

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No.: EB-11-IH-0442
)	
Hawaiian Telcom, Inc.)	NAL/Acct. No.: 201232080016
)	
)	FRN: 0001520980

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 14, 2012

Released: February 14, 2012

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Hawaiian Telcom, Inc. (HTI) apparently willfully violated the conditions of the submarine cable landing license for the Hawaii Interisland Cable System (Cable System),¹ by failing on two occasions to obtain Commission approval prior to transferring substantial control of the submarine cable landing license. Based on our review of the facts and circumstances surrounding this matter, and for the reasons discussed below, pursuant to Section 503(b) of the Communications Act of 1934, as amended,² we conclude that HTI is apparently liable for a total forfeiture of \$16,000 for the two unauthorized transfers of control.

II. BACKGROUND

2. Section 1 of the Cable Landing License Act states that no person shall land or operate in the United States “any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States.”³ Additionally, the submarine cable landing license for the Cable System may not be assigned or transferred without prior authorization from the Commission.⁴

¹ GTE Hawaiian Telephone Company Applications for a License to Land and Operate a High Capacity Digital Submarine Cable System Wholly Within the State of Hawaii, Linking the Islands of Kauai, Oahu, Maui and Hawaii, Cable Landing License, DA 93-1274, 8 FCC Rcd 7065 (CCB 1993) (*Cable Landing License Order*).

² See 47 U.S.C. § 503(b).

³ 47 U.S.C. § 34. The Commission has been delegated the President’s authority under the Cable Landing License Act. See Exec. Ord. No. 10530 § 5(a) (May 10, 1954), reprinted as amended in 3 U.S.C. § 301.

⁴ *Cable Landing License Order*, 8 FCC Rcd at 7606, para. 6(4) (CCB 1993) (specifying that “[n]either this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing”). This condition, which was included in all cable landing licenses prior to 2001, was codified as a routine condition in Section 1.767(g)(6) of the Commission’s rules in 2002. See *Review of Commission Consideration of Applications Under the Cable Landing License Act*, IB Docket No. 00-106, Report and Order, 16 FCC Rcd 22167, 22201-02, paras. 66-68 (2001).

3. HTI, previously known as Verizon Hawaii, is the holder of the submarine cable landing license for the Cable System. HTI is also the incumbent local exchange carrier for the State of Hawaii and provides service to all of Hawaii's major islands. Hawaiian Telcom Communications, Inc. (HTCI) (previously named Paradise MergerSub, Inc.) is the parent company of HTI, and Hawaiian Telecom Holdco, Inc. (Holdco) is the parent company of HTCI. In addition to local exchange service, Holdco and its affiliates (collectively, the Companies) provide exchange access, broadband services, and resold wireless services. The Companies use the Cable System to provide at least some of these services.

4. In 2004, GTE Corporation (GTE) and Verizon Holdco LLC (Verizon) filed several applications seeking Commission consent to transfer control of various entities holding FCC authorizations, including Verizon Hawaii (subsequently renamed HTI), the licensee of the Cable System, to Paradise MergerSub (subsequently renamed HTCI).⁵ This transaction was approved on August 17, 2004,⁶ and the transfer was consummated on May 2, 2005. Although the Commission reviewed and approved the license transfers relating to the transfer of control of Verizon Hawaii to HTCI, the parties to the transaction failed to file a transfer application covering the submarine cable landing license for the Cable System.⁷

5. Additionally, on December 1, 2008, Holdco and its subsidiaries filed for voluntary bankruptcy protection pursuant to Chapter 11 of the United States Bankruptcy Code. Under the court-approved reorganization plan, ownership of Holdco was transferred to HTI's secured creditors on December 30, 2009, resulting in a substantial ownership change in HTI.⁸ Soon thereafter, the Companies applied to the Commission for approval of several bankruptcy-related transfers. The Commission authorized these license transfers.⁹ Once again, the transfer of control applications omitted the submarine cable landing license for the Cable System. Holdco and its subsidiaries emerged from bankruptcy and the transfer was consummated on October 28, 2010.

⁵ HTCI was formerly named Paradise MergerSub, Inc., which was ultimately owned and controlled by the Carlyle Group. See ITC-ASG-20040630-00255 and ITC-ASG-20040630-00256.

⁶ See *International Authorizations Granted*, Public Notice, Report No. TEL-00821, DA 04-2520, IBFS File Nos. ITC-ASG-20040630-00255 and ITC-ASG-20040630-00256, 19 FCC Rcd 15469 (IB 2004); *Streamlined Domestic Section 214 Application Granted*, Public Notice, DA 04-2451, WC Docket No. 04-234, 19FCC Rcd 14831 (WCB 2004); *Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications*, Public Notice, Report No. 1924 (rel. Aug. 25, 2004).

