

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
SPRINTCOM, INC. and NPCR, INC.)
For Declaratory Order or for)
Waiver, or in the Alternative, for)
Authorization to Transfer Ownership)
And Control of Certain Wireless)
Tower Assets.)

DOCKET NO. 2008-0176

DECISION AND ORDER

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

PUBLIC UTILITIES
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SPRINTCOM, INC. and NPCR, INC.) Docket No. 2008-0176
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Tower Assets.)

DECISION AND ORDER

By this Decision and Order, the commission approves SPRINTCOM, INC. ("Sprintcom") and NPCR, INC.'s ("NPCR") (collectively, "Applicants") request for approval of a transfer of wireless tower assets, as described in Applicants' joint application filed on September 4, 2008.

I.

Background

A.

Description of Applicants

Sprintcom, a Kansas corporation, is a wholly-owned subsidiary of Sprint Nextel Corporation ("Sprint Nextel"), which is also a Kansas corporation. Sprintcom is authorized by the Federal Communications Commission ("FCC") and the commission to provide commercial mobile radio services ("CMRS") throughout

the State of Hawaii ("State").¹ Moreover, by commission order, Sprintcom has been designated as an eligible telecommunications carrier ("ETC") for purposes of receiving federal universal service support funding.²

NPCR, a Delaware Corporation, is ultimately a wholly-owned subsidiary of Sprint Nextel. In 1999, NPCR received commission authority to provide CMRS services in the State.³ NPCR also received commission designation as an ETC for purposes of receiving federal universal service support funding.⁴

Sprint Nextel, a publicly traded company with corporate headquarters in Overland Park, Kansas, is Applicants' ultimate parent company. It was formed through a merger between Sprint Corporation and Nextel Communications, Inc., which the commission approved.⁵ According to Applicants, Sprint Nextel is a global communications company providing a comprehensive range of wireless and wireline communications services to its customers.

¹See In re Sprintcom, Inc., Docket No. 98-0359, Decision and Order No. 16697, filed on November 10, 1998.

²See In re Sprintcom, Inc. and NPCR, Inc., Docket No. 2007-0402, Decision and Order No. 24169, filed on April 30, 2008 ("Docket No. 2007-0402").

³See In re NPCR, Inc., Docket No. 99-0038, Decision and Order No. 17036, filed on June 15, 1999.

⁴See In re NPCR, Inc., dba Nextel Partners, Docket No. 03-0104, Decision and Order No. 21089, filed on June 25, 2004 ("Docket No. 03-0104").

⁵See In re Sprint Communications Company, L.P., Sprint Payphone Service, Inc., and ASC Telecom, Inc.; Docket No. 05-0045; Decision and Order No. 21714; filed on April 4, 2005.

Applicants also represent that Sprint Nextel is the third largest provider of mobile telephony and related data services in the United States.

B.

Application

On September 4, 2008, Applicants jointly filed an application ("Application")⁶ seeking a declaratory order that no commission approval is required for the transfer of ownership and control of certain wireless tower assets located in Hawaii pursuant to the waivers granted to CMRS providers in Decision and Order No. 20890, filed on April 7, 2004, in Docket No. 03-0186 (the "CMRS Order")⁷ ("Declaratory Order"). Applicants' Declaratory Order request was made pursuant to HAR § 6-61-159.⁸

In the alternative, if the commission does not issue the Declaratory Order, Applicants request that the commission waive any approval requirements pursuant to HRS § 269-16(e) ("Waiver"). Further, should the commission decide not to grant

⁶Copies of the Application were served on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to this docket pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62. No persons moved to intervene or participate without intervention in this docket.

⁷See In re Public Utilities Commission, Docket No. 03-0186, Decision and Order No. 20890, filed on April 7, 2004.

⁸Applicants appear to have intended to refer to HAR § 6-61-159 as the basis for their Declaratory Order request instead of HAR § 6-61-59 as indicated on page 1 of the Application.

their Waiver request, Applicants alternatively request approval of the proposed transfer of the wireless assets to the extent applicable by law, including HRS §§ 269-19 and 269-7(a).

1.

