

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

--In the Matter of--)
)
SANDWICH ISLES COMMUNICATIONS, INC.)
)
Concerning the Motion to Compel)
Disclosure of Portions of Annual)
Financial Reports Filed Under)
Protection of Protective Orders)
2007-PO-20 and 2008-PO-19.)

ORDER DENYING MOTION TO COMPEL

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PUBLIC UTILITIES
COMMISSION

FILED

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_____)

ORDER DENYING MOTION TO COMPEL

By this Order, the commission denies the Motion to Compel disclosure of portions of SANDWICH ISLES COMMUNICATIONS, INC.'s ("SICI") annual financial reports ("AFRs") for the years 2006 and 2007.

I.

Background

By electronic mail ("e-mail") dated June 18, 2009, the commission received a request from Rick Daysog of the Honolulu Advertiser to review copies of, among other things, SICI's AFRs for the years 2006 and 2007, pursuant to the Uniform Information Practices Act (Modified), Hawaii Revised Statutes ("HRS") chapter 92F ("UIPA").¹ In response, the commission informed

¹Mr. Daysog also requested access to: (1) SICI's 2008 AFR; (2) Waimana Enterprises' AFRs for 2006, 2007 and 2008; (3) applications for rate increases filed by SICI or Waimana Enterprises; and (4) contracts between SICI or Waimana and the Department of Hawaiian Home Lands. Pursuant to Hawaii Administrative Rules ("HAR") §§ 2-71-13(f) and 2-71-14(c)(1), the

Mr. Daysog that SICI filed its 2006 and 2007 AFRs under protective orders issued by the commission, i.e., 2007-PO-20 and 2008-PO-19, and provided him with copies of SICI's redacted AFR filings.

By e-mail dated June 29, 2009, Mr. Daysog renewed his request to review SICI's unredacted AFRs and requested a list of utilities which have been granted a protective order by the commission.

By letter dated July 7, 2009, the commission instructed SICI and the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate")² that, pursuant to the applicable protective orders, the commission would treat Mr. Daysog's June 29, 2009 e-mail as a Motion to Compel disclosure of the AFRs.³ The commission also advised SICI that "[u]nder the terms of the protective orders, SICI bear[s] the burden of proof in supporting its claim, and the Commission will determine whether the information shall continue to be designated as confidential under this protective order. Pending a disposition of the motion, the information in question shall be treated as confidential information and shall not be disclosed except as permitted in this protective order."⁴ In addition, the

commission advised Mr. Daysog that the commission does not maintain any of those records.

²The Consumer Advocate is a party to all proceedings before the commission. See HRS § 269-51; HAR § 6-61-62.

³Copies of the e-mails between Mr. Daysog and commission were attached to the July 7, 2009 letter.

⁴See Letter from Commission Counsel dated July 7, 2009 at 2 (internal quotes omitted).

commission stated that any response to Mr. Daysog's Motion to Compel must be filed by July 14, 2009.

On July 13, 2009, SICI requested an extension of time until July 21, 2009, to file a response to the Motion to Compel ("Extension Request"). On July 16, 2009, SICI filed its Memorandum in Opposition to Motion to Compel ("Memorandum in Opposition").⁵ By letter dated July 31, 2009, the commission counsel advised SICI that "it appears that SICI has not sufficiently satisfied its burden of proof to support its claim that the information should continue to be designated as confidential under the applicable protective orders and the UIPA." However, because of the alleged substantial harm that disclosure would cause SICI, commission counsel informed SICI that the commission would withhold the records until August 7, 2009 and, prior to that date, SICI could provide additional information to support withholding of the AFRs or seek other relief.

On August 6, 2009, SICI filed its Supplemental Memorandum in Opposition to Motion to Compel ("Supplemental Filing"), which included the Declaration of Alan W. Pedersen, SICI's General Manager and Vice President of Regulatory Affairs ("Pedersen Declaration").

⁵The Consumer Advocate did not file any position.

II.

