

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Wavecom Solutions Corporation, Transferor,
and
Hawaiian Telcom, Inc., Transferee
Applications for Consent to Transfer Control
WC Docket No. 12-206

MEMORANDUM OPINION AND ORDER AND DECLARATORY RULING

Adopted: December 28, 2012

Released: December 28, 2012

By the Chief, Wireline Competition Bureau; Chief, International Bureau; and Chief, Wireless Telecommunications Bureau:

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I. INTRODUCTION

1. Wavecom Solutions Corporation (Wavecom) and Hawaiian Telcom, Inc. (HTI) (together, Applicants) filed a series of applications pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended (Act),¹ and the Cable Landing License Act of 1921,² seeking approval for the transfer of control of licenses and authorizations held by Wavecom to HTI.³ Specifically, Applicants seek approval to transfer control of domestic and international section 214 authorizations, a cable landing license, and various wireless licenses. Hawaiian Telcom Holdco, Inc., the ultimate parent corporation of HTI, also requests that the Commission extend Holdco's current authority under section 310(b)(4) of the Act⁴ regarding foreign ownership to include common carrier wireless licenses held by Wavecom. We find that, with the conditions set forth below, approval of the applications will serve the public interest, convenience, and necessity, and hereby grant the applications. We also grant Holdco's petition for a declaratory ruling regarding foreign ownership under section 310(b)(4) of the Act.

II. BACKGROUND

A. Applications and Review Process

2. On August 3, 2012, the Wireline Competition Bureau, International Bureau, and Wireless Telecommunications Bureau (collectively, Bureaus) released a consolidated public notice accepting the applications for non-streamlined processing and announcing a pleading cycle.⁵ In response to the public notice, two parties, L'office des postes et telecommunications de Polynesie francaise (OPT) and the State of Hawaii through its Department of Commerce and Consumer Affairs, Division of Consumer Advocacy (Hawaii DCCA), filed comments supporting a grant of the application subject to certain conditions regarding access to Wavecom's submarine cable.⁶ The Applicants filed reply comments.⁷ In addition, the Department of Justice, including the Federal Bureau of Investigation, with the concurrence of the Department of Homeland Security, requested that the Commission defer action on the transaction while they reviewed potential national security, law enforcement, and public safety issues.⁸

¹ 47 U.S.C. §§ 214, 310(d).

² 47 U.S.C. §§ 34-39.

³ See Wavecom Solutions Corporation, Transferor, and Hawaiian Telcom, Inc., Transferee, Application for Consent to Transfer Control of Domestic Authorizations Under Section 214 of the Communications Act, as Amended, WC Docket No. 12-206 (filed July 18, 2012) (Application); Application of Hawaiian Telcom, Inc. and Wavecom Solutions Corporation, File No. ITC-T/C-20120716-00183 (filed July 16, 2012); Application of Hawaiian Telcom, Inc. and Wavecom Solutions Corporation, SCL-T/C-20120716-00009 (filed July 16, 2012), Application of Hawaiian Telcom, Inc. and Wavecom Solutions Corporation, File No. 0005305989 (filed July 16, 2012).

⁴ 47 U.S.C. § 310(b)(4).

⁵ *Applications Filed for the Transfer of Control of Wavecom Solutions Corporation to Hawaiian Telcom, Inc.*, WC Docket No. 12-206, Public Notice, 27 FCC Red 9080 (WCB 2012).

⁶ OPT Comments in Support of Conditional Approval, WC Docket No. 12-206 (filed Sept. 4, 2012) (OPT Comments); Comments of Hawaii DCCA, WC Docket No. 12-206 (filed Sept. 14, 2012) (Hawaii DCCA Comments).

⁷ Joint Reply Comments of Applicants, WC Docket No. 12-206 (filed Sept. 19, 2012) (Reply).

⁸ Letter from Kimberly M. Schmid, U.S. Department of Justice, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206; File Nos. ISP-PDR-2012-0716-00183; SCL-T/C-20120716-00009; ISP-PDR-20120716-00003 (filed Sept. 4, 2012).

B. The Applicants**1. Transferor**

3. Wavecom, a Hawaii corporation, is a facilities-based competitive local exchange carrier (LEC) that provides local dial tone, high-speed Internet access, long distance, data, and other services to business customers in Hawaii. Wavecom provides communications services through an inter-island submarine fiber optic network, which consists of approximately 400 miles of undersea fiber that connects the six major islands of Oahu, Kauai, Molokai, Lanai, Maui, and the island of Hawaii (the Big Island). This undersea network, called the Hawaii Island Fiber Network (HiFN), is owned 50 percent by Wavecom and 50 percent by tw telecom of Hawaii, LLC (tw telecom), a competing common carrier.⁹ Wavecom's network also includes about 140 route miles of terrestrial (land-based) fiber, which includes three SONET fiber rings on Oahu.¹⁰ Wavecom holds microwave licenses, including licenses for common carrier microwave services.

2. Transferee

4. HTI, a Hawaii corporation, is the incumbent LEC serving approximately 409,000 access lines on all of Hawaii's major islands. Its sister company, Hawaiian Telcom Services Company, Inc. (HTSC), provides communications services, including interstate and intrastate long distance, high-speed Internet access, video services, and wireless services. HTI owns and operates a submarine cable called the Hawaiian Inter-Island Cable System (HICS) that connects four of the Hawaiian Islands, Oahu, Kauai, Maui, and Hawaii.¹¹

5. Applicants state that HTI is wholly owned by Hawaiian Telcom Communications, Inc., which in turn is wholly owned by Hawaiian Telcom Holdco, Inc. (Holdco), a Delaware corporation. Applicants state that Holdco common stock is publicly traded and is widely held. Twin Haven Special Opportunities Fund III, L.P. (Twin Haven Fund), a Delaware limited partnership, holds an 11 percent interest in Holdco. Twin Haven Fund is controlled by its general partner, Twin Haven Special Opportunities Partners III, LLC (Twin Partners), a Delaware limited liability company, which votes the shares held by Twin Haven Fund. Twin Partners is controlled by Rob Webster and Paul Mellinger, the only managing members of Twin Partners, each of whom is a U.S. citizen. There are no other 10 percent owners through Twin Haven Fund of HTI.¹²

C. The Transaction

6. Pursuant to a Share Purchase Agreement, the shareholders of Wavecom will sell to HTI all the shares of Wavecom for cash. Immediately after the transaction is consummated, Wavecom will be a wholly owned subsidiary of HTI, and the licenses and authorizations held by Wavecom will be indirectly controlled by HTI.¹³

⁹ Application at 9-10.

¹⁰ Application, Exh. 1(Description of Transaction, Public Interest Showing and Related Requests and Demonstrations) at 1-2. Wavecom was formerly known as Pacific Lightnet, Inc.

¹¹ Application, Exh. 1 at 2-3.

¹² Application at 4.

¹³ Application, Exh. 1 at 1-2.

III. STANDARDS OF REVIEW AND PUBLIC INTEREST FRAMEWORK

7. Pursuant to sections 214(a) and 310(d) of the Act,¹⁴ and sections 34 through 39 of the Cable Landing License Act,¹⁵ the Commission must determine whether the proposed transfer of assets, licenses, and authorizations held and controlled by Wavecom to HTI will serve the public interest, convenience, and necessity.¹⁶ In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules.¹⁷ If the proposed transaction would not violate a statute or rule, we consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.¹⁸ We then employ a balancing test weighing any potential public interest harms of the proposed transaction against the proposed public interest benefits.¹⁹ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.²⁰ If we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, we must designate the applications for hearing.²¹

¹⁴ 47 U.S.C. §§ 214(a), 310(d).