Proposed Transfer

Applicants state that, on or about July 23, 2008, TowerCo Acquisition LLC ("TowerCo"), a Delaware limited liability company, and various Sprint Nextel subsidiaries, including Applicants, entered into an agreement to transfer ownership and control of approximately 3,300 wireless towers owned by Sprint Nextel subsidiaries to TowerCo, including approximately thirty-one towers located in Hawaii (the "Proposed Transfer").⁹ Applicants represent that TowerCo: (1) is a private equity-backed entity, (2) owns and manages wireless telecommunications assets, and (3) is not a "telecommunications carrier" as defined under the Telecommunications Act of 1996.¹⁰ Applicants contend that the Proposed Transfer is structured so that the subsidiaries of Sprint Nextel will transfer ownership of the towers to new limited liability companies ("LLCs") and the subsidiaries will then sell their interests in the LLCs to

⁹Applicants initially stated that approximately thirty-seven Hawaii towers were affected in the Proposed Transfer. See Application at 5. Later, in response to CA-IR-3a, Applicants state that the number of Hawaii towers to be transferred is thirty-one and not thirty-seven. See Applicants' Responses to Consumer Advocate's First Submission of Information Requests, filed on November 12, 2008, at 6.

¹⁰See Application at 4.

TowerCo, the purchaser. Applicants state that the subsidiaries of Sprint Nextel intend to lease back a tower position for each site placed in a new LLC.

Applicants represent that the Proposed Transfer will provide Sprint Nextel with additional liquidity and greater managerial flexibility. According to Applicants, "[b]y leasing rather than owning these towers, Sprint Nextel can better focus on its core business of providing communications services to consumers, businesses and government customers."¹¹ Applicants state that the Proposed Transfer does not involve the antenna, transmitters, and other facilities used by Applicants to provide service in the State and that the transfer will not affect Applicants' ability to continue to use the towers. Applicants express that rather than owning the towers they will "simply" lease them.

2.

Requested Relief

Applicants state that the Proposed Transfer would potentially trigger the application of HRS §§ 269-19 and 269-7(a). However, they contend that no approval of the Proposed Transfer is required since the commission in the CMRS Order waived both these statutory requirements as they pertain to CMRS providers, subject to certain conditions. First, Applicants

¹¹Id. at 5.

state that the "only condition to the waiver of HRS § 269-19 was a requirement that CMRS providers notify the Commission and the Consumer Advocate of any merger or consolidation."¹² Applicants assert that while the condition does not specifically require notice of a sale of assets, they are providing such notice by the filing of the Application.¹³

Second, according to Applicants, waiver of HRS § 269-7(a) was limited to the requirement that CMRS providers obtain prior commission approval for transactions affecting the relations of their parents and/or affiliates. Applicants state that the Proposed Transfer is a matter that affects the relation of its parents and/or affiliates within the meaning of the CMRS Order since it includes transfers by Applicants and other Sprint Nextel subsidiaries under a national transaction. Applicants contend that "requiring approval under HRS § 269-7(a) would be inconsistent with the intent of the Commission to waive approval requirements under HRS § 269-19[.]"¹⁴ Thus, Applicants request that the commission issue a declaratory order that no approval is required for the Proposed Transfer pursuant to waivers granted to CMRS providers in the CMRS Order.

¹²Id. at 6.

¹³Moreover, they contend that the waiver of HRS § 269-19 as it relates to asset transfers is consistent with waivers granted under the CMRS Order regarding financing, ownership, and control matters.

¹⁴See Application at 7.

Finally, should the commission not grant the requested Declaratory Order, in the alternative, Applicants request a Waiver of the approval requirements, or, further in the alternative, approval of the Proposed Transfer.

In support of their alternative requests, Applicants state that the Proposed Transfer is in the public interest and that the transaction will not affect Applicants' fitness, willingness, or ability to provide CMRS services in the State. Further, Applicants represent that the transaction will be seamless to their wireless customers and that there will be "no effect, interruption or change in the wireless services provided to Applicants' Hawaii customers as a result of the proposed transaction."¹⁵ According to Applicants, upon conclusion of the Proposed Transfer, TowerCo will assume control of the tower assets and will lease and manage them in accordance with all applicable laws. Thus, Applicants represent that the "transaction will not adversely affect Applicants' fitness, willingness or ability to provide telecommunications services in Hawaii."¹⁶ Moreover, Applicants state that they do not anticipate that the Proposed Transfer will impact the amount of universal service fund ("USF") monies that they are entitled to as ETC carriers.

