

THE U.S. PACIFIC TERRITORIES AND FEDERAL TELECOMMUNICATIONS POLICIES: A BLUEPRINT FOR THE FUTURE

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Due to remote location, limited population and historically scarce representation before federal policy-makers in Washington, D.C., the U.S. Pacific territories have become the "lost children" of the United States in terms of telecommunications policy. Not only do the territories pose thorny legal problems for the Federal Communications Commission ("FCC"), but the FCC has been slow and hesitant in moving to address Pacific territory issues. The problem is now so severe that the Pacific territories risk being left off the emerging "Information Superhighway." Ironically, action by the FCC and other federal policy-makers is precisely what is needed with respect to the territories. Federal intervention establishing rate integration, mandating equal access, and resolving numbering issues would promote more accessible, lower cost communications between the territories and the continental United States.

Part I of this paper discusses the inconsistencies that exist in applying FCC policy to the U.S. Pacific territories. Part II discusses ways in which federal telecommunications policies may aid in integrating the U.S. territories into the U.S. social and economic infrastructure. Such solutions include applying three primary federal policies: toll rate integration, North American Numbering Plan integration and equal access.

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¹ Exec. Order No. 12572, Authority of the Secretary of the

I. HISTORICAL BACKGROUND

A. Governmental Status of U.S. Pacific Territories

Although there are three U.S. territories located in the Pacific that fly the United States flag, the Commonwealth of the Northern Mariana Islands ("CNMI"), the Territory of Guam, and the Territory of American Samoa are not part of the fifty states. CNMI has held U.S. commonwealth status since 1986.¹ By contrast, Guam is an "organized" territory since its civil government was established under the Guam Organic Act of 1950.² American Samoa is an unorganized territory; it has a legislature and an elected governor, but the operation of the civil government is not the result of the enactment of an organic act.³

The primary difference between a commonwealth and a territory is that the latter arguably entails a greater level of autonomy and self-government over internal matters.⁴ Indeed, Guam is currently seeking commonwealth status.⁵ The territorial status of the Pacific islands is not likely to become an issue with respect to the application of federal telecommunications policies.

B. Inconsistencies in Applying FCC Telecommunications Policies to U.S. Pacific Islands

The Communications Act of 1934 ("Communications Act") was enacted "[f]or the purpose of regulating interstate and foreign commerce in communi-

Interior with Respect to the Northern Mariana Islands, Nov. 3, 1986, 51 C.F.R. 40401 (1986), *reprinted in*, 48 U.S.C. § 1681.

² 48 U.S.C. §§ 1421-1428e (1988).

³ See Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 450 (1992).

⁴ *Id.* at 451.

⁵ *Id.*

cation by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service . . .”⁶ Section 153 of the Act defines the United States as “the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone.”⁷ Thus, it was clearly Congress’ intent that all U.S. territories (even those not yet in existence in 1934 when the Communications Act was enacted) be subject to the Communications Act and federal telecommunications policy. However, the FCC has been slow in exercising jurisdiction over the territories, as well as in applying federal policies.

Notwithstanding its statutory authority over the territories, the FCC has never quite known how to treat the Pacific territories from a regulatory standpoint. There is little question that the FCC has been extremely reluctant to apply mainland U.S. telecommunications policies to the U.S. Pacific territories. Most FCC policy actions simply fail to address, in one way or another, whether general policies adopted will apply to the Pacific territories.⁸ In fact, the FCC has rarely exercised its authority to apply federal telecommunications policies to CNMI or American Samoa. It was not until 1992 that the FCC expressly recognized the applicability of the Communications Act to the Territory of Guam.⁹ However, other FCC actions involving the Pacific territories have led to confusion. For example, the FCC has expressly ruled that Guam is a domestic point,¹⁰ however telecommunications traffic originating or terminating in Guam is processed through the International Division of the FCC and is tariffed as international traffic. Although Guam is deemed a domestic point, the FCC regulates virtually all telecommunications facilities between Guam and the contiguous United States as international points.

The FCC’s historical disinterest in the Pacific territories can be attributed to many factors. The most obvious is that CNMI, Guam and American Samoa together are approximately the size of the state of

Connecticut and have an aggregate population of approximately 223,000 people. Moreover, the territories are located approximately 5,500 miles from the continental U.S., closer to Japan than Hawaii. In addition, the territories have limited representation in Washington, D.C., where federal policy is created. As discussed below, unless the U.S. Pacific territories are to be excluded from the national telecommunications and information infrastructure, the FCC and other federal policy-makers must take a greater interest in the territories and affirmatively consider them in policy-making actions.