¹⁵ 47 U.S.C. §§ 34–39. The Cable Landing License Act provides that approval of a license application may be granted “upon such terms as shall be necessary to assure just and reasonable rates and service.” 47 U.S.C. § 35. The Commission does not conduct a separate public interest analysis under this statute. *See, e.g., SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18300, para. 16 n.59 (2005) (*SBC/AT&T Order*); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18442, para. 16 n.58 (2005) (*Verizon/MCI Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025 (1998) (*WorldCom/MCI Order*).

¹⁶ 47 U.S.C. § 310(d) requires that we consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17460–61, para. 26 (2008) (*Verizon/ALLTEL Order*); *Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc.*, WT Docket No. 06-96, Memorandum Opinion and Order and Declaratory Ruling, 21 FCC Rcd 13580, 13588, para. 13 (2006) (*DoCoMo/Guam Cellular Order*); *SBC/AT&T Order*, 20 FCC Rcd at 18300 n.60.

¹⁷ *Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket No. 08-238, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745-46, para. 9 (2009) (*CenturyTel/Embarq Order*).

¹⁸ *Id.*

¹⁹ *See, e.g., AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5672, para. 19 (2007) (*AT&T/BellSouth Order*).

²⁰ *See, e.g., id.*

²¹ *See, e.g., Application of Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and Echostar Communications Corp., Transferee*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, at para. 25 (2002) (*EchoStar/DirectTV Order*); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, et al.*, WT Docket Nos. 04-70, 04-254, and 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21542-44, at para. 40 (2004) (*Cingular/AT&T Wireless Order*).

8. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,”²² which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing spectrum in the public interest.²³ Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.²⁴ In conducting this analysis, we may consider technological and market changes, as well as trends within the communications industry, including the nature and rate of change.²⁵

9. Our analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences.²⁶ Our public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions to ensure that the public interest is served.²⁷ Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Act.²⁸ Similarly, 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.”²⁹ Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits.³⁰ In using this broad authority, the Commission has generally imposed conditions to remedy specific harms or confirm specific benefits likely to arise from transactions and that are related to the Commission’s responsibilities under the Act and related statutes.³¹

IV. DISCUSSION

A. Applicants’ Qualifications to Hold Licenses

10. As a threshold matter, we must determine whether the Applicants meet the requisite

²² *AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 20.

²³ See 47 U.S.C. §§ 254, 332(c)(7), 1302; Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996 Act), Preamble; *SBC/AT&T Order*, 20 FCC Rcd at 18301, para. 17 (2005); see also *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31; cf. 47 U.S.C. §§ 301, 303, 309(j), 310(d), 521(4), 532(a).

²⁴ See *AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 20.

²⁵ See *id.*

²⁶ See, e.g., *id.* at 5674, para. 21.

²⁷ See, e.g., *Verizon/ALLTEL Order*, 23 FCC Rcd at 17462, para. 29; *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-75, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348,12366, para. 33 (2008) (*XM/Sirius Order*); *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22.

²⁸ 47 U.S.C. § 303(r); see also *Verizon/ALLTEL Order*, 23 FCC Rcd at 17463, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22.

²⁹ 47 U.S.C. § 214(c); see also *Verizon/ALLTEL Order*, 23 FCC Rcd at 17463, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22.

³⁰ See, e.g., *Verizon/ALLTEL Order*, 23 FCC Rcd at 17463, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22; see also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission’s authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

³¹ See, e.g., *Verizon/ALLTEL Order*, 23 FCC Rcd at 17463, para. 29; *XM/Sirius Order*, 23 FCC Rcd at 12366, para. 33; *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22.

qualifications to hold, assign, and transfer licenses under section 310(d) of the Act and the Commission's rules. In general, when evaluating assignments under section 310(d), we do not re-evaluate the qualifications of the transferor.³² The exception to this rule occurs where issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.³³ This is not the case here. Thus, we need not re-evaluate Wavecom's basic qualifications.

11. Section 310(d) also requires that the Commission consider the qualifications of the proposed transferee as if the transferee were applying for the license directly under section 308 of the Act.³⁴ Among the factors that the Commission considers in its public interest inquiry is whether the applicant for a license or license transfer has the requisite "citizenship, character, financial, technical, and other qualifications."³⁵ No challenges have been raised with respect to the basic qualifications of HTI, and the Commission has previously found HTI qualified to control entities holding Commission licenses and

³² See *DoCoMo/Guam Cellular Order*, 21 FCC Rcd at 13590, para. 14; *Applications of Midwest Wireless Holdings, L.L.C. and Alltel Communications, Inc.*, WT Docket No. 05-339, Memorandum Opinion and Order, 21 FCC Rcd 11526, 11536, para. 17 (2006) (*ALLTEL/Midwest Wireless Order*); *Applications of Nextel Partners, Inc., Transferor, and Nextel Wip Corp. and Sprint Nextel Corporation, Transferees*, Memorandum Opinion and Order, 21 FCC Rcd 7358, 7362, para. 10 (2006) (*Sprint Nextel/Nextel Partners Order*); *SBC/AT&T Order*, 20 FCC Rcd at 18379, para. 171; *Verizon/MCI Order*, 20 FCC Rcd at 18526, para. 183; *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967, 13979, para. 24 (2005) (*Sprint/Nextel Order*); *Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-50, Memorandum Opinion and Order, 20 FCC Rcd 13053, 13063-64, para. 18 (2005) (*ALLTEL/Western Wireless Order*); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket 04-70, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21546, para. 44 (2004) (*Cingular/AT&T Wireless Order*); *Applications of VoiceStream Wireless Corporation and Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee*, IB Docket No. 00-187, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9790, para. 19 (2001) (*Deutsche Telekom/VoiceStream Order*); *Verizon/ALLTEL Order*, 23 FCC Rcd at 17464, para. 31; *Applications of Sprint Nextel Corporation and Clearwire Corporation for Consent to Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17570, 17582, para. 23 (2008) (*Sprint Nextel/Clearwire Order*).

³³ See *DoCoMo/Guam Cellular Order*, 21 FCC Rcd at 13590, para. 14; *ALLTEL/Midwest Wireless Order*, 21 FCC Rcd 11536, para. 17; *Sprint Nextel/Nextel Partners Order*, 21 FCC Rcd at 7362, para. 10; *SBC/AT&T Order*, 20 FCC Rcd at 18379, para. 171; *Verizon/MCI Order*, 20 FCC Rcd at 18526, para. 183; *Sprint/Nextel Order*, 20 FCC Rcd at 13979, para. 24; *ALLTEL/Western Wireless Order*, 20 FCC Rcd at 13063-64, para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21546, para. 44; *Deutsche Telekom/VoiceStream Order*, 16 FCC Rcd at 9790, para. 19; *Verizon/ALLTEL Order*, 23 FCC Rcd at 17464, para. 31; *Sprint Nextel/Clearwire Order*, 23 FCC Rcd 17582-83, para. 23.

³⁴ Section 308 requires that applicants for Commission licenses set forth such facts as the Commission may require as to citizenship, character, and financial, technical, and other qualifications. See 47 U.S.C. § 308. Our rules implementing the provisions of section 308 regarding an applicant's qualifications to hold the Commission licenses involved in this transfer are set forth in Parts 5, 25, and 63 of the Commission's rules. See 47 C.F.R. Parts 5, 25, 63; see also *DoCoMo/Guam Cellular Order*, 21 FCC Rcd at 13590, para. 14; *ALLTEL/Midwest Wireless Order*, 21 FCC Rcd at 11536, para. 17; *Sprint Nextel/Nextel Partners Order*, 21 FCC Rcd at 7362, para. 10; *SBC/AT&T Order*, 20 FCC Rcd at 18379, para. 171; *Verizon/MCI Order*, 20 FCC Rcd at 18526, para. 183; *ALLTEL/Western Wireless Order*, 20 FCC Rcd at 13063-64, para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21546, para. 44.