¹⁵Id. at 8.

¹⁶Id.

C.

Consumer Advocate's Statement of Position

On October 8, 2008, the Consumer Advocate filed its Statement of Position ("CA's SOP") informing the commission that it does not support a declaratory ruling that commission approval is not required for the Proposed Transfer. Moreover, the Consumer Advocate stated that it does not support the commission granting a waiver of the review and approval requirements provided for in HRS §§ 269-7(a) and 269-19, under HRS § 269-16.9(e) and HAR § 6-80-135. With respect to Applicants' alternative request for approval of the Proposed Transfer under HRS §§ 269-7(a) and 269-19, the Consumer Advocate stated that it needed additional time to determine whether the Proposed Transfer is reasonable.

At the outset, the Consumer Advocate stated that it must be recognized that the FCC requires carriers that receive ETC support "to use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."¹⁷ Moreover, it noted that: (1) state commissions must annually certify that ETC carriers satisfy the federal requirements; and (2) the commission was unaware of the need to ascertain FCC requirements for CMRS providers that are designated as ETCs since Applicants requested and received their respective ETC designations after the issuance of the CMRS Order. Based on the above, the Consumer Advocate asserted that "[s]ince

¹⁷See CA's SOP at 5 (citing 47 U.S.C. § 254(e); 47 C.F.R. § 54.7).

ETC carriers receive USF monies and have specific USF requirements to meet as a result of the carrier's use of these funds . . . the Commission should not allow ETC carriers to sell or transfer ownership in property that is used in the provision of the CMRS service without receiving explicit Commission approval to do so."¹⁸

This assertion is based on the reasoning that the commission imposed conditions on each carrier when approving requests for ETC designations. Specifically, the Consumer Advocate stated that the commission required in Decision and Order Nos. 21089 and 24169 that each carrier must "meet the service quality objectives and submit a summary description of all capital projects that exceed \$500,000, and network upgrade and expansion projects that were completed in the previous year to assist in determining whether the USF requirements are being met by [] Applicants."¹⁹

Hence, the Consumer Advocate stated that the commission must review the proposed disposal of an asset that is used in the provision of telecommunications services to determine the impact that the transaction may have on the carrier's ability to continue to provide services that satisfy the conditions to receive the ETC designation. Similar to validating the use of USF funds received, the Consumer Advocate argued that "all significant transactions (i.e., expenditures or dispositions) by

¹⁸Id.

¹⁹Id. at 5-6.

an ETC designated carrier that involves the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit, or any right thereunder, must be reviewed by the Commission to ensure that the ETC carrier is making proper use of their USF monies received."²⁰

The Consumer Advocate, thus, stated that it does not agree with Applicants' position that the Proposed Transfer does not require commission approval under HRS §§ 269-(7) and 269-19. The Consumer Advocate recommended that the commission issue a declaratory order finding that the commission must review the Proposed Transfer to determine whether: (1) the towers and associated sites were acquired with USF; and (2) the Proposed Transfer would negatively impact Applicants' ability to meet the conditions imposed by the commission when approval of their requests for ETC designations were granted.

Further, for the same reasons noted above, the Consumer Advocate contended that waivers under HRS § 269-16.9(e) and HAR § 6-80-135 of the Proposed Transfer are not in the public interest. Specifically, to ensure that the USF targeted public users in the affected areas of the facilities involved in the Proposed Transfer are not negatively impacted, the Consumer Advocate contended that the commission must consider whether Applicants utilized USF monies to acquire the assets being transferred and whether the Proposed Transfer would negatively impact their ability to meet the conditions imposed on their

²⁰Id. at 6 (internal quotes omitted).

ETC designations. In addition, the Consumer Advocate stated that competition, in this instance, may not serve the same purpose as public interest regulation since the "playing field" is not level between carriers who have received ETC designation and carriers who have not, since ETC designated carriers receive USF monies for the construction of plant facilities on the basis that the facilities will be used to provide universal service to all, particularly those in hard to reach areas. Thus, the Consumer Advocate recommended that the commission not grant a waiver of or exemption from the investigative and approval requirements of HRS §§ 269-7(a) and 269-19.

D.

