BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of)
)
PACIFIC LIGHTNET, INC.)
)
For Expedited Review and/or)
Approval of the Transfer of Pacific)
LightNet's Outstanding Shares to)
SK Telecom Holdings, L.P.)
)

DOCKET NO. 2008-0037

DECISION AND ORDER NO. 24168

Filed April 30, 2008

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KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii

for

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DECISION AND ORDER

By this Decision and Order, the commission approves the transfer of 100 percent of PACIFIC LIGHTNET, INC.'s ("PLNI") outstanding shares to SK Telecom Holdings, L.P. ("SK Telecom"), as described in the application filed by PLNI on February 15, 2008 ("Application"), subject to certain regulatory conditions.[1]

I.

Background

PLNI, a Hawaii corporation, is a facilities-based competitive local exchange carrier ("CLEC") providing a "full range" of telecommunications products and services to its customers on the islands of Oahu, Maui, Kauai, Hawaii, Molokai

[1]PLNI served copies of the Application on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to all proceedings before the commission. See Hawaii Revised Statutes ("HRS") § 269-51; Hawaii Administrative Rules ("HAR") § 6-61-62.

and Lanai.[2] Among other services, it provides local dial tone, high-speed Internet access, dedicated and switched long distance, special access, and enhanced data services.

On February 15, 2008, PLNI filed an application seeking commission authority to transfer 100 percent of PLNI's outstanding shares to SK Telecom (the "Proposed Transfer"). PLNI makes its request under HRS §§ 269-7(a) and 269-17.5, and HAR § 6-61-105; and seeks "expedited" treatment of its Application.[3] In support of its request, PLNI incorporates by reference its latest available audited balance sheet and income statement (for the year ended December 31, 2006) filed on March 28, 2007, pursuant to HAR § 6-61-76. However, to the extent that other documents are required, Applicant requests a waiver of, or an exemption from, any such filing requirements, pursuant to HRS § 269-16.9 ("Waiver Request").

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[2]In August 2001, the commission granted PLNI a certificate of authority to operate ("COA") as a provider of local and long distance services within the State of Hawaii ("State"). See In re Pacific LightNet, Inc., Docket No. 01-0157, Decision and Order No. 18868, filed on August 31, 2001.

[3]By letter dated February 25, 2008, PLNI specifically requests that the commission issue an order approving the Proposed Transfer by April 30, 2008. PLNI makes its request for expedited treatment of its Application to: (1) minimize unwarranted potential uncertainty for its employees and customers, (2) assist management in continuing operations without disruption; and (3) comply with obligations under the Stock Purchase Agreement to use its best efforts to obtain commission approval as expeditiously as practicable.

A.

Seller, Buyer, and Related Entities

TM Communications Hawaii, LLC, a Delaware limited liability company ("Tomen"), owns 50 percent of PLNI's voting stock, while NextNet Investments, LLC, a Washington limited liability company ("NextNet"), owns the reminder of PLNI's voting stock. According to PLNI, Tomen, which is ultimately controlled by Toyota Tsusho Corporation ("TTC"), has the "power" to vote and transfer PLNI's share owned by NextNet under an irrevocable proxy.[4] TTC is a Japanese conglomerate which "combines international trading functions with domestic source and supply activities, supply chain and logistics services, and processing and manufacturing functions in the industrial and consumer sectors."[5]

PLNI states that Tomen was the original noteholder that provided the necessary funds to GST Telecom Hawaii, Inc. ("GST") to construct the Hawaii Interisland Fiber Network in 1997. In 2001, Tomen along with NextNet took over GST's operations upon bankruptcy proceedings that had commenced in May 2000.[6]

SK Telecom, a Delaware limited partnership, is majority-owned by SK Capital Holdings, L.P. ("SK Capital"). PLNI states that SK Capital: (1) is a private firm "comprised of

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[4]See Application at 4.

[5]Id. at 5.

[6]The commission approved the purchase of GST's assets and operations by PLNI. See In re Pacific LightNet, Inc. and GST Telecom Hawaii, Inc., Docket No. 01-0156, Decision and Order No. 18870, filed on September 4, 2001.

experienced investors that have a history of investing in and supporting middle-market businesses led by strong management teams"[7]; and (2) has a philosophy that embraces "its role as a trusted financial partner to inject stability and growth into the companies in which it invests."[8] SK Capital formed SK Telecom to effectuate the Proposed Transfer.

B.

Proposed Transfer

On February 4, 2008, SK Telecom, PLNI, and Tomen, entered into a Stock Purchase Agreement under which Tomen (which along with NextNet owns all of PLNI's stock) agreed to sell 100 percent of PLNI's issued and outstanding stock to SK Telecom (the "Agreement"). According to PLNI, upon consummation of the transaction, PLNI will: (1) be wholly-owned by SK Telecom; and (2) remain a Hawaii corporation and continue to own all of the assets in its possession prior to the closing.

