



FSM Telecommunications Corporation

February 4, 2021

HAND DELIVERED

Takuro Akinaga
Chief Executive
Telecommunications Regulation Authority
P.O. Box 1919
Pohnpei FM 96941

Re: Response TRA letter

Dear Mr. Akinaga:

I am in receipt of your Draft Decision on Bottleneck Facilities dated 22 December 2021, and I am responding on behalf of FSM Telecommunications Corporation (FSMTC).

This letter is to be construed as our response on behalf of FSMTC and we wish to raise a number of important issues regarding the methodology used regarding designation of bottleneck facilities and the likely impacts that should be addressed and considered with any determination of bottleneck facilities.

It is important to initially look at the law.

Section 302(f) 'bottleneck facility' means a communications facility declared by the Authority to be essential for the production of communications services which, for technical reasons or due to economies of scope and scale and the presence of sunk costs, cannot practicably be duplicated by a potential competitor in a communications market;

This is the definition that is the foundation of the determination by TRA.

Section 339(1)(g) Access to communications facilities, networks, software and services, in a manner that is sufficiently unbundled, including co-location, to enable the second licensee to access the facilities and wholesale services that it reasonably requires in order to provide communications services to its customers;

This provision is also cited at page 1 of the draft decision.

20 Licensees who own or control bottleneck facilities are also subject to Section 343(2)(g) of the Act, which considers “designing or installing a communications facility or a communications network with the purpose of preventing or hindering another licensee from acquiring interconnection or access” to be anti-competitive conduct.

21 A declaration that a facility is a bottleneck facility does not change or affect the ownership or control of that facility. Such a declaration gives other licensees the right to request access to the facility and gives the licensee who owns or controls it the obligation to negotiate terms of access consistent with the Act and the Access Rules.

23 To the extent that they are essential for the production of communications services, a potential competitor could either be excluded from the market or could be forced to make an inefficient and unsustainable investment in duplicate facilities to produce those communications services, contrary to the objectives of the Act. This could prevent the development of effective competition in the FSM, contrary to the objectives of the Act, and could give licensees who own those facilities significant market power.

37 In summary, in historical antitrust cases, US courts have generally held a facility to be essential if it meets at least one of the following characteristics:

- The facility is essential to the public at large receiving a vital good or service.
- The facility is essential to competition for the service. That is, controlling the facility allows the controlling party to improperly interfere with competition in the relevant markets downstream of the facility. This happens when the facility cannot be practicably duplicated by competitors.

50 As with alternative facilities, duplicate facilities are only likely to be built if the owner of these alternative facilities can reasonably expect to earn sufficient returns to sustainably operate a business.

These determinations have to be made though within the existing marketplace here in the FSM. The issue is low demand, small market...how does declaring bottleneck facilities increase demand? The intent of the liberalization law is to open the telecom sector to allow for market forces to be put to work and allow companies to compete in the market. Currently no major international competitors are expressing an interest in this market. Based on responses received in the current litigation, no one is claiming

responsibility to even try and bring such competitors into the market. Even if they did come into the market, they would be immediately scared out of the marketplace if their infrastructure could be immediately declared a bottleneck facility. This type of broad interpretation of the law does not encourage competition but will in fact limit competition.

In addition, the FSM is a small market. To our knowledge no studies have shown that there will be a substantial increase in the market to justify these findings, solely due to available market size in the FSM, the ability of the remaining population to pay commercial rates, and the steady decrease in population due to outmigration. Attached as Exhibit A is an article from the U.S., <https://www.govtech.com/network/fcc-launches-14-2b-broadband-program-for-low-income-families> showing that to increase internet use and availability in the U.S., a huge market compared to the FSM, the customers needed to be subsidized. To our knowledge, no such subsidies are being considered in the FSM.

Further, any interpretation of bottleneck facilities should not be used to provide a free ride to new competitors. Any use of bottleneck facilities requires free market and sustainable pricing. The owners of any bottleneck facilities also require enough income to sustain their own business. A declaration of a bottleneck should not be made unless data is provided to determine if a declaration of a bottleneck facility is economically feasible and will benefit the overall state of the telecommunications industry in the FSM.

