

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

SBC COMMUNICATIONS INC. AND)
AT&T CORP.)

DOCKET NO. 05-0050

For an Exemption and/or Waiver or,)
In the Alternative, Approval of a)
Merger Transaction.)
_____)

DECISION AND ORDER NO. 21801

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

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Commission, State of Hawaii.

K. Higashi

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DECISION AND ORDER

By this Decision and Order, the commission: (1) denies the request of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") (collectively, "Applicants") for an exemption and/or waiver of Hawaii Revised Statutes ("HRS") § 269-19 or any other applicable provisions of HRS chapter 269 regarding the proposed merger of SBC and AT&T in accordance with the Agreement and Plan of Merger entered into by Applicants on January 30, 2005 (the "Merger Agreement") ("Proposed Merger"); and (2) approves Applicants' alternative request for approval of the Proposed Merger, pursuant to HRS § 269-7(a).

I. Procedural History

Applicants filed their Application on February 28, 2005 ("Application"), requesting an exemption and/or a waiver from the provisions of HRS § 269-19 or any other applicable provisions under HRS chapter 269 to the extent that the commission determines that the provisions apply to their Proposed Merger,

pursuant to HRS § 269-16.9 and Hawaii Administrative Rules ("HAR") § 6-80-135 ("Exemption/Waiver Request"). In the alternative, if the commission determines that HRS § 269-19 or any other provisions of HRS chapter 269 do apply and that an exemption and/or waiver is inappropriate, Applicants request commission approval of the Proposed Merger.

The Application was served on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"). By Statement of Position filed on March 22, 2005, the Consumer Advocate informs the commission that it does not object to the waiver of the requirements of HRS § 269-7(a) for the Proposed Merger, nor does it object to the approval of the Proposed Merger, if the commission declines to waive the requirements of HRS § 269-7(a) ("Statement of Position").¹

II. Background

A. Description of Applicants

SBC is a Delaware corporation headquartered in San Antonio, Texas. It provides voice, data, and Internet services for residential, business, and government customers primarily in a thirteen (13)-state region through a purported 52.4 million access lines and 5.1 million digital subscriber lines in service. Additionally, SBC holds a sixty per cent (60%) economic and fifty per cent (50%) voting interest in Cingular Wireless, which serves 49.1 million wireless

¹No "person" moved to intervene in this proceeding.

customers and offers coverage in one-hundred-seventy (170) countries worldwide through alliances with GSM-based providers.² SBC Long Distance, Inc., formerly known as, Southwestern Bell Communications Services, Inc., ("SBC LD"); a Delaware corporation headquartered in Pleasanton, California; is SBC's sole subsidiary with authority to operate in the State of Hawaii ("State"). SBC LD is authorized to provide intrastate telecommunications services in the State as a reseller and on a facilities-based basis.³ Applicants note that SBC LD is not involved in the Proposed Merger.

AT&T is a New York holding corporation headquartered in Bedminster, New Jersey. It provides voice and data communications services to residential, business, and government customers throughout the United States and worldwide. AT&T's network: (1) is supported by AT&T Laboratories, a world-leading source of research and development; and (2) is capable of supporting IP as well as other data and voice traffic. AT&T Communications of Hawaii, Inc. ("AT&T Hawaii"), is a wholly-owned subsidiary of AT&T. AT&T Hawaii is an authorized provider

²Applicants represent that SBC will be making a \$4 billion investment in the next three (3) years to bring Internet Protocol-based ("IP-based") services to millions of households. See, Application at 3.

