

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Joint  
Application of

COMPUTER NETWORK TECHNOLOGY  
CORPORATION

and

BANDWIDTH.COM CLEC, LLC

For Authority to Complete the  
Transfer of the Certificate of  
Public Convenience and Necessity  
To Provide Competitive  
Telecommunications Services of  
Computer Network Technology  
Corporation to Bandwidth.com CLEC,  
LLC

DOCKET NO. 2007-0381

DECISION AND ORDER NO. 24173

Filed May 1, 2008  
At 2:30 o'clock P.M.

Karen Higashi  
Chief Clerk of the Commission

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

Karen Higashi

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

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Joint	)	
Application of	)	
	)	
COMPUTER NETWORK TECHNOLOGY	)	Docket No. 2007-0381
CORPORATION	)	
	)	Decision and Order No. 24173
and	)	
	)	
BANDWIDTH.COM CLEC, LLC	)	
	)	
For Authority to Complete the	)	
Transfer of the Certificate of	)	
Public Convenience and Necessity	)	
To Provide Competitive	)	
Telecommunications Services of	)	
Computer Network Technology	)	
Corporation to Bandwidth.com CLEC,	)	
LLC	)	
_____	)	

DECISION AND ORDER

By this Decision and Order, the commission:

(1) approves the transfer of COMPUTER NETWORK TECHNOLOGY CORPORATION's ("CNT") Certificate of Authority ("COA")<sup>1</sup> to BANDWIDTH.COM CLEC, LLC ("Bandwidth")<sup>2</sup> to provide resold and facilities-based telecommunications services in the State of Hawaii ("State"), pursuant to Hawaii Revised Statutes ("HRS") § 269-19, HAR § 6-80-18(a) and subject to certain conditions specifically stated herein; (2) to the extent applicable, the

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<sup>1</sup>On June 3, 1996, Hawaii Administrative Rules ("HAR") chapter 6-80 took effect. HAR 6-80, among other things, replaced the Certificate of Public Convenience and Necessity with a COA for telecommunications carriers, and established procedures for requesting and issuing a COA.

<sup>2</sup>CNT and Bandwidth are collectively referred to as "Applicants".

commission, on its own motion, waives the requirements of HRS § 269-16.92 pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.

I.

Background

A.

Overview of Subject Entities

CNT, also known as McData Services Corporation, is a Minnesota corporation with its business offices in Minneapolis, Minnesota.<sup>3</sup> Applicants state, "CNT became a wholly owned, indirect subsidiary of Brocade Communications Systems, Inc. ("Brocade") in February 2007 upon completion of the acquisition of CNT's corporate parent, McData Corporation. CNT provides telecommunications services to Brocade's customers who purchase data networking solutions involving hardware, firmware, software, professional services, and data only connectivity and remote systems monitoring from Brocade or its affiliates."<sup>4</sup> However, "CNT does not provide intrastate telecommunications services or have any intrastate telecommunications facilities in Hawaii. As a result, [Applicants] have not provided a form of customer notice."<sup>5</sup>

CNT is authorized to provide intrastate telecommunications services in approximately 42 other states and

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<sup>3</sup>Application, at 3.

<sup>4</sup>Application, at 3 (footnote omitted).

<sup>5</sup>Application, at 3 n. 1.

the District of Columbia.<sup>6</sup> Applicants state, "CNT is also authorized by the Federal Communications Commission [("FCC")] to provide international and domestic interstate telecommunications services as a non-dominant carrier. In nearly all states where Bandwidth does not already have a Certificate and where permitted by law, the Certificates and authorizations of CNT will be transferred to Bandwidth."<sup>7</sup> By Order No. 20944, issued on April 30, 2004, in Docket No. 03-0412, CNT is authorized to operate as a reseller and facilities-based carrier of intrastate telecommunications services in the State..

Brocade is a Delaware corporation with offices located in San Jose, California.<sup>8</sup> Brocade "designs, develops, markets, sells, and supports data storage networking and application infrastructure management solutions, offering a line of storage networking products, software and services that enable companies to implement highly available, scalable, manageable, and secure environments for data storage applications."<sup>9</sup>

Bandwidth is a Delaware limited liability company formed on January 9, 2007.<sup>10</sup> It is authorized to provide telecommunications services in the following states: California, Florida, Illinois, Montana, New York, North Carolina, Ohio, and

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<sup>6</sup>Application, at 4.

<sup>7</sup>Application, at 4.

<sup>8</sup>Application, at 4.

<sup>9</sup>Application, at 4.

<sup>10</sup>Application, at 4 and Exhibit A.