Applicants' Withdrawal of Declaratory Order and Waiver

On October 15, 2008, Applicants filed their Response to Division of Consumer Advocacy's Statement of Position and Withdrawal of Request for Declaratory Order and Waiver ("Withdrawal") in which they "acknowledge[d] that in this case, their designation as ETCs likely raises different policy considerations than were originally considered by the Commission in granting" the CMRS Order.²¹ Further, Applicants stated that they were willing to concede that: (1) the CMRS Order does not waive commission review and approval requirements with respect to the Proposed Transfer; and (2) the commission has jurisdiction over the Proposed Transfer. Thus, Applicants withdrew their

²¹See Withdrawal at 2.

requests for a Declaratory Order and Waiver of the commission's approval requirements with respect to the Proposed Transfer.²²

E.

Consumer Advocate's Supplemental Statement

On February 12, 2009, the Consumer Advocate filed its Supplemental Statement of Position ("CA's Supplement") recommending that the commission find Applicants' Proposed Transfer to be reasonable and approve the Proposed Transfer. The Consumer Advocate asserts that: (1) Applicants' transfer and lease back option appears to be reasonable and in compliance with FCC requirements for use of USF support monies; and (2) the Proposed Transfer appears to be in the public interest, with Applicants being able to satisfy conditions of their ETC designations.

According to the Consumer Advocate, the "leasing of land or towers for cell sites appears to be a normal practice for many wireless carriers, and that the sale and lease back option is also a normal practice used by various businesses to enhance their cash positions."²³ The Consumer Advocate states that the benefits of a sale and lease back option is akin to benefits received by many companies that outsource or contract out various functions to external providers to streamline their operations to

²²Applicants stated that they were not taking a position as to the broader issue of the overall applicability of the CMRS Order on ETCs.

²³See CA's Supplement at 5 (internal quotes omitted).

become more effective and cost-efficient. The Consumer Advocate notes that in response to CA-IR-6, Applicants contend that they are "unaware of any statute or FCC rule which specifically addresses (1) the sale of assets previously constructed with the assistance of USF monies; (2) the use, application or accounting of funds received from the sale of such assets; or (3) the need to return such funds to the FCC."²⁴ Furthermore, the Consumer Advocate notes that the FCC allows "use of high-cost USF support for service improvements through the construction of cell towers, leasing space on existing towers, or resale of other carriers' services."²⁵ Hence, the Consumer Advocate states that the lease back of towers to provide service improvements as in the Proposed Transfer would appear compliant with USF guidelines and, thus, it accepts Applicants' contention that the Proposed Transfer does not appear to violate USF guidelines.

In its review of the public interest aspect of the Proposed Transfer, the Consumer Advocate focuses on Applicants' quality of service to its Hawaii customers and use of USF support received for Hawaii. Based on Applicants' representation that the only difference upon the close of the Proposed Transfer will be that the towers currently utilized to provide services will be leased instead of owned by Applicants, the Consumer Advocate accepts Applicants' contention that the Proposed Transfer will be

²⁴Id. at 6.

²⁵Id. (citing to FCC 05-46; Report and Order; Adopted: February 25, 2005; Released: March 17, 2005; para. 23; page 12 n.58).

transparent to their Hawaii customers and that there will be no change to the network or network quality. In addition, the Consumer Advocate states that it "presumes that there would be little to no negative impact to Applicants' existing ability to meet their ETC quality of service commitments to the Commission as set forth in Decision and Order Nos. 21089 and 24169 filed in Docket Nos. 03-0104 and 2007-0402, respectively."²⁶

Moreover, upon review of cost data provided by Applicants in response to information requests, the Consumer Advocate asserts that even with the removal of the total costs of the eleven Hawaii towers in question,²⁷ Applicants' actual expenditures for each year were more than the USF disbursements received by Applicants for the year.²⁸ Therefore, the Consumer Advocate surmises that Applicants could support their compliance with the USF requirements of spending the specific amount of support funds received for Hawaii in Hawaii for which the provision, maintenance, and upgrading of facilities and services for which the support is intended. Among other things, the Consumer Advocate notes that the amount of USF monies allocated

²⁶Id. at 8 (footnote and text therein omitted).

²⁷According to the Consumer Advocate, "Applicants identify eleven (11) out of the thirty-one (31) Hawaii towers proposed to be transferred in the transaction that were funded in part with USF support." See CA's Supplement at 8.