The purchase price is set forth in Section 1.2 of the Agreement, which will be paid in cash on the closing date of the transaction, subject to certain adjustments set forth in the Agreement.[9] SK Telecom will be funding the purchase price fully through equity, thus "no additional debt will be incurred by

[7]See Application at 5.

[8]Id.

[9]The purchase price and certain other portions of the Agreement were filed confidentially under Protective Order No. 24059, issued on February 28, 2008, in this docket.

PLNI" and there will be no encumbrance of PLNI's assets to consummate the Proposed Transfer.[10]

PLNI represents that SK Telecom anticipates retaining all of PLNI's existing employees and that PLNI will continue to be locally-managed and operated. Additionally, PLNI asserts that the Proposed Transfer will have "no impact on PLNI's network" and that there will be "no changes to network configurations or interconnections" as a result of the transfer.[11]

PLNI also states that the Proposed Transfer would serve the public interest. In particular, PLNI represents that the Proposed Transfer is in the public interest since it will provide PLNI with a "stable and committed" investment partner, "improving PLNI's ability to compete in its provision of telecommunications and other services to business and consumers in the state of Hawaii."[12] PLNI also contends that the transfer of ownership from a Japanese-based parent company to an entirely U.S.-based ownership would enable PLNI to: (1) participate in certain types of government contracts that it was previously precluded from due to foreign ownership issues; and (2) remove any potential Federal Communications Commission ("FCC") restrictions on service offerings imposed based on foreign ownership.

Furthermore, the Proposed Transfer is not expected to affect PLNI's day-to-day operations. According to PLNI, there are no anticipated changes in its rates, terms, or conditions of

[10] See Application at 6.

[11] Id. at 7.

[12] Id.

service due to the Proposed Transfer; and the transaction should not have any effect on PLNI's customers and should be "transparent to businesses and consumers that rely on PLNI's services."[13] Nonetheless, the Proposed Transfer is expected to facilitate PLNI's "ongoing evolution" and enable PLNI to improve its ability to compete with Hawaiian Telcom, Inc., the State's incumbent local exchange carrier, and other CLECs that operate in the State. Moreover, since the Proposed Transfer would only result in the change in the ultimate control and ownership of PLNI, the transfer will not result in a reduction in the number of service providers in the State and, thus, will not adversely affect competition in the State. Instead, PLNI states that the Proposed Transfer will help stabilize the market for the provision of telecommunications and advance services. Finally, PLNI notes that the Proposed Transfer does not implicate the FCC or the commission's anti-slamming rules since the transfer will not result in any "customer-facing" changes in PLNI. Thus, PLNI states that no customer notice will be needed to effectuate the Proposed Transfer.

C.

Consumer Advocate's Position

On March 28, 2008, the Consumer Advocate filed its Statement of Position ("CA's SOP") informing the commission that it does not object to PLNI's request. In sum, the

[13] Id. at 8.

Consumer Advocate recommends approval of the Proposed Transfer for the following reasons:[14]

1. The Agreement requires that PLNI not terminate its existing employees, which includes qualified employees and executives that currently run and manage PLNI.

2. Since the Proposed Transfer will be funded through equity by SK Telecom (and PLNI will not incur any debt or encumbrances of its assets), "SK Capital appears to be financially fit, and there should be no significant adverse effects to PLNI's current financial status as reflected in their Annual Report of Resellers and Various Telecommunications Services ("Annual Report") . . . ."[15]

3. The instant proceeding demonstrates PLNI's willingness to continue to provide authorized services in the State and the Proposed Transfer will not result in any changes to PLNI's network configurations or interconnections; nor would PLNI's COA, assets, and customers be transferred to a third party as a result of the transaction.[16]

4. The Proposed Transfer is expected to be in the public interest, since the transaction will: (1) improve PLNI's ability to compete in serving its customers in Hawaii; (2) enable PLNI to participate in more business opportunities that it was previously restricted from due to foreign ownership; (3) be transparent to customers (PLNI anticipates no changes to its day-to-day operations; rates, terms and conditions of service; network; or management personnel); and (4) "not result in a reduction in the number of competitive service providers in the state, and, therefore, will not adversely affect competition in Hawaii."[17]

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[14]The basis for the Consumer Advocate's position is fully set forth on pages 4-6 of its SOP.

[15]See CA's SOP at 4-5.

[16]Id. at 5.

[17]Id. at 6.

