

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

RECEIVED

2003 SEP -2 P 4: 29

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

In the Matter of the Petition of)
)
DIRECT TELEPHONE COMPANY, INC.)
)
AND)
)
SUMMIT COMMUNICATIONS, INC.)
)
For Expedited Exemptions or)
Waivers, and/or for Alternative)
Expedited Approvals Regarding)
§ 269-19 and § 269-7.5, Hawaii)
Revised Statutes.)
_____)

DOCKET NO. 03-0240

INTERIM DECISION AND ORDER NO. 20410

Filed August 29, 2003
At 4:10 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

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

K. Higashi

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	
)	
DIRECT TELEPHONE COMPANY, INC.)	Docket No. 03-0240
)	
AND)	Interim Decision and Order No. 20410
)	
SUMMIT COMMUNICATIONS, INC.)	
)	
For Expedited Exemptions or)	
Waivers, and/or for Alternative)	
Expedited Approvals Regarding)	
§ 269-19 and § 269-7.5, Hawaii)	
Revised Statutes.)	
_____)	

INTERIM DECISION AND ORDER

I.

By petition filed on August 26, 2003, DIRECT TELEPHONE COMPANY INC. ("DTC") and SUMMIT COMMUNICATIONS, INC. ("Summit") (collectively, the "Petitioners") petition the commission for waivers or exemptions: (1) to permit the transfer of the shared tenant services assets and operations of Summit, which is in bankruptcy, to DTC ("Proposed Transaction"), and (2) to permit DTC to provide shared tenant services ("STS"), pursuant to Hawaii Revised Statutes ("HRS") § 269-16.9 and Hawaii Administrative Rules ("HAR") §§ 6-76.1-45 and 6-80-135. In the alternative, if the commission determines that such waivers or

exemptions cannot be granted, Petitioners seek approval of the Proposed Transaction, pursuant to HRS § 269-19 and authorization for DTC to provide STS, pursuant to HRS 269-7.5 and HAR §§ 6-76.1-14(c) and 6-80-17(c). Petitioners request that the commission grant their requests on an expedited basis.

Petitioners served copies of the petition on the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"). On August 28, 2003, the Consumer Advocate submitted its statement of position ("Statement of Position") recommending that the commission deny Petitioners' requested waiver and exemption because it appears that there is inadequate support for a waiver or exemption. However, the Consumer Advocate "acknowledges the gravity of the situation and its urgency." Statement of Position at 2. Accordingly, the Consumer Advocate recommends commission approval to allow the transfer of Summit's STS assets and operations to DTC; and permit DTC to provide STS on the same terms and conditions and using the same "tariff" as currently being used by Summit. The Consumer Advocate also reserves its right to determine, through continued investigation, any regulatory qualifications or requirements that may be necessary to advance the interest of Summit's customers, as well as the public interest.

II.

A.

Petitioners

DTC, a Texas corporation, is authorized to transact business in the State of Hawaii ("State"). By Decision and Order No. 19265, filed on March 25, 2002, in Docket No. 01-0460, the commission granted DTC a certificate of authority ("COA") to provide telecommunications services on a resold basis in the State. By Decision and Order No. 19840, filed on December 4, 2002, in Docket No. 02-0209, the commission amended DTC's COA to permit DTC to provide intrastate telecommunications services as a facilities-based carrier.

Summit, a Hawaii corporation, requested and received exemptions from chapter 269, HRS, on five separate occasions for various STS projects under the rules then governing STS.¹ As a

¹See:

1. Decision and Order No. 15449, filed on March 13, 1997, in Docket No. 97-0049, exemption to provide STS to tenants and occupants of a residential apartment building at 444 Nahua Street, Honolulu;
2. Decision and Order No. 15581, filed on May 13, 1997, in Docket No. 97-0141, exemption to provide STS to tenants and occupants of a residential apartment building at 1920 Ala Moana Boulevard, Honolulu;
3. Decision and Order No. 15624, filed on June 6, 1997, in Docket No. 97-0173, exemption to provide STS to tenants and occupants of a senior living and skilled nursing facility at 1314 Kalakaua Avenue, Honolulu;
4. Decision and Order No. 16002, filed on October 7, 1997, in Docket No. 97-0337, exemption to provide STS to tenants and occupants of a commercial and professional facility at 405 North Kuakini Street, Honolulu; and

result of the adoption of chapter 6-76.1, "Shared Tenant Service,"² the commission's rules and regulations governing STS on September 22, 1997, Summit's exemptions were automatically converted into a COA.³

