Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of 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, THE ATISA SYSTEM	File No. SCL-LIC-20160314-00008

REPLY COMMENTS

PTI Pacifica, Inc. d/b/a IT&E ("IT&E") faces the loss of its nearly 20-year-old monopoly over submarine cable capacity on the Guam-Commonwealth of the Northern Marianas ("CNMI") route. It is therefore unsurprising that IT&E seeks to delay the deployment by DOCOMO Pacific, Inc. ("DOCOMO Pacific") of the Atisa submarine cable system. To do so, IT&E attempts to interject unrelated issues into this proceeding: the adjustment of the regulatory status of its own facilities and offerings and the consideration of other unfounded assertions.[1] The remedy sought by IT&E is inconsistent with well-established law and Commission precedent and would disserve the CNMI, which desperately needs a more reliable and less expensive alternative to IT&E's poorly-maintained facilities, which left the CNMI disconnected from the rest of the world during an outage in summer 2015.

[1] *See* Comments of PTI Pacifica, Inc. d/b/a IT&E, File No. SCL-LIC-20160314-00008 (filed May 4, 2016) ("IT&E Comments").

I. The Atisa Licensing Proceeding Is the Wrong Forum for Considering the Regulatory Status of IT&E's Competing Facilities and Services

IT&E improperly seeks to expand the Atisa licensing proceeding to address its own regulatory status. Neither the Cable Landing License Act, Executive Order 10530, nor any of the Commission's rules provides for evaluation or reconsideration of the regulatory status of an existing submarine cable in a proceeding to license a new, competing cable.[2] In reviewing an application for a non-common-carrier submarine cable, the Commission "need not look beyond the Cable Landing License Act."[3]

From the outset of its private cable policy, the Commission has rejected attempts to condition cable landing licenses to address matters beyond the new proposed cable. When the Commission licensed the PTAT-1, PTAT-2, and TAV-1 systems as the first non-common-carrier systems in 1985, it rejected a similar attempt to interject extraneous issues into the proceedings. There, AT&T supported non-common-carrier regulation of PTAT-1, PTAT-2, and TAV-1 "only if the Commission reconsiders and withdraws from regulating AT&T's facility loading choices."[4] The Commission found that the AT&T had sought the wrong forum for making such a determination:

> We are only considering here whether to grant cable landing licenses to the applicants to land and operate private transatlantic cable systems. We are not considering issues relating to our Title II regulation of AT&T's facility loading choices. . . . Any consideration of the merits of AT&T's request within the context of these applications would be beyond the language of the Cable Landing License Act.[5]

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2 47 U.S.C. § 34; Exec. Order No. 10530; 47 C.F.R. § 1.767.

3 *Tel-Optik Limited*, Memorandum Opinion and Order, 100 FCC.2d 1033, 1042 ¶ 21 (1985) ("*Tel-Optik*").

4 *Id.* at 1051 ¶ 40.

5 *Id.* The Commission later addressed AT&T's concerns in a subsequent rulemaking. *See Policy for the Distribution of United States International Carrier Circuits Among Available*

Here, DOCOMO Pacific has amply demonstrated that Atisa qualifies for non-common-carrier regulatory status.[6] IT&E's request with respect to its own system is far beyond the scope of this proceeding for licensing Atisa.

II. The Judicial Test for Common Carriage Does Not Provide for Consideration of Regulatory Parity with a Competitor

In seeking conditions on the cable landing license for Atisa, IT&E wrongly infers a regulatory-parity requirement from the *NARUC I* test for common carriage. Under the "indifferent offering" prong, the Commission must inquire "whether there are reasons implicit in the nature of [the] operations to expect an indifferent holding out to the eligible user public."[7] The nature of a competitor's offerings never factors into that analysis.

A "regulatory parity" requirement would be fundamentally inconsistent with the Commission's well-established private cable policy, which the Commission established in 1985 when it authorized PTAT-1, PTAT-2, and TAV-1 to compete with the common-carrier TAT-8 system.[8] Since then, the Commission has frequently licensed new non-common-carrier submarine cables that compete with earlier-licensed common-carrier submarine cables. For example:

Facilities During the Post-1988 Period, Report and Order, 3 FCC Rcd. 2156 ¶¶ 26-37 (1988).

6 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, the Atisa System, File No. SCL-LIC-20160314-00008, at 6-8 (filed Mar. 14, 2016).

7 *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*") *cert. denied*, 425 U.S. 992.

8 *See Tel-Optik*, 100 FCC.2d at 1053 ¶ 43.

- On the U.S.-Australia route, the Commission licensed the non-common-carrier Endeavour system to compete against the earlier-licensed common-carrier Southern Cross Cable Network.[9]

- On U.S.-Central American routes, the Commission licensed the non-common-carrier ARCOS-1 system to compete against the earlier-licensed common-carrier MAYA-1 system.[10]

- On U.S.-South America routes, the Commission licensed the non-common-carrier South American Crossing and SAm-1 systems to compete against the earlier-licensed common-carrier Pan-American system.[11]

In none of those licensing proceedings for new submarine cable systems did the Commission reevaluate or alter the regulatory status of the earlier-licensed systems.