5. Multiple telecommunication providers are authorized to provide the same services that PLNI is authorized to provide in the State and the Consumer Advocate would classify PLNI as a non-dominant carrier based on its review of PLNI's year-end 2006 Annual Report.[18]

6. "The Consumer Advocate recognizes that the existence of many telecommunications service providers in the Hawaii market serves to mitigate any traditional public utility regulatory concerns regarding the proposed transfer . . . . Therefore, if there are any adverse consequences from the proposed Transaction, Hawaii's consumers of [PLNI's] telecommunication services will have the option of selecting another service provider."[19]

While the Consumer Advocate does not object to commission approval of the Proposed Transfer for the reasons set forth above, should the transaction be approved, the Consumer Advocate recommends that a copy of the final sales agreement executed by the sellers and buyer be made part of the record of this proceeding pursuant to HAR § 6-61-105(c)(2). Moreover, the Consumer Advocate also recommends, to the degree applicable, "any acquisition premium, transaction or transition costs be recorded in below-the-line accounts as the Commission has maintained in past proceedings."[20] On this issue, the Consumer Advocate states that "these costs should not be recovered directly or indirectly from PLNI's customers."[21]

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[18]Id.

[19]Id.

[20]Id. at 7 (references omitted).

[21]Id.

II.

Discussion

A.

Proposed Transfer

Under State law, the commission is vested with broad powers to review the Proposed Transfer by which ownership of PLNI is ultimately being transferred from Tomen (and NextNet) to SK Telecom. Specifically, HRS § 269-7(a), states, in relevant part:

> The public utilities commission . . . shall have power to examine into the condition of each public utility, the manner in which it is operated with reference to . . . the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies, or corporations, its compliance with all applicable state and federal laws and with the provisions of its franchise, charter, and articles of association, if any, its classifications, rules, regulations, practices, and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations.

HRS § 269-7(a).

Commission approval under HRS § 269-7(a) requires a finding that the Proposed Transfer is "reasonable and consistent with the public interest."[22] A transaction is said to be

[22] See In re Sprint Communications Company, L.P., Sprint Payphone Services, Inc., and ASE Telecom, Inc., Docket No. 05-0045, Decision and Order No. 21715, filed on April 4, 2005 ("Sprint"), at 11 (citing In re ITC^DeltaCom Communications, Inc., et al., Docket No. 02-0345, Decision and Order No. 19874, filed on December 13, 2002); In re Time Warner Telecom of Hawaii, L.P., dba Oceanic Communications, et al., Docket No. 00-0354, Decision and Order No. 18220, filed on November 30, 2000; In re Time Warner Telecom of Hawaii, L.P., dba

reasonable and consistent with the public interest if the transaction "will not adversely affect the . . . [utility's] fitness, willingness, and ability to provide" public utility service in the State as authorized in its permit, certificate, or franchise.[23]

Moreover, HRS § 269-17.5 requires written commission approval before more than 25 percent of the issued and outstanding voting stock of a public utility organized under the State be held, whether directly or indirectly, by any single foreign corporation or any single nonresident alien, or any person, unless the transaction is exempt under this section.[24]

Oceanic Communications, et al., Docket No. 00-0047, Decision and Order No. 17662, filed on April 10, 2000.

[23]See Sprint at 11-12 (citing In re Ionex Telecommunications, Inc., et al., Docket No. 99-0223, Decision and Order No. 17369, filed on November 8, 1999).

[24]The Consumer Advocate agrees that HRS §§ 269-7(a) and 269-17.5 are applicable with regards to PLNI's request. Nonetheless, while initially stating that HRS § 269-19 is not applicable since the Proposed Transfer does not involve the transfer of PLNI's operating authority or property used in the performance of PLNI's services, the Consumer Advocate now contends that HRS § 269-19 is applicable since the Proposed Transfer "involves an acquisition relating to the parents" of PLNI. See CA's SOP at 3. The commission disagrees with the Consumer Advocate's assessment of the applicability of HRS § 269-19.

In making its contention that HRS § 269-19 applies, the Consumer Advocate cites to In re XO Long Distance Services, Inc. and XO Communications Services, Inc., Docket No. 04-0177, Decision and Order No. 21360 filed on September 22, 2004 ("Decision and Order No. 21360") and In re Computer Network Technology Corporation, Condor Acquisition, Inc. and McData Corporation, Docket No. 05-0019, Decision and Order No. 21745, filed on April 14, 2005 ("Decision and Order No. 21745"). Id. at 3 n.5. The authorities cited by the Consumer Advocate, however, are not on point. The commission in Decision and Order No. 21360 deemed that review of the subject transaction is applicable under HRS § 269-7(a), by stating that the "commission has jurisdiction to review proposed transactions of the parent entity of a

Upon review, the commission finds the Proposed Transfer to be reasonable and in the public interest. This decision is based on the record established in this proceeding, including PLNI's various representations. According to PLNI, upon consummation of the Proposed Transfer, PLNI will remain a Hawaii corporation and will continue to own all of the assets in its possession prior to the close of the transaction.[25] PLNI also represents that no additional debt will be incurred by PLNI to consummate the Proposed Transfer since SK Telecom will be funding the transaction fully through equity.[26] Additionally, the Proposed Transfer should not negatively impact PLNI's customers since the transaction, according to PLNI, will not affect its day-to-day operations, back office systems, existing management personnel, network, or interconnections; and PLNI anticipates no changes in rates, terms, and conditions for its services.[27] Accordingly, it appears that the Proposed Transfer should not adversely affect PLNI's fitness, willingness, and ability to provide telecommunications services in the State.

