

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
)
 DOCOMO PACIFIC, INC.,) File No. SCL-LIC-20160314-00008
)
 Application for a License to Land and Operate)
 a Private Fiber-Optic Submarine Cable System)
 Connecting Guam with Saipan, Rota, and Tinian)
 in the Commonwealth of the Northern Mariana)
 Islands,)
)
 The Atisa System)
)

COMMENTS OF PTI PACIFICA INC. d/b/a IT&E

PTI Pacifica, Inc. d/b/a IT&E (“IT&E”), by its attorneys, hereby files comments on the above-referenced application by DOCOMO Pacific, Inc. (“DOCOMO Pacific”).¹ DOCOMO Pacific seeks to license a fiber-optic submarine cable, to be known as the Atisa system, connecting Guam with Saipan, Rota and Tinian in the Commonwealth of the Northern Mariana Islands (“CNMI”). IT&E is the licensee and operator of the only existing fiber-optic submarine cable connecting Guam with Saipan, Rota and Tinian in the CNMI (“the Mariana-Guam Cable”). IT&E is an interested party in this proceeding not only because it provides a competing service but because it may request back-up capacity on the Atisa system after the cable is built.

¹ DOCOMO Pacific, Inc., Application for a License to Land and Operate a Private Fiber-Optic Submarine Cable System Connecting Guam with Saipan, Rota, and Tinian in the Commonwealth of the Northern Mariana Islands, March 14, 2016 (“Application”). Not included with the Application is a Memorandum of Understanding between the Government of the CNMI and DOCOMO Pacific, dated March 10, 2016 (copy attached) that contemplated potential “CNMI Government investment.”

IT&E does not seek denial of the Atisa license application. IT&E requests, however, that the Commission expressly confirm that DOCOMO Pacific's proposed Atisa system, and the services offered over that system subject to Federal Communications Commission ("Commission") jurisdiction, will be treated for regulatory purposes the same as IT&E's existing Mariana-Guam cable (and the services offered over that cable that are subject to Commission jurisdiction).

DISCUSSION

DOCOMO Pacific requests that it be authorized to operate Atisa on a non-common carrier basis.² DOCOMO Pacific states that the Commission should not subject Atisa to common-carrier regulation because Atisa will not operate on a common-carrier basis as defined in *NARUC I*.³ DOCOMO Pacific asserts that courts have stated that "[t]he primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking 'to carry for all people indifferently.'"⁴ DOCOMO Pacific states that it will not sell capacity on Atisa indifferently to the user public. Instead, DOCOMO Pacific claims that it will: (a) use Atisa capacity as an input for other services offered to retail, enterprise, and government customers in Guam and the CNMI, and (b) sell bulk capacity to particular enterprise and government customers pursuant to individually-negotiated indefeasible rights of use ("IRUs") and capacity

² Application at 6.

³ *Id. citing Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C., Cir. 1976) ("*NARUC I*") (stating that the court must inquire "whether there are reasons implicit in the nature of [the] operations to expect an indifferent holding out to the eligible user public"), *cert. denied*, 425 U.S. 992 (1976); and *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (affirming FCC's use of *NARUC I* test for distinguishing common-carrier and private-carrier services following enactment of the Telecommunications Act of 1996).

⁴ *Id. citing Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601 (D.C., Cir. 1976) (quoting *Semon v. Royal Indemnity Co.*, 279 F.2d 737,739 (5th Circ. 1960)).

leases, the terms of which will vary depending on the characteristics and needs of the particular capacity purchaser.⁵ IT&E notes that DOCOMO Pacific’s description of how it proposes to offer service matches how IT&E currently operates the Mariana-Guam Cable today and how IT&E will continue to operate its cable in the future.⁶ Because the services that DOCOMO Pacific proposes to provide over its submarine cable are essentially the same services that IT&T presently offers over its submarine cable, the services on both cables should be subject to the same regulatory treatment.⁷