II. A BLUEPRINT FOR THE FUTURE

On September 15, 1994, the National Telecommunications and Information Administration (“NTIA”) released an “Agenda for Action” for the National Information Infrastructure.¹¹ The Agenda for Action describes the role of government in promoting the development of the telecommunications and information infrastructure by the private sector, and in ensuring that all Americans have access to this infrastructure.¹² The infrastructure is predicted to connect the nation’s businesses, residences, schools, health care facilities and public information providers through advanced, interactive, high-speed networks.¹³ One of the overarching themes of the Agenda for Action is that all Americans without exception have access to the emerging telecommunications and information infrastructure. Indeed, the Agenda for Action is peppered with references to this concept. For example, the Agenda for Action states:

As a matter of fundamental fairness, this nation cannot accept a division of our people among telecommunications or information “haves” and “have-nots.” The Administration is committed to developing a broad, modern concept of Universal Service—one that would emphasize giving all Americans who desire it easy, affordable access to advanced communications and information services, regardless of income, disability, or location.¹⁴

The Agenda for Action also states: “because information means empowerment, the government has a

⁶ 47 U.S.C. § 151 (1988)(emphasis added).

⁷ *Id.* at § 153 (g).

⁸ *See, e.g., infra* note 15.

⁹ *See In re IT&E Overseas, Inc. and PCI Communications, Inc., Memorandum Opinion and Order*, 7 FCC Rcd. 4023, para. 4-5 (1992). According to the FCC, “it is clear that the Communications Act was intended by Congress to apply, and applies, in every respect, to all radio and wire communications originating or terminating on the Territory of Guam, and that Congress gave exclusive jurisdiction over all interstate and for-

eign common carrier communications, originating or terminating on Guam, to this Commission (footnote omitted).” *Id.* para 1250.

¹⁰ *See In re PCI Communications, Inc.*, 7 FCC Rcd. 63 (1992).

¹¹ *See* 58 Fed. Reg. 49,025 (1993).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 49028 (emphasis added).

duty to ensure that *all* Americans have access to the resources of the Information Age."¹⁶

With this overriding universal service goal clearly articulated, federal policy-makers must become more proactive in applying established procompetitive policies to the Pacific territories. The communications policies which will extend the information infrastructure to the Pacific territories are already in place; however, they simply have never been applied to the territories. The balance of this paper identifies three primary federal policies which, if applied to the Pacific territories, would significantly integrate them into the U.S. economic and communications infrastructure.

A. Toll Rate Integration

Perhaps the best illustration of how the application of federal telecommunications policies to the Pacific territories will benefit the citizens of those territories is rate integration.¹⁶ Rates between CNMI, Guam and American Samoa are arguably three times higher than rates for calls of comparable distances under rate integration. Applying rate integration to the Pacific territories, which can only occur by means of FCC intervention, will substantially reduce off-island calling rates and, in the process, generate greater social and economic integration with the mainland United States.

In the early 1970's, before toll rate integration, interstate telephone rates for Telecommunication Message Service ("MTS") to and from Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands were more than twice as high as interstate rates for comparable distances within the contiguous states. In conjunction with the introduction of satellite technology in the domestic telecommunications market, the FCC concluded that the charges for off-shore communication services between Alaska, Hawaii, Puerto Rico and the Virgin Islands, and the contiguous states should be integrated into one domestic rate pattern.¹⁷ The FCC mandated that:

¹⁶ *Id.* at 49027 (emphasis added).

¹⁸ Rate integration recognizes that the advent of satellite communications has eliminated the physical cost considerations inherent in previously-existing land-based communications systems, rendering satellite communications "distance insensitive." As a result, distance, theoretically, is no longer a crucial factor in the ratemaking process, allowing rates to become "integrated."

¹⁷ *In re General Communication Incorporated v. Alascom, Inc.*, Memorandum Opinion and Order 2 FCC Rcd. 6479, para. 7 (1987).

¹⁸ *Establishment of Domestic Communications Satellite Facilities*, 35 F.C.C.2d 844, para. 37 (1972), *aff'd on recon.*, 38

In [the] case of message telephone service (MTS), any such proposal shall give maximum effect to the elimination of overall distance as a major cost factor and should be designed, in specific time phases if necessary, to integrate these three United States points into the uniform mileage rate pattern that now obtains for the contiguous states, with all that such approach implies in terms of nationwide cost averaging and equalization for interstate rate-making purposes.¹⁸

Since the FCC mandated rate integration over two decades ago, rates for Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands have been included within nationwide rate averaging. Consequently, interstate MTS rates for off-shore consumers at these locations have been greatly reduced.¹⁹

The inclusion of CNMI, Guam and American Samoa in mainland toll rate integration will significantly lower costs between Guam and other U.S. points. In the past, limited international facilities resulting in high costs may have been the reason that Guam was left out of toll rate integration.²⁰ Today, however, high capacity fiber optic circuits and a U.S. licensed communications satellite at longitude 174 degrees west make possible the full integration of Guam into mainland policy.