FTTH Buildout

Initially the entire FTTH development cannot be a bottleneck facility as the terms of the World Bank funding per the Digital Micronesia Project is to build a universal fiber to the home system in all four states of the FSM.

I am attaching as Exhibit B the World Bank Financing agreement for the Digital Micronesia Project which includes the Fiber to the Home project.

I am also attaching as Exhibit C the World Bank Financing Agreement with OAE. These documents clearly state that FSMTC cannot own any of the FTTH buildout occurring under this grant. The only FTTH currently in existence has been built by

FSMTC. Hence any buildout by OAE/The World Bank will be duplicative, creating a situation where there is no bottleneck.

It is quite clear regarding the obligations of the FSM and OAE under these financing agreements. (It should be noted FSMTC is not a party to any of these World Bank financing agreements.)

The Financing Agreement with the FSM, Exhibit B, Schedule 2, Section 1(A)(6) states in part.

The Recipient shall take all measures required or necessary on its part to ensure that: (a) equipment, facilities or infrastructure, including but not limited to fiber optic networks, used in the supply of ICT services by FSMTC or the Open Access Entity, is used in an economically efficient manner, (b) from the Effective Date any new investment in fiber optic networks for telecommunication services shall be owned by the Open Access Entity and not by FSMTC or any other publicly owned or controlled entity: and (c) FSMTC shall not compete against the Open Access Entity or otherwise duplicate OAE's investments in equipment, facilities or infrastructure used in the provision of telecommunications services.

At all times OAE is a licensee of TRA and it is also acting in a competitive capacity. It appears OAE is a disguised retailer, as it appears to be assisting the appearance of competition, by supporting small retailers in the market and assisting them for free or not at market cost. Currently, they do not have any service agreements in place with any possible new retailers, even though they highlight on their web site that these are in fact new competitors.

The project referenced here is grant funded. Per se as the terms of the grant funding and based on representations made by OAE in court documents, section 302(f) cannot possibly apply to FTTH since it cannot be a bottleneck facility.

A 'bottleneck facility' means a communications facility declared by the Authority to be essential for the production of communications services which, **for technical reasons or due to economies of scope and scale and the presence of sunk costs, cannot practicably be duplicated by a potential competitor in a communications**

market;

OAE through the World Bank is already committed to duplicating the entirety of the FTTH so it is impossible to designate any of the current infrastructure developed by FSMTC as a bottleneck facility. Conversely whatever FSMTC has already built cannot be a bottleneck facility because it can and will be duplicated. This building of the FTTH facility is not hypothetical unless OAE will now say the project is not going forward, or the World Bank has withdrawn funding. If so, such information should and must be disclosed to TRA immediately.

If OAE disagrees with this argument it then is incumbent upon them to produce detailed plans and business models to show its construction plan for FTTH, and to show what they are not in fact duplicating.

However, the following attachments are from their Digital FSM web site. Exhibit D.

- a. Can A Small Market Still be Attractive to Overseas Telecommunication Companies, May 23, 2020.
- b. OAE statement
- c. Letter from Pieter Bakker, November 24, 2020, which states anticipated prices for wholesale fiber to the home connections will \$10.00 with retail prices expected at \$30.00 to \$35.00 per month.
- d. Digital FSM Post, November 26, 2020, same pricing.
- e. November 2020 release FSM Telecommunications Cable, sets same pricing and coverage in all four states.
- f. Digital FSM Post, March 13, 2021, re: build out in Yap.
- g. Digital FSM Post, March 15, 2021.
- h. Digital FSM Post, April 13, 2021. Competition by satellite, and IBoom
- i. Digital FSM Post, April 20, 2021. Laying fiber in Kosrae 2022
- j. Digital FSM Post, April 22, 2021. No fiber yet in Kosrae
- k. Digital FSM Post, May 7, 2021, new fiber future.
- l. Digital FSM Post, May 14, 2021, FTTH to open competition in Kosrae.
- m. Digital FSM Post, May 17, 2021, Digital FSM provide 4G/LTE to majority of Chuuk State.
- n. Digital FSM Post, May 19, 2021 Kosrae and Chuuk State signed implementation agreements with FSM so Digital FSM can proceed.