On February 13, 2002, Summit filed a voluntary petition for bankruptcy protection in the United States Bankruptcy Court for the District of Hawaii. On January 29, 2003, the bankruptcy court entered an order appointing Derek J. Sakaguchi as the Chapter 11 trustee for Summit.

After Summit filed for Chapter 11 bankruptcy protection, Summit experienced a major adverse swing in its finances. Summit's revenues plummeted at the end of January 2003, resulting in significant and ongoing monthly operating losses. Beginning in February 2003, Summit's Chapter 11 trustee began efforts to sell Summit's business.

-
5. Decision and Order No. 16040, filed on October 24, 1997, in Docket No. 97-0334, exemption to provide STS to tenants and occupants of a residential apartment building at 1551 Beretania Street, Honolulu.

²HAR chapter 6-76, the "Rules Governing Shared Tenant Service," effective October 3, 1994, was repealed on September 22, 1997. Chapter 6-76.1, "Shared Tenant Service," adopted to replace chapter 6-76, was effective September 22, 1997.

³See, HAR § 6-76.1-14(a). However, the commission believes that two of Summit's exemptions, which were granted after the adoption of chapter 6-76.1, HAR, remain in effect: (1) 405 North Kuakini Street, Honolulu and (2) 1551 Beretania Street, Honolulu.

B.

Proposed Transaction

On July 18, 2003, the Petitioners entered into an asset purchase agreement to sell Summit's business assets to DTC. Under the agreement, DTC will acquire substantially all of Summit's operating assets in exchange for, among other things, \$125,000 and the assumption of certain of Summit's liabilities relating to Summit's STS business.

DTC proposes to acquire Summit's STS business and to continue the operations "virtually unchanged" and "without interruption," so Summit's customers will continue to receive service under the same terms and conditions as they are under Summit's operation.⁴ DTC also proposes to offer employment to Summit's employees, subject to individual employee evaluation results.

On August 18, 2003, Summit's Chapter 11 trustee filed a motion with the bankruptcy court requesting an order approving the Proposed Transaction. The trustee requested, among other things, approval of the sale of a substantial portion of Summit's assets free and clear of liens and encumbrances and the assumption of certain leases and executory contracts in connection with the sale. Petitioners advise that if the sale is not approved by the bankruptcy court, it is unclear how or

⁴Petition at 8, 6, respectively.

whether Summit could continue its operations, as it is in arrears in its payments (pre-petition and post-petition) to its creditors and vendors. Furthermore, they advise that if a sale by Summit is not completed soon, Summit's creditors and vendors may force Summit to discontinue its operations. Such discontinuance of operations would result in the loss of employment by Summit's employees and the termination of STS to Summit's customers.

III.

A.

Requests for Waivers or Exemptions

As a result of the Proposed Transaction, Summit must seek approval for the sale of property necessary or useful in the performance of its duties to the public, pursuant to HRS § 269-19. In addition, DTC must seek authority to provide STS, pursuant to HRS § 269-7.5 and HAR § 6-76.1-14(c). However, the commission has the discretion to waive and exempt various commission requirements and rules relating to telecommunications providers, including those requirements invoked by the Proposed Transaction, pursuant to HRS § 269-16.9 and HAR §§ 6-76.1-45 and 6-80-135.

HRS § 269-16.9 provides, in relevant part, that the commission, on its own motion or upon the application of any

person, and upon notice and hearing, may exempt a telecommunications provider from any or all of the provisions of chapter 269, HRS, upon a determination that the exemption is in the public interest. The section further provides for criteria that the commission shall consider in its determination of whether an exemption is in the public interest. Among other criteria, the commission must consider: the benefits accruing to the customers and users of the exempt telecommunications provider or services; the impact of the exemption on the quality, efficiency, and availability of telecommunications services; the effect of the exemption on the preservation and promotion of affordable, universal, basic telecommunications services as those services are determined by the commission; and the impact on the availability of diversity in the supply of telecommunications services throughout the State. HRS § 269-16.9(a)(2), (3), (6) and (8).