Texas.<sup>11</sup> Applicants state that "Bandwidth is also authorized by the FCC to provide international and domestic interstate telecommunications services as a non-dominant carrier."<sup>12</sup> Bandwidth's parent company is Bandwidth.com, Inc., a Delaware S corporation which provides voice and data services.<sup>13</sup>

Bandwidth holds an authorization to transact business in Hawaii as a foreign limited liability company, effective November 30, 2007.<sup>14</sup> Bandwidth registered its trade name on November 30, 2007.<sup>15</sup>

B.

Application

On November 14, 2007, Applicants filed a request for commission approval to consummate a transaction involving the transfer of substantially all of CNT's regulated telecommunications services operations, including CNT's Hawaii COA, to Bandwidth ("Proposed Transaction").<sup>16</sup> Applicants served

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<sup>11</sup>Application, at 5.

<sup>12</sup>Application, at 5.

<sup>13</sup>Application, at 3-5.

<sup>14</sup>Application, at Exhibit B.

<sup>15</sup>Application, at Exhibit C.

<sup>16</sup>Applicants filed a Verified Joint Petition of Computer Network Technology Corporation and Bandwidth.com CLEC, LLC for Authority to Complete the Transfer of the Certificate of Public Convenience and Necessity to Provide Competitive Telecommunications Services of Computer Network Technology Corporation to Bandwidth.com CLEC, LLC; Exhibits A and D; Verification of David Morken, President Bandwidth.Com, Inc. and Bandwidth.com CLEC, LLC and Tyler Wall, Secretary McDATA Services Corporation (a/k/a Computer Network Technology Corporation) on

copies of the Application on the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate").<sup>17</sup>

The Proposed Transaction involves an Asset Purchase Agreement ("Agreement") executed between CNT and Bandwidth. Pursuant to the Agreement, Bandwidth will acquire substantially all of CNT's regulated telecommunications services operations, including CNT's Hawaii COA.<sup>18</sup> Applicants "request that the Commission allow CNT to transfer its existing Hawaii [COA] to Bandwidth (and change the name associated with the [COA] to Bandwidth) with the same conditions as previously granted to CNT. In the event that the Commission determines that the Hawaii [COA] granted to CNT cannot be transferred to Bandwidth, [Applicants] respectfully request, in the alternative, that a separate certification be granted to Bandwidth and that CNT's certification be cancelled upon notice that the Proposed Transaction was completed. Furthermore, Bandwidth will adopt all of the tariffs (or make such other filings as may be necessary in compliance with the laws of Hawaii) and will offer service under the same rates, terms and conditions as are currently set forth in CNT's existing tariffs. As a result, the

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November 14, 2007; Applicants filed Exhibits B and C on December 19, 2007; Applicants filed Bandwidth's updated confidential financial information, pursuant to Protective Order No. 23911, on January 3 and 25, 2007 (collectively, "Application."). Applicants served copies of the Application upon the Consumer Advocate.

<sup>17</sup>The Consumer Advocate is an ex officio party to this docket pursuant to HRS § 269-51 and HAR § 6-61-62(a).

<sup>18</sup>Application, at 3.

[t]ransactions will be transparent to prospective intrastate customers of CNT and Bandwidth in terms of the services offered in Hawaii."<sup>19</sup>

Applicants represent that "Bandwidth has the technical, managerial, and financial qualifications to acquire the [COA] of CNT. Bandwidth is operated by a highly qualified management team, all of whom have extensive backgrounds in information technology, networking and computer industries."<sup>20</sup> Applicants state, "the Proposed Transaction serves the public interest. The Proposed Transaction is expected to invigorate competition in Hawaii. The [t]ransaction will provide Bandwidth a presence in the telecommunications market in Hawaii, and thereby make Bandwidth a more viable competitor in all of its markets, as it can attract customers that seek a carrier that can offer intrastate telecommunications services in multiple states. . . . [Applicants] expect the transaction to be virtually transparent to consumers and potential customers except for the change in the name of the carrier offering service."<sup>21</sup>

C.

Consumer Advocate's Statement of Position

On December 13, 2007, the Consumer Advocate filed its Statement of Position ("Statement of Position") informing the commission that it recommends that the commission "decline to

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<sup>19</sup>Application, at 7.

<sup>20</sup>Application, at 5 and Exhibit D.