An argument has been made before the FCC that non-integrated rates between the Pacific territories and the United States are unlawfully discriminatory under section 202(a) of the Communications Act.²¹ Indeed, the FCC itself has stated that "a rate structure that uses different ratemaking methods to determine the rates that different users pay for comparable services is inconsistent with the national policy prohibiting unjust or unreasonable rate discrimination as expressed in section 202(a) of the Communications Act."²² At this point, there seems to be little justification for the establishment of rate integration between certain off-shore points, such as Hawaii, Puerto Rico and the U.S. Virgin Islands and not between other U.S. off-shore points such as the Pacific territories. In other words, such disparate ratemaking practices may be unlawful.

F.C.C.2d 665 (1972), *aff'd sub nom.*, *Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975).

¹⁹ See *Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers*, 50 Fed. Reg. 41,714 (1985).

²⁰ *Id.*

²¹ See *In re Guam Telecom, Ltd., L.C.*, File No. SCL-94-003 (filed Jul. 22, 1994). Section 202a of the Communications Act states "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices . . ." 47 U.S.C. 202(a) (1988).

²² See *supra* note 19, at 41,716.

There can be little argument that rate integration will substantially reduce off-island calling rates to the benefit of citizens of the Pacific territories. Lower rates for calls between the Pacific territories and the mainland U.S. will provide U.S. citizens living in the territories with more affordable access to telecommunications services, as well as promote social and economic integration between the territories and the U.S. mainland. However, this will only occur through federal intervention.

B. North American Numbering Plan Integration

Assigning the U.S. Pacific territories either a collective area code or their own unique area codes under the North American Numbering Plan would better serve to integrate the territories into the U.S. communications infrastructure. Global telephone numbering historically has been broken down into nine "World Numbering Zones."²³ Geographically proximate countries have comprised each of the World Numbering Zones. For example, World Numbering Zone one, also referred to as the North American Numbering Plan ("NANP"), consists of the United States, Canada, Bermuda and a number of Caribbean countries. Calls to countries in the NANP can be placed from countries either outside or inside the NANP by dialing the country code ("1") followed by the national destination code or national number.

The NANP is unique in that all countries in the NANP have the same country code: "1". This means simplified dialing for intra-NANP calling. For example, a call placed from the Commonwealth of the Bahamas (an NANP country) to Washington, D.C. (also within the NANP) is only an 11-digit call, in the format 1-NPA-NXX-XXXX. The three U.S. Pacific territories, by contrast, have historically been located in World Numbering Zone six along with Australia, New Zealand, the Republic of Singapore, Thailand, and numerous other countries in the south Pacific. The three U.S. Pacific territories are the

only U.S. states or territories that are not located in the NANP. Unlike the NANP, countries historically located in World Zone six and in other World Zones each have distinct two or three-digit country codes. The country codes for the territories are as follows: CNMI—670; Guam—671; and American Samoa—684. Calls to the three U.S. territories can be placed from countries either outside or within Zone six by dialing the country code followed by the national number.

Since the U.S. Pacific territories historically have been geographically located outside of the NANP, calls between the territories and all other points within the United States necessitate the dialing of additional digits. A call from Washington, D.C. to CNMI (or vice-versa) requires a thirteen digit dialing formula, in the format 011-670-NXX-XXXX.

By including the U.S. Pacific territories under the NANP, federal policy-makers would simplify dialing between the United States (and other NANP points) and the territories. Simplified dialing would make calling between the territories and the rest of the United States easier, which in turn, would promote greater calling activity. Inclusion of the territories within the NANP would also bring the territories into the United States 1-800 toll free network. Such a step would foster the integration of business markets in the mainland U.S. and the territories. Most importantly, a unified numbering zone would eliminate the perception that calls between the mainland U.S. and the territories are international, encouraging greater economic activity between the territories and the United States.

