

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
BUSINESS TELECOM, INC., dba BTI)
For Approval of A Pro Forma)
Transfer of Control.)
_____)

DOCKET NO. 03-0200

DECISION AND ORDER NO. 20389

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

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Karen Higashi
Chief Clerk of the Commission

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

K. Higashi

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OF THE STATE OF HAWAII

In the Matter of the Application of)	
BUSINESS TELECOM, INC., dba BTI)	Docket No. 03-0200
For Approval of A <u>Pro Forma</u>)	Decision and Order No. 20389
<u>Transfer of Control.</u>)	
_____)	

DECISION AND ORDER

I.

By an application filed on July 11, 2003, BUSINESS TELECOM, INC., dba BTI ("BTI" or "Applicant"), requests commission approval for a pro forma transfer of control ("proposed financial transaction") of BTI by WELSH, CARSON, ANDERSON & STOWE VIII, L.P., WCAS CAPITAL PARTNERS III, L.P., and WCAS INFORMATION PARTNERS (collectively referred to as "Welsh Carson"). Applicant makes its request pursuant to Hawaii Revised Statutes ("HRS") § 269-19.

Copies of the application were served on the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). On July 31, 2003, the Consumer Advocate filed its position statement, indicating that it does not object to the approval of the proposed financial transaction, described above and in more detail below, subject to certain qualifications.¹

¹In its July 31, 2003 position statement, the Consumer Advocate recommends that the commission approve the proposed financial transaction, provided that Applicant submits to the commission and the Consumer Advocate the following:

I.

A.

BTI is a North Carolina corporation and a wholly-owned subsidiary of BTI Telecom Corp., a privately-held North Carolina holding company. BTI is presently authorized to provide long distance telecommunications services in the District of Columbia and 49 states including the State of Hawaii ("State").²

Welsh Carson, presently a 69 per cent majority shareholder of BTI Telecom Corp. (collectively, with its subsidiaries, BTI and Business Telecom of Virginia, Inc., referred to as "BTI Operating"), is a private equity investment firm that specializes in acquiring and developing businesses in the information services, communications, and healthcare industries. As represented in Docket No. 03-0193 and in the instant application, BTI Telecom Corp. will become a wholly-owned direct

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1. A copy of the executed debt financing agreement, as required by Decision and Order No. 19287, filed on April 8, 2002, in Docket No. 01-0463; and
 2. A copy of BTI's 2002 income statement as required by Hawaii Administrative Rules ("HAR") § 6-80-91.

In its August 15, 2003 response to the Consumer Advocate's position statement, Applicant represents, among other things, that a copy of the above-referenced executed debt financing agreement and BTI's 2002 income statement will be submitted subsequent to the commission's approval of the applicable Stipulated Protective Orders to be executed by and between BTI and the Consumer Advocate.

²By Decision and Order No. 16358, filed on June 2, 1998, in Docket No. 98-0143, BTI was granted a certificate of authority to provide intrastate telecommunications services in the State on a resold basis.

subsidiary of ITC^DeltaCom, Inc. ("ITC"), but ultimate control of BTI Operating will remain with Welsh Carson.³

B.

The proposed financial transaction involves an indirect transfer of control of BTI Telecom Corp., BTI's ultimate parent, to ITC, accomplished through a merger of an ITC subsidiary into BTI Telecom Corp., the surviving entity. Specifically, Welsh Carson intends to exchange or convert its debt and equity interest in BTI Telecom Corp. for shares and warrants of ITC, respectively. Welsh Carson and certain of its affiliates also plan to invest an additional \$35 million in ITC in exchange for preferred stock of ITC. As a result of this proposed financial transaction, BTI Telecom Corp. will become a subsidiary of ITC similar to Interstate FiberNet, Inc. in Docket No. 03-0193, and Welsh Carson will then control approximately 59 per cent of the

³In addition to Welsh Carson's majority interest in BTI Telecom Corp., Welsh Carson also presently owns a minority interest in ITC (specifically, 49.3 percent of common stock of ITC or 43.9 per cent voting interest in ITC). ITC's subsidiary, ITC^DeltaCom Communications, Inc., dba ITC^DeltaCom ("DeltaCom"), was granted a certificate of authority to provide intrastate telecommunications services in the State on a resold basis in 1999. See Decision and Order No. 16931, filed on April 6, 1999, in Docket No. 98-0408. On August 8, 2003, in addressing DeltaCom's application for approval of ITC's indirect transfer of control of DeltaCom (Docket No. 03-0193), the commission waived, among other things, the requirements of HRS § 269-7(a), to the extent applicable. ITC and DeltaCom represent that after the consummation of the proposed financial transaction, the indirect transfer of control will result in Welsh Carson controlling approximately 59 per cent of the voting interest in ITC. See Decision and Order No. 20370, filed on August 8, 2003, in Docket No. 03-0193.

voting interest in ITC.⁴ Welsh Carson will continue to be BTI's indirect controlling shareholder (albeit two intervening corporate entities). Accordingly, the proposed indirect transfer of control ("indirect transfer of control") will not affect the direct ownership and control of BTI, which will remain with BTI Telecom Corp. Applicant represents, among other things, that the proposed indirect transfer of control (1) will neither result in a change in name, rates and service offerings of BTI, and (2) will be transparent to BTI's consumers in the State, and therefore, will not cause customer confusion or inconvenience.