<sup>21</sup>Application, at 9-10.

waive its [HRS] § 269-19 approval authority and HRS § 269-7(a) investigative authority over the proposed transaction pursuant to the provisions set forth in HRS § 269-16.9(e) and HAR § 6-80-135. The Consumer Advocate, however, recommends that the Commission approve the proposed transfer of the [COA]."<sup>22</sup>

The Consumer Advocate notes:

- Bandwidth will be one of many providers of telecommunication services authorized to provide service in the State.
- CNT continues to be a non-dominant carrier of telecommunications service in the state of Hawaii, as CNT does not currently provide intrastate telecommunications services in Hawaii even though it possesses a COA from the Commission.
- Applicants assert that the transaction will be virtually transparent to potential customers because, aside from the name change, Bandwidth will continue to provide service at the same rates, terms and conditions as CNT is currently authorized to provide.
- Applicants assert that the Proposed Transaction will invigorate competition in Hawaii by making Bandwidth a more viable competitor in all of its markets because it will attract customers seeking a carrier offering intrastate telecommunications services in multiple states. Thus[,] the proposed transaction should help to promote competition in the Hawaii telecommunications market.
- In addition, given the number of carriers that are authorized to provide the same telecommunications services as Bandwidth's' proposed services, the Consumer Advocate finds that competition should continue to serve the same purpose as public interest. Bandwidth's customers, therefore, will still have the ability to obtain the telecommunications services offered by the company in Hawaii from other telecommunications providers authorized to provide the same services in the State should Bandwidth be unable to continue

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<sup>22</sup>Statement of Position, at 1-2.



providing such services. It should be noted, however, that Bandwidth represented that it possesses the technical, managerial and financial qualifications to provide the regulated telecommunications services in Hawaii, should the [c]ommission authorize the proposed transfer of CNT's COA to Bandwidth.

Statement of Position, at 4-6 (footnotes omitted). The Consumer Advocate notes that "there are over 300 telecommunication service providers authorized in the State."<sup>23</sup>

With regard to providing notice to customers, the Consumer Advocate states, "based on the information contained in the [commission's] Annual Financial Report for 2004 and 2005, CNT reported no revenues or customers in Hawaii. To date, the Consumer Advocate has not received a copy of the 2006 [ ] Annual Financial Report. Furthermore, since there are no customers currently receiving service in Hawaii, there will be no need to notify customers in Hawaii of the change in service provider should the Commission approve the proposed transfer of CNT's COA to Bandwidth."<sup>24</sup>

The Consumer Advocate "recommends that the Commission approve the proposed transaction on the condition that Bandwidth provides copies of its authorization to do business in the [S]tate of Hawaii (Exhibit B) and Bandwidth's Registration of a Trade Name (Exhibit C). In addition, Bandwidth should re-file CNT's tariff with the appropriate change in the name of the

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<sup>23</sup>Statement of Position, at 4 n. 6.

<sup>24</sup>Statement of Position, at 5.

service provider if the proposed transaction is approved by the Commission."<sup>25</sup>

Applicants submitted Exhibits B and C via letter on December 19, 2007.

## II.

### Discussion

#### A.

##### Proposed Transfer of CNT's COA to Bandwidth

HRS § 269-19 specifically provides, in relevant part, that: "[n]o public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of . . . any franchise or permit, or any right thereunder . . . without first having secured from the public utilities commission an order authorizing it so to do."

Applicants contend that Bandwidth is financially qualified to provide telecommunications services in Hawaii. It provides telecommunications services in multiple states and with the financial backing of its parent company, it has access to financing and capital necessary to conduct its telecommunications operations and to fulfill any obligation it may undertake with respect to the operation and maintenance of its services. Applicants claim that Bandwidth has the technical and managerial qualifications to provide telecommunications services in Hawaii. Moreover, Applicants expect the transaction to be virtually transparent to consumers and potential consumers

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<sup>25</sup>Statement of Position, at 4-5.

except for the change in the name of the carrier offering services.<sup>26</sup>

HAR § 6-80-18(a) states:

The commission shall issue a certificate of authority to any qualified applicant, authorizing the whole or any part of the telecommunications service covered by the application, if it finds that:

- (1) The applicant possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed telecommunications service in the State;
- (2) The applicant is fit, willing, and able to properly perform the proposed telecommunications service and to conform to the terms, conditions, and rules prescribed or adopted by the commission; and
- (3) The proposed telecommunications service is, or will be, in the public interest.

Upon review of the record herein, the commission makes the following findings pursuant to HAR § 6-80-18(a):

1. Bandwidth possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed services, as evidenced by its authorizations to provide telecommunications services in other states, the fact that the transaction will be transparent to consumers, the qualifications of key managerial personnel, the findings noted by the Consumer Advocate that Bandwidth has the managerial and technical abilities to provide the proposed telecommunications services within the State, and the confidential financial statements submitted in support of the Application.

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<sup>26</sup>Application, at 9-10.

2. Bandwidth is fit, willing, and able to properly perform the telecommunications services as evidenced by Applicants' representations and the documents submitted in support of the Application. Moreover, the commission's grant of a transfer of CNT's COA to Bandwidth will be conditioned upon its conformity to the terms, conditions, and rules prescribed or adopted by the commission, as discussed below.

