

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
ACCERIS COMMUNICATIONS CORP.)
For Grant of the Authority)
Nunc Pro Tunc to Participate in)
Debt Financing Arrangements.)
_____)

DOCKET NO. 04-0347

DECISION AND ORDER NO. 21648

Filed Feb. 15, 2005
At 8 o'clock A.M.

Karen Higashi.
Chief Clerk of the Commission

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Commission, State of Hawaii.

K. Higashi.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	
ACCERIS COMMUNICATIONS CORP.)	Docket No. 04-0347
For Grant of the Authority)	Decision and Order No. 21648
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Debt Financing Arrangements.)	
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DECISION AND ORDER

By this decision and order, the commission conditionally waives the applicable requirements of Hawaii Revised Statutes ("HRS") §§ 269-7(a), 269-17 and 269-19 and Hawaii Administrative Rules ("HAR") §§ 6-61-101 and 6-61-105, as further described herein, but denies the request of ACCERIS COMMUNICATIONS CORP. ("Acceris") for approval of the Consummated Financial Transactions (described herein), *nunc pro tunc*.¹.

I.

Introduction

Acceris requests commission approval, *nunc pro tunc*, to participate in certain financial transactions consummated in support of its ultimate corporate parent ("Consummated Financial

¹"Now for then. A phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, i.e., with the same effect as if regularly done." Black's Law Dictionary 1069 (6th ed. 1990).

Transactions"), Acceris Communications, Inc., a Florida corporation ("Parent"), pursuant to HRS § 269-17.²

Acceris served copies of the Petition on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"). The Consumer Advocate stated, in its Statement of Position, filed on January 14, 2005, ("Statement of Position"), as amended on January 19, 2005, that it does not object to the Consummated Financial Transactions.

II.

Background

A.

Description of Subject Entities

Acceris is a Delaware corporation that is presently authorized to provide resold intrastate telecommunications services in the State of Hawaii.³ Acceris is a wholly-owned subsidiary of CPT-1 Holdings, Inc. ("CPT-1 Holdings"), also a Delaware corporation. CPT-1 Holdings is a wholly-owned subsidiary of WebToTel, Inc. ("WebToTel"), a Delaware corporation, and WebToTel is, in turn, a wholly-owned subsidiary of Parent.

²Acceris's Petition, filed on November 30, 2004.

³Decision and Order No. 18089, filed on September 28, 2000, in Docket No. 00-0208. Acceris was formerly known as WorldxChange Corp ("WorldxChange"), and WorldxChange was formerly known as PT-1 Counsel, Inc. See Decision and Order No. 20231, filed on June 13, 2003, in Docket No. 03-0089.

B.

Consummated Financial Transactions

The Consummated Financial Transactions involve Parent's entering into certain financial agreements resulting in the issuance of a \$5 million subordinated secured convertible term note for a three (3) year term ("Note"). Although Acceris is not a direct borrower under the Note, it has agreed to guarantee Parent's obligations under the Note and also granted a security interest in its assets to secure such obligations.

Acceris represents that the above-described transactions were consummated on October 18, 2004 and such transactions (1) "will not have any impact on the managerial and technical qualifications of Acceris or on the rates, terms or conditions under which Acceris provides service"; (2) involve only "contingent and non-primary obligations which have no immediate impact [on Acceris] and would be triggered, if at all, only in the event of a Parent default"; and (3) are not expected to "adversely effect the financial position of [Acceris] in any material respect or have a negative impact on Acceris' operations in Hawaii."⁴ Acceris also asserts that the Consummated Financial Transactions is in the public interest as they will provide "Parent and the Acceris companies, including Acceris, with access to greater financial resources" and, as a result, such transactions "will be entirely transparent to customers" and are

⁴Petition at 4.

"expected to promote competition in the Hawaii telecommunications market."⁵

C.

Consumer Advocate's Statement of Position

The Consumer Advocate states in its Statement of Position that it does not object to Acceris' request for commission approval of the Consummated Financial Transactions, described above. In particular, the Consumer Advocate states that although it believes that HRS § 269-17 is inapplicable for this matter, it recommends that the commission waive the approval requirements of HRS § 269-7(a) and 269-19 and the filing requirements under HAR Chapter 6-61, to the extent applicable, pursuant to HRS § 269-16.9 and HAR § 6-80-135.

In support of its recommendation, the Consumer Advocate further mentions that it recognizes: (1) "Acceris is a reseller of certain intrastate telecommunications services, which the [c]ommission has deemed fully-competitive"; (2) "Acceris is a non-dominant telecommunications carrier in Hawaii"; and (3) "Since there are many telecommunications providers authorized to provide resold long distance service in the Hawaii market, it is assumed that competition will then serve the same purpose as public interest regulation for the [Consummated Financial Transactions] affecting Acceris."⁶

⁵Id at 4-5

⁶Id. at 3-4

III.