⁵ See *AT&T Corp. et al.*, Cable Landing License, 13 FCC Rcd, 16,232, 16,238 (Int’l Bur. 1998) (finding that individualized decisions concerning the sale or lease of capacity on the China U.S. Cable Network would not constitute the effective provision of a service to the public so as to make the applicant a common carrier); *AT&T Submarine Systems, Inc.*, Cable Landing License, 11 FCC Rcd. 14,885, 14,904 ¶ 64 (Int’l Bur. 1996) (“*St. Thomas-St. Croix Cable Order*”) (finding that an “offer of access, nondiscriminatory terms and conditions and market pricing of IRUs does not rise to the level of an ‘indiscriminate’ offering” so as to constitute common carriage), *aff’d AT&T Submarine Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21,585 (1998), *aff’d sub nom. Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

⁶ Although the FCC staff once suggested (in an order involving the transfer of control of FCC authorizations not including the submarine cable) that the Mariana-Guam Cable is a common carrier “facility,” *IT&E Overseas, Inc. and PTI Pacifica, Inc.*, Memorandum Opinion and Order and Declaratory Ruling, 24 FCC Rcd 5466, 5489 (2009), the FCC orders authorizing construction of the cable did not, in fact, state that the facility was authorized solely on a “common carrier” basis, or that all services offered over that cable would be deemed common carrier services. See *Micronesian Telecommunications Corporation*, Cable Landing License, 8 FCC Rcd 748 (1993); *Micronesian Telecommunications Corporation*, Application For Authority Under Section 214 of the Communications Act of 1934, As Amended, To Construct And Operate the MTC Interisland Cable Between the Commonwealth of the Northern Mariana Islands and Guam, 8 FCC Rcd 750 (1993). Such a determination would have been inconsistent with the *NARUC I* case law cited by DOCOMO Pacific, as the question of whether a service is a common carrier service must be evaluated based on the manner in which the service under scrutiny is offered and provided; both private and common carriage services can be provided over the same facility. Here, the services that Docomo proposes to provide over its submarine cable are essentially the same services that IT&T presently offers over its submarine cable, and the services on both cables should therefore be subject to the same regulatory treatment.

⁷ The FCC rules at the time the license application for the Guam-Mariana Cable was filed did not include a provision equivalent to current Section 1.767(a)(6) that requests that the applicant state whether the cable was proposed to be operated on a common carrier or non-common carrier basis.

In the event the Commission grants the Application, therefore, the Commission should confirm that a level regulatory playing field will exist between the Atisa system (once built) and IT&E's existing Mariana-Guam cable. In other words, all undersea cable offerings that meet the *NARUC I* test for non-common carriage should be treated as such.

Respectfully submitted,

PTI PACIFICA, INC.

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May 4, 2016

**MEMORANDUM OF UNDERSTANDING
BETWEEN**

**THE GOVERNMENT OF THE COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS (“CNMI”)
AND
DOCOMO PACIFIC, INC. (“DPAC”)**

March 10, 2016

WHEREAS, at present, the CNMI is connected to Guam and the rest of the world via a single submarine fiber optic cable, constructed nearly twenty years ago; *and*

WHEREAS, on July 8, 2015 the cable suffered a catastrophic cut resulting in a near-total communication blackout in the CNMI for over 48 hours; *and*

WHEREAS, the backup microwave system designed to provide redundant capacity to the cable also failed; *and*

WHEREAS, as a result of the July outage, telephone service, internet access, telemedicine services, credit-card purchases, ATM withdrawals, airline flights, hotel reservations and immigration clearances were unable to be accessed or transacted; *and*

WHEREAS, in addition to the cable cut, the devastation caused by Tropical Storm Dolphin and Typhoon Soudelor in 2015 underscored the urgent need for the CNMI to ensure a reliable and resilient telecommunications network; *and*