3. The transfer of CNT's COA to Bandwidth is in the public interest. The commission recognizes that competition in the telecommunications market in the State provides consumers with added options to meet their needs. As noted by the Consumer Advocate, "the proposed transaction should help to promote competition in the Hawaii telecommunications market."<sup>27</sup>

Based on the foregoing, the commission approves the transfer of CNT's COA to Bandwidth, pursuant to HRS § 269-19 and HAR § 6-80-18(a) subject to the following conditions:

1. Within thirty (30) days of the date of this Decision and Order, Bandwidth shall file its initial tariff, incorporating the change in name from CNT to Bandwidth; and
2. Bandwidth shall continue to be accountable for any and all of CNT's unpaid public utility fees due to the commission, pursuant to HRS § 269-30, and any and all of CNT's annual financial reports that are required to be filed with the commission in accordance with HAR § 6-80-91.

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<sup>27</sup>Statement of Position, at 5.

B.

HRS § 269-16.92 Requirements

HRS § 269-16.92 provides that a telecommunications carrier shall not initiate a change in a subscriber's selection or designation of a long distance carrier without first obtaining authorization from the affected subscriber. Furthermore, HAR § 6-80-123 states, in relevant part, that "[a] telecommunications carrier intending or seeking to abandon or discontinue offering or providing a fully or partially competitive service shall, not later than thirty [(30)] days before the proposed date of abandonment or discontinuance, provide a written notice of its intent to the commission, the [C]onsumer [A]dvocate, and its affected customers."<sup>28</sup>

Nonetheless, HRS § 269-16.9 also permits the commission to waive regulatory requirements applicable to telecommunications providers if it determines that competition will serve the same purpose as public interest regulation. Specifically, 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.

Applicants represent that "CNT does not provide intrastate telecommunications services or have any intrastate telecommunications facilities in Hawaii,"<sup>29</sup> and the Consumer Advocate notes that CNT's Annual Financial Reports for

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<sup>28</sup>HAR § 6-80-123(a).

<sup>29</sup>Application, at 3 n 1.

2004 and 2005 reported no revenues or customers in Hawaii.<sup>30</sup> Based on the foregoing, the commission, sua sponte, waives the requirements of HRS § 269-16.92 governing customer notices pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.

C.

Tariff Revisions

Upon review of Applicants' proposed initial tariff, the commission finds appropriate the tariff revision proposed by the Consumer Advocate. Accordingly, the commission concludes that Bandwidth should re-file CNT's tariff with an appropriate change in the name of the service provider.

In addition, Bandwidth shall file an original and eight (8) copies of its tariff upon completion of appropriate interconnection/resale agreements and prior to commencing service in accordance with commission rules.

Finally, an original and eight (8) copies of Bandwidth's revised initial tariff shall be filed with the commission, and two (2) additional copies shall be served on the Consumer Advocate. Bandwidth shall ensure that the appropriate issue and effective dates are reflected in its tariff.

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<sup>30</sup>Statement of Position, at 5 n 7.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. The transfer of CNT's COA to provide resold and facilities-based telecommunications services in the State, as described in its Application, is approved subject to the following conditions:

- a. Within thirty (30) days of the date of this Decision and Order, Bandwidth shall file its initial tariff, incorporating the change in name from CNT to Bandwidth; and
- b. Bandwidth shall continue to be accountable for any and all of CNT's unpaid public utility fees due to the commission, pursuant to HRS § 269-30, and any and all of CNT's annual financial reports that are required to be filed with the commission in accordance with HAR § 6-80-91.

2. The requirements of HRS § 269-16.92, to the extent applicable, are waived, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.

3. As the holder of a COA, Bandwidth shall be subject to all applicable provisions of HRS chapter 269, HAR chapters 6-80 and 6-81, any other applicable State laws and commission rules, and any orders that the commission may issue from time to time.

4. Bandwidth shall file its tariffs in accordance with HAR §§ 6-80-39 and 6-80-40. Said tariffs shall incorporate the revisions discussed in Section II.C of this Decision and Order and the provisions of HAR chapter 6-80. In the event of a conflict between any tariff provision and State law, State law shall prevail.

5. An original and eight (8) copies of the initial tariff, with the noted revisions, shall be filed with the commission, and two (2) additional copies shall be served on the Consumer Advocate. Bandwidth shall ensure that the appropriate issued and effective dates are reflected in its tariffs.

6. Applicants shall promptly comply with the requirements set forth above. Failure to promptly comply with the requirements may constitute cause to void this Decision and Order, and may result in further regulatory action, as authorized by law.

DONE at Honolulu, Hawaii MAY - 1 2008.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By John E. Cole  
John E. Cole, Commissioner

APPROVED AS TO FORM:

By Leslie H. Kondo  
Leslie H. Kondo, Commissioner

Jodi L. K. Yi  
Jodi L. K. Yi  
Commission Counsel  
2007-0381.ah



CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 24173 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: MAY - 1 2008