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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----- In the Matter of -----)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to)
Implement the Federal)
Communications Commission's)
("FCC") *Triennial Review Order*,)
FCC No. 03-36.)
_____)

DOCKET NO. 03-0272

ORDER NO. 20471

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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ORDER

I.

On August 21, 2003, the Federal Communications Commission ("FCC") released its *Triennial Review Order*.¹ Through its *TRO*, the FCC established new rules governing the obligations of incumbent local exchange carriers ("ILECs") to make elements of their network available on an unbundled basis to competitive local exchange carriers ("CLECs") and, among other things, delegated to state commissions the task of undertaking proceedings to determine the unbundling obligations of ILECs concerning certain network elements in specific

¹In *Re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*; CC Docket Nos. 01-338, 96-98, and 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking; FCC No. 03-36; Adopted February 20, 2003; Released August 21, 2003 ("*Triennial Review Order*" or "*TRO*").

geographic markets, pursuant to section 251(d)(2) of the Telecommunications Act of 1996 (the "Act").²

The FCC instructed state commissions to conduct and complete "granular" proceedings within the framework of the *TRO*. First, state commissions are given ninety (90) days from the effective date of the order³ to rebut the FCC's "national finding" of no impairment for switching for large business customers (also known as enterprise customers), served by high-capacity loops, such as DS-1s ("90-day Review").⁴ Second, state commissions are given nine (9) months from the effective date of the order to determine whether or not economic and operational impairment exists in particular geographic markets for mass-market customers (referring to residential and very small business customers) under the new FCC test for "impairment" ("9-month Review").⁵

This proceeding is being initiated to implement the FCC's *Triennial Review Order* in the State of Hawaii (the "State"). We initiate our investigation in this docket,

²The Act, Public Law No. 104-104, amended the Communications Act of 1934, Title 47 of the United States Code ("U.S.C."). Section references in this docket are, thus, to those in 47 U.S.C., as amended by the Act.

³The *Triennial Review Order* was published in the Federal Register on September 2, 2003. Applying the normal reply comment period, thirty (30) days from publication, the effective date of the order is October 2, 2003.

⁴With an effective date of October 2, 2003, the 90-day timeframe expires on or about Tuesday, December 30, 2003.

⁵With an effective date of October 2, 2003, the 9-month timeframe expires on Friday, July 2, 2004.

sua sponte, in accordance with the federal requirements of the TRO and the Act, and pursuant to our general investigative powers set forth in Hawaii Revised Statutes ("HRS") § 269-7 and Hawaii Administrative Rules ("HAR") § 6-61-71.

II.

To fulfill the purposes of docket, the commission acknowledges that it must solicit the participation of the State's sole ILEC, VERIZON HAWAII INC. ("Verizon Hawaii"); the various CLECs that operate in the State; the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate")⁶; and other interested stakeholders. We note that many of the above-mentioned entities and organizations are parties to the commission's on-going proceeding in Docket No. 7702. Accordingly, and due to the short timeframes set forth in the TRO for the commission to complete its reviews, we find it reasonable at this time to make the parties of Docket No. 7702, parties to the proceedings in this docket.⁷

⁶Pursuant to HAR § 6-61-62, the Consumer Advocate is an ex officio party to every proceeding before the commission.

⁷Docket No. 7702 is a commission initiated proceeding investigating the communications infrastructure of the State. Through Docket No. 7702, the commission addressed, resolved, and facilitated the implementation of many issues and concerns involving the telecommunications industry including, but not limited to, the development and adoption of Title 6, Chapter 80, HAR, the commission's rules on *Competition in Telecommunications Services*; compliance with the Act and Act 225, Session Laws of Hawaii 1995; and the establishment of rates for unbundled network elements ("UNEs"). In light of the extensive work and reviews accomplished in Docket No. 7702, we believe that the parties of Docket No. 7702 will be able to assist and contribute in the development of a sound record in this docket.