³See, Decision and Order No. 20894, filed on April 8, 2004, in Docket No. 03-0416. Initially, however, SBC LD was only authorized to provide intrastate telecommunications services on a resold basis, pursuant to Decision and Order No. 15728, filed on July 28, 1997, in Docket No. 97-0212.

of intrastate telecommunications services in the State on a facilities-based and resold basis.⁴

B. Proposed Merger Transaction

Applicants entered into the Merger Agreement on January 30, 2005, in which SBC acquires AT&T through a merger of AT&T into a wholly-owned first-tier subsidiary of SBC, Tau Merger Sub Corporation ("Tau"). Tau is a newly formed corporation for the purpose of effectuating the Proposed Merger. AT&T will be the surviving entity upon merging with Tau, and the merged entity will retain the AT&T name.

Shareholders of AT&T will receive 0.77942 shares of SBC stock for each share of AT&T stock and a one (1)-time cash dividend from AT&T of \$1.30 per AT&T owned stock in connection with the Proposed Merger. SBC shareholders will continue to own SBC stock and will be unaffected by the transaction. Upon completion of the proposed transaction, former AT&T shareholders will hold approximately sixteen per cent (16%) of SBC's outstanding shares, and AT&T will become a wholly-owned subsidiary of SBC.

Applicants represent that the Proposed Merger shall be transparent and seamless for AT&T Hawaii customers. Applicants further represent that the Proposed Merger will not result in a change in the ownership of AT&T Hawaii, or the

⁴See, Decision and Order No. 14872, filed on August 9, 1996 in Docket No. 96-0251. Initially, however, AT&T Hawaii only obtained commission authority to provide intrastate "add-ons" to its interstate services under Decision and Order No. 13128, filed on February 11, 1994, in Docket No. 7719.

commission's authority over the public utility since the merger will occur at the parent level. They specifically state that the Proposed Merger does not involve a transfer of AT&T Hawaii's assets or authorities and that AT&T Hawaii will remain a wholly-owned subsidiary of AT&T.

III. Parties' Positions

A. Applicants' Requests and Representations

Applicants contend that the requirements of HRS § 269-19 obligating a public utility to obtain commission approval prior to merging are not triggered by the Proposed Merger. This argument is based on the fact that the Proposed Merger will occur at the parent level and that AT&T Hawaii will be unaffected by the transaction since no change in the ownership structure of AT&T Hawaii will occur. Nevertheless, if the commission determines that HRS § 269-19 or any provision of HRS chapter 269 is applicable, Applicants contend that the interest of the public will be served if the commission grants them an exemption under HRS § 26-16.9(a) or waiver under HRS § 269-16.9(e) from the commission's approval requirements, or in the alternative, approves the Proposed Merger.

Applicants contend that the Proposed Merger: (1) will allow them to provide services at just and reasonable rates; (2) increase the competitive markets in the State; and (3) will not affect the commission's authority to regulate AT&T Hawaii-- which, Applicants argue, are reasons why the commission should

exempt or waive the Proposed Merger from our approval requirements. Applicants also contend that the Proposed Merger will improve AT&T Hawaii's and SBC LD's ability to provide a large array of existing and emerging telecommunications and information services in the State "by bringing together two [(2)] industry leaders with complementary strengths and by capitalizing on the synergies related to the companies' shared values of customer services, innovation, and reliability."⁵

In addition, Applicants claim that the Proposed Merger will benefit the public. Among other things, Applicants maintain that the Proposed Merger will result in an entity that is "stronger, more effective, more responsive, and more innovative, and thus better able to meet the needs and demands of its customers[.]"⁶ They also contend that the public will benefit through the creation of a "vigorous" American carrier with global reach and with a network that will provide higher quality services through transport that is more efficient and reliable. Additionally, Applicants stress that the Proposed Merger will bring about synergies, such as "(a) more rapid and broader deployment of IP-based services; (b) a broader, more efficient deployment of new, innovative services on Multiprotocol Label Switching ("MPLS") networks; (c) the enhancement of the combined organization's ability to serve business customers that demand facilities-based, end-to-end services; (d) the closing of product line gaps; (e) the integration of wireless functionalities into

⁵See, Application at 7.

