

2 November 2012

**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—Ex Parte Notice*

Dear Ms. Dortch:

Through its counsel, l'Office des postes et télécommunications de Polynésie française ("OPT") hereby notifies the Commission of an *ex parte* meeting in the above-referenced proceeding. On October 31, 2012, Madeleine Findley, Danielle Piñeres, and I of Wiltshire & Grannis LLP, counsel for OPT, met with Jodie May of the Wireline Competition Bureau, David Krech and George Li of the International Bureau, and Jim Bird and Joel Rabinovitz of the Office of General Counsel. During the meeting, we discussed OPT's concerns regarding the proposed acquisition by Hawaiian Telcom, Inc. ("HT") of Wavecom Solutions Corporation ("Wavecom") (together, the "Applicants") (the "Proposed Transaction"). Contrary to Wavecom and HT's claims in their 24 October 2012 filing, OPT has raised legitimate concerns about the post-merger market power of the combined HT-Wavecom in the relevant markets, cable station access and landing services and intrastate transport/backhaul in Hawaii used for originating, terminating, or transiting international services.

**1. Cable Station Access and Landing Services**

During the meeting, OPT described the critical importance to French Polynesia of the Honotua cable system, which OPT constructed to replace the expensive, limited, and less-secure satellite capacity on which it had previously depended. Honotua now provides French Polynesia with true high-speed IP connectivity suitable for bandwidth-intensive and real-time applications.<sup>1</sup> The international segment of Honotua connects Tahiti directly to the Big Island of

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<sup>1</sup> OPT Comments in Support of Conditional Approval, WC Docket No. 12-206, at 2 (filed Sept. 4, 2012) ("OPT Comments").

Hawaii and provides onward connectivity to the rest of the world.<sup>2</sup> In 2008, OPT and Wavecom (then known as Pacific Lightnet, Inc. (“PLNI”)) executed a Landing Party Agreement (“LPA”) for landing party services and for OPT to land Honotua at Wavecom’s cable station at Kawaihae on the Big Island.<sup>3</sup> Over the course of their contract, OPT has paid Wavecom millions of dollars for landing and related services. Some of these funds financed the upgrade of Wavecom’s cable station at Kawaihae—improvements from which Wavecom continues to benefit.

OPT explained generally that cable stations house power-feed equipment and electronics for an undersea cable system and provide a point of interconnection for the system, enabling onward connectivity to other points of presence and the Internet backbone. Like most providers constructing new undersea cable systems, OPT had to choose whether to build and operate a cable station or contract with a third party (known as a landing party) for landing at that third party’s existing cable station. For legal and commercial reasons, OPT decided to contract with a landing party in Hawaii, and it chose Wavecom and Wavecom’s Kawaihae cable station on the Big Island.

After a cable system owner obtains licenses and permits for a system, constructs the system, and commences commercial operations, it is prohibitively and impractical to move the cable to land at an alternative cable station. *First*, the owner of such a cable would face sunk costs and potential liability associated with the initial LPA. *Second*, the owner would face significant costs and delays associated with procuring new facilities (having to construct or contract for use of alternative facilities for which it assumed it had already paid) and obtaining any necessary local, state, and federal permits, licenses, and clearances pertaining to environmental, communications, and national-security regulation.<sup>4</sup> *Third*, the owner would face potential disruption of communications traffic, which could impose additional costs for procuring substitute connectivity (if even available), compensating customers with service credits, and potential damage to equipment as it is recovered and reinstalled at a new landing point.<sup>5</sup> OPT is unaware of any circumstance in which the owner of an in-service, installed undersea cable has rerouted and reinstalled its cable from one cable station to another, and OPT

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 3. PLNI was sold to the private equity investor SK Telecom Holdings, L.P., in a transaction to which the Commission consented in 2008, before the execution of the LPA in September 2008, but which closed only in 2009, after the execution of the LPA. *See Notice of Domestic Section 214 Authorization Granted*, Public Notice, 23 FCC Rcd. 5228 (Wireline Comp. Bur. 2008); *International Authorizations Granted*, Public Notice, 23 FCC Rcd. 4731 (Int’l Bur. 2008); *Actions Taken Under Cable Landing License Act*, Public Notice, 23 FCC Rcd. 5775 (Int’l Bur. 2008).