Inclusion of the U.S. Pacific territories within the NANP has been proposed before. The U.S. Department of the Interior has explored the issue with the NANP Administrator with the goal of promoting the "economic, social, and political development of the territories and the commonwealth."²⁴ The NANP Administrator described the proposal as "technically feasible," and proposed three alternatives for accomplishing this goal.²⁵ These alternatives contemplate assigning a collective area code to the three territo-

²³ See *Numbering Plan for the ISDN Era*, International Telephone and Telegraph Consultative Committee ("CCITT"), Recommendation E.164, (1991). The CCITT has recommended, although the recommendation has not yet been formally adopted, that the break-out of country codes by World Numbering Zones be eliminated. See *Complement to ITU-T Recommendation E.164*, CCITT, List of ITU-T Recommendation E.164 Assigned Country Codes (1994). Ultimate adoption of this recommendation by the International Telecommunication Union ("ITU") would have no impact on the practical effect of assigning the U.S. territories a collective area code under the

NANP. The ITU is a specialized agency of the United Nations whose primary function is to set technical standards for world telecommunications.

²⁴ See Letter from Stella Guerra, Assistant Secretary, Territorial and International Affairs, U.S. Department of the Interior, to Fred G. Gaechter, NANP Administrator (May 28, 1992) (on file with CommLaw Conspectus).

²⁵ See Letter from Alfred Gaechter, Jr., NANP Administrator, to Stella Guerra, Assistant Secretary, Territorial and International Affairs, U.S. Department of the Interior (July 17, 1992)(on file with CommLaw Conspectus).

ries; sharing an existing area code, such as Hawaii's 809 NPA code; and assigning a unique area code to each of the three territories. The NANP Administrator concluded in 1992 that assigning a collective area code is the "only workable plan".²⁶

There should be little question that assigning to the U.S. Pacific territories either a single area code or their own unique area codes and including them under the NANP would better serve to integrate the territories into the U.S. communications infrastructure. There are no existing technical obstacles to this step. Such a step would facilitate easier access to the communications infrastructure. A coordinated effort by the FCC, U.S. Department of Interior, the U.S. State Department, and the NANP Administration could make this a reality.

C. Equal Access

Implementing equal access²⁷ through "1+" dialing in the U.S. Pacific territories is another step which could be taken to facilitate integration into the U.S. mainland economy. Equal access, or "1+" dialing, is a form of local exchange access that permits end users to access the facilities of a predesignated interexchange carrier ("IXC") by dialing "1," followed by the area code and seven digit telephone number.²⁸ One of the features of equal access is "presubscription," which enables end users to preselect a primary IXC prior to a central office conversion to equal access.²⁹ Alternatively, the end user has the capability of using other IXCs by dialing a five-digit access code (10XXX), followed by the area code and seven digit number.³⁰ Equal access has been implemented throughout the contiguous forty-eight states as well as in Hawaii, Puerto Rico and the U.S. Virgin Islands.

Although the local telephone company serving the CNMI, Micronesian Telecommunications Corporation ("MTC"), announced a conversion to Feature Group D ("FGD") effective June 17, 1993, true equal access does not exist in the CNMI. Calls from CNMI to the U.S. mainland, as well as from the

mainland to CNMI, still require the full-blown 011 dialing scheme. Apparently, 1+ dialing only can be used in the CNMI for calling among the three populated islands of Saipan, Rota and Tinian. Equal access also has not been implemented in American Samoa. As of spring, 1995, the FCC has taken no affirmative action to implement equal access in either the CNMI or American Samoa.

By contrast, significant progress is being made towards the implementation of equal access in Guam. After extended legal proceedings on this question, the FCC, on September 16, 1994, issued a ruling mandating that equal access be implemented in Guam.³¹ Although proceedings are ongoing before the FCC with respect to implementation details, the local telephone company which serves Guam, Guam Telephone Authority ("GTA"), is currently in the process of converting its central office switches to the FGD protocol.

The FCC's decision to require the implementation of equal access in Guam is based upon several considerations. First, the FCC found that equal access would maximize interexchange or long distance service competition in Guam which, in turn, would drive down prices and lead to the introduction of innovative service offerings.³² Specifically, the FCC found that FGD permits access to more than 900 IXCs, whereas the access arrangement currently used on Guam, Centralized Automatic Message Accounting/Automatic Numbering Identification ("CAMA/ANI"), limits the number of IXCs that can serve Guam to ten. According to the FCC, "[i]mposing an unnecessary and artificial limitation on the number of IXCs that can serve Guam, by retaining the existing CAMA/ANI protocol, would limit the potential benefits from interexchange competition, and would further disadvantage Guamanian citizens of the United States."³³

Second, the FCC determined that because the CAMA/ANI access protocol is a non-standard access protocol, it would be difficult and costly to implement upgrades over time.³⁴ The standard access protocol in the United States is FGD. Manufactur-

²⁶ *Id.*

²⁷ Equal access has been generally defined by the courts as that access which is equal in type, quality, and price to that provided to AT&T and its affiliates. *United States v. American Telephone & Telegraph*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

²⁸ See *In re MTS and WATS Market Structure, Phase II, Notice of Proposed Rulemaking*, 94 F.C.C.2d 292 (1983); *In re MTS and WATS Market Structure, Phase III, Report and Order*, 100 F.C.C.2d 860 (1985); *In re Investigation of Access and*

Divestiture Related Tariffs, Memorandum Opinion and Order, 101 F.C.C.2d 911 (1985).