The Proposed Transfer also appears to be in the public interest since, among other things, it would provide PLNI with a committed investor which should improve PLNI's ability to

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regulated public utility under HRS § 269-7(a)." See Decision and Order No. 21360 at 6 (emphasis added). Decision and Order No. 21745 merely refers to Decision and Order No. 21360. See Decision and Order No. 21745 at 7.

[25]See Application at 4.

[26]Id. at 6.

[27]Id. at 7-8.

continue to provide services and compete in the State's telecommunications market. Moreover, the commission recognizes that the Proposed Transfer would not adversely impact competition in the State since the transaction would not result in a reduction of the number of competitive service providers operating in the State. In addition, the commission agrees with the Consumer Advocate that there are "many" telecommunications providers operating in the State which mitigates traditional concerns related to the Proposed Transfer, such that, should any adverse consequences occur from the Proposed Transfer, PLNI's customers would have the option of selecting another service provider.[28]

Based on the foregoing, the commission concludes that the Proposed Transfer should be approved under HRS § 269-7(a) and HRS § 269-17.5.

B.

Consumer Advocate's Recommendations

Given the commission's decision to approve the Proposed Transfer, the commission finds reasonable the Consumer Advocate's recommendations on pages 6-7 of its SOP. It is proper to require PLNI to file appropriate copies of the final executed sales agreement upon consummation of the Proposed Transfer, with the same served on the Consumer Advocate.

In addition, the Consumer Advocate's recommendation that, to the degree applicable, any acquisition premium,

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[28]See CA's SOP at 6.

transition or transaction costs associated with the Proposed Transfer be recorded in below-the-line accounts, consistent with past commission proceedings, appears to also be appropriate. The commission agrees with the Consumer Advocate's contention that these costs should not be recovered directly or indirectly from PLNI's customers. As set forth above, however, the commission recognizes that should any adverse consequences occur from the Proposed Transfer, PLNI's customers would have the option of selecting another service provider due to the existence of numerous service providers in the State. Nonetheless, the commission finds it reasonable and in the public interest to require PLNI and SK Telecom, as applicable, to record any acquisition premium, transition or transaction costs associated with the Proposed Transfer in below-the-line accounts, to the degree applicable. Accordingly, the commission adopts the Consumer Advocate's recommendations as discussed above.

C.

Waiver Request

HRS § 269-16.9(e) allows the commission to waive regulatory requirements applicable to telecommunications providers if it determines that competition will serve the same purpose as public interest regulation. Similarly, HAR § 6-80-135 permits the commission 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.

The commission finds, at this time, that PLNI is a non-dominant carrier in the State.[29] The commission also finds that granting PLNI's request for approval of the Proposed Transfer is 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 any filing requirements not specifically addressed in this Decision and Order or already adhered to with regards to the matters of this docket, should be waived, as applicable, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.[30]

III.

Orders

THE COMMISSION ORDERS:

1. The Proposed Transfer, as described in the Application is approved, under HRS §§ 269-7(a) and 269-17.5.

2. PLNI and SK Telecom, as applicable, shall record any acquisition premium, transition or transaction costs associated with the Proposed Transfer in below-the-line accounts, to the degree applicable.

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[29]This determination is based on our review of PLNI's financial statements filed with the commission on March 28, 2007, which Applicant incorporates by reference in this docket.

[30]The commission's waiver of the applicable filing requirements in this instance should not be construed by any public utility, including PLNI, as a basis for not adhering to the filing requirements for similar transactions that fall within the commission's purview.

3. As soon as reasonably feasible, PLNI shall file appropriate copies of the final executed sales agreement regarding the Proposed Transfer with the commission, and serve the same on the Consumer Advocate.

4. Applicant's Waiver Request is granted as set forth in Section II.C of this Decision and Order.

5. Failure to comply with the requirements set forth above in ordering paragraph nos. 2 and 3, may constitute cause to void this Decision and Order, and may result in further regulatory action, as authorized by law.

6. Unless ordered otherwise by the commission, this docket shall be deemed closed upon PLNI's compliance with ordering paragraph no. 3, above.

DONE at Honolulu, Hawaii APR 30 2008.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso, Chairman

By John E. Cole, Commissioner

By Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

Ji Sook Kim
Commission Counsel

2008-0037.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 24168 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: APR 30 2008