<sup>4</sup> OPT Response to the Joint Reply Filed by Wavecom and HT, WC Docket No. 12-206, at 3 (filed October 8, 2012, corrected Oct. 16, 2012) (“OPT Response”).

<sup>5</sup> *See id.*

has not seriously considered such a possibility. While OPT had some bargaining power in choosing among alternative landing parties and negotiating the LPA *before* Honotua's construction and commencement of commercial operations, it has little if any bargaining power vis-à-vis Wavecom *after* construction and commencement of commercial operations, given the prohibitive costs of arranging an alternative landing. This gives Wavecom market power in one of the two relevant markets identified by OPT: post-construction cable access and landing services.

OPT had thought that it was protected by the Commission's regulation of the Hawaiian Islands Fiber Network ("HIFN," of which Wavecom owns a half-interest), including the Kawaihae cable station, as common-carrier facilities, thereby obligating Wavecom to offer collocation, cross-connects, and backhaul transport at reasonable and nondiscriminatory prices (pursuant to Sections 201 and 202 of the Communications Act of 1934, as amended (the "Act")) and to permit third parties to interconnect at Wavecom's Kawaihae cable station (pursuant to Section 251 of the Act).<sup>6</sup> Wavecom, however, has repeatedly ignored these obligations and frustrated OPT's efforts to connect with third parties and obtain onward connectivity from Kawaihae.<sup>7</sup>

OPT has long sought geographically diverse IP connectivity in order to maintain continuity of the high-speed connectivity on which the French Polynesian economy and government now depend. (It has also sought that connectivity from competing providers, in order to encourage competition among its providers.) Although Honotua's Tahiti-Hawaii segment consists of a single cable, and although there is no other fiber-optic cable connecting to Tahiti on any international route, much less the Tahiti-Hawaii route, OPT has sought to maximize this diversity by maintaining Internet backbone connections in both Hawaii and California. For that reason, OPT negotiated for and obtained in the original LPA—when it had some bargaining power with Wavecom—an indefeasible right of use on Wavecom fiber pairs connecting Wavecom's Kawaihae cable station to HT's Kawaihae cable station, where the Southern Cross Cable Network ("SCCN") lands. (OPT actually connects with the SCCN in SCCN's manhole outside the HT cable station, so it does not connect with HT in HT's Kawaihae cable station.) The SCCN provides connectivity between Kawaihae and California (among other landing points), and OPT purchases capacity on SCCN to allow it to obtain IP connectivity in Los Angeles. In the LPA, OPT also contracted for capacity between Wavecom's Kawaihae cable station and Wavecom facilities at 737 Bishop Street in Honolulu, which OPT anticipated using (along with additional third-party services) to reach the carrier-neutral data center DR Fortress in Honolulu.

OPT has conducted two subsequent tenders for IP connectivity in Hawaii. Each tender has failed due to Wavecom's demands that third parties attempting to connect with OPT at the

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<sup>6</sup> OPT Comments at 4-5.

<sup>7</sup> *Id.*

Kawaihae cable station or Wavecom's facilities at 737 Bishop Street pay exorbitant collocation and physical interconnection charges to Wavecom, which effectively priced those third parties out of the market when compared with Wavecom's own bids.<sup>8</sup> In the absence of a longer-term solution, OPT currently purchases a small amount of IP connectivity directly from Wavecom (for which Wavecom re-sells an Internet backbone connection in Honolulu—Wavecom itself is not an Internet backbone provider—and self-provisions transport between Honolulu and Kawaihae on HIFN) on a month-to-month basis at high prices.