⁶See, Application at 8.

large business customer product offerings; and (f) the creation of substantial additional" fixed and variable cost savings.⁷ They also state that the enhanced financial position resulting from the Proposed Merger will allowed the combined-entity to accelerate capital expenditures to provide new and innovative services such as: "(a) IP-based video services, (b) speech and text technologies for visually, hearing, and speech-impaired customers, (c) fraud reduction and security services, (d) e-commerce capabilities, and (e) service provisioning and repair systems."⁸ They contend that the introduction and provision of these services will benefit Hawaii customers and that the Proposed Merger will result in an estimated net present value of operating and capital expense synergies (i.e., reduced costs, increased productivity, and increased revenues) of approximately \$15 billion which will also benefit its subsidiaries.

Furthermore, Applicants state that the consummation of the Proposed Merger will strengthen competition in the State's telecommunication business sector since the merged resulting entity will be better positioned than either stand-alone SBC and AT&T companies to compete with various telecommunications providers currently operating in the State (i.e., the incumbent local exchange carrier, Verizon Hawaii Inc. ("Verizon Hawaii") and the competitors, such as Pacific LightNet, Inc. ("PLNI") and Time Warner Communications of Hawaii, Inc. ("TWCH")).

⁷See, Application at 9.

⁸See, Application at 12.

Applicants also state that the Proposed Merger will not adversely affect competition and customers in Hawaii's mass-market sector since "well before" the proposed transaction AT&T Hawaii discontinued actively marketing local and long distance services to Hawaii's residential and small business customers and has dismantled the necessary infrastructure to provide these services in Hawaii.

Moreover, Applicants represent that the Proposed Merger will not adversely affect the availability and quality of services currently provided by AT&T Hawaii or SBC LD and that the Proposed Merger will be transparent to Hawaii customers since it will not affect the rates, terms, and conditions of services the entities currently provide. Applicants also assert that upon consummation of the Proposed Merger, the commission will continue to retain full authority over the "rates, services, and responsibilities" of AT&T Hawaii and SBC LD "in accordance with applicable law to the same extent that it does today."⁹

B. Consumer Advocate's Position

In its Statement of Position, the Consumer Advocate states that it will not oppose a waiver of the investigative and approval requirements of HRS § 269-7(a) for the Proposed Merger advanced in the Application.¹⁰ This position is based on the

⁹See, Application at 15.

¹⁰The Consumer Advocate reasoned that Applicants' request for a waiver or exemption of the requirements of HRS § 269-19 is moot based on its determination that HRS § 269-19 does not directly apply to Applicants since SBC and AT&T are holding companies, and are not authorized to provide telecommunications services in the

Consumer Advocate's: (1) determination of the existence of various competitive providers of a wide range of facilities-based and resold telecommunication services in the State (i.e., Verizon Hawaii, PLNI, and TWCH); (2) conclusion that SBC LD "and AT&T Hawaii are non-dominant carriers for the services they provide in Hawaii"; (3) finding that the Proposed Merger "should result in a stronger entity both financially and operationally"; and (4) finding that the "current competitive environment may be improved to some extent and will continue to serve the same purpose as public interest regulation."¹¹

On the other hand, if the commission does not waive the requirements of § 269-7(a) and determines that commission approval of the Proposed Merger is necessary, the Consumer Advocate states that it will not oppose the requested approval. The Consumer Advocate bases this position on its finding that Applicants "are fit, willing, and able to enter into the [Proposed M]erger and will be a solid, viable holding parent company for the wholly-owned subsidiaries in Hawaii."¹² Moreover, the Consumer Advocate finds that the Proposed Merger is reasonable and will serve the public interest since it will place Applicants in a stronger position to "enhance the competitive telecommunications market place in Hawaii and to provide Hawaii

State under the commission's jurisdiction. Accordingly, the Consumer Advocate addressed Applicants' request under the approval requirements of HRS § 269-7(a). See, Statement of Position at 3.