³⁵ See *AT&T/BellSouth Order*, 22 FCC Rcd at 5756, para. 191; *Applications of SBC Communications Inc. and BellSouth Corporation for Consent to Transfer of Control or Assignment of Licenses and Authorizations*, WT Docket No. 00-81, Memorandum Opinion and Order, 15 FCC Rcd 25459, 25465, para. 14 (2000) (*SBC/BellSouth Order*); see also 47 U.S.C. §§ 308, 310(d); 47 C.F.R. Parts 5, 25, 63.

authorizations.³⁶ We are satisfied that HTI remains qualified as a licensee.

B. Potential Public Interest Harms

1. Competitive Overlap

12. The potential competitive harms from this transaction are limited. There are several locations where the proposed transaction would result in reduced competition to enterprise customers because both Wavecom and HTI are providing business services to the same location. In previous transactions, the Commission has determined that, in considering the risk of harm to competition in the provision of special access services, the relevant geographic market is a particular customer's location, because it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid small but significant and nontransitory increases in the price of special access services, and because there are significant entry barriers to putting competitive last-mile facilities into place.³⁷ Our consideration of potential public interest harms therefore focuses on the areas where HTI is the incumbent LEC, Wavecom is a competitive LEC, and HTI has significant last-mile special access facilities.

13. In previous transactions where an incumbent LEC has acquired a competitive LEC, we have identified competitive harm where both carriers provide service to a building over their own facilities and there is no evidence that another competitive LEC is likely to connect the building to its network.³⁸ To eliminate the possibility of such harm in the Hawaiian special access market, HTI has committed not to increase rates for any service provided by HTI or Wavecom in the buildings identified in Appendix A for seven years following the merger closing date.³⁹ The commitment extends to both new and existing customers in those buildings, and would cease to apply to a particular building (i) if the merged company divests either HTI's or Wavecom's legacy fiber facilities in that building, (ii) if the number of competitive carriers with fiber facilities in the building returns to the level that existed prior to the merger closing date, or (iii) if the Commission adopts comprehensive changes to its special access rules requiring industry-wide changes to rates or rate structures for the implicated services such that concerns of competitive harm no longer exist.⁴⁰ We conclude that this commitment is sufficient to mitigate potential competitive harms resulting from this transaction. We therefore accept this commitment and make it a binding and enforceable condition of our approval.

2. Submarine Cable

14. We find that the proposed transaction is unlikely to result in public interest harm for access to Wavecom's cable landing station or for inter-island transport in Hawaii. Although Wavecom and HTI

³⁶ See, e.g., *Domestic Section 214 Application Granted, Transfer of Control of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Debtors-in-Possession*, WC Docket No. 10-41, Public Notice, 25 FCC Rcd 13149 (WCB 2010).

³⁷ *Applications Filed by Qwest Communications International, Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, WC Docket No. 10-110, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4202-03, para. 16 (2011) (*Qwest/CenturyLink Order*) (citing *SBC/AT&T Order*, 20 FCC Rcd at 18307-11, para. 28, 32, 39-40; *Verizon/MCI Order*, 20 FCC Rcd at 18449-53, paras. 28, 32, 39-40)).

³⁸ *Qwest/CenturyLink Order*, 26 FCC Rcd at 4203, para. 17 (citing *Application for Transfer of Control of OnFiber Communications, Inc. to Qwest Communications Corporation*, WC Docket No. 06-111, Public Notice, 21 FCC Rcd 9933, 9933, n.5 (WCB 2006); *AT&T/BellSouth Order*, 22 FCC Rcd at 5676-77, para. 27)).

³⁹ Letter from Gregory J. Vogt, Counsel for HTI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206 (filed Dec. 20, 2012) (HTI Dec. 20 Letter) (containing voluntary condition and list of 12 buildings).

⁴⁰ *Id.* at 3.

both operate submarine cable systems, this record does not support a finding that the transaction will cause any significant anticompetitive effects associated with cable access or insufficient capacity.

15. OPT, the incumbent telecommunications provider in French Polynesia, owns and operates the Honotua Cable System that connects Tahiti to Hawaii and lands at Wavecom's Kawaihae cable station on the Big Island.⁴¹ OPT and Wavecom operate pursuant to a 2008 Landing Party Agreement (LPA) between the parties that establishes the pricing and terms under which Wavecom provides access to its cable station.⁴² OPT makes two primary arguments in seeking conditions on the proposed transaction. First, OPT states that, as a prudent backup measure for its current Internet backbone connection in Los Angeles, it desires a second (redundant) connection in Hawaii. OPT contends that Wavecom has acted to preclude it from contracting with competitive providers other than Wavecom to transport OPT's traffic from the Big Island to Honolulu, Oahu to connect to large data centers and to cables carrying traffic to the U.S. mainland. In this regard, OPT asserts that Wavecom has imposed unreasonably discriminatory collocation charges and delays on any Wavecom competitor that seeks to connect to OPT's cable at the Kawaihae cable station.⁴³ Second, OPT asserts that the proposed transaction will reduce overall the number of competitive providers of inter-island fiber transport services between the Big Island and Oahu, thereby giving HTI greater market power.⁴⁴ OPT requests that the Commission condition its consent for the proposed transaction by requiring Wavecom to permit other telecommunications providers to access the cable station on cost-based and non-discriminatory rates and terms.⁴⁵ Hawaii DCCA supports OPT's concerns and requests a condition that, if HTI employs Wavecom's facilities to provide retail

⁴¹ OPT Comments at 1-3. Wavecom's Kawaihae cable station serves as a point of interconnection with other long haul undersea cable systems and third party providers of terrestrial or undersea backhaul services in the state. OPT explains that a cable owner, such as OPT, requires access to Wavecom's cable station to house its power-feed equipment and submarine line terminal equipment and other electronics to manage its cable system. It states that a cable owner can either construct its own cable station or enter into an LPA 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 the cable station. Letter from Kent D. Bressie, Madeleine V. Findley, Danielle J. Pineras, Counsel for OPT, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206 at 2 (filed Oct. 8, 2012) (OPT Oct. 8 Letter). OPT states that it provides international transport services and purchases inter-island (within Hawaii) transport from Wavecom. *Id.* at 4.

⁴² OPT Comments at 3; Reply at 14-15; Letter from Kent D. Bressie, Counsel for OPT, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206 at 2 (filed Nov. 2, 2012) (OPT Nov. 2 Letter).

⁴³ OPT Comments at 4-5 and Att. A, Decl. of Patrick Ellacott (OPT Ellacott Decl. at 1-2) and Att. B, Decl. of Steve Brock, at paras. 6-9; OPT Oct. 8 Letter at 10-13; OPT Nov. 2 Letter at 3-4; Letter from Kent D. Bressie, Madeleine V. Findley, Danielle J. Pineras, Counsel for OPT, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206, at 3-4 (filed Dec. 5, 2012) (OPT Dec. 5 Letter); Letter from Kent D. Bressie, Madeleine V. Findley, Danielle J. Pineras, Counsel for OPT, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206, Att. at 1-3 (filed Dec. 19, 2012) (OPT Dec. 19 Letter); Letter from Kent D. Bressie, Madeleine V. Findley, Danielle J. Pineras, Counsel for OPT, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206, Att. at 2-3 (filed Dec. 26, 2012) (OPT Dec. 26 Letter).

⁴⁴ OPT Comments at 6-11; OPT Oct. 8 Letter at 7-10; OPT Dec. 5 Letter at 4-5.