Upon review of the record, the commission finds that there is insufficient support for waivers or exemption in the instant docket. Accordingly, the commission concludes that Petitioners' request for waivers or exemption should be denied. The commission will consider Petitioners' alternate request for approval of the transfer of STS assets and for authority to provide STS.

B.

Request for Approval of Transfer of STS Assets

HRS § 269-19 provides, in relevant part, that

[n]o public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its ... property necessary or useful in the performance of its duties to the public ... without first having secured from the ... commission an order authorizing it so to do.

Moreover, the section provides that every such sale made other than in accordance with the order of the commission shall be void.

Since the commission has a very limited amount of time in which to complete its review and in light of the urgency of the situation, the commission relies upon and takes administrative notice of the information provided in Docket No. 01-0460 and Docket No. 02-0209, in which the commission granted authority to DTC to provide resale and facilities-based services, respectively. Upon a review of the complete record, including the aforementioned dockets, the commission concludes that approval of the Proposed Transaction, under HRS § 269-19 should be granted, on a temporary basis, until further notice from the commission.⁵ The commission shall grant temporary

⁵The commission derives its authority to approve the Proposed Transaction on a temporary basis from HRS § 269-6, which tasks the commission with the general supervision over all public utilities and the performance of the duties and exercise of the powers imposed or conferred upon it by chapter 269, HRS.

approval of the Proposed Transaction in this instance, since it would like to continue its review of the petition. Additionally, the commission is reluctant to impinge on the rights of individuals or entities who may request for commission approval to intervene or participate in this docket.⁶

C.

Request for Authority to Provide STS

HRS § 269-7.5 provides, in relevant part, that no public utility, as defined in § 269-1, shall commence its business without first having obtained from the commission a certificate of public convenience and necessity.⁷ HAR § 6-76.1-14(c) further provides, in relevant part, that any person, other than the incumbent telecommunications carrier or a premises owner, seeking to offer, initiate, or provide STS on a commercial basis shall apply in writing (in compliance with chapter 6-80, subchapter 2) to the commission for a COA.⁸

⁶Persons wanting to intervene or participate in the instant docket are allowed 20 days from the filing of the petition in which to file their written motions, pursuant to HAR § 6-61-57(3)(A).

⁷On June 3, 1996, HAR chapter 6-80 took effect. Chapter 6-80, among other things, replaces the CPCN with a COA for telecommunications carriers, and establishes procedures for requesting and issuing a COA.

⁸Pursuant to HAR § 6-80-17(c), any person, other than the incumbent telecommunications carrier, seeking to offer, initiate, or provide intrastate telecommunications service must apply in writing to the commission for a COA.

DTC failed to file its annual financial report for the year ended December 31, 2002, in compliance with HAR § 6-80-91. In addition, DTC failed to pay the public utility fee due on July 31, 2003, pursuant to HRS § 269-30. We also share the same concerns raised by the Consumer Advocate in its Statement of Position.

Notwithstanding these omissions and concerns, the commission, upon review of the entire record in this matter, and in reliance of the commission's determinations made in Docket No. 01-0460 and Docket No. 02-0209, makes the following interim findings pursuant to HAR § 6-80-18(a):

1. DTC possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed services on a temporary basis;

2. At this juncture, DTC is fit, willing, and able to properly and temporarily perform the telecommunications services proposed; and

3. DTC's proposed telecommunications services are in the public interest, since Summit is unsure of how or whether it will be able to continue its operations in the event that the sale does not occur.

Accordingly, the commission concludes that DTC should be granted authority, on a temporary basis,⁹ to provide STS within the State on the same terms and conditions and using the same "tariff" as currently being used by Summit. Such approval is further conditioned upon DTC's compliance with the commission's laws, rules, and regulations, any other terms, conditions, and requirements imposed subsequent to the commission's and the Consumer Advocate's review of the instant petition, and the filing of its 2002 annual financial statement and payment of its July 2003 public utility fee, in particular.