- o. Digital FSM Post, May 26, 2021 Competitive price for telcom services to all of FSM including outer islands.
- p. Digital FSM Post, June 1, 2021 Rollout of FTTH to Tonowas, Udot and Eot.
- q. Digital FSM Project, Kacific's Coverage Benefits FSM.
- r. Digital FSM Post, July 12, 2021, rollout of FTTH in Yap progressing.
- s. Digital FSM Post, July 15, 2021 What is the Digital FSM project. The project involves a new fiber optic cable network to all four states of FSM, bringing higher speed more reliable internet to the people of FSM.
- t. Digital FSM Post, August 1, 2021, Universal Communications Group awarded tender to deliver fiber-to-the-home networks in Yap, Pohnpei and Kosrae State. Are you excited that your home and business will soon be connected to the fiber optic network.
- u. Digital FSM Post, August 29, 2021, Great news Pohnpei! You are one step closer to your fiber-to-the-home network!
- v. Digital FSM Post, September 17, 2021 Frequently Asked Question. Including, Who is paying for the fiber optic cable developments? The World Bank has provided nearly all the money required for the establishment of the undersea fiber optic network to Chuuk and Yap and will provide the money for the fiber-to-the-home network still to be deployed in all four states.
- w. Digital FSM Post, September 22, 2021 Surveyors helping plan for the island wide roll out of the fiber-to-the-home network in Pohnpei.
- x. Digital FSM Post, November 15, 2021, Under the new structure, funding has enabled the newly established open access entity, FSM Cable Company, to invest in infrastructure such as Pohnpei's fiber-to-the-home network and opened up this infrastructure to new telecom operators in the state.
- y. Digital FSM Post, November 23, 2021, OAE conducting fiber-to-the-home survey on Pohnpei.
- z. Digital FSM Post, December 20, 2021, What is FMTTC?
- aa. Digital FSM Post, November 21, 2021, Will the outer islands be connected?

The Digital FSM postings promise a comprehensive FTTH buildout in all four states, and this is consistent even through the present.

The following is a response to a request for admission by OAE.

20. Admit that OAE will be competing directly with FSMTC for the provision of terrestrial fiber to homes in Yap.

Response: Denied. The OAE provides no retail services. FSMTC is currently the OAE's only customer and the only operator using the services provided by the OAE. The OAE's purpose is not to compete or to give any one competitor an advantage in the market, but to provide low cost open access to bottleneck facilities on equitable terms. The OAE's ownership of bottleneck facilities would reduce costs for all operators including FSMTC while stimulating innovation in retail services.

In this admission, OAE is stating it should own all bottleneck facilities.

However, based on witness testimony it also becomes unclear what they are trying to do.

WITNESS: The Phase 3 funding is approximately thirty, Three Zero Million dollars and Fifteen Million of that is for the infrastructure part of the project. Of which from that Fifteen Million, approximately twelve million is allocated to fiber to the home infrastructure.

MR. WARREN: In which states?

WITNESS: In principal, in all four States, but there is a close (clause) in the financing agreement for the FSM digital-FTTH is part of the FSM digital project and that financing agreement says that World Bank will not finance duplication of existing cables. In the State of Chuuk on the island of Weno there is already a fiber cable, a terrestrial fiber cable, operated by FSM Telecom. So, the OAE have so far refrained from any initiatives in Chuuk, but we are looking to bring fiber network on the larger Chuuk lagoon islands. And we are debating at the moment on how to do that. That would not be a network that we would operate ourselves to serve customers. It would be a network that would be made available to Telecom operators.

Testimony, Pieter Bakker, May 7, 2021, pp. 33-34.

MR. WARREN: Does Telecom have their own project to do the same thing or?

WITNESS: Yes, but here you get into a situation again, that the financing agreement for the projects clearly forbid duplication. Because World Bank's point of view is we are a developing organization and they fund where no local money is available, then obviously there is no way for World Bank to step in because that would create market distortion. So, the instruction here to the government, or the agreement or the financing agreement clearly states to the governments that it is their responsibility to make sure that initiatives, other initiatives, into fiber investments would be kept on hold or it would be synchronized with the OAE.