⁴⁵ OPT specifically requests conditions under which Wavecom must permit other telecommunications providers to use Wavecom's cross connect links in its Kawaihae cable station to connect their equipment to backhaul links and undersea cable capacity of any supplier of telecommunications, including OPT; and collocate their transmission and routing equipment used for accessing submarine cable capacity and backhaul links at the Kawaihae cable station at terms, conditions, and cost-oriented rates that are reasonable and non-discriminatory; and that require Wavecom to provide undersea submarine cable capacity, backhaul links, and cross connect links in the Kawaihae cable station at terms, conditions, and rates that are reasonable and non-discriminatory. OPT Comments at 12-13.

telecommunications service, HTI should make capacity on Wavecom's facilities available to competitors under section 251(c) of the Act.⁴⁶

16. Applicants assert that OPT's allegations are not specific to the transaction and that OPT has existing remedies under the LPA to address its cable station dispute, the availability of which is unaffected by the proposed transaction.⁴⁷ Wavecom states that it makes interconnection and collocation available to third parties at its cable station at competitive rates, and that OPT is attempting to use this transaction to leverage its existing contract terms and that OPT's conditions are unnecessary.⁴⁸ Applicants argue that the Wavecom cable station is not a bottleneck facility and that there are adequate competitive alternatives for submarine cable capacity in the international transport market in the trans-Pacific region.⁴⁹ They contend that there are alternative submarine cable providers for transport between the Big Island and Oahu.⁵⁰ Applicants further assert that it is unnecessary to impose section 251(c) obligations on Wavecom, which is subject to existing common carrier obligations under Title II of the Act.⁵¹ Applicants also report that, in the state proceeding addressing the proposed transaction, HTI has agreed with the Hawaii DCCA to meet reporting and access obligations for the Wavecom facilities, which will address its concerns.⁵²

17. We agree with the Applicants that OPT's claims regarding specific pricing, terms, and conditions for interconnection at Wavecom's landing station are not merger-specific,⁵³ are based on arguments about prior conduct by Wavecom, and are more appropriately resolved through the contractual provisions in the LPA between the parties or through the Commission's complaint process under section 208 of the Act.⁵⁴ OPT does not dispute that the LPA, which has been in place since 2008 and has a full term of 15 years, addresses the access dispute it has with Wavecom, which began in 2010 and predates the proposed transaction.⁵⁵ OPT has in fact notified Wavecom of its claims through the dispute resolution procedures contained in the agreement.⁵⁶ We also disagree with OPT that we must address its

⁴⁶ Hawaii DCCA Comments at 5-6 (citing 47 U.S.C. § 251(c)).

⁴⁷ Reply at 11-15; Exh. 1, Decl. of Jeremy Amen (Wavecom Amen Decl.) at paras. 3-8; Letter from Nancy J. Victory and Gregory J. Vogt, Counsel for Applicants, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206 at 1-6 (filed Oct. 24, 2012) (Applicants' Oct. 24 Letter).

⁴⁸ Wavecom Amen Decl. at 4-8.

⁴⁹ Reply at 4-6; Applicants' Oct. 24 Letter at 1-3.

⁵⁰ Reply at 6-10; Applicants' Oct. 24 Letter at 4-5.

⁵¹ Reply at 16-18.

⁵² Letter from Gregory J. Vogt, Counsel for Hawaiian Telcom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206 at 1 (filed Nov. 23, 2012) (Applicants' Nov. 23 Letter). *See Hawaiian Telcom, Inc. and Wavecom Solutions Corporation For an Exemption or Waiver from All Regulatory Requirements or, in the Alternative, Approval of the Share Purchase Transaction and Related Transactions*, Docket No. 2012-0174, Hawaiian Telcom, Inc., Wavecom Solutions Corporation, and the Division of Consumer Advocacy's Stipulation of Settlement and Certificate of Service (Hawaii Pub. Util. Comm'n, filed Nov. 9, 2012).

⁵³ *See Verizon Communications, Inc. and America Movil, S.A. de C.V., Application for Authority to Transfer Control of Telecomunicaciones de Puerto Rico, Inc.*, WT Docket No. 07-43, Memorandum Opinion and Order, 22 FCC Rcd 6195, 6206-07, para. 25 (2007) (rejecting assertions that a transfer of control should be denied or conditioned based on non merger-specific issues and finding that applicants were subject to existing requirements).

⁵⁴ 47 U.S.C. § 208. *See Verizon/MCI Order*, 20 FCC Rcd at 18529, para. 191 (noting that a number of issues raised by commenters were the subject of other pending proceedings).

⁵⁵ OPT Ellacott Decl. at paras. 5-12.

⁵⁶ Wavecom Amen Decl. at 3.

interconnection claims in the proposed transaction. OPT asserts that Wavecom's Kawaihae cable station is a bottleneck facility, and OPT cannot relocate its cable landing point if Wavecom's pricing policies prevent competitors from interconnecting with OPT at the station.⁵⁷ We agree with OPT that it is costly and impractical for it to move its Honotua cable, which is already operational, to an alternative landing station.⁵⁸ However, OPT admits that, for legal and commercial reasons, it chose to land its cable at Wavecom's facility in 2008 and acknowledges that it had bargaining power when it negotiated specific pricing, terms, and conditions in the LPA.⁵⁹ As Applicants point out, there are multiple entry points for cables landings on Hawaii, and OPT could have landed its cable directly on Oahu if that is where it needed to connect in order to access major data centers.⁶⁰

18. We are not persuaded by OPT that we must place conditions on the proposed transaction to prevent Wavecom and HTI from increasing prices for cable station access.⁶¹ OPT's proposed conditions would require Wavecom to offer cable station access, interconnection, and collocation on reasonable and non-discriminatory terms.⁶² The record indicates that Wavecom offers cable station access and interconnection, and has expressly agreed to allow third parties to collocate at the Kawaihae cable landing station.⁶³ The Commission has licensed Wavecom's HiFN cable system as a common carrier facility,⁶⁴

⁵⁷ OPT Oct. 8 Letter at 2-4, 10 (citing *AT&T Submarine Systems, Inc.*, Cable Landing License, 11 FCC Rcd 14885, 14896-97, para. 40 (Int'l Bur. 1996) (*AT&T Submarine Order*)); Letter from Kent D. Bressie, Madeleine V. Findley, Danielle J. Pineras, Counsel for OPT, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206 at 1-3 (filed Nov. 19, 2012) (OPT Nov. 19 Letter) (OPT explains that it is subject to a number of costs if it were to move an installed undersea cable system to an alternative landing site). See Hawaii DCCA Comments at 4 (stating that it is concerned about potential discrimination regarding pricing on an individual case basis for cable landing services).

⁵⁸ OPT Oct. 8 Letter at 10; OPT Nov. 2 Letter at 2-3; OPT Nov. 19 Letter at 1-4.

⁵⁹ OPT Nov. 2 Letter at 3.

⁶⁰ Applicants' Oct. 24 Letter at 2-3 (citing *AT&T Submarine Order*, 11 FCC Rcd at 14896-97, paras. 42, 39, and asserting that there are other cable landing stations in Hawaii); Applicants' Nov. 23 Letter at 2. OPT states that Honolulu serves as the principal location for points of interconnection with third party undersea cable operators and data centers. OPT Oct. 8 Letter at 5. OPT has existing options for its transport needs having contracted with Wavecom to use its facilities to reach Honolulu, and also having negotiated and obtained in its original LPA with Wavecom an indefeasible right-of-use on Wavecom's fiber pairs connecting Wavecom's Kawaihae cable station to HTI's Kawaihae cable station, where another undersea cable, the Southern Cross Cable Network (SCCN), lands. OPT then uses SCCN for connectivity from Kawaihae to California. Applicants' Oct. 24 Letter at n.5; OPT Nov. 2 Letter at 3.

⁶¹ OPT Dec. 5 Letter at 2-4; OPT Dec. 19 Letter at 2; OPT Dec. 26 Letter at 2-4.

⁶² See *supra* n.45.

⁶³ Reply at 15 and Wavecom Amen Decl. at paras. 4-5.