Discussion

A.

Extension Request

HAR § 6-61-23 Enlargement. (a) When by this chapter or by notice or by order of the commission, any act is required or allowed to be done at or within a specified time, the commission for good cause shown may at any time, in its discretion:

- (1) With or without motion or notice, order the period enlarged, if written request is made before the expiration of the period originally prescribed or as extended by a previous order[.]

HAR § 6-61-23(a)(1) (emphasis added).

SICI filed its Extension Request on July 13, 2009, which is prior to the expiration of the period originally prescribed (i.e., July 14, 2009). In its Extension Request, SICI informed the commission that it intends to submit a response to the Motion to Compel and requested additional time to July 21, 2009, to submit its response.

Here, the commission finds good cause to approve SICI's Extension Request under HAR § 6-61-23(a)(1), and concludes that SICI's Extension Request should be approved.

B.

Motion to Compel

The protective orders under which SICI's AFRs were filed provide that the records are subject to disclosure pursuant

to the UIPA. Specifically, in relevant part, the protective orders state:

To the extent that any of the documents covered by this protective order consist of "government records," as defined in Hawaii Revised Statutes ("HRS") §92F-3, the provisions of HRS Chapter 92F ("Uniform Information Practices Act" or "UIPA") shall apply to the disclosure of information contained in such documents. In the event any provision of this protective order conflicts with any provision of the UIPA, the UIPA shall control.

2007-PO-20 at 3-4; 2008-PO-19 at 2-3.

The UIPA requires the commission and other government agencies to allow public access to government records unless such access is restricted by one or more of the exceptions to disclosure contained in HRS Chapter 92F. HRS § 92F-11. The statute further provides that an "agency has the burden of proof to establish justification for non-disclosure[,]" and therefore, places on the commission the burden of establishing that the record (or information contained therein) falls within one or more of the UIPA's exceptions to disclosure. HRS § 92F-15(c).

To assist in determining whether the requested records could be withheld, the commission sought SICI's position concerning the applicability of the UIPA's exceptions to the AFRs. In its Memorandum in Opposition, SICI asserted that the confidential information requested by Mr. Daysog is protected from public disclosure under two UIPA exceptions, HRS §§ 92F-3(3) and 92F-13(4). Under HRS § 92F-13(3) (the "Frustration Exception"), disclosure is not required of "[g]overnment records that, by their nature, must be confidential in order for the

government to avoid the frustration of a legitimate government function[.]” HRS § 92F-13(4) provides that disclosure is not required of “[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure[.]”⁶

OIP has interpreted the Frustration Exception to allow an agency to withhold confidential business information. See OIP Op. Ltr. No. 02-07 (August 27, 2002); OIP Op. Ltr. No. 04-12 (July 9, 2004). Confidential business information is defined to be commercial or financial information, which if disclosed, is likely to cause the party submitting the information substantial competitive harm.⁷ OIP Op. Ltr. No. 02-07. In determining whether disclosure will cause substantial competitive harm, OIP has stated:

⁶The commission notes that SICI’s reliance on HAR § 6-80-9, which states that “[n]o telecommunications carrier is required to release or share with any person any of the carrier’s confidential proprietary information or materials,” is questionable given that the Office of Information Practices (“OIP”) has opined that an administrative rule adopted by an agency is not a “state law” within the meaning of HRS 2F-13(4). See OIP Op. Ltr. No. 04-05 (February 23, 2004) at 6 (citing OIP Op. Ltr. No. 92-4 (June 10, 1992)). However, the commission need not rule on that issue here since we find that another exception applies in this case.

⁷SICI also asserts that the Frustration Exception allows an agency to withhold records if disclosure would impair the agency’s ability to obtain similar information in the future. When the information is required to be filed by law, as with the AFRs, the OIP opined that there is a rebuttable presumption that disclosure would not impair the agency’s ability to obtain similar information in the future. OIP Op. Ltr. No. 05-13 (May 23, 2005). In this case, the commission would not be persuaded solely by conclusory and unsupported statements about the commission’s ability in the future to receive AFRs, since the commission has the authority to require the submission of AFRs and may enforce such requirements under HRS Chapter 269.