OPT explained that the Proposed Transaction would increase Wavecom's market power over cable station access and landing services at Kawaihae and cited Wavecom's past actions as evidence that a market-power problem already exists. At present, the only competitive alternative that OPT has for taking traffic out of Wavecom's Kawaihae cable station is to use the IRU between Wavecom's Kawaihae cable station and HT's Kawaihae cable station (for which it contracted in the original LPA), as Wavecom has consistently sought to impose high collocation and physical interconnection charges on third parties seeking to connect with OPT. To date, OPT has not used the connectivity to HT's Kawaihae cable station as a basis for procuring onward connectivity to Honolulu on HT's Hawaiian Islands Cable System ("HICS") because OPT does not actually connect with HT (but instead directly with the SCCN outside the HT cable station).

Regardless, after consummation of the Proposed Transaction, all of OPT's options for taking traffic out of Wavecom's Kawaihae cable station will depend entirely on the facilities and services of the combined HT-Wavecom. Whether at Wavecom's Kawaihae cable station or HT's Kawaihae cable station, OPT would confront the same competitive issues of the charges, terms, and conditions that the cable station owner would impose on third parties seeking access for collocation, physical interconnection, and cross-connects in order to reach OPT.

OPT reiterated that the Commission licensed both the HIFN and HICS systems, including their cable stations, as common-carrier facilities.<sup>9</sup> While the Commission did not expressly find that the facilities constitute bottleneck facilities, those facilities remain subject to common-carrier regulation and subject to Title II of the Act.<sup>10</sup> Neither Wavecom nor HT has ever sought

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<sup>8</sup> *Id.* at 4-6.

<sup>9</sup> *Id.* at 6-7 (citing *GST Pacwest Telecom Hawaii, Inc.*, Cable Landing License, File No. 95-003 (New File No. SCL-LIC-19950627-00024), 11 FCC Rcd. 3024 (Int'l Bur. 1996) ("HIFN Cable Landing License"), *GTE Hawaiian Telephone 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); and *Actions Taken Under the Cable Landing License Act*, Public Notice, File Nos. SCL-ASG-20110112-00002 and -00003, 26 FCC Rcd. 4923 (Int'l Bur. 2011)).

<sup>10</sup> *Id.* In this respect, the licenses differ markedly from that for the St. Thomas-St. Croix Cable System, where the Commission declined to impose common-carrier regulation. *AT&T*

to change the common-carrier status of HIFN or HICS facilities, respectively, and the common control of these two systems following the consummation of the Proposed Transaction (as discussed further in part 2 below) only underscores the need for continuing common-carrier regulation of these facilities—as well as additional competitive safeguards.

## 2. Intrastate Transport/Backhaul

With respect to intrastate transport/backhaul, OPT explained that in Hawaii, undersea cables provide inter-island (intrastate) connectivity. Owners of cables on international routes (like OPT) rely on the provision of this intrastate connectivity, or backhaul, to transport their traffic from cable landing stations (which are typically not at carrier switching facilities, telehotels, data centers or other major points of presence), on to other points of interconnectivity.<sup>11</sup>

OPT described to the Commission the current competitive landscape for intrastate transport and cable landing services in Hawaii. As OPT previously explained in its filings, the Proposed Transaction would reduce the number of effective competitors in the Hawaii intrastate transport/backhaul and cable landing market from three to two, with HT controlling 75 percent of the available fiber capacity on the Big Island-Oahu route.<sup>12</sup> Contrary to the Applicants' assertions, current competition for intrastate transport/backhaul and cable landing services is far from "rampant and growing."<sup>13</sup> SCCN does not compete in the market for intrastate backhaul—SCCN advertises HT and Wavecom among potential backhaul providers for its own customers, but not SCCN itself.<sup>14</sup> In fact, although SCCN has a cable segment between the Big Island and Oahu, SCCN has no regulatory authority to provide intrastate capacity to third parties between these two points.<sup>15</sup> The Paniolo Fiber-Optic Cable ("PFOC") system does not appear to compete

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*Submarine Systems, Inc.*, Cable Landing License, 11 FCC Rcd. 14,885, 14,897 ¶ 40 (Int'l Bur. 1996) ("*St. Thomas-St. Croix Cable Landing License*").

