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BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

*RE: Wavecom Solutions Corporation, Transferor, and Hawaiian Telcom, Inc.,
Transferee; Application for Consent to Transfer Control, WC Docket No. 12-206*

Dear Ms. Dortch:

Through its counsel, l'Office des postes et télécommunications de Polynésie française (“OPT”) responds to the joint reply filed by Wavecom Solutions Corporation (“Wavecom”) and Hawaiian Telcom, Inc. (“HT”) (together, the “Applicants”) in the above-referenced proceeding.¹ The Applicants misidentify the relevant markets and mischaracterize the competitive circumstances in those markets. They also distort OPT’s arguments to avoid addressing the key issue confronting the Commission in this proceeding: the greatly increased risk of competitive harm that the post-merger market power of HT and Wavecom will afford the combined company an even greater ability to abuse its market power than the pre-merger Wavecom has already done.

I. The Commission Should Analyze the Cable Station Access/Landing Services and Intrastate Transport/Backhaul Markets as the Relevant Markets

The Commission should analyze the competitive effects of HT’s pending acquisition of Wavecom (the “Proposed Transaction”) by examining two relevant markets: (1) cable station access and landing services, and (2) intrastate transport/backhaul in Hawaii used for originating, terminating, or transiting international services. When analyzing market power as part of its public-interest analysis, the Commission “begins by defining the relevant product and

¹ See Joint Reply Comments of Applicants, WC Docket No. 12-206 (filed Sept. 19, 2012) (“Applicants’ Joint Reply”).

geographic markets and by identifying the market participants.”² The relevant product market is “a group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a ‘small but significant and nontransitory’ increase in ... price.”³ The relevant geographic market is “the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a ‘small but significant and nontransitory’ increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change.”⁴ Consistent with this analytical framework, the Commission has long recognized the cable station access/landing services and intrastate transport/backhaul markets as relevant markets, and it should do so here. The Applicants’ assertion that the Commission should analyze the competitive effects of the Proposed Transaction with reference to the global international transport market is nonsensical and inconsistent with Commission precedent.

A. Cable Station Access/Landing Services Is a Relevant Market

In the relevant market, Wavecom and HT offer cable station access and landing services in their cable stations at Kawaihae, on the Big Island, to third-party-owned undersea cable owners. OPT does not provide cable station access or landing services in Hawaii, but instead purchases such services from Wavecom.

To land and operate an undersea cable in a particular location, a cable owner (such as OPT) requires facilities in which to house its power-feed equipment (which powers the cable and its repeaters) and submarine line terminal equipment and other electronics to manage the communications stream. This equipment is typically housed in a facility known as a cable station. A cable owner can either (a) construct its own cable station and connecting facilities (bore pipes, beach manholes, ducts, and conduits) between the “wet plant” and the cable station

² *Petition of Qwest Corp. for Forbearance*, Memorandum Opinion & Order, 25 FCC Rcd. 8622, 8646 ¶ 42 (2010) (“*Phoenix Forbearance Order*”), *aff’d*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) (citations omitted). *See also AT&T Inc. & Bell South Corp., Application for Transfer of Control*, Memorandum Opinion & Order, 22 FCC Rcd. 5662, 5675-76 ¶ 24 (2007) (“*AT&T/BellSouth Order*”); *Verizon Communications, Inc. & MCI, Inc., Applications for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd. 18,433, 18,446 ¶ 21 (2005) (“*Verizon/MCI Order*”).

³ *Phoenix Forbearance Order*, 25 FCC Rcd. at 8648 ¶ 48 (quoting U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, §§ 1.11, 1.12 (Apr. 2, 1992, revised Apr. 8, 1997) available at <http://www.justice.gov/atr/public/guidelines/hmg.pdf> (“*DOJ/FTC Horizontal Merger Guidelines*”).