[a]lthough conclusory and generalized allegations of competitive harm are insufficient to prove the likelihood of substantial competitive harm, neither must there be proof of actual competitive harm. Substantial competitive harm is present when (1) the submitter faces actual competition, and (2) there is a likelihood of substantial competitive harm.

OIP Op. Ltr. No. 04-12 at 6 (citing OIP Op. Ltr. No. 02-07 at 9).

Given this standard, commission counsel initially advised SICI that it appeared that it failed to demonstrate how disclosure of the information set forth in the respective AFRs would cause SICI substantial competitive harm.⁸

In its Supplemental Filing, SICI makes numerous assertions of harm that appeared to be inapplicable to the information requested in this case. For instance, SICI claims that disclosure of "operational information," "narrative descriptions of SIC[I]'s plans," "[i]nformation on the network capabilities and location," and "SIC[I]'s forward-looking intentions" will cause it competitive harm. The requested records, i.e., the AFRs, do not contain any such information.

SICI's Supplemental Filing, however, does contain certain representations of substantial competitive harm that will result if the AFRs are disclosed that the commission finds likely. More specifically, according to SICI, competitors could use its confidential financial information to "target specific markets and take important customers away from SIC[I]." Noting that this is a serious concern, SICI contends that "[w]ireless carriers could target SIC[I] customers based on the information

⁸See Letter from Commission Counsel dated July 31, 2009.

contained in the financial filings and, with relatively small investment in a tower or two, aggressively compete with SIC[I]."⁹ In addition, SICI argues that confidential information set forth in the AFRs could be used by its competitors to "identify and exploit SIC[I]'s financial weaknesses by targeting and causing SIC[I] to deplete critical staffing and/or financial resources in a particular field, preventing SIC[I] from focusing its resources on what would otherwise be its most critical operations and financial obligations."¹⁰

The commission notes that SICI could have more specifically explained how disclosure of the AFRs would cause it substantial competitive harm; however, the commission finds sufficient SICI's support for its claim that the information contained in the requested AFRs should continue to be designated as confidential under the applicable protective orders. Given the "robust" nature of competition in Hawaii's telecommunications industry,¹¹ the commission finds that disclosure of the information set forth in SICI's AFRs "would likely" cause SICI substantial competitive harm.

Based on the foregoing, the commission finds that: (1) the information contained in SICI's AFRs for the years 2006 and 2007 may be withheld under HRS § 92F-13(3); and (2) the

⁹See Pederson Declaration at ¶ 11.

¹⁰Id. at ¶ 12.

¹¹The Legislature in 2009 found that competition in Hawaii's telecommunications market is robust and that "[c]onsumers have many choices when deciding how to communicate: traditional land-line telephony, voice over internet protocol, and wireless phone service." See Act 180, Session Laws of Hawaii 2009, Section 1. Also see Pederson Declaration at ¶ 7.

information contained in SICI's AFRs for the years 2006 and 2007 should continue to be designated as confidential under the applicable protective orders. Thus, the commission denies the Motion to Compel disclosure of portions of SICI's AFRs for the years 2006 and 2007.

III.

Orders

THE COMMISSION ORDERS:


1. SICI's request, filed on July 13, 2009, for an extension of time from July 14, 2009, to July 21, 2009, to submit its response to the Motion to Compel, is approved.
2. The Motion to Compel disclosure of portions of SICI's AFRs for the years 2006 and 2007, is denied.
3. This matter is closed.

DONE at Honolulu, Hawaii AUG 20 2009

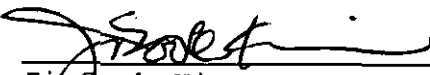
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By: 
Carlito P. Caliboso, Chairman

By: 
John E. Cole, Commissioner

By: 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

SICI.motion to compel.ps

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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