Testimony, Pieter Bakker, May 7, 2021, p. 36.

MR. WARREN: Have you begun on any of these State based projects?

WITNESS: No, not really because what I told you earlier is that in the financing agreement there are terms and obligations. One of the obligations is that four implementation agreements need to be signed before any money will be made for grant funding. And the Pohnpei implementation agreement is missing at this time. So, what we have done is preparatory work, and project plans. That can all be done with limited amounts of money. They have been funded, but that funding is limited to the urgent project planning only. So, more detailed planning is more complicated and would require more money and that money is not available at the moment as long as the FSM Government has not fulfilled all its terms and obligation, its obligations mainly in the financing agreement. So, when we are in a planning phase and next step we start when funding becomes available.

Testimony, Pieter Bakker, May 7, 2021, pp. 34-35

The transcript portions are attached as Exhibit E.

The hearing testimony is contradictory to the postings attached from the Digital FSM project which also provides OAE as the contact address. At this point we don't have any clue as to what OAE is doing, and they sought protection in the court case to not respond to FTTH issues in that case.

The issues raised here do not go to the issue of the wisdom or the feasibility of the program pushed by the FSM and the World Bank. This response assumes it will be implemented but we simply are requesting to know in detail what OAE is in fact going to build.

OAE argued to the court, that these matters should be handled administratively before TRA. Obviously now is the time to address these issues. OAE has repeatedly stonewalled on providing detailed information on their FTTH project. Without such detailed information the TRA should not have enough information to rule, nor would it be prudent to rule on the determination of a bottleneck facility until such plans are disclosed. Obviously when they are going to build and what they are going to build are fundamental and foundational issues.

Attached as Exhibit F, are the requests for admissions and responses provided by OAE on July 7, 2021, 14 to 40. As can be seen, OAE responded to 27 requests for admission that TRA has jurisdiction and any requests should go through TRA. Basically OAE is stonewalling on their plans unless TRA forces them to provide information on their plans for FTTH.

52. As before, in assessing whether a facility can practicably be duplicated, it is necessary to consider it in the FSM context.

OAE and the World Bank have repeatedly stated they are going forward with the FTTH project in FSM, so there is no factual dispute that FTTH can practically be duplicated.

87. Draft Decision on FTTP facilities providing internet services: Internet access services provided using copper, mobile or satellite communications facilities are not an effective substitute for similar services produced using FTTP facilities. Copper, mobile and satellite facilities are therefore not alternatives to FTTP facilities, and the TRA must consider whether terrestrial FTTP facilities can be practicably duplicated.

91. Draft Decision on terrestrial fiber facilities providing point-to-point backhaul services: Point-to-point backhaul services provided using mobile or satellite communications facilities are not an effective substitute for similar services produced using fiber facilities. Mobile or satellite facilities are therefore not alternatives for point-to-point terrestrial fiber facilities.

119. Some information on the potential costs of building a FTTH network is available from public and confidential sources.

- OAE estimate of \$4-5 million to build an FTTH network across the FSM, with a further \$4-5 million to install drop wires to connect residences and businesses to that network.³⁸
- FSMTC has estimated a total cost of approximately _____ to complete FTTH infrastructure. This includes to reach up to 2,800 premises in Kosrae, up to 2,000 premises in Yap and up to 7,650 premises in Pohnpei.³⁹
- The World Bank, through the Digital Federated States of Micronesia Project, estimate costs of up to \$12 million for “constructing and installing domestic fiber optic and wireless networks and related infrastructure to strengthen domestic internet and telecommunications connectivity.”⁴⁰

136. Draft Decision: duplication of an FTTP fiber optic facility on islands where one exists is not practicable for economic reasons.

However, OAE and the World Bank have repeatedly stated they are constructing a new FTTH system in all four states. This decision should moot all contention that FSMTC owns bottleneck facilities.

Further, FSMTC has a mandate under its founding legislation which was reaffirmed under PL 18-52.