The record of Docket No. 7702 indicates that the current parties to the docket are:

- (a) The Consumer Advocate;
- (b) AT&T COMMUNICATIONS OF HAWAII, INC. ("AT&T");
- (c) PACIFIC LIGHTNET, INC. ("PLNI");
- (d) SPRINT COMMUNICATIONS COMPANY, L.P. ("Sprint");
- (e) TIME WARNER TELECOM OF HAWAII, L.P., dba OCEANIC COMMUNICATIONS ("Oceanic");
- (f) UNITED STATES DEPARTMENT OF DEFENSE AND ALL OTHER FEDERAL EXECUTIVE AGENCIES ("DOD"); and
- (g) Verizon Hawaii.

The commission will expect all parties to this proceeding to fully participate in the development of the procedures and issues necessary to conduct the reviews under the federal guidelines of the TRO and consistent with all State laws and commission rules and regulations. If determined necessary, the parties to this proceeding will also be expected to actively participate in all elements of contested case proceedings in this docket. The commission is aware that similar proceedings are being conducted in other states and territories under the regulatory jurisdiction of the FCC, and we recognize that some members of the newly named parties to this proceeding, i.e., the current Docket No. 7702 parties (referred to in this order as the "Initial TRO Parties") may not have the necessary time and resources to fully participate as a party in this docket. Accordingly, within twenty (20) days of the date of this order, the Initial TRO Parties must either: (1) file a letter notifying

the commission of its duly authorized representative(s) for the proceedings in **this** docket in accordance with HAR § 6-61-12, or (2) submit a written request for commission approval to withdraw from the proceedings in this docket.

Additionally, any interested individual, entity, or community or business organization is invited to file a motion to intervene or participate without intervention in this docket in compliance with our rules set forth in HAR Chapter 6-61, Subchapter 4. We do this to encourage public input and to ensure, as much as possible, a comprehensive examination of issues involved in the implementation of the TRO.⁸

III.

The commission will, on its own initiative, conduct the reviews in this docket, in light of the *Triennial Review Order*, concurrently in two distinct and separate parts in accordance with HAR § 6-61-39. Part I of this proceeding will delve into the issues and concerns surrounding the 90-day Review, while the commission's 9-month Review will be conducted in Part II of this proceeding.

⁸We will make every effort to notify all interested individuals of the initiation of this docket. To this end, we expect to, among other things, place this order on our Internet website, at <http://www.state.hi.us/budget/puc/puc.htm>, and mail this order to every telecommunications provider who is duly authorized to operate in our State.

A.

Part I: 90-day Review

With regards to Part I of this proceeding, the FCC made "a national finding that competitors are not impaired without unbundled access to incumbent LEC local circuit switching when serving DS[-]1 enterprise customers."⁹ The FCC clarified that such a finding means "denial of access to unbundled switching would not impair a competitor's ability to serve the enterprise markets, including all customers which are served by the competitor over loops of DS[-]1 capacity and above."¹⁰ (Referred to in this order as the "No Impairment Finding".) The FCC gives states ninety (90) days to rebut its No Impairment Finding "in individual markets based on specific operational evidence regarding loop, collocation, and transport provisioning and specific economic evidence including the actual deployment of competitive switches and competitors' costs in serving enterprise customers."¹¹

In light of the guidelines set forth in the *TRO* and due to the short period of time given for the commission to rebut the FCC's No Impairment Finding, we believe that it is reasonable to go forward with the 90-day Review of the FCC's No Impairment Finding upon a filing of a motion for the commission to proceed ("Motion to Proceed") by a CLEC within twenty (20) days of the

⁹See, *TRO* at ¶ 421.

¹⁰See, *TRO* at ¶ 453.

¹¹See, *TRO* at ¶ 421.

date of this order. Along with its Motion to Proceed, the CLEC must also file sufficient evidence to support its position that the FCC's No Impairment Finding should be rebutted. To proceed without such a motion would result in a waste of the commission's resources and impede the commission's ability to timely address this matter. Additionally, the CLEC filing the motion: (1) must also timely file and qualify for party status under HAR § 6-61-55, if not already named as a party; (2) must be prepared to set forth or facilitate the production of all the evidence necessary to rebut the FCC's No Impairment Finding; and (3) shall bear the burden of proof with regards to this matter. If no such motion is filed within the required time, the commission will consider the 90-day review as unsustainable, and Part I of this proceeding may be concluded. However, if a Motion to Proceed is filed, the commission will allow the Initial TRO Parties and those who timely filed for intervention in this proceeding five (5) days to provide comments on the Motion to Proceed.

