

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of )  
PRIMUS TELECOMMUNICATIONS, INC. )  
For Approval of Incurring Debt )  
And Financing Obligations. )  
\_\_\_\_\_ )

DOCKET NO. 05-0022

DECISION AND ORDER NO. 21805

Filed May 6, 2005  
At 8 o'clock A.M.

Karen Higashi  
Chief Clerk of the Commission

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DIV. OF CONSUMER ADVOCACY  
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STATE OF HAWAII

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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 )	
PRIMUS TELECOMMUNICATIONS, INC. )	Docket No. 05-0022
For Approval of Incurring Debt )	Decision and Order No. 21805
And Financing Obligations. )	
_____ )	

DECISION AND ORDER

By this Decision and Order, the commission waives the 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, to the extent applicable, subject to a condition described herein.

I.

Introduction

PRIMUS TELECOMMUNICATIONS, INC. ("Primus") requests commission approval to participate in certain debt and debt-related financing arrangements, described more fully below ("Proposed Financial Transactions"), pursuant to HRS §§ 269-17 and 19.<sup>1</sup>

Primus served copies of the Petition on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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<sup>1</sup>Primus' Petition, filed on January 31, 2005.

("Consumer Advocate"). The Consumer Advocate stated, in its Statement of Position, filed on April 5, 2005 ("Statement of Position"), that it does not object to the Proposed Financial Transactions, subject to one qualification, discussed below.

## II.

### Background

#### A.

##### Description of Subject Entities

Primus is a Delaware corporation that is presently authorized to provide resold intrastate telecommunications services in the State of Hawaii.<sup>2</sup> Primus is a wholly-owned subsidiary of Primus Telecommunications Holding, Inc. ("Parent"), which is, in turn, a wholly-owned subsidiary of Primus Telecommunications Group, Incorporated ("PTGI"), also a Delaware corporation.

#### B.

##### Proposed Financial Transactions

The Proposed Financial Transactions involve Parent's entering into certain financial arrangements resulting in Parent entering into a six-year Term Loan Facility ("Loan") for an aggregate principal amount of up to \$100 million. Parent and its affiliates intend to use the proceeds from the Loan for the potential repurchases of certain currently outstanding debt and

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<sup>2</sup>Decision and Order No. 17664, filed on April 11, 2000, in Docket No. 99-0189.

general corporate purposes, including the accelerated implementation of new product initiatives to increase Primus' competitive offerings. Although Primus would not be a direct borrower under the Loan, it intends to grant a security interest in all of its assets (tangible and intangible), including a pledge of any stock owned by Primus, and to guarantee Parent's obligations under the Loan after obtaining the required regulatory approvals.

Primus represents that the above-described transactions (1) "will not result in any change in control of the Parent or [Primus]"; (2) "will be transparent to consumers and will not cause a change in the officers or directors of [Primus]"; and (3) "will not impair the ability of [Primus] to perform [its services to the public], and will promote a lawful objective within the corporate purposes of [Primus]."<sup>3</sup> Primus also asserts that the Proposed Financial Transactions will serve the public interest in promoting competition among telecommunications carriers by providing Primus and Parent with the opportunity to strengthen their financial position. As a result, the Proposed Financial Transactions "are expected to continue to yield financial benefits that will ultimately inure to the benefit of [Primus'] customers."<sup>4</sup>

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<sup>3</sup>Petition at 3-4.

<sup>4</sup>*Id.*

C.