²⁸Based on the record established herein and information from Docket Nos. 03-0104 and 2007-0402, the Consumer Advocate developed a cost table, which includes USF Disbursements, Applicants' Actual Expenditures, Costs of Eleven Hawaii Towers Included in the Transfer, and Applicants' Actual Expenditures Less Cost of the Eleven Hawaii Towers. See CA's Supplement at 9.

towards the towers is relatively nominal when compared to the magnitude of Applicants' actual expenditures. Accordingly, the Consumer Advocate states that "it appears that there will be no negative impact (1) to [] Applicants' quality of service provided to [their] Hawaii customers; (2) to [] Applicants' ability to meet [their] ETC service commitments to the Commission; or (3) to [] Applicants' ability to comply with the region specific requirements for use of USF support."²⁹ Thus, the Consumer Advocate states that approval of Applicants' Proposed Transfer will generally be in the public interest, and that the transaction does not appear to violate any conditions of Applicants' ETC designation and the FCC's region specific requirements for use of USF support monies.

II.

Discussion

As Applicants have withdrawn their requests for declaratory order or, in the alternative, waiver of commission approval requirements, the commission addresses Applicants' remaining request for commission approval of the Proposed Transfer.

HRS § 269-19 states:

No public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit, or any right thereunder, nor by any means, directly or

²⁹Id. at 10.

indirectly, merge or consolidate with any other public utility corporation without first having secured from the public utilities commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation, made other than in accordance with the order of the commission shall be void.

HRS § 269-19 (emphasis added). The purpose of HRS § 269-19 is to safeguard the public interest.³⁰

Moreover, under HRS § 269-7(a), the commission is empowered to examine the condition of a public utility, the manner in which it is operated with reference to the safety or accommodation of the public, "and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations."

Upon review of the record in this docket, the commission finds that the Proposed Transfer is reasonable and in the public interest. The commission's decision herein is based on Applicants' representation that the Proposed Transfer will: (1) be seamless to their wireless customers; (2) not "[a]ffect, interrupt or change" the provision of wireless services to Applicants' customers; and (3) "will not adversely affect Applicants' fitness, willingness or ability to provide telecommunications services" in the State.³¹ In addition, Applicants state that the Proposed Transfer will not impact the amount of USF monies that they are entitled to receive as ETCs.

³⁰See In re Honolulu Rapid Transit Co., 54 Haw. 402, 409, 507 P.2d 755, 759 (1973).

³¹See Application at 8.

Upon close of the Proposed Transfer, Applicants intend to lease back tower positions from the buyer, TowerCo. According to Applicants, "[b]y leasing rather than owning these towers, Sprint Nextel can better focus on its core business of providing communications services to consumers, businesses and government customers."³² Increased management focus and flexibility achieved through the Proposed Transfer should result in stronger entities that can better respond to the competitive forces that currently exist in the State's telecommunications market. Accordingly, the Proposed Transfer appears to be in the public interest since Applicants and their customers should benefit through additional liquidity and enhanced management flexibility. The Proposed Transfer also appears to further the commission's objective of fostering competition in the State's telecommunications market.

Moreover, it does not appear that the Proposed Transfer will result in a violation of FCC requirements, nor does it appear that the Proposed Transfer will negatively impact Applicants' ability to satisfy the conditions of their ETC designations. Specifically, the record demonstrates, among other things, that Applicants have spent sufficient amounts on other facilities in their designated areas for the provisioning, maintenance, or upgrade of facilities to satisfy federal requirements.³³ Further, the commission agrees with the Consumer Advocate that, in this specific instance, "the benefits of any

³²Id. at 5.

³³See CA's Supplement at 9-10.

improved service and expanded coverage gained from the initial construction of the subject eleven (11) towers would continue to be retained in Hawaii for [] Applicants' Hawaii customers."³⁴

Based on the foregoing, the commission concludes that the Proposed Transfer should be approved.

III.

Orders

THE COMMISSION ORDERS:

1. The Proposed Transfer, described in the Application filed on September 4, 2008, is approved.

2. This docket is closed, unless ordered otherwise by the commission.

DONE at Honolulu, Hawaii MAR - 5 2009.

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:

Ji Sook Kim
Ji Sook Kim
Commission Counsel

By Leslie H. Kondo
Leslie H. Kondo, Commissioner

2008-0176.laa

³⁴Id. at 10 (footnote and text therein omitted).

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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