Regulatory parity is similarly irrelevant under the "public-interest" prong of the *NARUC I* test. Instead, the Commission considers the potential market power of the applicant and the effect its new facility will have on competition on a particular route.

> In ascertaining the public interest, the focus of our inquiry here is whether the ***license applicant*** has sufficient market power to warrant regulatory treatment as a common carrier. In particular, in the past we have found that if sufficient alternative facilities, ***including common carrier facilities***, are available an applicant would be unable to charge monopoly rents and hence would not have market power.[12]

Here, Atisa will provide the first competing submarine cable system on the Guam-CNMI route and challenge the monopoly of IT&E.

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9 *Actions Taken Under the Cable Landing License Act*, Public Notice, FCC File No. SCL-LIC-20070621-00009, 23 FCC Rcd. 7446 (Int'l Bur. 2008).

10 *ARCOS-1 USA, Inc.*, Cable Landing License, FCC File No. SCL-LIC-19981222-00032, 14 FCC Rcd. 10,597 (Int'l Bur. 1999).

11 *Telefónica SAM USA, Inc. and Telefónica SAM de Puerto Rico, Inc.*, Cable Landing License, FCC File No. SCL-LIC-20000204-00003, 15 FCC Rcd. 14,915 (Int'l Bur. 2000).

12 *AT&T Submarine Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21,585, 21,589 ¶ 9 (1998) (citation omitted) (emphasis added), *aff'd Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

III. IT&E Misrepresents Uncertainty About the Regulatory Status of Its Mariana-Guam Cable

IT&E inaccurately suggests that there is uncertainty about the regulatory status of the Mariana-Guam Cable.[13] The Commission licensed IT&E's Mariana-Guam Cable (previously known as the MTC Interisland Cable System) as a common-carrier facility in 1993 pursuant to a separate international Section 214 authorization for which IT&E's predecessor had specifically applied.[14] The Commission has repeatedly confirmed the IT&E system's common-carrier status.[15]

The Commission likely had good reasons under the public-interest prong of *NARUC I* for licensing the Mariana-Guam Cable as a common-carrier system, as that system gives IT&E a fiber monopoly on that route and allows IT&E to charge some of the world's highest per-megabit capacity prices. IT&E's assertion that it is now offering services in the same manner planned for the Atisa system[16] suggests that IT&E is in violation of its international Section 214

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13 *See* IT&E Comments at 3 n.6.

14 *See Micronesia 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*, Memorandum Opinion, Order and Authorization, 8 FCC Rcd. 750 (Com. Car. Bur. 1993).

15 *See, e.g.*, *IT&E Overseas, Inc., Transferor, and PTI Pacifica, Inc., Transferee*, Memorandum Opinion and Order and Declaratory Ruling, 24 FCC Rcd. 5466, 5489 ¶ 54 (Wireline Comp., Wireless, and Int'l Burs. 2009) (stating that "the MTC Interisland Cable System is a common carrier facility"); *Application of Bell Atlantic New Zealand Holdings, Inc. Assignor, and GTE Pacifica, Inc., Assignee, for the Assignment of Personal Communications Service License WQCV808 (MTA 050)*, Order, 21 FCC Rcd. 12,079, 12,079-80 ¶ 2 (Wireless and Int'l Burs. 2006) (stating that "GTE Pacifica also owns and operates the common carrier MTC Interisland Cable"); *Bell Atlantic New Zealand Holdings, Inc., Transferor, and Pacific Telecom Inc., Transferee*, Order and Authorization, 18 FCC Rcd. 23,140, 23,143 ¶ 3 (Wireline Comp., Wireless, and Int'l Burs. 2003) (stating that "GTE Pacifica holds . . . a submarine cable landing license to land and operate the common carrier MTC Interisland Cable System").

16 *See* IT&E Comments at 3.

authorization, which requires IT&E to provide reasonable and non-discriminatory offerings—obligations that do not apply to non-common-carrier systems.

IV. IT&E Misrepresents the DOCOMO Pacific-CNMI Government MOU Regarding Potential Financing for Atisa

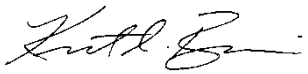
IT&E also misrepresents the potential financing that the CNMI Government might provide in an attempt to insinuate that DOCOMO Pacific has failed to comply with the Commission's rules for cable landing license applications with respect to ownership disclosures.[17] By its plain language, the Memorandum of Understanding ("MOU") cited by IT&E states that the CNMI Government will assist DOCOMO Pacific in seeking funding from the U.S. Department of the Interior and, in the event such funds are unavailable, then consider providing funding in consideration of receipt of capacity on Atisa. Nowhere does the MOU suggest that the CNMI Government will take an ownership interest in Atisa; it will not. The Commission's rules do not require disclosure of potential (much less actual) financing arrangements that do not involve equity interests in the applicant or the submarine cable system above specified levels. Thus, there was no reason for DOCOMO Pacific to include the MOU with its application—and no reason for the Commission to consider it now.

[17] *See id.* at 1 n.1.

CONCLUSION

For the foregoing reasons, the Commission should reject IT&E's attempt to delay the construction and operation of Atisa with collateral issues and unfounded assertions and instead proceed expeditiously to grant a cable landing license.

Respectfully submitted,



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