

OPT TALKING POINTS
17 DECEMBER 2012

I. Relevant Product and Geographic Markets

- Standards
 - A 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.” (*Phoenix Forbearance Order*)
 - A 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.” (*EchoStar-DirecTV HDO*)
 - Commission uses a narrower geographic market where proposed merger partners “serve island populations that are remote from the U.S. mainland.” (*IT&E-PTI Pacific Order*)
 - The standard is whether there is a lack of competitive substitutes that would allow owner to restrict output or raise prices. (*St. Thomas-St. Croix Cable Order*)
- First Relevant Market: intrastate transport/backhaul used for originating, terminating, or transiting international services
 - Both Wavecom and HT compete in this market. OPT is a customer in this market.
 - The prospect of buyer substitution of international transport in the Pacific region would not constrain the price of intrastate transport/backhaul in Hawaii, as such products do not offer intra-Hawaii connectivity.
 - FCC has jurisdiction to review and regulate international and interstate effects resulting from increased market power for an intrastate service.
- Second Relevant Market: cable station access and landing services provided post-construction
 - Both Wavecom and HT compete in this market (though not necessarily with each other with respect to cables already landed at their respective cable stations). OPT is a customer in this market.
 - *Ex ante* market for landing party services prior to construction is a separate market, as the prospect of buyer substitution of *pre*-construction landing service arrangements would not constrain the price of *post*-construction cable station access and landing services.
 - It is not economically feasible for OPT to move its cable landing to another cable station after selecting, constructing, and commencing system operations.

II. Market Participants

- Intrastate transport/backhaul
 - Proposed Transaction would result in HT controlling 75 percent of the available fiber capacity on the Big Island-Oahu route and reduce the number of competitors from three to two.
 - Mere existence of other infrastructure in the region is insufficient to demonstrate competition in the market.
 - Southern Cross does not and cannot compete in the market for backhaul, as it is not authorized by the Hawaii PUC to provide intrastate services. Southern Cross instead advertises HT and Wavecom among potential backhaul providers.
 - Sandwich Isles' ongoing legal and financial difficulties with USAC and the FCC limit the ability of Paniolo/Sandwich Isles to make third-party sales.
 - Paniolo's three-hop, indirect, partially terrestrial route is not an economic substitute for point-to-point backhaul service from the Big Island to Honolulu.
 - HT and Wavecom assertions re comparability with pricing "on the mainland" are unsupported and irrelevant for purposes of the Hawaii intrastate transport/backhaul market.
 - Neither HT nor Wavecom has provided any evidence of pricing, standard terms and conditions, or tariffs for intrastate transport/backhaul.
 - In fact, OPT is already paying Wavecom exorbitant month-to-month rates for a limited IP connectivity (transport+backbone connectivity) service, as Wavecom has exercised market power in the cable station access market.
 - For more than two years, OPT has been unable to secure diverse IP connectivity in Hawaii.
- Cable station access and landing services provided post-construction.
 - Competition in intrastate transport/backhaul market matters only if OPT is able to arrange connectivity beyond Wavecom's Kawaihae cable station.
 - OPT has explained at length how Wavecom has (a) sought to impose exorbitant and discriminatory charges for cable station access, physical interconnection, and collocation in order to price competitors out of the market for intrastate transport/backhaul and (b) threatened to sue potential providers for sharing information about Wavecom pricing with third parties, including OPT.
 - Even if alternative (non-HT-Wavecom) cable stations could accommodate OPT (and they cannot—tw telecom does not have a cable station in Kawaihae and Paniolo's is too distant and otherwise not viable, as noted above), OPT

would still have to pay Wavecom to take traffic out of Wavecom's Kawaihae cable station.

- Neither HT nor Wavecom has provided any evidence of pricing, standard terms and conditions, or tariffs for cable station access, physical interconnection, or collocation.

III. Failure of Applicants to Meet Burden of Proof

- Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transactions would serve the public interest.
- Thus far, the Applicants have repeatedly cited their prior assertions, rather than provide documentary evidence.

IV. Proposed Conditions

- To address increased market concentration in the relevant markets and the insufficiency of existing common-carrier regulation of Wavecom's interest in HIFN (including the Kawaihae cable station), OPT requests the Commission condition its approval for the Proposed Transaction as follows:
 - Wavecom must permit other telecommunications providers to:
 - Use Wavecom's cross-connect links in Wavecom's Kawaihae cable station to interconnect their networks to other telecommunications providers (including OPT) collocated in or landing at the cable station;
 - Offer cable station access, physical interconnection, and collocation of transmission and routing equipment used by third parties to offer intrastate transport/backhaul to other telecommunications providers (including OPT) collocated in or landing at Wavecom's Kawaihae cable station at terms, conditions, and rates that are reasonable, cost-oriented, and non-discriminatory; and
 - Wavecom and HT must offer intrastate transport/backhaul at terms, conditions, and rates that are reasonable and non-discriminatory.