21 FSMC 203

(2) to operate and manage such services on the basis of commercially accepted practices, treating all users of telecommunications services on equitable terms in accordance with its published tariffs, and requiring all users to pay for the services provided;

(3) to plan for the expansion and improvement of telecommunications facilities and services;

(4) to the extent practicable, to expand telecommunications services to areas and communities in the Federated States of Micronesia that are presently unserved or poorly served and to improve the quality, reliability, and variety of services available to all users in a manner consistent with commercial reasonableness and with promoting economic development, the advancement of education and health care, and the preservation of the cultural identity of the people of the Federated States of Micronesia;

(5) to improve the telecommunications skills and promote the telecommunications training of Micronesian citizens who are employees of the Corporation;

(6) to establish, publish, and implement a structure of tariffs and rates for telecommunications services calculated to ensure that, to the extent practicable, adequate and equitable charges are imposed for services and that the tariff structure promotes the increased use of telecommunications services;

(7) to invest all surplus revenues of the Corporation in the expansion and improvement of telecommunications facilities and services;

(8) to incur indebtedness for the purpose of expanding and improving telecommunications facilities, to the extent and on such terms as are deemed commercially reasonable by the Corporation;

It is actually unfair competition to allow competitors to profit from this mandate to seek below cost services from alleged bottleneck facilities. Any bottleneck facilities declared would and should recognize this mandate and the attendant expenses required to comply.

Additionally, even though satellite is discounted in the analysis of bottleneck facilities it must be considered in a relevant analysis to determine what is its effect on the overall market? Requiring a sharing of fiber facilities may end up limiting effective competition by fiber. The analysis in paragraphs 73-76 is not that persuasive or effective in its

overall findings. While fiber cable may have a bigger capacity, there is no determination of what customers need or use. If 95% of internet traffic is to download Netflix and to use Facebook or other digital media, excess capacity is not a factor in competition. Have there been any studies conducted on what number of customers actually would use the higher capacities described, especially if satellite can reach remote locations, not readily accessible to cable? Star Link is a potentially big competitor and cannot simply be disregarded concerning any future planning.

137. In the event that a FTTP fiber optic facility is duplicated by new FTTP fiber optic facilities, the TRA would repeat the assessment here at the relevant time in order to determine whether FTTP facilities in that area continue to be bottleneck facilities.

138 Islands where no FTTP facilities exist are even less densely populated. Therefore, the factors that make duplication of an FTTP facility not practicable where FTTP already exists (high costs, small customer base) are magnified. If duplication is not practicable on islands where FTTP facilities currently exist, it is likely less practicable on islands where FTTP facilities do not currently exist.

139 Therefore, unless material changes take place in the market between now and the time that FTTP facilities are commissioned on other islands, the TRA would likely declare such facilities to be bottleneck facilities following their commissioning. Prior to making any such decision, the TRA would repeat the assessment here at the relevant time.

It is unclear what the TRA is determining with these statements. Is TRA going to declare bottleneck facilities, then when OAE builds its network suddenly say they are not bottleneck facilities? What is meant by commissioning? When a new network is active or when it is being planned? It is unduly burdensome on one licensee, to create pricing structures, determine cost basis for temporary provision of services, or else to implement pricing and access to a bottleneck facility if such decision can be reversed at any time.

Further, how many facilities must potential competitors have access to? As a practical matter anything built or planned by OAE will then comply with the requirements under the interconnection laws. If they will build it, as they have repeatedly contended in litigation, then it is a moot point. There is no need for any use by other parties of

current FTTH construction by FSMTC. Additionally, is OAE now a competitor of FSMTC for the use and control of these facilities?

Lastly, the draft decisions speak in vague generalities. On what islands and what facilities is the TRA stating may be a bottleneck facility? It is impossible to oppose these draft findings when they are too indefinite to respond to. Is Yap a bottleneck facility? If so which islands and which locations, or is it the entire state? Without definition it is impossible to respond in any detail concerning what is there, what percentage of coverage there is and what is fiber, copper or other coverage.

Section 31 of the Regulations on Interconnection provide the following.

