

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Applications Filed for the Transfer of) WC Docket No. 12-206
Control of Wavecom Solutions Corporation)
to Hawaiian Telcom, Inc.)
)

**COMMENTS OF
THE STATE OF HAWAII**

The State of Hawaii, by its attorneys and through its Department of Commerce and Consumer Affairs (“DCCA”), Division of Consumer Advocacy, hereby comments on the applications of Wavecom Solutions Corporation (“Wavecom”) and Hawaiian Telcom, Inc. (“HTI”) seeking approval for the transfer of control of Wavecom to HTI. The State supports the Commission’s grant of the application subject to the conditions discussed herein.¹

As the Commission is aware, HTI provides local and intraLATA telecommunications services on a statewide basis and is the incumbent local exchange carrier (“ILEC”) for the state of Hawaii.² Wavecom is a facilities-based competitive local exchange carrier (“CLEC”) in Hawaii, holding considerable fixed assets including an inter-island submarine fiber optic network that consists of approximately 400 miles of undersea fiber linking the six major islands of the

¹ The DCCA Division of Consumer Advocacy is also filing comments on this date with the Hawaii Public Utilities Commission (“HPUC”), which is considering a separate application that was submitted by Wavecom and HTI seeking approval of this proposed transaction. The various materials that have been filed with the HPUC on this matter can be accessed at: http://dms.puc.hawaii.gov/dms/DocketDetails?docket_id=84+3+ICM4+LSDB9+PC_Docket59+26+A1001001A12G17B00118D2918918+A12G17B00118D291891+74+1873&docket_page=4. The State relied in part on these materials in developing these comments.

² The only exception is for the Department of Hawaiian Home Lands (“DHHL”) areas, where Sandwich Isles Communications, Inc., which, while originally only granted the authority to serve the lands administered by the DHHL, is known as the ILEC for those areas.

State, along with about 140 route miles of land-based fiber that includes three SONET fiber rings on Oahu. Wavecom represents that it provides regulated and unrelated products and services to approximately 1,700 business customers throughout the State, including such services as local dial tone, high-speed Internet access, dedicated and switched long distance, special access, and enhanced data services, hosted PBX offerings, managed services and a recently formed cloud services business.³

Pursuant to a Stock Purchase Agreement entered into between the parties, Wavecom would initially become a wholly-owned subsidiary of HTI, although the parties indicate in materials filed with the Hawaii Public Utilities Commission (“HPUC”) that some or all of Wavecom’s assets may be transferred into HTI or other of its subsidiaries following the transfer.⁴

It is the disposition of these fixed assets, particularly Wavecom’s undersea fiber network, that is of particular concern to the State. As noted above, Wavecom’s undersea fiber network reaches all of Hawaii’s major islands, providing more extensive undersea fiber reach than HTI’s own undersea fiber network, which connects only four of the major islands. The Hawaiian Islands constitute six major and many smaller islands separated from each other by distances of more than 100 miles and by ocean channels that are more than 10,000 feet deep. As a result, undersea fiber links between Hawaii’s major islands constitute a substantial bottleneck in the

³ The State understands that Wavecom’s cloud service business and related employees, equipment and assets are not included in the proposed Stock Purchase. Prior to completing the transaction, Wavecom reportedly intends to transfer the cloud service business, employees, equipment and assets to a separate entity formed by Wavecom’s current shareholders.

⁴ See *Application of Hawaiian Telcom, Inc. and Wavecom Solutions Corporation For an Exemption of Wavier from All Regulatory Requirements or, in the Alternative, Approval of the Share Purchase Transaction and Related Transactions*, HPUC Docket No. 2012-0174, at 8 (July 16, 2012) available at: http://dms.puc.hawaii.gov/dms/OpenDocServlet?RT=&document_id=91+3+ICM4+LSDB15+PC_DocketReport59+26+A1001001A12G17B25536C8295118+A12G17B25536C829511+14+1960 (last visited Sept. 11, 2012).

provision of competitive retail telecommunications services. Although the Applicants suggest that other alternatives exist for inter-island communications, such as “point-to-point microwave facilities, satellite services, and facilitates-based terrestrial wireless services,”⁵ none of these technologies provide the throughput, reliability and low latency of undersea fiber.

The Applicants also assert that, even after the transaction, there will still be four separate owners of undersea cable systems in the State offering competitive alternatives.⁶ It is unclear, however, how many of these operators have significant inter-island capacity available for lease to third parties. Although tw telecom operates an inter-island network on a common carrier basis, a second operator, Paniolo Cable, reportedly leases all of its undersea capacity to its affiliate, Sandwich Isles Communications, Inc. A third undersea cable operator, Southern Cross Cable, is primarily an international provider and operates only one inter-island link in the state between Oahu and the Big Island. Thus the purchase of Wavecom by HTI would significantly reduce the competitive options available in the State for inter-island transport.

The Applicants apparently seek to minimize the potential impact of this reduction by observing that both HTI and Wavecom are common carriers and are thus “under a statutory duty to provide service to customers on reasonable request and at reasonable prices pursuant to 47 U.S.C. § 201(b), and are prohibited from engaging in unreasonable discrimination pursuant to 47 U.S.C. § 202(a).”⁷

The State questions, however, the manner in which Wavecom has carried out its common carrier obligations. For example, in response to an inquiry by the State regarding Wavecom’s

⁵ See *Applications Filed for the Transfer of Control of Wavecom Solutions Corporation to Hawaiian Telcom, Inc.*, WC Docket No. 12-206, Public Interest Statement at 10 (July 23, 2012).