⁴ *Application of EchoStar Communications Corp., (a Nevada Corporation), General Motors Corp, and Hughes Electronics Corp. (Delaware Corporations) (Transferees) and EchoStar Commc’ns Corp. (a Delaware Corporation) (Transferee)*, Hearing Designation Order, 17 FCC Rcd. 20,559, 20,609 ¶ 117 (2002) (citing *DOJ/FTC Horizontal Merger Guidelines*, § 1.21) (“*EchoStar/DIRECTV Order*”).

and shore-end facilities or (b) enter into a contract (known as a landing party agreement) with an existing cable station owner under which the cable station owner leases or grants on an indefeasible-right-of-use basis collocation space and access to those connecting facilities and provides related services. Multiple cables may land at a single cable station, and cable stations—which are considered part of the undersea cable system—may be licensed for one or more systems.⁵ The cable station serves as a point of interconnection by the cable system owner with other long-haul undersea cable systems and third-party providers of terrestrial or subsea backhaul services.

Once the cable facilities are constructed, however, cable owners do not move their landings from one cable station to another, given the high cost of procuring new facilities and relocating equipment, the high cost of obtaining new federal and state permits, the potential damage to the equipment, and the potential disruption of communications traffic. Consequently, a third-party cable station owner has the potential to control significant aspects of a cable owners' activities at the cable station.

The Commission has recognized a separate product market for cable station access.⁶ In the face of a small but significant and nontransitory increase in the price of cable station access and landing services, an international cable owner (such as OPT) landing at a particular cable station (such as Wavecom's Kawaihae cable station) would not switch to another form of interconnection, collocation, and shore-end access facilities, as no such service or facility exists. Consequently, the Commission should analyze market power in the Proposed Transaction by considering cable station access and landing services as a separate, relevant market.

⁵ The Commission requires that a party owning or controlling a U.S. cable station be a joint cable landing licensee for any cable system landing at its cable station, absent a waiver. *See* 47 C.F.R. § 1.767(h)(1). In recent years, cable owners landing at third-party cable stations have typically sought waivers to exclude the cable station owners from the licenses. The Commission granted such a waiver to OPT, meaning that Wavecom is not a joint licensee for the Honotua Cable System. *See Actions Taken Under the Cable Landing License Act*, Public Notice, 25 FCC Rcd. 17,049 (Int'l Bur. 2010).

⁶ *See, e.g., AT&T Submarine Systems, Inc., Cable Landing License*, 11 FCC Rcd. 14,885, 14,896-97 ¶ 40 (Int'l Bur. 1996) (“*St. Thomas-St. Croix Cable Landing License*”) (recognizing that the market for “facilities providing access to the St. Thomas station [are] relevant because a major purpose of the St. Thomas-St. Croix system is to serve as a ‘virtual node’ to interconnect with international cables landing in the U.S. Virgin Islands at the St. Thomas station. The St. Thomas station currently is a major Caribbean landing point for international cables, and thus the ability to interconnect with these cables at the St. Thomas station is critical for common carriers.”), *aff’d*, 13 FCC Rcd. 21,585 (1998), *aff’d, Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). Unlike the St. Thomas-St. Croix Cable, both HIFN and HICS are licensed as common-carrier facilities.

The Commission has also recognized a localized geographic market for cable station access.⁷ The State of Hawaii, the Big Island, or even Wavecom’s Kawaihae cable station serves as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a small but significant and nontransitory increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change. Given the bottleneck characteristics of third-party-owned cable stations for cable owners after cable construction and commencement of operations, OPT believes that a cable owner would be unlikely to switch the landing even to another cable station.

In light of these and other potential exercises of market power, the Commission licenses some undersea cable systems as common-carrier facilities under Section 214 of the Communications Act of 1934, as amended (the “Act”), which in turn requires offerings on reasonable and non-discriminatory terms under Sections 201 and 202 of the Act.⁸ The Commission declined to impose such regulation in the case of the St. Thomas-St. Croix Cable, but it did impose such regulation on both the Hawaiian Islands Fiber Network (“HIFN”) and the Hawaiian Islands Cable System (“HICS”), indicating that the operation of these systems has from the outset posed a risk to competition.⁹

B. Intrastate Transport and Backhaul in Hawaii—or at the Kawaihae Cable Station—Is a Relevant Market

In the relevant market, both Wavecom and HT—using HIFN and HICS facilities, respectively—offer intrastate transport between Oahu and the Big Island to third parties. Their customers may use these services to originate or terminate traffic within Hawaii or as a key input for connectivity beyond Hawaii or beyond the United States. OPT, by contrast, competes in the international transport market. OPT owns and operates the Honotua Cable System between French Polynesia and Hawaii. OPT does not provide intrastate transport in Hawaii but instead purchases intrastate transport from Wavecom and has sought to purchase such services from HT.