WHEREAS, additional benefits associated with a new, state-of-the-art submarine fiber-optic cable include stimulating business activity and investment in the CNMI, modernizing the health care, education and public service industries, and providing a seamless roaming experience for tourists; *and*

WHEREAS, DOCOMO PACIFIC, INC. is the premier full-service telecommunications provider in Guam and the CNMI; *and*

WHEREAS, in the wake of Typhoon Soudelor the CNMI Legislature passed official resolutions (SR 19-14; HR 19-28) supporting and empowering DOCOMO PACIFIC to rebuild and harden the CNMI’s telecommunications infrastructure; *and*

WHEREAS, as part of its due diligence review of the current state of the region’s telecommunications infrastructure needs, DOCOMO PACIFIC has developed a robust business case for constructing a new submarine fiber-optic cable to connect Guam and the CNMI; *and*

WHEREAS, in February 2016 DOCOMO PACIFIC entered into a contract to construct a new submarine cable system, to be named Project ATISA, which system will include a

new redundant microwave backup facility and the expansion of fixed and mobile networks in the CNMI, which is estimated to cost Twenty-Five Million Dollars (\$25,000,000); *and*

WHEREAS, extending new cable landing points to Rota and Tinian will add incremental project costs of approximately Six Million Dollars (\$6,000,000) to Project ATISA; *and*

WHEREAS, in light of the significant regulatory, financial and logistical challenges inherent in a project of this scope and sophistication, DOCOMO PACIFIC seeks to partner closely with the Government of the CNMI in order to complete Project ATISA as quickly and environmentally responsibly as possible.

NOW, THEREFORE, BE IT HEREBY

RESOLVED, that the Government of the CNMI has determined that a new submarine fiber optic cable serves the long term economic, social and overall developmental goals of the CNMI; *and be it further*

RESOLVED, that the Government of the CNMI will in good faith expeditiously facilitate all Commonwealth permitting associated with Project ATISA; *and be it further*

RESOLVED, that the various agencies and instrumentalities of the Government of the CNMI will work with DOCOMO PACIFIC to negotiate good-faith agreements for the use of public lands for beach manholes, cable landing stations, and microwave facilities on Rota, Tinian and Saipan; *and be it further*

RESOLVED, that in order to construct branching units and establish direct landing points-of-presence on the islands of Tinian and Rota, the Government of the CNMI will formally request the Office of Insular Affairs at the U.S. Department of Interior to increase the CNMI Capital Improvements Projects (“CIP”) funds allocation for a period of three (3) years, or, in the alternative, to increase the Technical Assistant Grant Fund, in order to facilitate the DOCOMO PACIFIC investment in Project ATISA; *and be it further*

RESOLVED, that if the CNMI is unsuccessful in obtaining an increase in the CIP funds and/or the Technical Assistance Grant funds, the Government of the CNMI will endeavor to commit funding from alternative sources for the next three (3) years in consideration for bandwidth capacity by DOCOMO PACIFIC commensurate with the amount of the CNMI Government investment; *and be it further*

RESOLVED, that the CNMI Department of Public Lands will meet and confer with DOCOMO PACIFIC to on revising an existing agreement on the undergrounding of terrestrial fiber.

Both parties commit to cooperate in mutual good faith efforts to accomplish the goals set forth herein.

Resolved and executed on this 10th day of March 2016 at Saipan, Commonwealth of the Northern Mariana Islands.

Hon. Ralph Deleon Guerrero Torres
Governor
Commonwealth of Northern Mariana Islands

Jonathan Kriegel
President & CEO
Docomo Pacific, Inc.

Koichi Takahara
Chairman
Docomo Guam Holdings, Inc.

CERTIFICATE OF SERVICE

I, Karla E. Huffstickler, hereby certify under penalty of perjury that the foregoing Comments of PTI Pacifica Inc., d/b/a IT&E was served this 4th day of May, 2016, by depositing a true copy thereof with the United States Postal Service, first class postage pre-paid, addressed to:

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/s/
Karla E. Huffstickler