Consumer Advocate's Statement of Position

The Consumer Advocate suggests that the Proposed Financial Transactions, described above, does not trigger HRS § 269-17 because "Parent will be the entity entering into the debt obligation" and "Parent is not authorized to provide telecommunications services in the state of Hawaii and is thus not a Hawaii public utility."<sup>5</sup> Thus, in its Statement of Position, the Consumer Advocate recommends that the commission waive the regulatory requirements under HRS §§ 269-7(a) and 269-19 or, in the alternative, approve such transactions under HRS §§ 269-7(a) and 269-19. In support of its recommendation, the Consumer Advocate, among other things, states:

1. Primus is a non-dominant reseller of intrastate telecommunications services;
2. The Proposed Financial Transactions are intended to serve the public interest by allowing Parent greater access to capital, thus strengthening Primus' ability to bring competitive telecommunications services to consumers in Hawaii, and are expected to be entirely transparent to consumers; and
3. Since many telecommunications service providers are authorized to provide resold telecommunications services in the Hawaii market, it is assumed that competition will

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<sup>5</sup>Statement of Position at 2.

serve the same purpose as public interest regulation for the proposed encumbrance affecting Primus, and such encumbrance should not adversely affect customers because they will be able to seek alternative service providers to obtain the same services.<sup>6</sup>

In addition, the Consumer Advocate qualifies its recommendation by stating that because it did not receive a copy of Primus' revised tariff required under Decision and Order No. 17664, the commission should require Primus to immediately file copies of such revised tariff with the commission and the Consumer Advocate.<sup>7</sup>

### 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

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<sup>6</sup>*Id.* at 3-4.

<sup>7</sup>*Id.* at 4-5.

transaction if it is reasonable and consistent with the public interest.<sup>8</sup>

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, pursuant to HRS § 269-17, "[a]ll stock and every stock certificate, and every bond, note, or other evidence of indebtedness of a public utility corporation not payable within twelve [(12)] months, issued without an order of the commission authorizing the same, then effect, shall be void."

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."

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<sup>8</sup>See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

Upon a review of the record<sup>9</sup>, we find and conclude that the Proposed Financial Transactions fall under the purview of HRS §§ 269-7(a), 269-17 and 269-19.<sup>10</sup> Notwithstanding these regulatory requirements, 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 (except provisions of HRS § 269-34 or provisions of HAR chapter 6-80 that implement HRS § 269-34), 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 Primus are fully competitive, and Primus is a non-dominant carrier in Hawaii. We also find that the Proposed Financial Transactions are consistent with the public interest, and that competition, in

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<sup>9</sup>We also take official notice of all commission records relating to Primus and its predecessors, pursuant to HAR § 6-61-48.

<sup>10</sup>We disagree with the Consumer Advocate that HRS § 269-17 is inapplicable in this matter. Although we acknowledge that the Parent issued the Loan as part of the Proposed Financial Transactions, we view Primus' 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. In *re Acceris Communications Corp.*, Docket No. 04-0347, Decision and Order No. 21648 (February 15, 2005); see also, In *re Z-Tel Communications, Inc.*, Docket No. 04-0200, Decision and Order No. 21472 (November 24, 2004).



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.<sup>11</sup> 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 Primus' Petition fails to meet any of these filing requirements.

Finally, our records indicate that Primus filed its revised tariffs on February 18, 2004, and it became effective on February 19, 2004. See Tariff Order No. 20858, filed on March 22, 2004. However, because the Consumer Advocate represents that it did not receive copies of Primus' revised tariffs, we will require Primus to provide two (2) copies of such revised tariffs to the Consumer Advocate within thirty (30) days from the date of this Decision and Order. We will also allow the Consumer Advocate to file comments to Primus' revised tariffs within thirty (30) days from the date it receives such revised tariffs.

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<sup>11</sup>See 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 Primus' 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 Primus, 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. The requirements of HRS §§ 269-7(a), 269-17 and 269-19, to the extent applicable, are waived with respect to the Proposed Financial Transactions, described in Primus' Petition, filed on January 31, 2005.


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

3. The waiver, noted above and granted in this decision and order, is subject to the condition that Primus provides two (2) copies of its revised tariffs to the Consumer Advocate within thirty (30) days from the date of this Decision and Order. The Consumer Advocate may file comments to Primus' revised tariffs within thirty (30) days from the date it receives such revised tariffs.

4. Primus 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 MAY - 6 2005.


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

05-0022.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21805 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  
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Attorneys for PRIMUS TELECOMMUNICATIONS, INC.

  
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Karen Higashi

DATED: MAY - 6 2005