

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAIIAN TELCOM, INC.)
For Approval of Changes to its)
Tariff. Transmittal No. 07-16.)
_____)

DOCKET NO. 2007-0233

ORDER NO. 23873

Filed Dec. 6, 2007
At 11 o'clock A.M.

Karen Higashi
Chief Clerk of the Commission

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

Karen Higashi

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

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Docket No. 2007-0233

Order No. **23873**

ORDER

By this Order, the commission denies the Motion for Reconsideration filed by HAWAIIAN TELCOM, INC. ("Hawaiian Telcom"), on November 16, 2007.¹

I.

Background

Hawaiian Telcom is the incumbent provider of telecommunications services within the State of Hawaii ("State"). TWTC is a facilities-based, competitive provider of interstate and intrastate telecommunications services, including dedicated access (private line) and local exchange services.

¹Motion for Reconsideration; Memorandum in Support; Affidavit of Galen K. Haneda; Affidavit of Jane I. Kikawa; and Certificate of Service, filed on November 16, 2007 (collectively, "Motion for Reconsideration").

The Parties are HAWAIIAN TELCOM, INC., TIME WARNER TELECOM OF HAWAII, L.P. ("TWTC"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY, an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

TWTC purchases unbundled network elements, including DS1 loop elements, from Hawaiian Telcom as part of its provisioning of competitive telecommunications services within the State.

TWTC currently provides telecommunications services to the State Judiciary ("Judiciary"). As asserted by TWTC: (1) Hawaiian Telcom, TWTC, and Pacific Lightnet, Inc., all submitted bids for the Judiciary contract; and (2) at the bid opening, the rates submitted by each telecommunications carrier were revealed, and the rates submitted by Hawaiian Telcom, as reflected in Transmittal No. 07-16, were substantially below the rates submitted by Pacific Lightnet, Inc. and TWTC.

As a result of the inability of Hawaiian Telcom and TWTC to reach agreement on a stipulated protective order, the commission, following its review of the competitors' respective positions, issued Protective Order No. 23816, on November 8, 2007.

Protective Order No. 23816 states in relevant part:

"TWTC intends for the following persons to be '[Q]ualified [P]ersons': Ed Murley, Regulatory Vice President; Rochelle Jones, Senior Vice President, Regulatory; Tammy Chatfield, Regulatory Analyst; and TWTC's counsel. TWTC may also retain an independent consultant. None of these persons engage in any of the activities that would disqualify them from being a '[Q]ualified [P]erson.'"

. . . .

Moreover, the commission will also adopt Hawaiian Telcom's alternative position and strictly limit the scope of qualified TWTC personnel who are authorized by this Protective Order to have access to the confidential information disclosed by

Hawaiian Telcom in this proceeding. Specifically, the commission, with respect to TWTC, will limit the term "Qualified Persons" to the following individuals identified by TWTC: Ed Murley, Regulatory Vice President; Rochelle Jones, Senior Vice President, Regulatory; Tammy Chatfield, Regulatory Analyst; and TWTC's counsel.

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12. "Qualified Person," as used in this protective order means any one of the following:

.

- d. For TWTC, Ed Murley, Regulatory Vice President; Rochelle Jones, Senior Vice President, Regulatory; Tammy Chatfield, Regulatory Analyst; and TWTC's counsel; provided that none of these persons are engaged in developing, planning, marketing, or selling TWTC's products or services, or determining the costs of TWTC's products or services, or designing prices of TWTC's products or services to be charged to customers.

Protective Order No. 23816, at 16-17 and 22 (footnote and citation therein omitted) (emphasis added).

On November 15, 2007, TWTC filed six sets of the Protective Agreement, signed by TWTC's representatives, including a Protective Agreement signed by Mr. Murley.²

On November 16, 2007, Hawaiian Telcom timely filed its Motion for Reconsideration, seeking the partial reconsideration of Protective Order No. 23816, "to the extent that it finds that Ed Murley, Vice President Regulatory of Time Warner Telecom of Hawaii, L.P. [('TWTC')]' is a 'Qualified Person [,]' as defined in paragraph 12 thereof and orders that any confidential information

²The Protective Agreement form was attached as an exhibit to Protective Order No. 23816.

be provided to him."³ On November 28, 2007, TWTC filed its Memorandum in Opposition to Hawaiian Telcom's Motion for Reconsideration.⁴

II.

Discussion

HAR chapter 6-61, subchapter 14, governs motions for reconsideration filed with the commission. HAR §§ 6-61-137, 6-61-139, and 6-61-140 state:

§6-61-137 Motion for reconsideration or rehearing. A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

§6-61-139 Additional evidence. When, in a motion filed under this subchapter, a request is made to introduce new evidence, that evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced.

³Motion for Reconsideration, at 1.

⁴Memorandum in Opposition to Hawaiian Telcom's Motion for Reconsideration; Affidavit of Edward Murley; and Certificate of Service, filed on November 28, 2007 (collectively, "Memorandum in Opposition"). By letter dated November 20, 2007, the commission instructed TWTC to file a reply to Hawaiian Telcom's Motion for Reconsideration by November 29, 2007, finding that a reply was "necessary or desirable" pursuant to HAR § 6-61-140. By this Order, the commission formally adopts said finding in this regard.

§6-61-140 Replies to motions. The commission may allow replies to a motion for rehearing or reconsideration or a stay, if it deems those replies desirable or necessary.