⁶ See *id.*

⁷ See *id.* at 10-11.

pricing structure, it was disclosed that, rather than publishing fixed rates for point-to-point circuits and collocation, Wavecom's pricing for these services reflect "pricing on individual case basis."⁸ The State is concerned that this discretionary wholesale pricing scheme could be discriminatory. The State's concern in this regard is heightened by the Comments of L'Office des Postes et Télécommunications de Polynésie Française, which claims that Wavecom has engaged in discriminatory and anticompetitive behavior by inappropriately leveraging its cable station as a bottleneck facility in order to favor Wavecom's backhaul services on the Big Island-Oahu route.⁹

In exploring ways to prevent the potential for discrimination in the sale of capacity on Wavecom's undersea and terrestrial fiber networks in Hawaii, the State observes that HTI, as the ILEC in Hawaii, is additionally subject to the unbundling and wholesale access obligations of Section 251(c) of the Communications Act. When the State asked the Applicants whether HTI's regulatory obligations would extend to Wavecom post transaction, the Applicants claimed that "[b]ecause Wavecom will not be an ILEC post transaction, it will not be subject to Section [251(c)] of the Communications Act after the transaction is consummated."¹⁰

⁸ *Hawaiian Telcom, Inc. and Wavecom Solutions Corporation's Responses to the Division of Consumer Advocacy's First Submission of Information Requests*, HPUC Docket No. 2012-0174, at CA-IR-12 (Aug. 28, 2012) available at: http://dms.puc.hawaii.gov/dms/OpenDocServlet?RT=&document_id=91+3+ICM4+LSDB15+PC_DocketReport59+26+A1001001A12H29B14822E6831318+A12H29B14822E683131+14+1960 (last visited Sept. 11, 2012).

⁹ *See Comments in Support of Conditional Approval of L'Office des Postes et Télécommunications de Polynésie Française*, WC Docket No. 12-206, at 1 (Sept. 4, 2012).

¹⁰ *See Hawaiian Telcom, Inc. and Wavecom Solutions Corporation's Responses to the Division of Consumer Advocacy's Second Submission of Information Requests*, HPUC Docket No. 2012-0174, at CA-IE-33 (Aug. 28, 2012) available at: http://dms.puc.hawaii.gov/dms/OpenDocServlet?RT=&document_id=91+3+ICM4+LSDB15+PC_DocketReport59+26+A1001001A12H29B13821C9981118+A12H29B13821C998111+14+1960 (last visited Sept. 11, 2012). The Applicants' response to the State actually cites to Section 254(c) of the Act, but they have since acknowledged their intent to cite to Section 251(c) of the Act.

The implication that an ILEC could acquire a competitor that controls key network assets and, if kept as a separate corporation, not be required to provide access to those key network elements is troubling. For this reason, Section 251(h)(B)(ii) of the Communications Act provides that the subsidiary of an ILEC becomes subject to Section 251(c) requirements if it is a “successor or assign” of the ILEC.¹¹

Most of the case law that addresses the “successor or assign” provision of Section 251 involves ILEC subsidiaries that were set up to provide advanced retail services (such as VoIP) to customers that were previously served directly by the ILEC. In such circumstances, Courts have explained that allowing an ILEC to “sideslip Section 251(c)’s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme.”¹²

Far less judicial analysis appears to exist with respect to the potential use by an ILEC of bottleneck intrastate transport facilities held in the name of a wholly-owned subsidiary to support the ILEC’s retail services to end users. These are the circumstances that would exist if Hawaiian Telcom is permitted to assume control of Wavecom and its inter-island undersea fiber network.

It would therefore be appropriate for the Commission to conclude that, to the extent that Hawaiian Telcom employs any portion of Wavecom’s telecommunications facilities to support Hawaiian Telcom’s retail telecommunications service offerings, Hawaiian Telcom should be required to make capacity on all of Wavecom’s telecommunications facilities available to competitors pursuant to the requirements of Section 251(c). Further, Hawaiian Telcom should not be permitted following its purchase of Wavecom to “cherry pick” its network elements by

¹¹ See 47 U.S.C. § 251(h)(B)(ii).

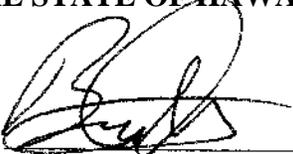
¹² See *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

transferring specific assets to Hawaiian Telcom based on Hawaiian Telcom's need for those assets to support its retail offerings, while leaving the remaining assets in the Wavecom subsidiary where they may be insulated from Section 251(c) requirements. Instead, the Commission should require as a condition of the acquisition that all of Wavecom's transport facilities and associated equipment be subject to the Section 251(c) unbundling and wholesale access requirements if any portion of those assets is employed by Hawaiian Telcom to support its retail offerings.

This relatively modest remedy would potentially balance against the competitive concerns that exist from the reduction in the number of independent operators of undersea fiber network capacity in Hawaii. It would also help to ensure that competitive providers of retail telecommunications services in Hawaii can continue to secure nondiscriminatory access to inter-island fiber links in order to provide backhaul and throughput to support their competitive service offerings for consumers.

Respectfully submitted,

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