As undersea cables do not typically land directly at carrier switching facilities, telehotels, data centers, or other major points of presence, backhaul capacity is critical for reaching those

⁷ See *St. Thomas-St. Croix Cable Landing License*, 11 FCC Rcd. at 14,897 ¶¶ 41-42 (recognizing the U.S. Virgin Islands, Puerto Rico, and the British Virgin Islands as the relevant geographic market); see also, e.g., *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Order, 12 FCC Rcd. 23,891, 23,953 ¶ 145 (1997).

⁸ 47 U.S.C. §§ 201, 202, 214.

⁹ See Comments of OPT in Support of Conditional Approval, WC Docket No. 12-206, at 6-7 (filed Sept. 4, 2012) (“OPT Comments”); *GST Pacwest Telecom Hawaii, Inc.*, Cable Landing License, File No. 95-003 (New File No. SCL-LIC-19950627-00024), 11 FCC Rcd. 3024, 3025 ¶ 7 (Int’l Bur. 1996) (“*HIFN Cable Landing License*”); *GTE Hawaiian Tel. Co.*, Cable Landing License, File No. SCL-93-003 (New File No. SCL-LIC-19921015-00008), 8 FCC Rcd. 7605, 7605-06 ¶ 6 (Com. Car. Bur. 1993) (“*HICS Cable Landing License*”).

other points of interconnectivity. This is certainly the case in Hawaii, where Honolulu serves as the principal location of such points of interconnectivity, particularly the carrier-neutral data center operated by DR Fortress. Cable owners have an incentive to maximize competitive access to backhaul providers and cross-connects within the cable station, while third-party cable station owners have an incentive to charge third-party providers a premium for such access in order to ensure that the cable owner procures such services from the cable station owner.

In the face of a “small but significant and nontransitory” increase in the price of intrastate transport/backhaul, an international cable owner landing at a particular cable station would not switch to interstate or international transport, which would not provide the cable owner with connectivity within Hawaii. They would also be highly unlikely to switch to satellite or microwave facilities.¹⁰ Moreover, Hawaii is the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a small but significant and nontransitory increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change. Consequently, the Commission has recognized a separate product and geographic market for intrastate, intraterritorial, or domestic interstate transport used for origination or termination of international traffic.¹¹ The Commission has also found that where proposed merger partners “serve island populations that are remote from the U.S. mainland,” use of a narrower geographic market is further warranted.¹² Consequently, the Commission should also analyze market power in the Proposed Transaction by considering intrastate transport/backhaul as a separate, relevant market.

¹⁰ See discussion of terrestrial and satellite facilities in part II.A below; see also OPT Comments at 10.

¹¹ See, e.g., *St. Thomas-St. Croix Cable Landing License*, 11 FCC Rcd. at 14,897 ¶ 40 (recognizing that the market for “facilities operating between St. Thomas and St. Croix [are] relevant because the proposed facility will operate between St. Thomas and St. Croix and thus is potential route for U.S. Virgin Islands-originating or -terminating traffic”); *Alascom, Inc., AT&T Corp. and Pacific Telecom, Inc.*, Order and Authorization, 11 FCC Rcd. 732, 754 ¶ 48 (1995) (“*Alascom/AT&T Order*”) (finding that the relevant markets for the undersea cable services in the AT&T-Alascom merger was the “interstate interexchange market”).

¹² *IT&E Overseas, Inc., Transferor, and PTI Pacifica, Inc., Transferee*, Memorandum Opinion & Order & Declaratory Ruling, 24 FCC Rcd. 5466, 5479 ¶ 25 (Wireline Comp., Wireless Telecomm’ns & Int’l Burs. 2009) (adopting Guam and the Commonwealth of the Northern Mariana Islands as the relevant geographic market).

C. The Applicants Misidentify International Transport Provided in a Global Market as the Relevant Product and Geographic Markets

The Applicants ignore the Commission’s analytical framework for considering market power and instead nonsensically claim that the relevant product market is international transport and that the relevant geographic market is global.¹³ Were this the case, the Applicants would be competing in the same market as OPT. As noted in parts I.A and B above, however, the Applicants and OPT compete in separate markets, with OPT acting as a customer of Wavecom for intrastate transport and cable landing services and a potential customer of HT for intrastate transport.