HAR §§ 6-61-137, 6-61-139, and 6-61-140.

By its Motion for Reconsideration, Hawaiian Telcom seeks reconsideration of the commission's finding that Mr. Murley of TWTC is a Qualified Person that is entitled to review and have access to the confidential information disclosed by Hawaiian Telcom in this proceeding. Based on the supporting affidavits of two persons, both former employees of TWTC, Hawaiian Telcom asserts that Mr. Murley has been with TWTC since approximately 1995, has engaged in multiple executive capacities for TWTC in Hawaii, and has been engaged in the development of strategic plans to market or sell TWTC's products or services.⁵ Accordingly, Hawaiian Telcom concludes that Mr. Murley does not meet the proviso set forth in Paragraph 12.d of Protective Order No. 23816, which states that TWTC's representatives who are designated as Qualified Persons shall not be "engaged in developing, planning, marketing, or selling TWTC's products or services, or determining the costs of

⁵See Affidavit of Galen K. Haneda; and Affidavit of Jane I. Kikawa. The affiliation of Mr. Haneda and Ms. Kikawa, if any, with Hawaiian Telcom, is not identified or discussed in the affidavits or in Hawaiian Telcom's Memorandum in Support.

With respect to HAR § 6-61-139, governing the introduction of new evidence (in this case, the two affidavits), Hawaiian Telcom appears to reason that because the commission included the "names of the [TWTC] individuals who would be 'Qualified Persons' in the protective order itself . . . this is the first opportunity for Hawaiian Telcom to raise its concerns regarding Mr. Murley before the Commission." Memorandum in Support, at 2 (footnote and text therein omitted).

TWTC's products or services, or designing prices of TWTC's products or services to be charged to customers [.]"

As an alternative proposal, Hawaiian Telcom requests that "the Commission direct Mr. Murley to attest via affidavit that he does not engage in developing, planning, marketing or selling [TWTC's] products or services or determine the costs of [TWTC's] products or services or design prices of [TWTC's] products or services to be charged to customers, including those activities identified in the [two] attached affidavits."⁶

In its Memorandum in Opposition, TWTC counters that Mr. Murley meets the criteria of a "Qualified Person," as set forth in Paragraph 12.d of Protective Order No. 23816, and as evidenced by the submittal of a Protective Agreement signed by Mr. Murley. TWTC also takes issue with the critical assertions set forth in Hawaiian Telcom's two supporting affidavits, countering that the affiants' statements relate to Mr. Murley's job functions during periods beginning over twelve years ago, TWTC's business and Mr. Murley's job duties have changed substantially since that time, and to the extent that the affiants' observations relate to Mr. Murley's job functions in 2005, such observations bear little relevance to Mr. Murley's job functions today, over two years after Mr. Haneda and Ms. Kikawa both left TWTC's employment. Lastly, "in order to address any concerns raised by Hawaiian Telcom's Motion, TWTC has

⁶Motion for Reconsideration, at 6-7 (footnote and text therein omitted).

provided an affidavit by Mr. Murley stating that he does not engage in developing, planning, marketing, or selling TWTC's products or services, or determining the costs of TWTC's products or services, or designing prices of TWTC's products or services to be charged to customers."⁷

Initially, TWTC's statement that Mr. Murley does not engage in any of the activities that will disqualify him from being a Qualified Person was based on the written representation of TWTC's counsel.⁸ Now, in response to Hawaiian Telcom's Motion for Reconsideration and consistent with the incumbent telecommunications carrier's alternative proposal, TWTC has submitted the sworn affidavit of Mr. Murley, dated November 27, 2007, which states:

1. Affiant makes this Affidavit in opposition to Hawaiian Telcom's Motion for Reconsideration, filed on November 16, 2007, in Docket No. 2007-0233.

2. Affiant makes this Affidavit based on [his] personal knowledge.

3. Affiant is the Vice President-Regulatory of [TWTC].

4. Affiant does not engage in developing, planning, marketing, or selling TWTC's products or services, or determining the costs of TWTC's products or services, or designing prices of TWTC's products or services to be charged to customers.

Affidavit of Edward Murley, at 1 (emphasis added).

⁷Memorandum in Opposition, at 5.

⁸See TWTC's transmittal letter, dated October 24, 2007, at 2-3.

Based on the written representations of TWTC's counsel, as verified by Mr. Murley's sworn affidavit, TWTC appears to have sufficiently addressed the concerns raised by Hawaiian Telcom in its Motion for Reconsideration. Accordingly, the commission denies Hawaiian Telcom's Motion for Reconsideration.

III.

Order

THE COMMISSION ORDERS:

Hawaiian Telcom's Motion for Reconsideration, filed on November 16, 2007, is denied.

DONE at Honolulu, Hawaii DEC - 6 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

APPROVED AS TO FORM:

for Michael Azama
Michael Azama
Commission Counsel

By John E. Cole
John E. Cole, Commissioner

Leslie H. Kondo
By
Leslie H. Kondo, Commissioner

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CERTIFICATE OF SERVICE

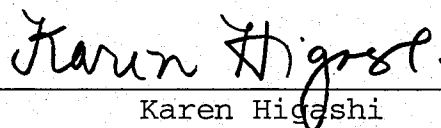
I hereby certify that I have this date served a copy of the foregoing Order No. 23873 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: DEC - 6 2007