

March 18, 2022

HAND DELIVERED

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

Re: Response Bottleneck Facilities Draft Findings

Dear Mr. Akinaga:

Thank you for holding a hearing on the bottleneck facilities issue on March 2, 2022. There were some issues that should have been addressed. I was a bit concerned when the representative from Castalia, Mr. Anton Murashev, refused to answer a direct question if the ultimate plan was for the TRA to declare numerous bottleneck facilities in order for the FSM to then expropriate such facilities. However, Mr. Murashev was quite happy to expound on definitions of bottleneck facilities in other totally unrelated industries.

We submitted a previous letter outlining a number of concerns.

However, our main concerns are itemized here.

Initially we believe it is clearly premature to designate either FTTH or the Pohnpei Spur a bottleneck facility while numerous issues have not been briefed, discussed or any plans disclosed. Significant telecommunications decisions should not be made in a vacuum. If the goal of the telecommunications act is to promote competition and increase services, we need to be advised who is competing, what competition they are offering, and under what conditions will services need to be provided.

For the Pohnpei Spur, we have the following concerns.

Pohnpei Spur

- TRA is a regulator of telecommunications. It should be able to differentiate between the fibers in the Pohnpei Spur.

We disagree with the TRA's contention that the Pohnpei Spur is an individual unit that cannot be distinguished. In the modern communications world that should

be an easy distinction. Further briefing and expert input should be allowed on this issue.

- What obligations would FSMTC have if the Pohnpei Spur is a bottleneck?

The above is a significant concern. OAE contends it is the wholesale operator who would provide services to all retailers. Why would FSMTC need to compete with OAE and make services available on its fibers? There really is no sustainable economic, technical or administrative reasons to declare the entire Pohnpei Spur a bottleneck. World Bank consultants have repeatedly pushed for the entire Pohnpei Spur to be taken from FSMTC and given to OAE, which would seem to be the only reason for declaring the entire cable a bottleneck. FSMTC objects to such a designation.

FTTH

- If OAE/World Bank is going to construct FTTH throughout the FSM,

how can there be a bottleneck?

The entire plan for the OAE/World Bank is to construct FTTH in all four states.

Ample evidence was provided that this is the public plan.

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;

The OAE/World Bank has repeatedly provided that the entire project is based on the World Bank covering the sunk costs of the FTTP project at no cost to the consumer, OAE or the national government.

Based on the above, the finding in section 136 is not supported. "Draft Decision: duplication of an FTTP fiber optic facility on islands where one exists is not practicable for economic reasons."

If the statement is untrue that the World Bank is not funding FTTP on all islands, but instead will seek to use FTTP developed by others, including FSMTC, it must be disclosed at this time.

- If OAE/World Bank is not going to construct FTTH throughout the FSM, then we need to know their detailed plans so we can comment?

Pieter Bakker's statement during the public hearing was pretty damning. If OAE is not building and designing the FTTH then who is? Why would OAE contend it is responsible to own and maintain the FTTH if now it is saying it is not involved. If the World Bank financing is not covering the complete implementation of FTTH, on a four state basis, what are they going to do?

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.

Clearly it is premature to declare a bottleneck facility on FTTP wherever it is built, until either OAE, the FSM or the World Bank actually disclose their plans. Such a finding would be a clear denial of due process.

- Bottleneck determinations cannot be universal, (anywhere there is Fiber), but determined by specific facts and specific locations.
- Explain 146 point to point verses the draft determination that all complete facilities are bottlenecks. What facilities is TRA defining? We need to know so we can comment.

These two issues are dealt with together.

The draft decision states the following, Appendix 5.

All fiber to the premises (FTTP) network facilities consisting of optical fiber from and including the distribution frame in the exchange(s) to and including the termination point in the relevant customer premises, on islands where FTTP network facilities have been built as of the date of this decision. For clarity, these are Yap, Weno and Pohnpei.

Compare that to section 146.

Draft Decision: In many cases, point to point terrestrial fiber optic facilities can be practically 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 bottleneck, the TRA will assess those facilities individually or 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.

To remove any doubt, TRA defined point to point facilities.

Section 140. There is limited information on the record on the cost to build point-to-point fiber facilities. However, generally speaking, point-to-point facilities require lower capital cost to build because fewer physical assets are required. However, they are also smaller in scope, as they serve specific individual customers or provide backhaul for segments of a communications network.

The draft decision in Appendix 5, then is clearly overbroad. The TRA found in the body of the document that point to point facilities, specifically to customer homes are not bottleneck facilities, section 146, unless a licensee requests such a determination and TRA makes an independent assessment. To the knowledge of FSMTC, no requests were made and no independent assessments were conducted. As a result the draft finding in Appendix 5 should be vacated.

- Declaring all facilities bottlenecks will be counterproductive to bringing in outside competitors.

The decisions being made today should be mindful of the ultimate goals of the telecommunications restructuring. If the FSM is trying to bring in large

international competitors, then declaring any infrastructure they may build to be a bottleneck will likely hinder any serious consideration of expansion into the FSM.

The review being conducted on FTTP seems mainly to support the World Bank's desire to build infrastructure and then have OAE run the infrastructure. However, a serious competitor, especially concerning fiber optic connectivity would build their own infrastructure. If that can be declared a bottleneck and seized, or even if the same is done to FSMTC infrastructure, no serious and major international players would even consider coming into the FSM. Decisions must be made that are conducive to encouraging competition.

- Declaring bottlenecks now, forcing pricing and sharing provisions, then declaring later they are not bottlenecks is a waste of resources, and not really capitalism?