Contrary to the Applicants’ assertions,¹⁴ the Commission has never stated that it must use the global international transport market simply because a transaction involves undersea cable facilities or services. According to the Applicants’ logic, to which the Commission has never subscribed, undersea cables are international and global by definition. To the contrary, the Commission has long recognized that undersea cable facilities are used to provide particularized products in specific geographic markets, and that transactions involving such facilities and services should be analyzed with reference to markets other than those ascribed by the Applicants.¹⁵

D. The Commission Has Jurisdiction to Consider the Competitive Effects of the Proposed Transaction

The Commission has jurisdiction to consider the competitive effects of the Proposed Transaction on the markets for intrastate transport and cable landing services for three reasons. *First*, the Proposed Transaction affects the market for international services in the United States, which depend upon intrastate transport for origination, termination, and transit of international telecommunications in the United States, and the Commission has exclusive jurisdiction over

¹³ See Applicants’ Joint Reply at 4-5. Although the Applicants assert participation in the international transport market by claiming that “the combined entity will own or control only one international cable landing license” and that the Proposed Transaction involves “one international and one domestic cable system being combined,” Applicants’ Joint Reply at ii, 12, the Commission has never licensed either HIFN or HICS to land in a foreign country, and neither system does. See FCC File Nos. File No. SCL-LIC-19950627-00024 and SCL-LIC-19921015-00008. Wavecom and HT each control one cable landing license for a domestic system. Post-close, HT will control two such licenses. The Applicants further undermine their assertion of global international transport as the relevant market by discussing effects in interstate markets and discuss extensively their views of competition by other intrastate facilities owners. Applicants’ Joint Reply at 4-10.

¹⁴ Applicants’ Joint Reply at 4-5.

¹⁵ See *St. Thomas-St. Croix Cable Landing License*, 11 FCC Rcd. at 14,897 ¶ 42; *Alascom/AT&T Order*, 11 FCC Rcd. at 754 ¶ 48.

international telecommunications.¹⁶ In this regard, intrastate transport/backhaul services are analogous to special access services,¹⁷ which the Commission regulates even though special access lines provide a local connection between a home or business and, typically, a local exchange carrier, because the lines provide transport used for interstate and international communications. The same onward transport of communications occurs in the intrastate transport/backhaul services market. *Second*, the Commission has jurisdiction over operation of intra-Hawaii undersea cables and cable stations pursuant to the Cable Landing License Act.¹⁸ *Third*, the Commission has jurisdiction over interconnection and collocation pursuant to Section 251 of the Act.

II. The Applicants Have Failed to Rebut OPT’s Analysis of Competitive Effects

A. The Relevant Markets Have Fewer Market Participants than the Applicants Claim

As described in OPT’s initial comments, OPT believes that the Proposed Transaction’s horizontal merger poses a high risk to competition by greatly increasing the ability of the merged Wavecom-HT to raise prices for intrastate transport and cable landing services and giving the combined company an ability to exercise market power even greater than that already exercised by the pre-merger Wavecom.¹⁹ As OPT has already demonstrated, the Proposed Transaction will reduce the number of effective competitors in the Hawaii intrastate transport/backhaul cable

¹⁶ See, e.g., *Teleglobe USA Inc., Applications for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended*, Order, 11 FCC Rcd. 8162, 8165-67 ¶¶ 11-12, 15 (Int’l Bur. 1996); *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 FCC 2d 413, 417 ¶ 6 (1974).

¹⁷ See 47 C.F.R. §§ 69.701 *et seq.*; see also *Special Access for Price Cap Local Exchange Carriers, and AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report & Order, WC Docket No. 05-25 & RM-10593, FCC 12-92, at 1 ¶ 1 n.1 (rel. Aug. 22, 2012).