B.

Part II: 9-month Review

With regards to Part II of this proceeding, the commission will move forward with its analysis under the assumption that a 9-month Review is sustainable. The FCC made a finding that CLECs are impaired without access to unbundled local

switching for mass-market customers on a national basis.¹² Finding that economic and operational barriers for the cut over process result in the impairment, the FCC specifically ordered state commissions, within nine (9) months of the effective date of the *TRO*, to "approve and implement a batch cut process that will render the hot cut process more efficient and reduce per-line hot cut costs."¹³ In the alternative, the FCC requires state commissions to issue detailed findings that support the conclusion that the ILEC's current hot cut process, in a particular geographic market, does not impair competitors and that a batch cut process is therefore not necessary.¹⁴ The commission will address its hot cut/batch cut obligations for local switching and all other issues including those related to high capacity loops and dedicated transport under the FCC's 9-month deadline for mass-market customers in Part II of this proceeding.

After the requisite intervention period and the issuance of a commission order determining the parties and/or participants to this docket, the commission will require the parties to meet informally to develop a stipulated protective order, if necessary, and stipulated procedural/prehearing order to govern the matters of Part II of this proceeding for the

¹²See, *TRO* at ¶ 459.

¹³See, *TRO* at ¶¶ 459 and 460.

¹⁴See, *TRO* at ¶ 460.

commission's review and consideration.¹⁵ If the parties are not able to stipulate, each party will be required to file proposed orders for the commission's consideration. More specific directions and guidelines on these matters are forthcoming; however, we will strive towards dispensing with all procedural matters of Part II of this docket by the end of November 2003.

IV.

THE COMMISSION ORDERS:

1. A proceeding is initiated to implement the FCC's *Triennial Review Order*.

2. The current Docket No. 7702 parties--the Consumer Advocate, AT&T, PLNI, Sprint, Oceanic, DOD, and Verizon Hawaii--shall be made parties to this proceeding, as the Initial TRO Parties. Within twenty (20) days of the date of this order, the Initial TRO Parties shall either: (1) file a letter notifying the commission of its duly authorized representative(s) for the proceedings in **this** docket in accordance with HAR § 6-61-12, or (2) submit a written request for commission approval to withdraw from the proceedings in this docket.

3. Any individual, entity, or organization desiring to intervene as a party or to participate without intervention in

¹⁵The stipulated protective order will also apply to Part I of proceeding in this docket; however, we will require the parties to file a separate stipulated procedural/prehearing order for Part I of this proceeding, if it is deemed sustainable.

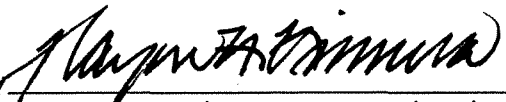
this proceeding shall file a motion to intervene or participate without intervention not later than twenty (20) days of the filing of this order. Motions to intervene or participate without intervention must comply with all applicable rules of HAR Chapter 6-61, *Rules of Practice and Procedures Before the Public Utilities Commission*.


4. Any CLEC who wishes to rebut the FCC's no impairment finding for switching for large business customers that are served by large capacity loops, such as DS-1s, in a 90-day proceeding before the commission shall file a Motion to Proceed within twenty (20) days of the date of this order. Along with its Motion to Proceed, the CLEC must also file sufficient evidence in support of its position that the FCC's No Impairment Finding should be rebutted, and the CLEC will be held to the requirements set forth on this matter in Section III.A. of this order. Comments on the Motion to Proceed, if applicable, will be received through the parameters also set forth in Section III.A. of this order.

DONE at Honolulu, Hawaii this 29th day of September,
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:


Ji Sook Kim
Commission Counsel

FCC TRO:eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 20471 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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DATED: September 29, 2003