<sup>11</sup> OPT Response at 4-5.

<sup>12</sup> *Id.* at 7-8.

<sup>13</sup> Applicants' Joint Reply at 4-10.

<sup>14</sup> OPT Comments at 8-9 (citing *Backhaul: Hawaii*, Southern Cross Cable Network, [www.southerncross.com/public/Backhaul/default.cfm?PageID=88](http://www.southerncross.com/public/Backhaul/default.cfm?PageID=88) (listing 6 cable and satellite backhaul providers serving Hawaii, including HT and Wavecom but not including Southern Cross itself)). As OPT noted during the meeting, several of the providers listed are resellers of capacity on HICS or HIFN, cables owned by HT and Wavecom (and in part by tw telecom). Note that an intrastate satellite connection would not be a desirable option for OPT due to concerns regarding latency and reliability that OPT sought to avoid by building Honotua to replace satellite connectivity in the first place.

<sup>15</sup> See OPT Comments at 9-10.

at all with the intrastate transport provided on the Hawaii Inter-Island Cable System (“HICS”) and the Hawaii-Fiber Network (“HIFN”), and, in any event, faces legal and practical limitations on its ability to sell to third parties.<sup>16</sup> Wavecom and tw telecom jointly own and operate HIFN<sup>17</sup> and currently both compete with the service provided by HT over HICS.<sup>18</sup> If the Proposed Transaction is approved, only tw telecom will compete with HT for intrastate transport and cable landing services. For these reasons, competition for intrastate transport/backhaul services and cable landing services would be very significantly reduced as a result of the Proposed Transaction, which merits scrutiny by the Commission and the imposition of conditions to ensure adequate competition.

### 3. Relevant Markets and Jurisdiction

In the meeting, OPT reiterated that the Commission should analyze the competitive effects of the Proposed Transaction in two relevant markets over which it has jurisdiction: (1) the intrastate transport/backhaul market in Hawaii used for originating, terminating, or transiting international services; and (2) cable station access and landing services.<sup>19</sup> Wavecom and HT currently compete to provide intrastate transport between Oahu and the Big Island.<sup>20</sup> OPT is a customer in this intrastate transport; it currently purchases some exorbitantly expensive transport from Wavecom and has sought to obtain more competitively priced transport from other providers, including HT.<sup>21</sup> The Commission should therefore examine competitive effects in the intrastate transport market. In addition, both Wavecom and HT offer cable station access and landing services at Kawaihae to third-party-owned undersea cable providers. As previously noted, once a cable owner has landed its cable at a particular station, significant barriers operate to prevent the cable owner from moving its cable to a different landing station. For that reason, an international cable owner would not switch to another form of interconnection, collocation, and shore-end access facilities even in the face of a small but significant and nontransitory increase in the price of cable station access and landing services.<sup>22</sup>

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<sup>16</sup> *Id.* at 9; OPT Response at 8.

<sup>17</sup> OPT explained (and later confirmed) that tw telecom lands its fibers comprising its half-interest in HIFN at a facility separate from Wavecom’s Kawaihae cable station. Regardless, the LPA does not grant OPT any capacity or IRU to reach the tw telecom facility, meaning that to reach OPT tw telecom would have to pay the collocation and physical interconnection charges demanded of all third parties by Wavecom.

<sup>18</sup> *See* OPT Comments at 6-7.

<sup>19</sup> OPT Response at 1.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.* at 4, 6.

<sup>22</sup> *Id.* at 3.