¹¹See, Statement of Position at 4-5.

¹²See, Statement of Position at 7.

customers with a better selection of telecommunications service choices."¹³

IV. Discussion

A. Exemption/Waiver Request

On the outset, we agree with Applicants' and the Consumer Advocate's assessment that HRS § 269-19 requiring public utilities to obtain commission approval prior to merging, among other things, is not applicable in this instance since Applicants are holding companies and do not hold certificates of authorities to operate in the State.¹⁴ Nonetheless, Applicants' wholly-owned subsidiaries, SBC LD and AT&T Hawaii, do provide services in the State and are under the commission's regulatory purview. The commission has traditionally reviewed transactions involving holding companies of State certificated entities under the requirements of HRS § 269-7(a).¹⁵

HRS § 269-7(a) provides the commission with the power to examine the condition of a public utility, the manner in which it is operated with reference to the safety or accommodation of the public, ". . . and all matters of every nature affecting the relations and transactions between it and the public or persons

¹³Ibid.

¹⁴See, Application at 5 and Statement of Position at 3.

¹⁵See, Decision and Order No. 16831, filed on February 16, 1999, in Docket No. 98-0374 (*In re Network Plus, Inc.*) and Decision and Order No. 21715, filed on April 4, 2005, in Docket No. 05-0045 (*In re Sprint Communications Company, L.P., Sprint Payphone Services, Inc., and ASE Telecom, Inc. ("Sprint/Nextel")*).

or corporations." Accordingly, the commission has the authority to examine any and all transactions of the public utility that affect or may affect the public that it serves.

Under HRS § 269-16.9(a) the commission, "upon its own motion or upon the application of any person, and upon notice and hearing, may exempt a telecommunications provider or a telecommunications service from any or all of the provisions of this chapter, except the provisions of section 269-34, upon a determination that the exemption is in the public interest." Emphasis added. While under HRS § 269-16.9(e), "[t]he commission may waive other regulatory requirements under this chapter applicable to telecommunications providers when it determines that competition will serve the same purpose as public interest regulation." Emphasis added. Similarly, HAR § 6-80-135 allows the commission to grant an exemption from or waive the applicability of any of the provisions of HRS chapter 269 or any rule (except provisions related to HRS § 269-34), upon a determination that an exemption or waiver is in the public interest.

Upon review, we find that AT&T Hawaii, AT&T's wholly-owned subsidiary, played an integral role in the development and advancement of Hawaii's telecommunications industry. For instance, AT&T Hawaii has been and continues to be a party in Docket No. 7702, the commission's on-going generic proceeding investigating the State's communications infrastructure. Through its involvement in Docket No. 7702, AT&T Hawaii was also involved in the development and the eventual ratification of HAR

chapter 6-80, the State's administrative rules governing competition in telecommunications services. Additionally, AT&T Hawaii continues to provide the U.S. Department of Defense with telecommunications services in the State under its Hawaii Information Transfer System contract.¹⁶

In support of their Exemption/Waiver Request, Applicants refer to the commission's decision in *In re Bell South BSE, Inc.*, Decision and Order No. 21085, filed on June 25, 2004, in Docket No. 04-0076 ("*Bell South*"), wherein we waived the approval requirements of HRS § 269-19, among other things.¹⁷ Unlike Applicants, however, the regulated carriers in *Bell South* are not (and have never been) a party to Docket No. 7702 and did not participate in the development and eventual ratification of HAR chapter 6-80.

Based on the above, the commission does not find, in this instance, that competition will serve the same purpose as public interest regulation; nor do we find that an exemption or waiver of the regulatory approval requirements of HRS § 269-7(a),

¹⁶We will disregard Applicants' request for an exemption under HRS § 269-16.9(a) since an exemption under this sub-section requires the commission to hold a hearing on the matter before making its determinations. Our decision is based on the following factors: (1) Applicants did not request that the commission hold a hearing, pursuant to HRS § 269-16.9(a); (2) Applicants request that we "permit the [Proposed M]erger to proceed as expeditiously as possible" (emphasis added; see, Application at 7) is inconsistent with a hearing on HRS § 269-16.9(a) since holding a hearing would impede an expeditious determination of the matters of the Application; and (3) the commission's ultimate determination regarding Applicants' Proposed Merger herein.