¹⁸ See, e.g., 47 U.S.C. § 34 (requiring a written license from the President to land or operate a cable in the United States except “cables, all of which, including both terminals, lie wholly within the continental United States”); Exec. Order No. 10,530, Sec. 5(a) (delegating such authority to the Commission, subject to ultimate Executive Branch approval), *reprinted as amended* in 3 U.S.C. § 301; Federal Communications Commission, International Bureau, *Submarine Cable Landing Licenses*, <http://transition.fcc.gov/ib/pd/pf/sc11.html> (“A cable landing license must be obtained prior to landing a submarine cable to connect . . . points within the continental United States, Alaska, Hawaii or a territory or possession in which the cable is laid within international waters.”).

¹⁹ See OPT Comments at 6-11.

station access, and landing services markets from three to two, with one (HT) controlling 75 percent of the available fiber capacity on the Big Island-Oahu route.²⁰

Southern Cross. The Applicants admit that the Southern Cross Cable Network (“SCCN”) does not compete directly in the relevant market.²¹ They instead suggest that the Commission should nevertheless include SCCN in the relevant market analysis because SCCN might expand capacity in the future or because customers such as OPT could contract with a third party to obtain backhaul from the SCCN landing station.²² Arguments about hypothetical future business expansion or indirect access to backhaul services notwithstanding, the Applicants offer no evidence that SCCN actually competes with HIFN or HICS capacity on the Big Island-Oahu route. In fact, Southern Cross relies in part on HIFN and HICS to provide backhaul to its customers.²³

Paniolo/Sandwich Isles. Paniolo is not a viable competitor in the intrastate transport market. Paniolo itself has leased all of its capacity to Sandwich Isles Communications, and Sandwich Isles cannot sell significant capacity to third parties without undermining its long-running effort to obtain Universal Service Fund support.²⁴ Even if it could, Sandwich Isles’ ongoing financial troubles make it a much less attractive provider.²⁵ At best, the Applicants assert that the Paniolo Cable has provided emergency restoration services and could do so again, if it filed for and received any necessary regulatory authorizations.²⁶ Paniolo’s prior provision of

²⁰ See OPT Comments at 6-11.

²¹ See Applicants’ Joint Reply at 8.

²² See *id.*

²³ See *Backhaul: Hawaii*, Southern Cross Cable Network, www.southerncrosscables.com/public/Backhaul/default.cfm?PageID=88 (last visited Oct. 8, 2012).

²⁴ See OPT Comments at 9 & n.32; *Paniolo Cable, Inc. Application for License to Land and Operate a High Capacity Fiber Optic Cable System Extending Among the Hawaiian Islands of Kauai, Oahu, Molokai, Maui and Hawaii*, File No. SCL-LIC-20070223-00003, at 6-9 (filed Feb. 23, 2007) (stating that Sandwich Isles Communications, Inc., will lease all Paniolo cable capacity). See generally *Sandwich Isles Commc’ns, Inc. Petition for Waiver of Section 54.302 of the Commission’s Rules*, WC Docket Nos. 10-90 and 10-208.

²⁵ See Press Release, Office of Sen. Daniel Akaka, Oversight hearing examines concerns with the Universal Service Fund reform (June 8, 2012), available at <http://akaka.senate.gov/press-releases.cfm?method=releases.view&id=6f7ae007-1fc7-4ce2-88c2-3f6bf8e86639> (quoting Albert Hee, President of Sandwich Isles Communications, as saying, “The rule changes have effectively created an environment where small companies, like ours, cannot participate in the Universal Service Fund and, therefore, will quickly face bankruptcy”).

²⁶ See Applicants’ Joint Reply at 7-8.

emergency restoration to tw telecom²⁷ is not the same as regularly offering interisland transport to third parties.

Terrestrial and Satellite Facilities. The Applicants’ assertions about competing terrestrial and satellite facilities are not credible and are directly contradicted by statements made by Wavecom and HT in the Hawaii PUC proceeding considering the Proposed Transaction. In response to a query from the Hawaii Consumer Advocate, Wavecom and HT admitted that, other than undersea cable facilities and HT’s own Interisland Microwave Network, “[n]either Hawaiian Telcom nor Wavecom is aware of any other alternatives for transporting telecommunications services between the islands.”²⁸ Far from being “abundantly available,” such facilities are entirely lacking. As OPT noted previously, satellite capacity is not an effective substitute for fiber connectivity, given the great expense, reduced reliability, and latency of satellite communications as compared with fiber. This is particularly true for backhaul for an international undersea cable, where concerns about reliability and low latency are of paramount importance. As for terrestrial microwave facilities, the Applicants themselves admit that such facilities are not a substitute for fiber connectivity, due to limited capacity. Such direct facilities also do not exist on the Big Island-Oahu route, as the islands are too distant from each other, necessitating transit of other islands, as with the Paniolo system. The owners of these facilities do not compete at all in the market for cable station access and landing services.