Section 31.

(1) Licensees shall adopt one of the following approaches to set prices for Access to Bottleneck Facilities:

(a) commercial negotiation;

(b) cost-based prices, which may include a reasonable profit to reflect the risk of investment; or

(c) retail-minus prices, which may be based on the actual costs that the Licensee will avoid by providing the service on a wholesale, rather than retail basis.

In order to comply with the requirements above, FSMTC will need to evaluate its investment to come up with a cost based pricing mechanism, that will include a profit to reflect the risk of a reasonable investment. It would appear that these determinations would be fruitless and a waste of company resources if OAE and the World Bank are in fact building a comprehensive FTTH program.

Why would a regulator burden consumers with requiring FSMTC to create a brand new pricing system when the World Bank and OAE is building its own system?

Overall, there is another major consideration that must be considered.

Financing Agreement with the FSM, Exhibit B. Schedule 2, Section 1(A)(6) states in part. This provision was cited earlier but it is extremely important on this issue.

The Recipient shall take all measures required or necessary on its part to ensure that: (a) equipment, facilities or infrastructure, including but not limited to fiber optic networks, used in the supply of ICT services by FSMTC or the Open Access Entity, is used in an economically efficient manner, **(b) from the Effective Date any new investment in fiber optic networks for telecommunication services shall be owned by the Open Access Entity and not by FSMTC or any other publicly owned or controlled entity: and (c) FSMTC shall not compete against the Open Access Entity or otherwise duplicate OAE's investments in equipment, facilities or infrastructure used in the provision of telecommunications services.**

The World Bank is a driving force behind OAE, and is pressing the implementation of the Digital FSM program. Is the declaration of a bottleneck facility for all FTTH built by FSMTC the beginning of an expropriation attempt by the FSM and OAE to force a transfer of FSMTC's infrastructure to OAE? That would work within the constraints of the grant scheme, but it would irreparably harm FSMTC.

Again we seek to determine what is the actual implementation intent under the financing agreements entered into with the World Bank and being implemented by the FSM, OAE and even TRA?

FSMTC is jointly owned by the states and the FSM, while OAE is solely owned by the national government. Such a taking is an expropriation, not a simple transfer of assets, and FSMTC states on the record it is wholly opposed to any such attempt at a transfer.

As shown, OAE has already published a pricing model of \$10.00 per line for retailers on its FTTH systems, which have yet to be built. FSMTC cannot sustainably offer such a price on its systems that could be determined to be bottleneck facilities and cannot be compelled to follow unrealistic pricing proposals. The pricing issue needs to be addressed consistent with any determination on bottleneck facilities.

146 Draft Decision: In many cases, point-to-point terrestrial fiber optic facilities can be practicably duplicated. The TRA does not intend to declare all point-to-point fiber

facilities to be bottleneck facilities. If any licensees consider that there is a case for specific point-to-point facilities to be declared bottlenecks, the TRA will assess those facilities individually on a case-by-case basis. Such an assessment will include an assessment of whether, in that specific case, the potential access seeker can access poles, rights of way, or other inputs necessary to build its own duplicate facility.

At this time FSMTC does not oppose this determination.

Pohnpei Spur finding

80. Draft Decision on submarine fiber optic cables providing internet services: Where a submarine fiber optic facility exists, there are no alternative facilities that can produce the same or similar (i.e. competitive) services. TRA must therefore consider whether submarine fiber optic facilities can be practicably duplicated by a competitor.

102. Draft Decision: the TRA considers it is not practicable to duplicate any of the submarine fiber optic cable facilities in FSM for reasons of economies of scope or scale and sunk costs. Subject to the discussion below, all submarine facilities should therefore be declared to be bottleneck facilities.

109. Draft Decision: Given the above, and consistent with our conclusion on submarine facilities generally, the TRA considers that the Pohnpei Spur, like other submarine cables, is an essential facility (i.e. a facility that is essential for the production of communications services in the FSM) that cannot practicably be duplicated by a potential competitor. Therefore, the TRA intends to declare the Pohnpei Spur a bottleneck facility.