III.

HRS § 269-19 requires a public utility corporation to obtain our approval prior to: (1) selling, leasing, assigning, mortgaging, disposing of, or encumbering the whole or any part of its property necessary or useful in performance of its duties to the public, or any franchise or permit; or (2) directly or indirectly merging or consolidating its property with any other public utility corporation.⁵ In the instant case, the proposed

⁴See, Exhibit A, attached herein, depicting proposed new corporate structure. In Exhibit A, BTI Telecom Corp. is referred to as Business Telecom Corp.

⁵HRS § 269-19 provides: "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 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."

financial transaction is neither a disposition of Applicant's property or its certificate of authority nor a merger or consolidation of a public utility corporation with another public utility corporation. Thus, HRS § 269-19 is inapplicable.

However, HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations." Thus, the commission has jurisdiction to review proposed financial transactions of the parent entity of a regulated public utility under HRS § 269-7(a).⁶

HRS § 269-16.9 also permits us to waive regulatory requirements applicable to telecommunications providers if we determine that competition will serve the same purpose as public interest regulation. Specifically, HAR § 6-80-135 permits us to grant an exemption from or waive the applicability of any of the provisions of HRS chapter 269 or any rule, upon a determination that an exemption or waiver is in the public interest.

Upon review of the record in this docket, particularly Applicant's representations in this docket, we find the following: (1) that much of the telecommunications services currently provided by BTI are competitive; (2) that BTI is a non-dominant carrier in

⁶See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

Hawaii⁷; (3) that the proposed financial transaction is consistent with the public interest; and (4) that competition, in this instance, will serve the same purpose as public interest regulation.

Based on the foregoing, the commission, on its own motion, will waive the requirements of HRS § 269-7(a), to the extent applicable, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.⁸ Similarly, based on, among other things, Applicant's representations, we also find that it is in the public interest to waive the applicability of HAR §§ 6-61-101 and 6-61-105 in this application. Accordingly, we conclude that the requirements of HAR §§ 6-61-101 and 6-61-105 that are not satisfied by the information provided in Applicant's application should be waived.⁹

⁷Based on the representations made in the instant docket and Docket No. 03-0193, we recognize that Welsh Carson will soon indirectly control both DeltaCom and BTI, competitive local exchange carriers authorized to provide telecommunications services in Hawaii. However, we agree with the Consumer Advocate that "their combined share of the Hawaii market should not result in any market dominance" at this time.

⁸At the same time, the commission will continue to examine a utility's application on a case-by-case basis to determine whether the applicable requirements of HRS § 269-7(a) or any other related provision governing utility transactions, should be waived. The commission's waiver in this decision and order shall not be construed by any utility as a basis for not filing an application involving similar transactions or circumstances.

⁹We note that the application failed to comply with the requirements set forth in HAR §§ 6-61-101 and 6-61-105 by not submitting, among other things, a copy of the applicable financial statements and agreements relating to the proposed financial transaction.

IV.

THE COMMISSION ORDERS:

1. The requirements of HRS § 269-7(a), to the extent applicable, are waived with respect to the proposed financial transaction described in the instant application, filed on July 11, 2003.

2. To the extent that the application does not contain all of the information required under either HAR § 6-61-101 or HAR § 6-61-105, the applicability of those sections is waived.


3. Within 15 days after the issuance date of the applicable Stipulated Protective Orders, Applicant shall submit the following documents to the commission and the Consumer Advocate:

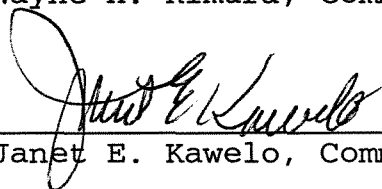
- a. A copy of the executed debt financing agreement, as required by Decision and Order No. 19287, filed on April 8, 2002, in Docket No. 01-0463; and
- b. A copy of BTI's 2002 income statement, as required by HAR § 6-80-91.

