

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
NEXTG NETWORKS OF CALIFORNIA,)
INC., dba NEXTG NETWORKS WEST)
For Approval of an Indirect)
Transfer of Control of NextG)
Networks of California, Inc.,)
dba NextG Networks West.)

DOCKET NO. 2009-0125

DECISION AND ORDER

FILED

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Docket No. 2009-0125

DECISION AND ORDER

By this Decision and Order, the commission waives the requirements of Hawaii Revised Statutes ("HRS") §§ 269-7(a) and 269-19 and Hawaii Administrative Rules ("HAR") §§ 6-61-101 and 6-61-105, to the extent applicable, with respect to the transfer of ownership and control of NEXTG NETWORKS OF CALIFORNIA, INC., dba NEXTG NETWORKS WEST's ("Petitioner") parent corporation, NextG Networks, Inc. ("Parent"), to new investors, thus indirectly transferring control of Petitioner ("Proposed Transaction").

I.

Background

A.

Petition

On June 5, 2009, Petitioner¹ filed a petition for commission waiver or approval, as necessary, of the Proposed Transaction, pursuant to HRS §§ 269-7(a), 269-19 and 269-16.9(e), as applicable ("Petition").² Petitioner seeks commission waiver or approval of the Proposed Transaction which is memorialized in the Merger Agreement and Plan ("Merger Agreement") entered into by Parent and Nodes Merger Corp. ("Nodes"), as of May 15, 2009, to consummate the transaction. The Merger Agreement contemplates the merger of Nodes into Parent, with Parent as the surviving corporation. Following consummation of the Proposed Transaction: (1) Parent's current stockholders will cease to own a majority of the outstanding shares of Parent's capital stock; (2) investment funds affiliated with Madison Dearborn Partners, LLC ("Madison Dearborn")³ will collectively own approximately 61% of the

¹Petitioner is a Delaware corporation headquartered in San Jose, California. By Decision and Order No. 23653, filed on September 12, 2007, in Docket No. 2007-0074, Petitioner was granted a certificate of authority to provide facilities-based intrastate interexchange telecommunications services within the State of Hawaii ("State"). Petitioner provides radio frequency transport and backhaul telecommunications services primarily to commercial mobile radio service providers.

²Petitioner served copies of the Petition on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to this proceeding.

³Madison Dearborn is based in Chicago and, according to Petitioner, is one of the most experienced and successful private equity investment firms in the United States. Petitioner states

outstanding shares of Parent's capital stock; and (3) Accel Growth Fund L.P. ("Accel")⁴ and its affiliates will collectively own approximately 14% of the outstanding shares of Parent's capital stock. Despite the change in Parent's ownership, Petitioner anticipates maintaining the managerial and technical expertise of Petitioner and its Parent. The Proposed Transaction is expected to be consummated on or about August 31, 2009.⁵

According to Petitioner, the Proposed Transaction is reasonable and in the public interest. Petitioner represents that, upon completion of the Proposed Transaction, Petitioner will continue to provide high-quality telecommunications services to consumers, while gaining critically important access to additional resources. Petitioner states that end-user customers will continue to receive services at the same rates, terms, and conditions as prior to the transaction. As such, the Proposed Transaction, according to Petitioner, will be transparent to and have no impact upon customers in Hawaii and the only change will be that the ownership and control of Parent will transfer to new investors.

that principals of Madison Dearborn manage funds with more than \$18 billion in equity commitments. See Petition at 2.

⁴According to Petitioner, Accel is a global venture capital investment firm with offices worldwide. See Petition at 3.

⁵On August 7, 2009, a representative of Petitioner, Mr. Robert Morgan, contacted commission staff by telephone to advise that the Merger Agreement's new closing date is August 27, 2009.

In support of its waiver request, Petitioner states that it is not classified as a dominant carrier in the State and that it currently has no customers in Hawaii. Moreover, Petitioner contends that services that it would provide after the consummation of the Proposed Transaction are competitive. According to Petitioner, "[t]he existing competitive market for [Petitioner's] services will continue to protect the public interest after the [P]roposed Transaction, making [c]ommission regulation of this [t]ransaction unnecessary.⁶

B.

Consumer Advocate's Statement of Position

On July 30, 2009, the Consumer Advocate submitted its Statement of Position, informing the commission that it will not be participating in this proceeding.⁷

II.

Discussion

A.

Proposed Transaction

HRS § 269-16.9 allows the commission to waive regulatory requirements applicable to telecommunications providers if it determines that competition will serve the

⁶See Petition at 7 (internal quotes omitted).

⁷The Consumer Advocate notes in its statement that its position to not participate in this docket should not be construed as either accepting, supporting, or adopting any of the positions proposed justifications offered, or requested relief articulated in the Petition.

same purpose as public interest regulation. Specifically, HAR § 6-80-135 permits the commission to waive the applicability of any of the provisions of HRS chapter 269 or any rule, upon a determination that a waiver is in the public interest.

In this docket, the commission finds, at this time, that Petitioner is a non-dominant carrier in the State.⁸ The commission also finds that the Proposed Transaction is consistent with the public interest, and that competition, in this instance, will serve the same purpose as public interest regulation. Thus, the commission concludes that the requirements of HRS §§ 269-7(a) and 269-19 should be waived, to the extent applicable, with regards to the matters in this docket, pursuant to HRS § 269-16.9 and HAR § 6-80-135.⁹ Similarly, based on these findings and conclusions stated above, the commission will also waive the provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that the Petition fails to meet any of these filing requirements.

⁸Petitioner represents that it currently does not serve any customers in Hawaii. See Petition at 7.

⁹The commission will continue to examine each application or petition and make determinations on a case-by-case basis as to whether the applicable requirements of HRS §§ 269-7(a) or 269-19 should be waived. Thus, our waiver in this instance should not be construed by any public utility, including Petitioner, as a basis for not filing an application or petition regarding similar transactions that fall within the purview of these statutes.

III.

Orders

THE COMMISSION ORDERS:

1. The requirements of HRS §§ 269-7(a) and 269-19, to the extent applicable, are waived with respect to the Proposed Transaction, described in the Petition filed on June 5, 2009.
2. The filing requirements of HAR §§ 6-61-101 and 6-61-105, to the extent applicable, are also waived.
3. This docket is closed unless ordered otherwise by the commission.

DONE at Honolulu, Hawaii AUG 24 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:

By Leslie H. Kondo
Leslie H. Kondo, Commissioner

 Ji Sook Kim
Ji Sook Kim
Commission Counsel

2009-0125.1aa

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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