⁶⁴ *GST Telecom Hawaii, Inc. and Time Warner Telecom of Hawaii, L.P.*, Application for Modification of License to Land and Operate the GST Interisland Cable System, SCL-MOD-20001025-00036, Modification of Cable Landing License, 16 FCC Rcd 869, 871, para. 3 (Int'l Bur. 2001) (*Wavecom Cable License Order*) (citing *GST Pacwest Telecom Hawaii, Inc. Application for License to Land and Operate a High Capacity Digital Submarine Cable System Extending Between the Hawaiian Islands of Kauai, Oahu, Molokai, Lanai, Maui and Hawaii*, Cable Landing License, 11 FCC Rcd 3024 (Int'l Bur. 1996)). See Application, Exh. 1 at 10-11 (stating that HTI and Wavecom both own common carrier cable systems). See *AT&T Corp. et al., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, File No. SCL-LIC-19981117-00025, Cable Landing License, 14 FCC Rcd 13066, 13076-77, 13079-80, paras. 28-29, 36. 40 (1999) (finding that a cable provider allowing third parties to collocate in its landing station to provide competitive backhaul reduces certain competitive harms, and that the Commission can further address public interest concerns by imposing common

and those requirements remain in place under the terms of its cable landing license that is being transferred in this proceeding. This is not the proper forum for contesting the reasonableness of the rates for access to Wavecom's station. OPT can raise a claim that the rates are unjust and unreasonable through a section 208 complaint alleging a violation of sections 201(b) and 202 of the Act,⁶⁵ but this is not an issue that implicates the fitness of HTI to provide service once the transaction is consummated.⁶⁶ We find that the Commission's complaint process will adequately protect the public interest from anti-competitive concerns.⁶⁷ In addition, HTI expects that the Hawaii Public Utilities Commission (PUC) will adopt reporting and facility access obligations for Wavecom's submarine cable facilities, and HTI has stated that it will comply with those obligations.⁶⁸ We expect that such conditions, in addition to Applicants' existing common carrier obligations under the Act, will address any potential concerns. We also do not find that it is necessary to impose further conditions on access to Wavecom's submarine cable.

19. In addition to its argument about cable landing services provided by Wavecom, OPT asserts that the proposed transaction will reduce the number of competitors that are available to provide inter-island submarine cable capacity to third parties that seek options for transporting their traffic between the Big Island and Oahu. OPT states that there are currently only three providers of fiber backhaul services between the Big Island and Oahu that offer economic substitutes for each other—Wavecom, tw telecom (which owns 50 percent of the strands on the HiFN cable), and HTI—and that the proposed transaction would reduce the number to two, HTI and tw telecom.⁶⁹

20. Applicants counter that the proposed transaction will not cause competitive harm for inter-island transport services and that, post-transaction, there will be four separate owners of undersea cables, including HTI. They maintain that HTI would control a small portion of available capacity on the inter-island route and have no ability to impose price increases.⁷⁰ Applicants state that, in addition to HTI, the other cables offering inter-island connectivity are: (1) tw telecom, whose ownership interest will continue in the HiFN cable after the proposed transaction; (2) the Paniolo Fiber Optic Cable (Paniolo), which connects five of the Hawaiian islands, including the Big Island and Oahu; and (3) SCCN, which is an international cable owner that has substantial inter-island capacity between the Big Island and Oahu.⁷¹

carrier obligations on the operations of submarine cable systems to ensure that the facilities are offered to the public indifferently).

⁶⁵ See 47 U.S.C. §§ 201(b), 202, 208. *IT&E Overseas, Inc., Transferor, and PTI Pacifica, Inc., Transferee*, WC Docket No. 08-54, Memorandum Opinion and Order and Declaratory Ruling, 24 FCC Rcd 5466, 5489, para. 54 (WCB 2009) (*IT&E/PTI Order*) (finding that claims about the rate for capacity on an undersea cable in Guam were not merger specific issues and should be the subject of a section 208 complaint, and stating that such a remedy would adequately protect the public interest from any anti-competitive concerns without denying the public the benefits of the transaction).

⁶⁶ See *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, 25 FCC Rcd 5972, 5989, n.121 (2010) (stating that, in the absence of any basis for concluding that the transferee is likely to engage in unreasonable behavior post-merger, allegations regarding past discriminatory conduct by the transferor are more appropriately addressed in enforcement proceedings).

⁶⁷ *IT&E/PTI Order*, 24 FCC Rcd at 5489, para. 54.

⁶⁸ Applicants' Nov. 23 Letter at 1.

⁶⁹ OPT Comments at 6-7; OPT Oct. 8 Letter at 7-9; OPT Nov. 2 Letter at 5-6. See Hawaii DCCA Comments at 3 (stating that it is unclear how much capacity is available on the competing cables).

⁷⁰ Reply at 9-11; Applicants' Oct. 24 Letter at 4-5.

⁷¹ Reply at 7-10; Att. 2, Decl. of Daniel Masutomi (Masutomi Decl.) at paras. 2-7; Applicants' Nov. 23 Letter, Att. (Submarine Cable Map).

Applicants maintain that these providers could significantly expand capacity on the existing cables by installing additional optical equipment as demand dictates.⁷²

21. OPT acknowledges that tw telecom is a viable competitor and that Wavecom and tw telecom operate the portions that they own of the HiFN cable as independent networks, but it argues that Paniolo and SCCN do not make capacity on their cables available to third parties and are therefore not viable competitors.⁷³ The record is unclear on the availability of wholesale capacity on the Paniolo cable. OPT asserts that Paniolo leases all of its capacity to a LEC affiliate, and that if it did offer wholesale capacity to OPT, its connectivity between the Big Island and Oahu includes transit of terrestrial facilities that provide poor network performance.⁷⁴ HTI does not dispute that the Paniolo cable is primarily used by Paniolo's LEC affiliate, but states that Paniolo has made some excess capacity available to other carriers.⁷⁵ OPT asserts that Paniolo has only offered emergency restoration service, not generally available wholesale capacity.⁷⁶ We agree that we cannot rely on the Paniolo cable as a competitive inter-island option because, based on the record before us, capacity on the cable appears to be primarily dedicated to the use of one entity.

22. OPT further asserts that Southern Cross does not provide inter-island transport capacity on its cable to third parties and is not authorized by the Hawaii PUC to provide transport service.⁷⁷ Applicants disagree and claim that carriers that seek capacity on the SCCN cable between the Big Island and Oahu could themselves secure authorization from the Hawaii PUC to use the cable.⁷⁸ While it is not clear from this record the extent to which SCCN routinely offers inter-island transport service, Applicants have submitted information indicating that SCCN has a very large amount of inter-island capacity on its cable segment that extends between the Big Island and Oahu that would be useful for inter-island communications, as well as the international telecommunications that SCCN provides.⁷⁹ Unlike the smaller Paniolo cable, there is no evidence in the record that SCCN would not offer excess wholesale capacity to authorized intrastate carriers for inter-island transport. We thus find that there would be at least

⁷² Masutomi Decl. at para. 10 (“HTI is not aware of any current limitations or constraints on interisland capacity that would prevent any of its competitors from rapidly moving to capture business using existing capacity in the event of a hypothetical attempt to impose an anticompetitive increase in price post-closing. Moreover, given current technology, the interisland fiber optic strands currently in place are capable of carrying literally thousands of times more capacity through the upgrade of equipment.”).

⁷³ OPT Comments at 6-7; OPT Oct. 8 Letter at 7-9.

⁷⁴ OPT Comments at 9-10; OPT Oct. 8 Letter at 8-9; OPT Dec. 5 Letter at 5; OPT Dec. 19 Letter at 1-2. Paniolo stated in its cable landing license application that it would lease the cable solely to Sandwich Isles Communications, Inc. *Actions Taken Under Cable Landing License Act*, Report No. SCL-00034, Public Notice, 22 FCC Rcd 13169 (Int'l Bur. 2007).

⁷⁵ Reply at 7-8 and Masutomi Decl. at para. 8-9.