D.

Summary

In sum, as stated by the Consumer Advocate, we also recognize "the gravity of the situation and its urgency" alleged by Petitioners. However, we note that the expedited and temporary approvals granted by this interim decision and order is based primarily on Petitioner's representations, and to ensure that ultimately the public interest is protected. In this extraordinary situation, we find and conclude that the

⁹The commission again finds its authority to grant temporary authority under HRS § 269-6. In addition, the commission relies upon its authority under HRS § 269-7.5(b), which allows the commission to authorize the whole or any part of the operations covered by the application.

"public interest" warrants such temporary approvals at this juncture.

IV.

THE COMMISSION ORDERS:

1. Petitioners' request for waivers or exemptions to permit the transfer of the STS assets and operations to Summit and to permit DTC to provide STS is denied.

2. The Proposed Transaction, as described in the petition filed in this docket, is approved, pursuant to HRS § 269-19, on a temporary basis. This temporary authority shall be valid from the date of this interim decision and order until the date of the final decision and order in this docket.

3. DTC is authorized to provide STS on the same terms and conditions and using the same "tariff" as currently being used by Summit, on a temporary basis. This temporary authority shall be valid from the date of this interim decision and order until the date of the final decision and order in this docket.

4. DTC shall file its 2002 annual financial statement with the commission and pay its public utility fee due that was on July 31, 2003 within 20 days of this interim decision and order.

5. DTC shall make informational filings in lieu of a tariff that substantially conform with Summit's filings and reflect DTC's name as the provider of the STS.

6. Petitioners shall jointly inform the commission and the Consumer Advocate of the financial closing of the Proposed Transaction within 7 days of its occurrence.

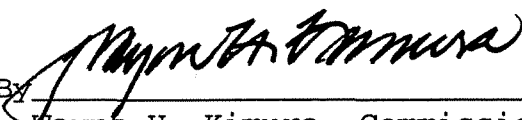
7. Petitioners are directed to monitor their quality of service provided to their customers during their respective operations before and after closing of the Proposed Transaction, and shall notify the commission and the Consumer Advocate immediately in the event of an interruption or upon the occurrence of an event that may cause a disruption or interruption in service to the customers.

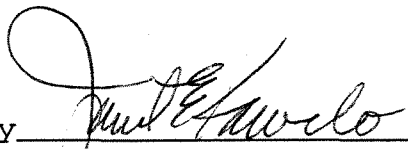
8. Upon the completion of its review of the petition, the lapse of the 20-day intervention or participation period, and the satisfaction of the terms and conditions set forth in section IV.4. and 5. of this interim decision and order, the commission will issue a final decision and order. Failure to comply with the terms and conditions, noted above, within the time specified constitutes cause to void this interim decision and order.

DONE at Honolulu, Hawaii this 29th day of August, 2003.

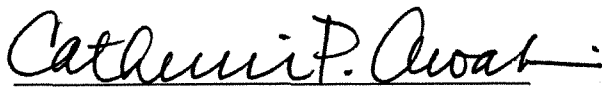
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Catherine P. Awakuni
Commission Counsel

03-0240.oc

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Interim Decision and Order No. 20410 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

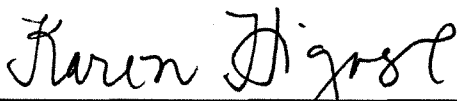
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

OWEN H. MATSUNAGA, ESQ.
GERSON & HIENEMAN
American Savings Bank Tower, Suite 780
1001 Bishop Street
Honolulu, HI 96813

NIK THOMAS, PRESIDENT
DIRECT TELEPHONE COMPANY, INC.
6300 Richmond, suite 301
Houston, TX 77057

DEREK J. SAKAGUCHI, BANKRUPTCY TRUSTEE
SUMMIT COMMUNICATIONS, INC.
1132 Bishop Street, Suite 1800
Honolulu, HI 96813

CUYLER E. SHAW, ESQ.
ASHFORD & WRISTON LLP
1099 Alakea Street, 14th Floor
Honolulu, HI 96813



Karen Higashi

DATED: August 29, 2003