¹⁷See, *Bell South* at 4-5, and 7.

in this instance, is in the public interest.¹⁸ Accordingly, we conclude that Applicants' Exemption/Waiver Request should be denied.

B. HRS § 269-7(a) Review

Commission approval under HRS § 269-7(a) requires a finding that the Proposed Merger is "reasonable and consistent with the public interest."¹⁹ A transaction is said to be reasonable and consistent with the public interest if the transaction "will not adversely affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in the State, as authorized by the commission."²⁰

Upon review, it appears that the Proposed Merger will not have a negative affect on the telecommunications services provided to customers in Hawaii through Applicants' subsidiaries, AT&T Hawaii and SBC LD. We also concur with the Consumer Advocate's finding that Applicants are "fit, willing,

¹⁸Our determination with regards to this matter is consistent with the commission's decision in *Sprint/Nextel*. See, *Sprint/Nextel* at 11.

¹⁹See, *Sprint/Nextel* at 11 citing, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345 (*In re ITC^DeltaCom Communications, Inc. et al.*); Decision and Order No. 18220, filed on November 30, 2000, in Docket No. 00-0354 (*In re Time Warner Telecom of Hawaii, L.P., dba Oceanic Communications et al.*); and Decision and Order No. 17662, filed on April 10, 2000, in Docket No. 00-0047 (*In re Time Warner Telecom of Hawaii, L.P., dba Oceanic Communications et al.*).

²⁰See, *Sprint/Nextel* at 11-12 citing Decision and Order No. 17369, filed on November 8, 1999, in Docket No. 99-0223 (*In re Ionex Telecommunications, Inc., et al.*).

and able to enter into the" Proposed Merger.²¹ Additionally, Applicants' representation that the Proposed Merger will result in a more operationally and financially stronger company appears reasonable. A stronger parent company will be in a better position to financially support its subsidiaries and should result in an accelerated introduction of advanced telecommunications services to its customers throughout the various sectors of the telecommunications market. Among other things, customers should benefit through the introduction of new and advanced services and through the availability of various telecommunications options in the market. For these reasons, we find the Proposed Merger to be reasonable and in the public interest.²²

Based on the above, we conclude that Applicants' Proposed Merger should be approved, pursuant to HRS § 269-7(a). As a condition of our approval, we will require Applicants to provide notice of the consummation of the Proposed Merger by filing a copy of their Certificate of Merger with the commission and Consumer Advocate, as soon as practicable.

²¹See, Statement of Position at 7.

²²Our findings and determinations, set forth above, are based on Applicants' representations in the record.

V. Orders

1. Applicants' Exemption/Waiver Request is denied.

2. The Proposed Merger, as described in the Application, filed on February 28, 2005, is approved, pursuant to HRS § 269-7(a).

3. As soon as practicable, Applicants shall file a copy of their Certificate of Merger with the commission and the Consumer Advocate to provide notice of the consummation of their Proposed Merger.

4. Applicants shall timely comply with the regulatory requirement set forth in ordering paragraph no. 3, above. Failure to timely comply with the requirement may constitute cause to void this Decision and Order, and may result in further regulatory action, as authorized by State law and commission rules and regulations.

DONE at Honolulu, Hawaii MAY - 3 2005.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By Wayne H. Kimura
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

By Janet E. Kawelo
Janet E. Kawelo, Commissioner

Ji Sook Kim
Ji Sook Kim
Commission Counsel

05-0050.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21801 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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Certificate of Service

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DATED: MAY - 3 2005