⁷⁶ Masutomi Decl. at para. 8-9 and Exh. 2 (contract between HTI and Paniolo for leased capacity). The Commission has found that alternative routes if they are indirect, use non-common carrier cable systems, and satellite links, can constrain the ability of a submarine cable provider to exercise market power. See *AT&T Corp., Access Telecom, GTE Hawaiian Tel International Inc., et al. Application for a License to Land and Operate in the United States a Private Fiber Optic Cable System Extending Between Guam and the Philippines, the G-P Cable System*, Cable Landing License, 14 FCC Rcd 1923, 1927, para. 10 (Int'l Bur. 1998) (finding that a cable between Guam and the Philippines was not a bottleneck facility because there were alternative, indirect routes available).

⁷⁷ OPT Comments at 8-9; OPT Oct. 8 Letter at 8; OPT Dec. 5 Letter at 5; OPT Dec. 19 Letter at 1-2.

⁷⁸ OPT Comments at 8-9 and n.29; Applicants' Oct. 24 Letter at 4-5.

⁷⁹ Masutomi Decl. at para. 6 and Exh. 1.

three entities that could provide inter-island transport between the Big Island and Oahu—HTI, tw telecom, and SCCN—and that this would offer sufficient competition in this case.

23. In assessing submarine cable competition, the Commission examines cable capacity to determine whether a transaction would increase ownership concentration such that we would have anticompetitive concerns.⁸⁰ Although Applicants argue that we should consider all international submarine cable capacity available in the trans-Pacific region in our analysis,⁸¹ our focus is on inter-island capacity and transport in Hawaii. These cables are used to originate, terminate, and transit international traffic. Both Wavecom and HTI own domestic-only cables connecting the Hawaiian Islands and do not, themselves, provide international transport services in the greater Pacific region. Wavecom's cable license, which will be transferred as part of the proposed transaction, states that it is an authorization for a domestic-only cable.⁸² We therefore examine cable capacity in Hawaii. According to HTI's declaration, Wavecom has capacity of 10 Gigabits/second (Gbps) on its cable system, and HTI has capacity of 70 Gbps for a combined capacity of 80 Gbps on their cables; the SCCN (480 Gbps) and tw telecom (70 Gbps) cable systems have a combined capacity of 550 Gbps; collectively, the cables have a capacity of 630 Gbps.⁸³ Post-transaction, we estimate that HTI will own 80 Gbps out of a total 630 Gbps of capacity or approximately 12.6 percent of capacity on all inter-island submarine cable networks.⁸⁴

24. We find that there is substantial inter-island capacity on cables owned and operated by entities unaffiliated with Applicants. Under the terms of this transaction, HTI is purchasing one-half of an existing cable, and other competitors will remain in the market that have inter-island capacity such that we find that the transaction will not pose anticompetitive concerns.

C. Potential Public Interest Benefits

25. In addition to assessing the potential competitive harms of the proposed transaction, we also consider whether it is likely to generate public interest benefits. We find that the transaction is likely to generate public interest benefits, although it is difficult to quantify the magnitude of the benefits. The

⁸⁰ *Applications Filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer Control*, IB Docket No. 11-78, Memorandum Opinion and Order, 26 FCC Rcd 14056, 14070, para. 31 (Wir. Comp. Bur and Int'l. Bur. 2011) (*Global Crossing/Level 3 Order*) (citing *AT&T/BellSouth Order*, 22 FCC Rcd at 5741, para. 159; *Verizon/MCI Order*, 20 FCC Rcd at 18514-15, para. 158; *Merger of MCI Communications and British Telecommunications PLC, GN*, Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15389-97, paras. 94-122 (1997)). OPT has argued that Paniolo's cable is not a competitive option because it is a non-common carrier facility, but the Commission does not exclude non-common carrier systems in its capacity analysis. *Global Crossing/Level 3 Order*, 26 FCC Rcd at 14070, n.105. Nonetheless, even without including the Paniolo cable capacity, we find below that HTI will own a small percentage of inter-island submarine cable capacity.

⁸¹ Reply at 5-6; Applicants' Oct. 24 letter at 2-4.

⁸² *Wavecom Cable License Order*, 16 FCC Rcd at 671, para. 3.

⁸³ Masutomi Decl. at paras. 3-7. For reasons explained above, we do not include Paniolo's cable in our capacity assessment.

⁸⁴ Masutomi Decl. at Exh. 1 (Hawaiian Telcom, Inc. Estimate of the Potential Capacity of All Interisland Submarine Networks). HTI has also provided estimates of maximum capacity on the cables. HTI estimates that Wavecom and HTI would own 59 percent of maximum capacity on the inter-island submarine networks, not including Paniolo. Masutomi Decl. at paras. 4-7 and Exh. 1 (estimating that tw telecom has maximum capacity of 24,000 Gbps and SCCN is adding 6,000 Gbps). We acknowledge that HTI and Wavecom will own a large percentage of capacity on the cables should the owners upgrade them to their maximum use, but timing of such upgrades is speculative. HTI states that upgrades are possible, but it does not provide specific timelines for other providers, except SCCN, which it predicts will be complete at the end of 2012. *Id.* at paras. 3-6.

Commission applies a “sliding scale approach” when evaluating benefit claims. Under this sliding scale approach, where potential harms appear “both substantial and likely, the Applicants’ demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”⁸⁵ On the other hand, where potential harms appear to be less likely or less substantial, as in this case, we will accept a lesser showing to approve the transaction.⁸⁶ We do not find substantial public interest harms, and we find the benefits that are likely to result from the transaction are sufficient for us to find that the proposed transaction serves the public interest.

26. Approval of the transaction will enhance HTI’s network by augmenting next-generation fiber capacity and diversity statewide. No party disputes Applicants’ claim that integrating Wavecom’s and HTI’s facilities will create needed redundancy between Hawaii’s main islands (Oahu-Kauai, Oahu-Maui, and Maui-Hawaii), and that this redundancy is necessary to relieve congestion and accommodate growth. Applicants assert that the combination of Wavecom’s and HTI’s terrestrial fiber will allow redundancy at various points on Oahu, including at cable landing stations that will make the State of Hawaii more competitive as a hub location for international transport providers.⁸⁷ The added capacity and route diversity is also likely to lead to enhanced competition in the video market as HTI, which competes against the existing cable provider, is able to use Wavecom facilities to expand services to more subscribers.⁸⁸

27. In addition, the transaction is expected to put Wavecom on a more solid financial footing, thereby allowing it to continue to serve its customers and invest in next generation services.⁸⁹ Applicants assert that the proposed transaction would make greater financial resources available for the expansion and operation of Wavecom’s network and have stated that these increased resources will allow Wavecom to improve service to the public and compete more effectively against other competitors in Hawaii.⁹⁰

⁸⁵ *Verizon/ALLTEL Order*, 23 FCC Rcd at 17496, para. 118; *EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferees)*, 17 FCC Rcd 20559, 20631, para. 192 (2002) (*EchoStar-DirecTV HDO*) (quoting *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14825, para. 256 (1999)); *cf.* DOJ/FTC Guidelines § 4 (“The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

⁸⁶ *See, e.g., Applications of Cellco Partnership D/B/A/ Verizon Wireless and AT&T, Inc.*, WT Docket No. 06-96, Memorandum Opinion and Order and Declaratory Ruling, , 25 FCC Rcd 10985, 11009, para. 54 (2010) (*Cellco Partnership Order*); *Verizon/ALLTEL Order*, 23 FCC Rcd at 17496, para. 118.

⁸⁷ Application at 3-6; Letter from Gregory J. Vogt, Counsel for Hawaiian Telcom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206 at 1-2 and Appendix A (Decl. of Daniel Masutomi) (Masutomi Nov. 29 Decl.) (filed Nov. 29, 2012) (Applicants’ Nov. 29 Letter).

⁸⁸ Application at 3-6; Applicants’ Nov. 29 Letter at 2; Masutomi Nov. 29 Decl. at para. 7.

⁸⁹ Application at 4-5; Masutomi Nov. 29 Decl. at para. 8.