Section 137.

Again it is premature to determine a bottleneck on FTTP when so much information has not been provided. The decision in section 137 shows the impracticality of making such a determination now.

Section 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.

Section 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.

At the current time, there is clearly an intent through the provided documents that the World Bank/FSM/OAE, is intending to build something at the current time. It is a necessity for them to disclose their plans, so we can at least fairly comment on them.

Further, if FSMTC facilities are declared bottlenecks, then FSMTC would need to hire experts to determine any fair pricing on the use of facilities. This will be quite expensive and is basically an unnecessary cost. Further, there would be expenses to comply with a bottleneck facility designation, which would also be

wasted if other facilities were commissioned, since public announcements have already been made of the intent of World Bank/OAE to build such facilities.

The act is supposed to provide for efficient use of resources, and to facilitate improvement in the telecommunications industry. Wasting such resources is not worthwhile to declare a bottleneck facility at this time, when further information can easily be provided.

- How can pricing determinations be possible in this small market? Is this a step to having the FSM expropriate these facilities?

The TRA appears to be deferring any input on this decision, but we believe that it counterproductive. Pricing on bottleneck facilities requires 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.

These statements are all well and good, but who will provide the input on such pricing, and are we looking at years of disputes over such pricing. This issue then is more complicated by the TRA issuing a generalized opinion stating all FTTP currently built is a bottleneck facility.

Additionally this seems to be a not very covert attempt to take away all of the FSMTC's fiber facilities. The scope and breadth of this draft order is that all facilities concerning fiber are to be considered bottlenecks, including cables to individual homes. The only logical conclusion is that the bottleneck facility designation is to allow the transfer of these assets to OAE. This is supported by the recommendations going back to the Digital FSM Semester Report of December 2020, attached as Exhibit F.

During the Semester, the President submitted legislation to transfer the ownership of the Hantru cable to OAE. This received mixed support in Congress and highlighted the challenges in implementing legislative changes for what is a relatively simple piece of asset restructuring between two state owned entities. As a result, Secretary Apis has not presented the report to Congress as the project team agreed that Congress is not ready to receive such a report and act on it in a positive manner.

The summary report has been used with States to explain the wider program of reform and highlight the need for change in FSMTC.

The project team has focused less on the actual report and instead on creating the environment that would cause the FSMTC Board to direct management to engage with DTC&I with a backstop position that reform would be a necessary condition for any future request for shareholder funds.

The key issue the project team is looking to solve in completing the condition of the financing agreement is not the "answer" in terms of what solution needs to be implemented but having an environment where change is able to be implemented and effective.

Four paths have been followed over the semester to create an environment for change.

(b) Increased activity and response by TRA to FSMTC conduct.

For all these reasons TRA should implement workable and realistic expectations and solutions to the issue of bottleneck facilities, and not simply follow the expectations of others.

- It is wrong to wholly discount satellite as a competitor to fiber optic internet access for consumers? That decision must also be reviewed.

In reviewing the issues of bottleneck facilities, it is wrong for TRA to discount satellite as a competitor. The services required in the FSM are adequately

provided by satellite. Merely because fiber may have a higher speed, or greater bandwidth, does not mean that there is clearly a market for it, or a substantial enough market to segment the existing customer base. If retail customers simply want to access Facebook and Netflix, the real comparison is comparing the provision of access to this type of service and cost.

The definition of bottleneck facilities will also be impacted regarding the implementation of competitive satellite services, competition from satellite must also be considered under the relevant definitions. More investigation should be done on such issues. We have repeatedly asked for market studies that should have been conducted by the World Bank/OAE but we have never been provided any such information.

- Final issue arising just this week.

IBoom! is apparently selling fiber connectivity to a number of customers in Yap. While FSMTC does not oppose fair competition, it appears that there is still no service agreement in place between OAE and IBoom!, which means these services are being subsidized by OAE, and it is unfair competition under Section 343.

However, the primary consideration is that TRA needs to determine what new facilities to a number of customers have been built by IBoom!, in order to make a fair and reasoned determination on bottleneck facilities. If IBoom! has created alternative facilities that is relevant in determining what is actually in fact a bottleneck in Yap. Further IBoom!'s facilities must also be analyzed under the criteria used to determine bottleneck facilities. If TRA is solely looking at facilities constructed by FSMTC that is a violation of equal protection and would violate the requirement for fairness and evenhandedness espoused by TRA.

This issue is another significant factor in delaying a decision on a declaration of bottleneck facilities, until further fact finding can be conducted.

Conclusion

It is premature to issue rulings on bottleneck facilities for the above-stated reasons. There is no need to declare the Pohnpei Spur a bottleneck and TRA should have the resources to distinguish the separate connections in the Pohnpei Spur. It will have no competitive or cost advantage, and will simply saddle FSMTC with additional

regulatory costs.

On the designation of bottleneck facilities it is also premature as no one has disclosed the actual plans for the World Bank/Digital Micronesia project which is highly relevant to any bottleneck discussions. These plans must at least be disclosed and considered. The intent of the telecommunications act was to make the industry more transparent and so that all parties, including FSMTC can compete with the same information. Licensees hiding information is contrary to this policy.

Lastly, FSMTC states unequivocally on the record it is opposed to the use of the bottleneck facility designation to form the basis for expropriation of its facilities. Thank you for your assistance in this matter.

Sincerely,



Fredy Perman
President/CEO
FSM Telecommunications Corporation
Enc.

cc: Pieter Bakker
iBoom!
CPUC