B. HICS and HIFN Upgrades Would Likely Increase the Market Share of the Combined HT-Wavecom in the Intrastate Transport Market

The Applicants’ arguments about potential capacity upgrades on HIFN and HICS only underscore OPT’s concerns about concentration in the intrastate transport market.²⁹ The Applicants provide no information regarding HT’s assertions of a possible capacity upgrade on HIFN, whether by Wavecom individually or jointly with HIFN’s other owner, tw telecom, or whether either owner is currently capacity-constrained. (Wavecom itself did not address this

²⁷ See Letter from Dana Frix, Chadbourne & Parke LLP, Counsel for Sandwich Isles Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-133, at 2 (filed July 30, 2010).

²⁸ Hawaiian Telcom, Inc. and Wavecom Solutions Corp.’s Responses to the Div. of Consumer Advocacy’s Second Submission of Information Requests, Hawaii PUC Docket No. 2012-0174, Response to CA-IR 32(a) (filed 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. In its initial comments, OPT directly quoted this admission by the Applicants, although the Applicants now attempt to dismiss their own admission as “OPT’s assertions.” Applicants’ Joint Reply at 11 n.49.

²⁹ See Applicants’ Joint Reply at 6; *see also id.*, Attachment 2 – Declaration of Daniel Masutomi at ¶¶ 3, 10.

point in the comments or declarations.) If HT were to upgrade HICS, the combined HT-Wavecom would control an even greater share of the interisland capacity market.

If Wavecom alone were to upgrade HIFN, the combined HT-Wavecom would also end up controlling an even greater share of the interisland capacity market. Realistically, though, the combined HT-Wavecom would have a strong incentive *not* to upgrade both HIFN and HICS, given the capital costs and the fact that such action could depress capacity prices. HT is already upgrading HICS, suggesting that there is no reason for the same owner/investor to upgrade HIFN.

C. Wavecom’s Kawaihae Cable Station Remains a Bottleneck Facility

Contrary to the Applicants’ assertions,³⁰ Wavecom’s Kawaihae cable station remains a classic bottleneck facility in the market for cable landing services—one which the Proposed Transaction would strengthen. As noted in part I.A above, there are numerous legal and practical impediments to a cable owner moving a cable landing once its cable has been constructed and entered into service. As the International Bureau noted in the case of the St. Thomas-St. Croix Cable,

the factual question of whether the proposed cable system is a competitive ‘bottleneck’ is relevant. Under *NARUC I* and Commission precedent, our decision necessarily must consider whether the proposed cable system is a competitive “bottleneck” (*i.e.*, whether there are no competitive substitutes, enabling the owner to restrict output or raise prices), or whether there are, in fact, competitive alternatives.³¹

Wavecom has already created insurmountable barriers to entry for competing providers of onward connectivity. In the case of OPT’s Honotua system, which is already operational, an alternative landing is simply not feasible.

D. OPT’s Alternative Arrangements Highlight Wavecom’s Market Power, Which the Proposed Transaction Will Only Increase

OPT’s alternative arrangements for traffic exchange in Los Angeles—cited by the Applicants as evidence of competition—only highlight Wavecom’s market power in the markets for cable station access, landing services, and intrastate backhaul. Despite two separate tendering processes conducted over two years in order to obtain intrastate transport to reach Honolulu from Kawaihae, OPT has been unable to secure a viable offer for such services. Wavecom has offered services to OPT on a case-by-case basis at inflated rates (and in violation of Hawaii PUC rules regarding tariffed services) and demanded that third parties seeking to

³⁰ See Applicants’ Joint Reply at 10-11.

³¹ *St. Thomas-St. Croix Cable Landing License*, 11 FCC Rcd. at 14,896 ¶ 39.

provide such services to OPT pay an extortionate premium to transit or collocate in Wavecom's cable station.³² OPT has come to rely on back-up arrangements with Southern Cross to take traffic to Los Angeles, even though some of that traffic is ultimately destined for Hawaii or other points in the Pacific. That traffic transits HT's own Kawaihae cable station, giving the combined HT-Wavecom even greater control over OPT's onward connectivity arrangements in the future.