⁹⁰ Application at 4 (stating that Wavecom’s existing customers are hindered in their ability to receive higher capacity connections because of legacy equipment limitations on its network); Reply at 2 (“As a smaller market participant with less financial stability than others in the market, Wavecom lacks the resources to compete effectively by itself.”); Applicants’ Nov. 23 Letter at 2-3 (“Part of the reason the transaction is in the public interest is due to the precarious nature of Wavecom’s finances. The transaction will address these serious financial difficulties, allowing Wavecom’s customers to continue to receive service.”); HTI Dec. 20 Letter at 1 (stating that a year-end closing would stem continuing Wavecom financial and customer losses); Letter from Nancy J. Victory, Counsel for

D. Foreign Ownership

28. Holdco requests a declaratory ruling, pursuant to section 310(b)(4) of the Act, that the public interest would be served by extending its current foreign ownership ruling to encompass Wavecom and its common carrier wireless licenses.⁹¹ We find, subject to the conditions specified herein, that the public interest would be served by extending the current foreign ownership ruling under section 310(b)(4), which the Commission issued to Holdco,⁹² to Wavecom and its common carrier wireless licenses. We conclude, based on ownership information Holdco has submitted to the Commission, that its current foreign ownership complies with that section 310(b)(4) ruling.

1. Review of Foreign Ownership Issues

29. We review, under section 310(b)(4) of the Act and Commission rules and policies established in the *Foreign Participation Order*,⁹³ the post-transaction foreign ownership of Wavecom. As part of our foreign ownership analysis under section 310(b)(4), we consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the proposed transfer of control.⁹⁴ Section 310(b)(4) establishes a 25 percent benchmark for investment by foreign individuals, corporations, and governments in U.S.-organized entities that control U.S. common carrier wireless licensees.⁹⁵ This section of the Act also grants the Commission discretion to allow higher levels of foreign ownership if it determines that such ownership is not inconsistent with the public interest.⁹⁶ The presence of aggregated alien equity or voting interests in a common carrier licensee's parent in excess of 25 percent triggers the applicability of section 310(b)(4)'s statutory benchmark.⁹⁷ Once the benchmark is triggered, section 310(b)(4) directs the Commission to determine whether the "public interest will be served by the refusal or revocation of such license."⁹⁸

30. In the *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by individuals or entities from World Trade Organization ("WTO") Member countries in U.S. common carrier and aeronautical fixed and aeronautical en route radio

Wavecom Solutions Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206 at 1-4 (filed Dec. 24, 2012). OPT asserts that the Commission should not forego a competitive analysis because the parties have raised financial concerns. OPT Dec. 5 Letter at 7; OPT Dec. 19 Letter at 2. As set forth above, the Bureau conducted a competitive analysis pursuant to our standard of review and public interest framework.

⁹¹ 47 U.S.C. § 310(b)(4). The petition for declaratory ruling is included in the narrative portion of the transfer of control applications and has been assigned File No. ISP-PDR-20120716-00003.

⁹² ISP-PDR-20100122-00002, International Authorizations Granted, Public Notice, DA 10-1798, 25 FCC Rcd 13369, 13370 (IB 2010) (*2010 Holdco 310(b)(4) Ruling*).

⁹³ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997), Order on Reconsideration, 15 FCC Rcd 18158 (2000) (*Foreign Participation Order*).

⁹⁴ See *Foreign Participation Order*, 12 FCC Rcd at 23918-21, paras. 59-66. In assessing the public interest, we consider the record and accord the appropriate level of deference to Executive Branch expertise on these issues. See *id.*

⁹⁵ 47 U.S.C. § 310(b)(4).

⁹⁶ *Id.*

⁹⁷ See *Applications of BBC License Subsidiary L.P. (Assignor) and SF Honolulu Subsidiary, Inc. (Assignee), et al.*, Memorandum Opinion and Order, 10 FCC Rcd 10968, 10973-74, para. 25 (1995).

⁹⁸ 47 U.S.C. § 310(b)(4).

licensees.⁹⁹ Therefore, with respect to indirect foreign investment from WTO Members, the Commission adopted a rebuttable presumption that such investment generally raises no competitive concerns.¹⁰⁰ Because the Commission has previously issued a foreign ownership ruling to Holdco under section 310(b)(4), we consider in this proceeding whether Holdco remains in compliance with that ruling and, if so, whether it is appropriate to extend Holdco's current ruling to encompass Wavecom and its common carrier wireless licenses.

31. As discussed above, Wavecom and HTI are both Hawaiian corporations. HTI is a wholly owned subsidiary of Hawaiian Telcom Communications, Inc. which is, in turn, a wholly-owned subsidiary of Holdco, both Delaware corporations. As a result of this transaction Wavecom will become a direct wholly-owned subsidiary of HTI and an indirect wholly-owned subsidiary of Holdco.

32. The Commission has previously found that it would be in the public interest to allow up to 100 percent indirect foreign ownership of HTI as a result of the foreign ownership in Holdco. That authorization was conditioned on HTI obtaining prior Commission approval before (1) any foreign individual or entity acquires a direct or indirect equity and/or voting interest in Holdco in excess of 25 percent or (2) Holdco's direct or indirect equity and/or voting interests from non-WTO Member countries (including interests from unknown countries) exceeds 25 percent.¹⁰¹ Holdco asserts that it is compliance with that ruling.¹⁰² Holdco common stock is publicly traded and is widely held. As noted above, only one entity – Twin Haven Fund, a U.S. entity – has a greater than 10 percent ownership interest in Holdco. Holdco also states that it monitors compliance with the conditions of its foreign ownership ruling and that shareholders that comprise approximately 81 percent of the total outstanding stock of Holdco are either U.S. entities or entities that are organized in and/or have their main headquarters in either the Netherlands or Switzerland, both of which are WTO Member countries.¹⁰³ Holdco does not know the citizenship of the other 19 percent ownership, but believes it is most likely either U.S. or other WTO Member ownership.¹⁰⁴

33. We therefore find that Holdco is entitled to a rebuttable presumption that the indirect foreign ownership in Wavecom would not pose a risk to competition in the U.S. market. We find no evidence in the record that rebuts this presumption and, as we explained above, we find no basis to conclude that the proposed transaction is likely to harm competition.¹⁰⁵ In addition, any national security, law enforcement, foreign policy, or trade concerns are addressed by the condition placed on the grant of the applications.¹⁰⁶ Accordingly, pursuant to section 310(b)(4) of the Act and the rules and policies established in the *Foreign*

⁹⁹ *Foreign Participation Order*, 12 FCC Rcd at 23896, 23913, 23940, paras. 9, 50, 111-112.

¹⁰⁰ *Id.* at 23913, 23940, paras. 50, 111-112. The Commission stated, in the *Foreign Participation Order*, that it will deny an application if it finds that more than 25 percent of the ownership of an entity that controls a common carrier wireless licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding. *See id.* at 23946, para. 131.

¹⁰¹ *See 2010 Holdco 310(b)(4) Ruling*, 25 FCC Rcd at 13370.

¹⁰² *See* Letter from Gregory J. Vogt, Counsel for Hawaiian Telcom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-206, Decl. of Brian Tanner at 2 (filed Dec. 19, 2012).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See supra* paras. 12-24; *see also Foreign Participation Order*, 12 FCC Rcd at 23905-09, paras. 33-41.

¹⁰⁶ *See infra* paras. 35-36.

Participation Order, we find that it is in the public interest to extend Holdco's section 310(b)(4) foreign ownership ruling to cover Wavecom and its wireless licenses.