²⁹ 101 F.C.C.2d 911, para. 1.

³⁰ *Id.*

³¹ See *In re Guam Telephone Authority Petition for Declaratory Ruling, Memorandum Opinion and Order*, 9 FCC Rcd. 4890 (1994) [hereinafter *Guam Order*].

³² *Id.* para. 8.

³³ *Id.* para. 9.

³⁴ *Id.* para. 12.

ers of telecommunications switching equipment and software will continue to design product upgrades to be compatible with FGD, not CAMA/ANI.³⁵ Because of this, the FCC expressed concern that continued use of CAMA/ANI would turn Guam into a "technological 'backwater'".³⁶

Finally, the FCC concluded that the access dialing pattern offered by FGD is superior to that currently available under CAMA/ANI.³⁷ Under CAMA/ANI, long distance calls cannot be placed without first dialing a three-digit access code corresponding to a particular IXC.³⁸ FGD, by contrast, only requires the dialing of a one-digit access code "1" to route calls over the facilities of the presubscribed carrier. According to the FCC,

[o]ne digit access is also faster than three-digit access for long-distance emergency calls from Guam, where a rapid response may be essential to the national defense, or the safety or life or property. Given the frequency of typhoons on Guam, the recent earthquake, and Guam's remoteness from other portions of the United States, this consideration may be of particular importance.³⁹

Equal access implementation issues involving Guam are still being resolved before the FCC. For example, subsequent to the FCC's ruling, IT&E Overseas, Inc. ("IT&E"), a major IXC serving the Guam market, filed a Petition for Clarification requesting that certain misstatements in the FCC's Order,⁴⁰ be corrected.⁴¹ The most significant issue involves the FCC's reliance upon the conversion to equal access which allegedly occurred in the CNMI. In particular, the FCC's decision appears to accept the CNMI experience as support for the proposition that GTA will be able to "implement FGD so that calls to Guam from the mainland will still use the international ("011") dialing pattern, while calls to the U.S. mainland from Guam will be on a "1+" basis."⁴² As IT&E points out in its Petition, how-

ever, all calls between the mainland U.S. and CNMI must still use the international ("011") dialing pattern, meaning that true equal access does not exist in CNMI.⁴³ This issue raises questions as to the technical feasibility of implementing true equal access in Guam.

The FCC's justifications for requiring the implementation of equal access in Guam are equally applicable to CNMI and American Samoa. In particular, equal access in CNMI and American Samoa would promote IXC competition and lower prices; ensure that the access protocol in these territories does not become technically outmoded; and provide a more rapid response system in the event of an emergency. In addition, equal access implementation in all the territories would promote dialing uniformity throughout the United States so that American travellers and tourists would be familiar with dialing patterns whether they are in the territories or on the mainland. In short, equal access in the territories would enhance the access of U.S. citizens in the Pacific territories to the telecommunications infrastructure.

III. CONCLUSION

The existing federal policies of rate integration, equal access, and inclusion in the NANP should be applied to the U.S. Pacific territories in order to better integrate the territories into the U.S. social and economic infrastructure. Just as important, these federal policies would help implement the Agenda for Action and ensure that U.S. citizens in the territories have access to the "Information Superhighway." Applying these policies would promote greater accessibility to communications services as well as lower the cost such services between the territories and the United States.

³⁵ *Id.*

³⁶ *Id.* para. 13.

³⁷ *Id.* para. 19.

³⁸ For example, MCI can be accessed by dialing 011, followed by 1+ (area code) + (seven digit number). The three-digit code must be used to place *all* long distance calls.

³⁹ *Guam Order supra* note 31, para. 19.

⁴⁰ *See Guam Order supra* note 31.

⁴¹ *See In re Guam Telephone Authority Petition for Declaratory Ruling, Petition for Clarification*, filed Oct. 17, 1994. [hereinafter *IT&E Petition*]

⁴² *Guam Order, supra* note 31, para. 17.

⁴³ *See IT&E Petition supra* note 40 at 5. This is another illustration of FCC inconsistency with respect to the territories.