings filed in this matter, the commission finds that it may be more beneficial and efficient for [KRS and HTI] to participate in nonbinding mediation prior to holding a hearing in this docket."⁷

Accordingly, pursuant to HRS § 269-15.6 and consistent with HRS § 91-8.5, the commission will direct the Parties to participate in nonbinding mediation prior to the commencement of a commission hearing on this matter, subject to the following guidelines and conditions:

1. Upon the receipt of this Order, the Parties shall promptly confer and jointly select a person to

⁶Docket No. 04-0330, Order No. 21834, at 5; and Docket No. 04-0296, Order No. 21526, at 4.

⁷Docket No. 04-0330, Order No. 21834, at 5 (footnote omitted); and Docket No. 04-0296, Order No. 21526, at 4 (footnote omitted). As previously described by the commission:

"Mediation" is a process in which a neutral facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. The mediator normally uses a variety of skills and techniques to help parties communicate, negotiate, and reach agreements and settlements. While mediators may, under certain circumstances, make suggestions about potential resolutions to the parties, they have no authority to bind the commission in matters that are within [the commission's] statutory purview."

Docket No. 04-0330, Order No. 21834, at 5-6 n.3; and Docket No. 04-0296, Order No. 21526, at 4 n.3.

conduct the mediation. If the Parties are unable to jointly select a mediator, the Parties shall inform the commission within ten days of the date of this Order of the non-selection, and the commission will select the mediator.

2. Unless otherwise extended by the commission, the mediation period shall not exceed thirty days from the date of this Order. The Parties shall report in writing the status of its mediation efforts within twenty days from the date of this Order. If the matter in this docket is not been resolved by the mediation process, a hearing on this matter will be scheduled by the commission, and the Parties will be notified of the date, time, and location of the hearing through a notice of hearing to be issued by the commission subsequent to the completion of the mediation process.
3. Unless otherwise provided by law, ordered by the commission, or agreed to by the Parties, all costs of the mediation shall be borne equally by the Parties. KRS and HTI shall be responsible for their own travel and lodging costs incurred by their participation in the mediation process.
4. No mediation statements or settlement offers tendered shall be admitted into any commission proceeding involving this matter.

5. All further proceedings in this matter are suspended pending the outcome of the nonbinding mediation process.

See Docket No. 04-0330, Order No. 21834, at 6-7; and Docket No. 04-0296, Order No. 21526, at 4-6.

III.

Orders

THE COMMISSION ORDERS:

1. The Parties shall participate in nonbinding mediation prior to the commencement of a commission hearing on this matter, subject to the guidelines and conditions set forth in Section II of this Order, above.

2. If the Parties are unable to jointly select a mediator, the Parties shall inform the commission within ten days of the date of this Order of the non-selection, and the commission will select the mediator.

3. The Parties shall report in writing the status of its mediation efforts within twenty days from the date of this Order.

4. All further proceedings in this matter are suspended pending the outcome of the nonbinding mediation process.

DONE at Honolulu, Hawaii MAR 31 2008.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

By Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

Michael Azama
Michael Azama
Commission Counsel

2008-0017.cp

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 24115 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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Karen Higashi

Karen Higashi

DATED: MAR 31 2008