Contrary to Wavecom and HT's assertions,<sup>23</sup> the relevant product market for the Proposed Transaction is *not* the international transport market and the relevant geographic market is not global. Neither Wavecom nor HT offers international transport for a global geographic market. Instead, they offer intrastate transport and cable station access and landing services. The Commission has explicitly recognized separate product markets for intrastate transport and cable station-related services and geographic markets on a more localized basis.<sup>24</sup>

The Commission has recognized its jurisdiction to consider the competitive effects of a transaction in the market for cable access and landing services pursuant to the Cable Landing License Act.<sup>25</sup> The Commission has also previously recognized that it has jurisdiction to consider and regulate intrastate backhaul where a transaction will result in increased market power that affects the provision of international or interstate communications services.<sup>26</sup> OPT underscored that although the Hawaii Public Utilities Commission ("Hawaii PUC") has jurisdiction to regulate intrastate services,<sup>27</sup> the PUC does not regulate undersea cable infrastructure, including intrastate cable systems, and it will not consider the effect of changes to intrastate market power on the international market. The Commission's jurisdiction therefore does not conflict with or displace the Hawaii PUC, but rather would consider an important aspect of the transaction that is not within the Hawaii PUC's purview.

#### **4. Relevance of Wavecom's Past Behavior**

OPT also reiterated that, contrary to the Applicants' assertions,<sup>28</sup> OPT is not seeking to use the Commission's merger-review process to litigate issues with Wavecom's past non-performance.<sup>29</sup> Instead, OPT references the dispute with Wavecom to underscore that market concentration in the relevant markets already exists and has led to anticompetitive effects, and that the Proposed Transaction will only magnify those effects. Contrary to the Applicants'

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<sup>23</sup> Joint Reply Comments of Applicants ("Applicants' Joint Reply"), WC Docket No. 12-206, at 5 (filed 19 Sept. 2012); Joint Response Comments of Applicants ("Applicants' Joint Response"), WC Docket No. 12-206, at 2 (filed 24 Oct. 2012).

<sup>24</sup> *St. Thomas-St. Croix Cable Landing License*, 11 FCC Rcd. at 14,896-97, ¶ 40.

<sup>25</sup> See OPT Response at 2-3 (citing *St. Thomas-St. Croix Cable Landing License*).

<sup>26</sup> *Id.* at 5 (citing *AT&T Submarine Systems, Inc.*, Cable Landing License, 11 FCC Rcd. 14,885, 14,897 ¶ 40 (Int'l Bur. 1996) ("*St. Thomas-St. Croix Cable Landing License*").

<sup>27</sup> Indeed, the Hawaii PUC is conducting its own review of this transaction. See Hawaii PUC Docket No. 2012-0174, *available at* [http://dms.puc.hawaii.gov/dms/DocketDetails?docket\\_id=85+3+ICM4+LSDB9+PC\\_Docket60+26+A1001001A12G17B00118D2918918+A12G17B00118D291892+164+1873](http://dms.puc.hawaii.gov/dms/DocketDetails?docket_id=85+3+ICM4+LSDB9+PC_Docket60+26+A1001001A12G17B00118D2918918+A12G17B00118D291892+164+1873).

<sup>28</sup> Applicants' Joint Response at 2-3.

<sup>29</sup> See OPT Response at 13.

assertions,<sup>30</sup> OPT's preexisting disputes with Wavecom are not new, as evidenced by the two failed tenders for third-party IP connectivity in 2010 and 2011. That the LPA between OPT and Wavecom incorporates language parallel to Wavecom's obligations under the Communications Act to act in a "reasonable" and "non-discriminatory" manner does not somehow strip the Commission of jurisdiction to enforce the provisions of the Act.<sup>31</sup> OPT also explained that it has not filed a Section 208 complaint with respect to Wavecom's past behavior because OPT has thus far pursued commercial negotiations to address Wavecom's non-performance. Moreover, a Section 208 complaint is not an appropriate procedural vehicle for considering transaction-specific effects. Nothing in the Act or the Commission's implementing regulations requires an aggrieved party to file a Section 208 complaint before raising public interest concerns regarding transaction-specific effects in a transaction review.<sup>32</sup>

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For all of the foregoing reasons, the Commission should consent to the Proposed Transaction subject to competitive safeguards sought in the OPT Comments.

Respectfully submitted,



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cc: Jim Bird  
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<sup>30</sup> Applicants' Joint Reply at 14.

<sup>31</sup> OPT Response at 13.

<sup>32</sup> OPT Response at 14.