Wavecom provides no evidence whatsoever that its backhaul rates are competitive or that its dark fiber rates are "below market."³³ Nowhere does Wavecom address the fact that it offered unreasonable and discriminatory rates and conditions (including a 42-week provisioning window) to third parties seeking access to the Kawaihae cable station in order to compete for the provision of those backhaul services.

E. The Applicants Have Distorted OPT's Argument about Collocation

Contrary to the Applicants' distorted characterization,³⁴ OPT has not argued that Wavecom has a Section 251 obligation to offer collocation. To the contrary, OPT argued that to the extent Wavecom offers collocation—which it does—it must do so on reasonable and non-discriminatory terms and conditions.³⁵ Wavecom does have a Section 251 obligation to interconnect.³⁶ As noted in part III below, Wavecom's past abuses of market power with respect to collocation are relevant to the Commission's public-interest analysis of the Proposed Transaction, as post-merger, the combined HT-Wavecom will control an even greater share of the cable station access and landing services market in Hawaii and on the Big Island.

³² See OPT Comments at 4-6; Comments of the State of Hawaii, Dep't of Commerce & Consumer Affairs, Div. of Consumer Advocacy, 3-4, WC Docket No. 12-206 (filed Sept. 14, 2012).

³³ Applicants' Joint Reply, Attachment 1 – Declaration of Jeremy Amen at ¶ 5.

³⁴ See Applicants' Joint Reply at 15.

³⁵ See OPT Comments at 5, 12-13.

³⁶ 47 U.S.C. § 251(a).

III. Wavecom’s Current Abuses of Market Power in the Relevant Markets Highlight the Risks of a Combined HT-Wavecom

A. Wavecom’s Past Misconduct Is Highly Relevant to the Commission’s Review

Wavecom’s current abuses of market power in the relevant markets and continuing violations of its obligations under the Act and the Commission’s rules all highlight the risks of a combined HT-Wavecom, which will have even greater market power in the relevant markets. Past misconduct and a history of noncompliance by a party to a transfer of control or assignment application constitutes an element of the FCC’s public interest review. As the Commission noted with respect to the proposed EchoStar/DirecTV merger:

EchoStar’s record with respect to compliance with SHVIA’s must-carry provisions and our rules suggests a resistance to taking steps to serve the public interest that do not also serve the company’s view of its own private economic interest. Moreover, one of the prime subjects of the alleged prior misconduct lies at the heart of the realization of the proffered public interest benefits claimed to flow from the merger—provision of additional local-into-local service pursuant to the must-carry rules. Accordingly, *this history of past conduct will be taken into account* in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives.³⁷

Section 214(c) of the Act authorizes the Commission to impose “such terms and conditions as in its judgment the public convenience and necessity may require.”³⁸ For the Commission to find that a transaction is in the public interest, “the Applicants and the proposed transaction must be in compliance with the Communications Act, related statutes, and the Commission’s rules.”³⁹ The Commission has stated that it will treat “any violation of any provision of the Act, or of the Commission’s rules, as predictive of an applicant’s future truthfulness and reliability and, thus, as having a bearing on an applicant’s character

³⁷ *EchoStar/DIRECTV Order*, 17 FCC Rcd. at 20,579 ¶ 35 (emphasis added); *see also, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, For Consent to Transfer Control; and Petition for Declaratory Ruling*, Memorandum Opinion & Order, 23 FCC Rcd. 17,444, 17,462 ¶ 29 (2008) (“*Verizon/ALLTEL Order*”); *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion & Order, 23 FCC Rcd. 12,348, 12,366 ¶ 33 (2008) (“*XM/Sirius Order*”); *AT&T/BellSouth Order*, 22 FCC Rcd. at 5674 ¶ 22.

³⁸ 47 U.S.C. § 214(c); *see also Verizon/ALLTEL Order*, 23 FCC Rcd. at 17,463 ¶ 29; *XM/Sirius Order*, 23 FCC Rcd. at 12,366 ¶ 33; *AT&T/BellSouth Order*, 22 FCC Rcd. at 5674 ¶ 22.