⁷ See Letter from Gregory J. Vogt, Esq., Counsel to Hawaiian Telcom, Inc., to Kathy Berthot, Attorney Advisor, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission (dated Sept. 8, 2011) (LOI Response).

⁸ *In re Hawaiian Telecom Communications, Inc., et al.*, Ch. 11, Case No. 08-02005 (Bankr. D. Haw. Dec. 30, 2009).

⁹ *Domestic Section 214 Authorization Granted; Domestic Section 214 Application Filed for the Transfer of Control of Hawaiian Telecom, Inc., and Hawaiian Telecom Services Company, Inc., Debtors-in-Possession*, WC Docket No. 10-41, DA 10-1746, 25 FCC Rcd 13149 (WCB 2010); *International Authorizations Granted*, Public Notice, Report No. TEL-01457, DA 10-1798, IBFS File No. ITC-ASG-20100122-00038, 25 FCC Rcd 13369 (IB2010); *Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports Action*, Public Notice, Report No. 6390 (rel. Nov. 17, 2010).

6. On January 12, 2011, the Companies filed applications seeking Commission consent to transfer control of the submarine cable landing license held by HTI.¹⁰ The Companies filed these applications to correct the earlier omissions.¹¹ The International Bureau granted these applications on March 28, 2011,¹² but referred the matter to the Enforcement Bureau for investigation. On August 9, 2011, the Enforcement Bureau issued a Letter of Inquiry (LOI) to the Companies requesting information concerning their compliance with the requirement to obtain Commission approval before transferring control of the submarine cable landing license.¹³ The Companies responded to the LOI on September 8, 2011.¹⁴ That response makes clear that control of HTI, holder of the submarine cable landing license, was twice transferred without prior Commission authorization.¹⁵

III. DISCUSSION

7. Under Section 503(b)(1) of the Communications Act of 1924, as amended, “[a]ny person who is determined by the Commission . . . to have . . . willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission . . . shall be liable to the United States for a forfeiture penalty.”¹⁶ Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate any provision of this Act or any rule or regulation by the Commission authorized by this Act.”¹⁷ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of “willful” applies to both Sections 312 and 503(b) of the Act,¹⁸ and the Commission has so interpreted the term in the Section 503(b) context.¹⁹ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.²⁰ To impose a forfeiture penalty, the Commission must issue a notice of apparent liability, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²¹ The

¹⁰ See Application for Authority to Transfer Control of Submarine Cable Landing License, File No. SCL-LIC-19921015-0008 (filed Jan. 12, 2011); Application for Authority to Transfer Control of Submarine Cable Landing License, File No. SCL-LIC-19921015-0008 (filed Jan. 12, 2011). See also *Streamlined Submarine Cable Landing License Applications Accepted for Filing*, Public Notice, Report No. SCL-00114S (rel. Feb. 18, 2011).

¹¹ See *id.*

¹² *Actions Taken Under Cable Landing License Act*, Public Notice, Report No. SCL-00115, IBFS File Nos. SCL-ASG-20110112-0002 and SCL-T/C-20110112-0003, DA 11-565, 26 FCC Rcd 4923 (IB 2011).

¹³ See Letter from Theresa Z. Cavanaugh, Acting Chief, Investigation & Hearings Division, Enforcement Bureau, Federal Communications Commission, to John T. Komeiji, Senior Vice President and General Counsel, Hawaiian Telcom, Inc. (dated Aug. 9, 2011) (LOI).

¹⁴ See *LOI Response*, *supra* n.7.

¹⁵ *Id.* at 3-8.

¹⁶ 47 U.S.C. § 503(b)(1); see also 47 C.F.R. § 1.80(a)(1).

¹⁷ 47 U.S.C. § 312(f)(1).

¹⁸ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁹ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991).

²⁰ *Id.* at 4388, para. 5; *Callais Cablevision, Inc.*, 16 FCC Rcd 1359, 1362, para. 9 (2001).

²¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

Commission will then assess a forfeiture if it finds, based on the evidence, that the person has violated the Act, a rule, a Commission order, or the terms of a Commission license.²²

A. Apparent Violations of the Terms of the Cable Landing License

8. The submarine cable landing license for the Cable System prohibits the transfer of control of the license without prior Commission approval.²³ We conclude that it is apparent that the Companies willfully and repeatedly violated that license term by failing to obtain Commission authorization prior to consummating two substantial transfers of control of HTI, the holder of the submarine cable landing license. The first apparent violation occurred when Verizon and Paradise MergerSub transferred control of the cable landing license to HTCI; the second occurred when control of HTI was transferred from Holdco's prior shareholders to the new shareholders, in conjunction with the Chapter 11 bankruptcy reorganization. The Companies concede that the license was "inadvertently omitted" from the FCC applications that were filed to effectuate these transfers.²⁴

9. The requirements to obtain prior approval for ownership changes involving cable landing licenses serve important public policies, notably the identification of any foreign ownership interests and the prevention of anti-competitive behavior that could result in competitive harms in the U.S. market.²⁵ The Companies' failure to obtain prior Commission approval of these ownership transfers prevented the Commission from examining whether control of the license for the Cable System should be transferred to the entities that, in fact, operated that System for a five-year period. In light of these considerations and the admission by the Companies that they failed to obtain prior Commission approval of the license transfers, we conclude that the Companies apparently willfully and repeatedly violated the express terms of the license, and therefore a forfeiture is warranted.

B. Proposed Forfeiture

10. In determining the amount of a forfeiture penalty, Section 503(b)(2)(E) of the Act and Section 1.80(b)(6) of the rules direct the Commission to take into account "the nature, circumstances, extent, and gravity of the violations . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²⁶ The Commission's *Forfeiture Policy Statement* and implementing rules prescribe a forfeiture of \$8,000 for each separate unauthorized substantial transfer of control.²⁷ In this case, there were two separate unauthorized transfers of control. Based on the facts

²² 47 C.F.R. § 1.80(a)(1) (stating that "[a] forfeiture penalty may be assessed against any person found to have: (1) Willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument of authorization issued by the Commission"). See also *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002) (affirming forfeiture penalty issued for violation of a Commission order).

²³ See *Cable Landing License Order*, 8 FCC Rcd at 7606, para. 6(4).

²⁴ See *LOI Response*, Answers to Inquiries 4 and 5.

²⁵ See *Review of Commission Consideration of Applications Under the Cable Landing License Act*, Report and Order, 16 FCC Rcd 22167, 22184 (2001) (adopting streamlined procedures for cable landing licensing, while ensuring careful Commission review of certain applications to guard against anti-competitive behavior).

²⁶ 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(6).

²⁷ See 47 C.F.R. § 1.80(b)(6); *Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17113 (1997).

and circumstances presented, HTI is therefore apparently liable for a total forfeiture of \$16,000 for willful violations of the express terms of the cable landing license for the Cable System.²⁸

IV. ORDERING CLAUSES

11. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Act²⁹ and Sections 0.111, 0.311, 0.314 and 1.80 of the Rules,³⁰ Hawaiian Telcom, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of \$16,000 for apparently willfully or repeatedly violating the conditions of the submarine cable landing license for the Hawaii Interisland Cable System.³¹

12. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Hawaiian Telcom, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-0000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank Federal Reserve Bank of New York, and account number 2700001. FCC Form 159 (Remittance Advice) must accompany any payment. When completing the FCC Form 159, enter the NAL/Account number in block 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). The Companies will also send electronic notification within forty-eight (48) hours of the date said payment is made to Theresa Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela Kane at Pamela.Kane@fcc.gov, and Mindy Littell at Mindy.Littell@fcc.gov.

14. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.³² The written statement must be mailed to Theresa Z. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554 and must include the NAL/Acct. No. referenced above. The written statement should also be emailed to Theresa Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela Kane at Pamela.Kane@fcc.gov, and Mindy Littell at Mindy.Littell@fcc.gov.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-

²⁸ We note that the Companies made good faith efforts to comply with the obligation to seek prior Commission approval before consummating the transactions that transferred control of the authorizations held by HTI. Under these circumstances, we do not believe an upward adjustment of the proposed forfeiture is warranted.

²⁹ 47 U.S.C. § 503(b).

³⁰ 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80.

³¹ 47 U.S.C. § 1; *Cable Landing License Order*, 8 FCC Rcd at 7606, para. 6(4).

³² See 47 C.F.R. §§ 1.80(f)(3), 1.16.

year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for payment of the full amount of this Notice of Apparent Liability for Forfeiture under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³³ For answers to questions regarding payment procedures, contact the Financial Operations Group Help Desk at 1-877-480-3201 or email: ARINQUIRIES@fcc.gov.

17. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to Gregory J. Vogt, Counsel for Hawaiian Telecom, Inc., 2121 Eisenhower Avenue, Suite 200, Alexandria, VA 22314.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

³³ See 47 C.F.R. § 1.1914.