2. Declaratory Ruling

34. Pursuant to the rules and policies established in the Commission's *Foreign Participation Order*,¹⁰⁷ we find that the indirect foreign ownership of Wavecom in excess of the 25 percent benchmark in section 310(b)(4) is consistent with the public interest. Specifically, this ruling allows up to 100 percent indirect foreign ownership of Wavecom as a result of foreign equity and/or voting interests held directly or indirectly in its controlling U.S. parent, Holdco, subject to the following conditions: (1) Wavecom shall obtain prior Commission approval before any foreign individual or entity acquires a direct or indirect equity and/or voting interest in Holdco in excess of 25 percent; and (2) Wavecom shall obtain prior Commission approval before Holdco's direct or indirect equity and/or voting interests from non-WTO Member countries (including interests from unknown countries) exceeds 25 percent. Wavecom has an affirmative duty to monitor its foreign equity and voting interests, calculate these interests consistent with the attribution principles enunciated by the Commission, and otherwise ensure continuing compliance with the provisions of section 310(b)(4) of the Act.¹⁰⁸

E. National Security, Law Enforcement, Foreign Policy, and Trade Concerns

35. When analyzing a transfer of control or assignment application in which foreign investment is an issue, we also consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the Executive Branch.¹⁰⁹ On December 10, 2012, the Department of Justice (DOJ), with the concurrence of the Department of Homeland Security (DHS), filed a Petition to Adopt Conditions to Authorizations and Licenses (DOJ/DHS Petition).¹¹⁰ HTI has submitted a Letter of Assurance (LOA) to DOJ and DHS.¹¹¹ DOJ and DHS state that they have no objection to the Commission granting the applications and petition for declaratory ruling provided that the Commission condition its consent on compliance with the commitments set forth in the LOA.¹¹²

36. In assessing the public interest, we take into account the record and accord deference to Executive Branch expertise on national security and law enforcement issues.¹¹³ As the Commission stated

¹⁰⁷ See *Foreign Participation Order*, 12 FCC Rcd 23891 (1997).

¹⁰⁸ See *Applications of Cellco Partnership d/b/a Verizon Wireless and AT&T, Inc.*, WT Docket No. 09-121, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd 10985, 11024, para. 99 (IB/WTB 2010); *Mobile Satellite Ventures Subsidiary LLC and SkyTerra Communications, Inc., Petition for Declaratory Ruling Under Section 310(b) of the Communications Act of 1934, as Amended*, File No. ISP-PDR-20070314-00004, Order and Declaratory Ruling, 23 FCC Rcd 4436, 4443, para. 16 (2008); *Verizon Communications, Inc., Transferor, and América Móvil, S.A. de C.V., Transferee, Application for Authority to Transfer Control of Telecomunicaciones de Puerto Rico, Inc. (TELPRI)*, WT Docket No. 06-113, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd 6195, 6225, para. 68 (2007).

¹⁰⁹ *Foreign Participation Order*, 12 FCC Rcd at 23918, para. 58.

¹¹⁰ DOJ/DHS, Petition to Adopt Conditions to Authorizations and Licenses, File Nos. ITC-T/C-20120716-00183; ISP-PDR-20120716-00003; WC Docket No. 12-206 (filed Dec. 10, 2012).

¹¹¹ Letter of Assurance attached to DOJ/DHS Petition to Adopt Conditions to Authorizations and Licenses, File Nos. ITC-T/C-20120716-00183; ISP-PDR-20120716-00003; WC Docket No. 12-206 (Dec. 7, 2012)(Letter of Assurance).

¹¹² DOJ/DHS Petition at 1.

¹¹³ See *Foreign Participation Order*, 12 FCC Rcd at 23918–21, paras. 59–66.

in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch.¹¹⁴ In accordance with the request of the DOJ and DHS in the absence of any objection from the Applicants, we condition our grant of the applications and petition for declaratory ruling on Applicants' compliance with the commitments set forth in the LOA. The DOJ/DHS Petition and LOA are publicly available on the Commission's website.¹¹⁵

V. CONCLUSION

37. Upon review of the Application and the record in this proceeding, we conclude that approval of this transaction is in the public interest subject to the conditions stated above and in Appendix A.

VI. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and (j), 214, 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 214, 309, 310(d), that the applications filed by Wavecom Solutions Corporation and Hawaiian Telcom, Inc. for the transfer of control of the domestic section 214 authorization set forth in Appendix B and for the assignment and transfer of control of licenses and international section 214 authorizations set forth in Appendix B ARE GRANTED.

39. IT IS FURTHER ORDERED that, as a condition of this grant and pursuant to section 214(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(c), Hawaiian Telcom, Inc. shall comply with the conditions set forth in Appendix A of this Order.

40. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), and 310(b)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(b)(4), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the petition for declaratory ruling filed by Hawaiian Telcom Holdco, Inc. is GRANTED to the extent specified in this Memorandum Opinion and Order and Declaratory Ruling.

41. IT IS FURTHER ORDERED that, pursuant to sections 4(i)–(j), 214, 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)–(j), 214, 309, 310(b), 310(d), that grant of the applications and associated petition for declaratory ruling IS CONDITIONED UPON compliance by Hawaiian Telcom, Inc. with the provisions of the Letter of Assurance between the Department of Justice, with the concurrence of the Department of Homeland Security, dated December 7, 2012, which is publicly available on the Commission's website.¹¹⁶

¹¹⁴ *Id.* at 23919, para. 62.

¹¹⁵ See DOJ/DHS Petition, available at <http://apps.fcc.gov/ecfs/proceeding/view?z=bsgfb&name=12-206>.

¹¹⁶ See *id.*

42. IT IS FURTHER ORDERED that, pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, this Memorandum Opinion and Order IS EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief, Wireline Competition Bureau

Mindel De La Torre
Chief, International Bureau

Ruth Milkman
Chief, Wireless Telecommunications Bureau

APPENDIX A**BUILDINGS FOR WHICH THE APPLICANTS COMMIT NOT TO RAISE RATES FOR SEVEN YEARS FOLLOWING MERGER CLOSING DATE**

| | |
|----------------------------------------------------|-----------------------|
| 1402 Punahou Street | HONOLULU, HI, 96822 |
| 2293 Victor Wharf Access Road | PEARL CITY, HI, 96872 |
| 280A Puali | KAUNAKAKAI, HI, 96748 |
| 3016 Umi Street | LIHUE, HI, 96766 |
| 560 Halekauwila Street | HONOLULU, HI, 96850 |
| 1601 Punahou Street | HONOLULU, HI, 96822 |
| 2565 McCarthy Mall at Keller Hall | HONOLULU, HI, 96822 |
| 2850 Pukoloa Street | HONOLULU, HI, 96819 |
| 287 Pacific Missile Range Facility (Barking Sands) | WAIMEA, HI, 97652 |
| 7192 Kalaniana'ole Highway | HONOLULU, HI, 96825 |
| 91-340 Farrington Highway | KAPOLEI, HI, 96707 |
| Mauna Loa Highway at Molokai Ranch | MAUNALOA, HI, 96748 |

**APPENDIX B
LIST OF LICENSES AND AUTHORIZATIONS
SUBJECT TO TRANSFER OF CONTROL**

SECTION 214 AUTHORIZATIONS

A. International

| <u>File Number</u> | <u>Authorization Holder</u> | <u>Authorization Number</u> |
|------------------------|-------------------------------|-----------------------------|
| ITC-T/C-20120716-00183 | Wavecom Solutions Corporation | ITC-214-20010503-00269 |

B. Domestic

| <u>File Number</u> | <u>Authorization Holder</u> |
|---------------------------------|-------------------------------|
| <i>See WC Docket No. 12-206</i> | Wavecom Solutions Corporation |

CABLE LANDING LICENSE APPLICATION

| <u>File Number</u> | <u>Authorization Holder</u> | <u>Authorization Numbers</u> |
|------------------------|-------------------------------|--------------------------------------------------|
| SCL-T/C-20120716-00009 | Wavecom Solutions Corporation | SCL-LIC-19950627-00024 SCL-MOD-20001025-00036 |

SECTION 310(d) AUTHORIZATIONS

| <u>File Number</u> | <u>Authorization Holder</u> | <u>Authorization Number</u> |
|--------------------|-------------------------------|-----------------------------|
| 0005305989 | Wavecom Solutions Corporation | Call Sign WQEH949 |