³⁹ *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd. 4238, 4343 ¶ 258 (2011).

qualifications.”⁴⁰ Where the FCC finds that an applicant’s past conduct has been noncompliant, it has imposed competitive safeguards, much as OPT asks it to do here.⁴¹

Contrary to Wavecom’s assertions,⁴² OPT is not trying to change its landing party agreement or invite the Commission to intervene in a commercial dispute. Instead, OPT seeks to highlight that it has been unable to enforce the pre-merger Wavecom’s existing obligations to act in a reasonable and nondiscriminatory manner under Title II of the Act—a problem that the Proposed Transaction will only exacerbate.⁴³

The landing party agreement merely reflects Wavecom’s common-carrier obligations in Sections 201, 202 and 251 of the Act. Recitation of those obligations in the contract does not render them a purely contractual obligation or foreclose a Commission remedy in favor of a contractual one. Ultimately, it is the Commission that has a statutory obligation to enforce Section 201/202/251 obligations—particularly with respect to the post-merger combination, as part of the FCC’s public-interest analysis. Neither those statutory obligations nor the contractual provisions have been sufficient to constrain the pre-merger market power of Wavecom

OPT has worked (unsuccessfully) for years to try to persuade Wavecom to comply with its Sections 201, 202 and 251 obligations, among others. These concerns were not introduced to Wavecom for the first time in this proceeding or in recent offers to negotiate Wavecom’s statutory compliance and settlement of other unrelated issues (which are not before the Commission).

⁴⁰ *SBC Commc’ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18,290, 18,379 ¶ 172 (2005) (footnotes omitted). The Commission further noted that “[i]n prior merger orders, the Commission has used the Commission’s character policy in the broadcast area as guidance in resolving similar questions in transfer of licenses proceedings.” *Id.*

⁴¹ *See, e.g., Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, 14 FCC Rcd. 14,712, 14,871-72 ¶ 386 (1999) (noting prior competitive issues regarding collocation services and imposing competitive safeguards as condition on transaction approval).

⁴² *See Applicants’ Joint Reply* at 13-15.

⁴³ *See* 47 U.S.C. §§ 201(b), 202(a) & 251(a); *see also* OPT Comments at 4-6.

B. A Section 208 Complaint Is Not an Appropriate Remedy for Addressing Merger-Specific Effects or a Prerequisite for Seeking Conditions on a Merger

Contrary to the Applicants' assertions, a Section 208 complaint is not an appropriate remedy for addressing merger-specific effects of the Proposed Transaction or a prerequisite for seeking conditions on any Commission consent for the transaction. The Applicants erroneously contend that OPT should seek an alternative remedy for its concerns regarding Wavecom's unreasonable and discriminatory behavior.⁴⁴ It is indisputably true that Section 208 provides a remedy for violations of the Communications Act. But nothing in the Communications Act or its implementing regulations requires an aggrieved party to file a Section 208 complaint prior to raising public interest concerns regarding transaction-specific effects in a transaction review.⁴⁵ To the contrary, such competition issues are appropriately raised in a merger review.⁴⁶ Moreover, the Applicants' Section 208 argument fails to address the fact that HT has an economic incentive—and the market power—to continue these anti-competitive practices post-close, unless the FCC acts to impose appropriate competitive safeguards.

* * *

⁴⁴ See Applicants' Joint Reply at iii, 14-15.

⁴⁵ See 47 U.S.C. § 208.

⁴⁶ See, e.g., *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion & Order, 14 FCC Rcd. 3160, 3168 ¶ 14 (1999) (noting that the public interest "analysis must include, among other things, consideration of the possible competitive effects of the transfer").

Ms. Marlene H. Dortch
Federal Communications Commission
8 October 2012 – *CORRECTED*
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For the reasons described above, OPT respectfully requests that the Commission grant consent for the Proposed Transaction subject to competitive safeguards.

Respectfully submitted,



Kent D. Bressie
Madeleine V. Findley
Danielle J. Piñeres
WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036-2516
+1 202 730 1337 tel

*Counsel for l'Office des postes et
télécommunications de Polynésie française*

Attachment

cc: Jim Bird
David Krech
Jodie May
Wayne McKee
Linda Ray
Tracey Wilson