DONE at Honolulu, Hawaii this 22nd day of August,
2003.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

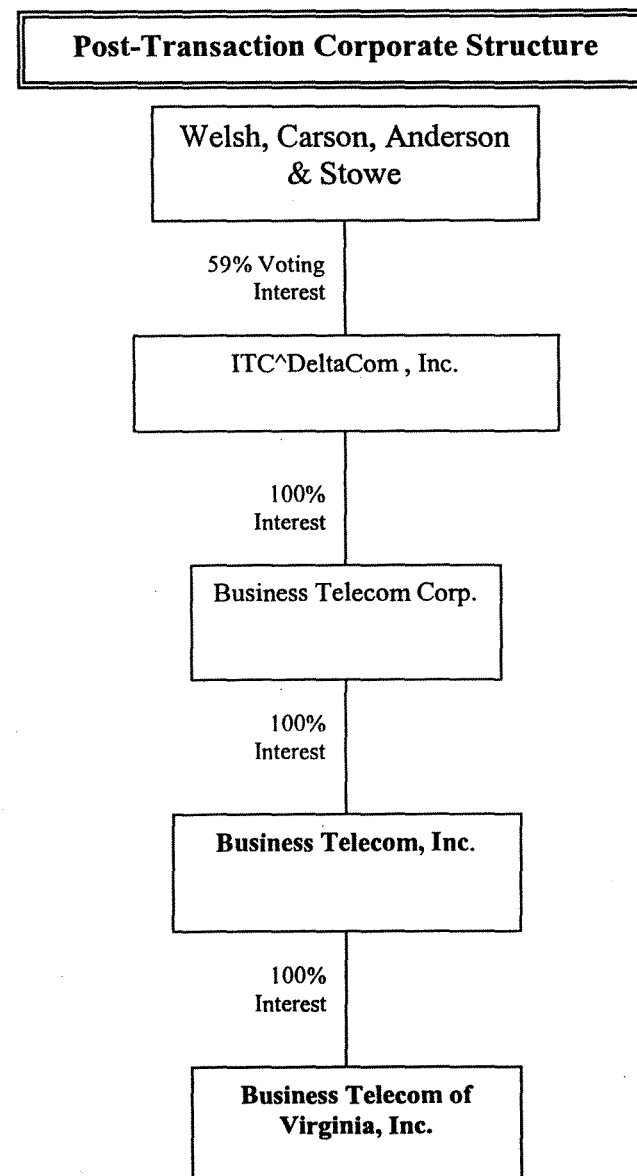
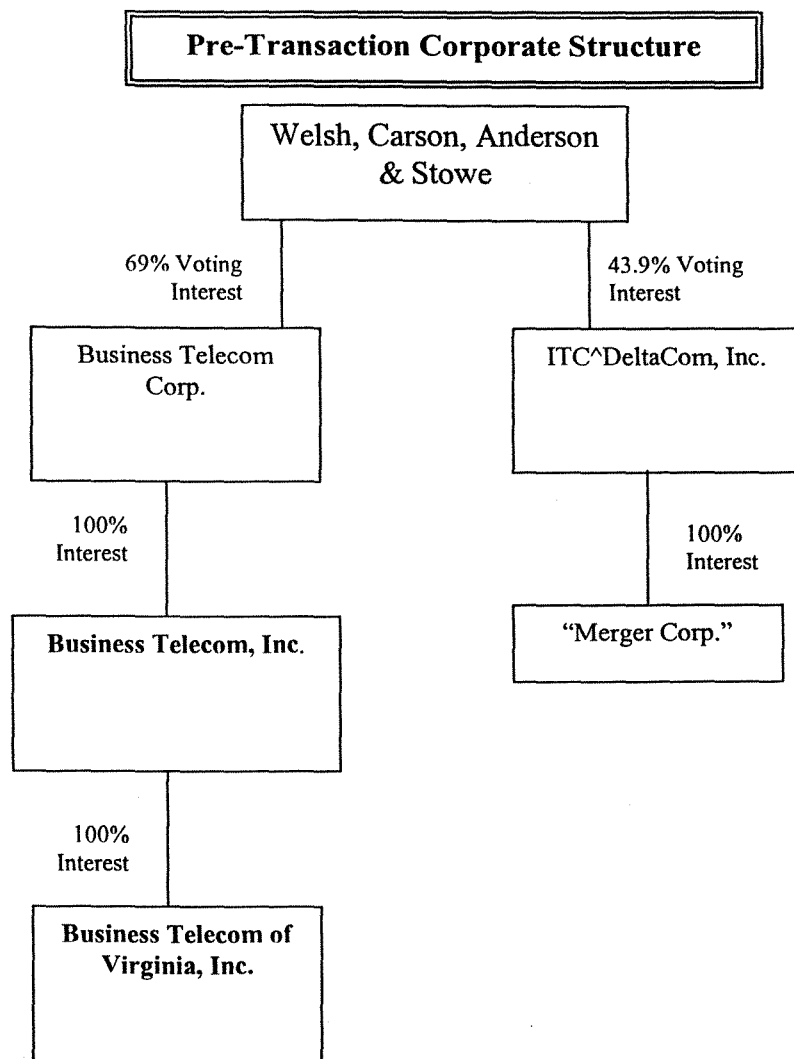
APPROVED AS TO FORM:


Kris N. Nakagawa
Commission Counsel

03-0200.eh

EXHIBIT A
CHART OF PROPOSED TRANSACTION

CHART OF PROPOSED TRANSACTION



CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 20389 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

DATED: August 22, 2003