Discussion

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 the proposed financial transactions of the parent entity of a regulated public utility under HRS § 269-7(a). Under this section, the commission will approve the proposed financial transaction if it is reasonable and consistent with the public interest.⁷

HRS § 269-17 requires a public utility to obtain the commission's approval before issuing stocks and stock certificates, bonds, notes, and other evidences of indebtedness payable at periods of more than twelve (12) months. This section permits the proceeds of such debt to be used only for the acquisition of property or for the construction, completion, extension, or improvement of or addition to the utility's facilities or service, or for the discharge or refunding of its obligations or reimbursement of funds expending for the foregoing described purposes. Furthermore, "[a]ll stock and every stock certificate, and every bond, note, or other evidence of indebtedness of a public utility corporation not payable within

⁷See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

twelve [(12)] months, issued without an order of the commission authorizing the same, then effect, shall be void." HRS § 269-17.

HRS § 269-19 requires a public utility corporation to obtain our consent prior to, among other things, mortgaging, encumbering, or otherwise disposing of its property. Similar to HRS § 269-17, HRS § 269-19 also states: "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." HRS § 269-19.

Upon a review of the record,⁸ we find and conclude that the Consummated Financial Transactions fall under the purview of HRS §§ 269-7(a), 269-17 and 269-19.⁹ However, because Acceris further acknowledges that the above-described transactions have already been consummated, the commission concludes that it does not have the statutory authority under HRS Chapter 269 to grant retroactive approvals, as requested by Acceris. See, *In re*

⁸We also take official notice of all commission records relating to Acceris and its predecessors, pursuant to HAR § 6-61-48

⁹We disagree with the Consumer Advocate that HRS § 269-17 is inapplicable in this matter. Although we acknowledge that the Parent issued the Note as part of the Consummated Financial Transactions, we view Acceris' participation in these transactions by providing a guarantee and granting a security interest in its assets as the issuance of "other evidence of indebtedness" under HRS § 269-17. See *In re Z-Tel Communications, Inc.*, Docket No. 04-0200, Decision and Order No. 21472 (November 24, 2004).

Globalcom, Inc., dba GCI Globalcom, Inc., Docket No. 04-0265, Decision and Order No. 21362 (September 24, 2004); and *In re Sea Link of Hawaii, Inc.*, Docket No. 02-0212, Decision and Order No. 21085 (June 25, 2004). Accordingly, the commission concludes that Acceris' request for approval, *nunc pro tunc*, of the Consummated Financial Transactions should be denied.

In the alternative, however, 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 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, we find, at this time, the telecommunications services currently provided by Acceris are fully competitive, and Acceris is a non-dominant carrier in Hawaii. We also find that the Consummated Financial Transactions are 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 applicable requirements of HRS §§ 269-7(a), 269-17 and 269-19 should be waived with regards to the matters in this docket, pursuant to

HRS § 269-16.9 and HAR § 6-80-135.¹⁰ Similarly, based on these findings and conclusions stated above, we will also waive the provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that Acceris' Petition fails to meet any of these filing requirements.

Finally, our review of the record indicates that Acceris is delinquent as follows: (1) The filing of its December 2004 public utility fee, pursuant to HRS § 269-30; and (2) The filing of its annual telecommunications relay service contribution for the period July 1, 2004 to June 30, 2005, established pursuant to: (a) Act 50, Session Laws of Hawaii 2003; and (2) Order No. 21049, filed on June 10, 2004, in Docket No. 04-0070. Accordingly, we conclude that our waiver in this decision and order should be subject to the condition that Acceris timely satisfies the two (2) delinquencies noted above within thirty (30) days of the date of this decision and order.

¹⁰See also, Decision and Order No. 18454, filed on March 28, 2001, in Docket No. 00-0443. The 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), 269-17 and 269-19 should be waived. The commission's determination, in the instant case, of the applicability of HRS §§ 269-7(a), 269-17 and 269-19 is based on our review of Acceris' instant petition only. Thus, our waiver in this instance of the applicability of HRS §§ 269-7(a), 269-17 and 269-19 should not be construed by any public utility, including Acceris, as a basis for not filing an application or petition regarding similar transactions that fall within the purview of these statutes.

IV.

Orders

THE COMMISSION ORDERS:

1. Acceris' request for approval of the Consummated Financial Transactions, *nunc pro tunc* and described in Acceris' Petition, filed on November 30, 2004, is denied.

2. The requirements of HRS §§ 269-7(a), 269-17 and 269-19, to the extent applicable, are waived with respect to the Consummated Financial Transactions, described in Acceris' Petition, filed on November 30, 2004.

3. HAR §§ 6-61-101 and 6-61-105 filing requirements, to the extent applicable, are waived.

4. The waiver, noted above and granted in this decision and order, is subject to the condition that Acceris timely satisfies the two (2) delinquencies noted in Section III. above within thirty (30) days of the date of this decision and order.


5. Acceris shall conform to all of the commission's orders set forth above. Failure to adhere to the commission's orders shall constitute cause to void this decision and order, and may result in further regulatory actions, as authorized by law.

DONE at Honolulu, Hawaii FEB 15 2005.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Kris N. Nakagawa
Commission Counsel

04-0347.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21648 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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DIVISION OF CONSUMER ADVOCACY
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Karen Higashi

DATED: FEB 15 2005