108. The fact that OAE secured rights in the existing facility instead of building a separate facility between Pohnpei and Guam also suggests the Pohnpei Spur cannot practicably be duplicated. The fact that two parties each use half of the facility will, however, be an important consideration in the future when assessing whether terms and conditions offered to third parties satisfy the requirements of the Act (particularly Section 339(g)), as third parties will have access to two suppliers of similar services on the Pohnpei Spur.

103 FSMTC and OAE submitted that the Pohnpei Spur is effectively two facilities because half of the 16 available wavelengths on the facility are allocated to each of FSMTC and OAE, who can operate and upgrade them independently, and their two halves of the Pohnpei Spur are therefore “duplicated” and should not be considered a bottleneck facility.

104 However, the definition of bottleneck facility in the Act refers to physical assets, and does not mention rights such as wavelengths inside a fiber.

105 The Pohnpei Spur is owned by FSMTC,³² not by FMSTC and OAE (OAE has rights of use established by contract). Thus, even if the Pohnpei Spur were considered to be two facilities, FSMTC would be considered to own both facilities.

106 New channels were not created to be given to OAE when the contract was signed—the system started with 16 channels, and still has 16. What FSMTC has done is share that submarine facility with OAE by giving OAE access to 8 specific wavelengths.

107 The TRA’s view is that there is a single facility which has been shared by two parties via an agreement, under which one party (FSMTC) allows access by another party (OAE).

These findings create an unnecessary burden on FSMTC. By unnecessarily declaring the Pohnpei Spur to be in its entirety a bottleneck facility, FSMTC is now subject to burdens imposed by the telecommunications act.

Section 302(f) ‘bottleneck facility’ means a communications facility declared by the Authority to be essential for the production of communications services which, for technical reasons or due to economies of scope and scale and the presence of sunk costs, cannot practicably be duplicated by a potential competitor in a communications market;

A “communications facility” can and should be determined to be a spectrum, after all TRA is regulating telecommunications. The access claimed by OAE has distinctions that can be distinguished.

Further, creating this simplistic analogy does not meet the definition provided by TRA.

37 In summary, in historical antitrust cases, US courts have generally held a facility to be essential if it meets at least one of the following characteristics:

- The facility is essential to the public at large receiving a vital good or service.
- The facility is essential to competition for the service. That is, controlling the facility allows the controlling party to improperly interfere with competition in the relevant markets downstream of the facility.

The added language of “This happens when the facility cannot be practicably duplicated by competitors,” is superfluous in this situation. The cable access is provided by OAE as a wholesaler.

§389(2) The Open Access Entity shall provide international and domestic connectivity for the transmission of data for communications services as a wholesaler but not at retail. Such connectivity shall be provided on non-discriminatory and cost-based terms.

Section 339(1)(g) Access to communications facilities, networks, software and services, in a manner that is sufficiently unbundled, including co-location, to enable the second licensee to access the facilities and wholesale services that it reasonably requires in order to provide communications services to its customers;

Clearly, any new retailer could access the services needed from the Pohnpei Spur, through OAE. There is no limitation to any licensee on access from OAE, so there is no need to require duplicative access from FSMTC.

However, the declaration of a bottleneck facility for both halves of the Pohnpei Spur requires FSMTC to be held to the same standards for providing access as OAE is required under the telecommunications law, PL 18-52.

Again this establishes and creates regulatory and compliance burdens on FSMTC that are unnecessary. If OAE can address and distribute wholesale capacity from its spectrum then there is no need for a bottleneck determination. Again such requirement simply raises costs to be passed on to the consumer with no benefit to the consumer.

FSMTC agrees with the finding in 105 that FSMTC does own the entire Pohnpei Spur.

However, for the record, OAE is claiming an interest in the Pohnpei Spur which it acquired at zero cost, which is a dispute still before the court in this matter between FSMTC and OAE.

Please schedule another public hearing so these issues can be addressed.

Thank you for your assistance in this matter.

Sincerely,



Fredy Perman
President/CEO
FSM Telecommunications Corporation
Enc.

cc: Pieter Bakker
iBoom!
CPUC