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28 June 2011

<u>BY ELECTRONIC FILING</u>

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: IB Docket No. 11-57; FCC File Nos. FCN-NEW-20110315-00002 & FCN-NEW-20110316-00003

Dear Ms. Dortch:

AST Telecom, LLC d/b/a Blue Sky Communications ("Blue Sky"), American Samoa Hawaii Cable, LLC ("ASHC"), Samoa American Samoa Cable, LLC ("SASC"), and American Samoa License, Inc. ("ASLI," together with Blue Sky, ASHC, and SASC, the "Licensees"), urge the Commission to reject the baseless challenge of American Samoa Telecommunications Authority ("ASTCA")[1] to above-referenced notifications of the Licensees seeking consent to foreign-carrier affiliations on a non-dominant basis with SamoaTel Limited ("SamoaTel").[2] The Licensees and SamoaTel do not control bottleneck facilities, and SamoaTel does not have market power in the Independent State of Samoa ("Independent Samoa") sufficient to affect adversely competition in the U.S. market.

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1 ASTCA filed its *ex parte* submissions on April 21, 2011 ("ASTCA April 21 Submission") and May 5, 2011 ("ASTCA May 5 Submission"). ASTCA styled its first submission as "Comments," though ASTCA concedes that it missed the comment deadline. *See* ASTCA April 21 Submission at 1 n.2. Moreover, the ASTCA April 21 Submission was filed without a motion to accept late-filed comments or offer to extend the fast-approaching reply deadline Accordingly, the ASTCA April 21 Submission simply constitutes an *ex parte* written submission.

2 Foreign Carrier Affiliation of American Samoa License, Inc., FCC File No. FCN-NEW-20110315-00002 (filed March 15, 2011) ("ASLI FCN"); Foreign Carrier Affiliation of AST Telecom, LLC d/b/a Blue Sky Communications, American Samoa Hawaii Cable, LLC, and Samoa American Samoa Cable, LLC, FCC File No. FCN-NEW-20110316-00003 (filed March 15, 2011) ("Cable Landing Licensees FCN"). Blue Sky acquired a majority stake in SamoaTel on March 31, 2011, following grants of special temporary authority by the Commission's International Bureau.

ASTCA's request for dominant-carrier treatment of the Licensees on the American Samoa-Independent Samoa route is unavailing because ASTCA misstates the facts and because ASTCA does not address the legal requirements for imposing dominant-carrier regulation:

- ASTCA has improperly implied that it must rely on SASC's undersea cable and SamoaTel's cable station to transport and terminate traffic in Independent Samoa, when in fact ASTCA relies exclusively on its own competing end-to-end microwave facilities on the American Samoa-Independent Samoa route. Those microwave facilities provided ASTCA with an effective monopoly on the American Samoa-Independent Samoa route until late 2008. ***ASTCA does not use—and in fact has never sought to use—capacity on SASC's undersea cable, nor does it need to, given its microwave link.***

- ASTCA has also improperly implied that it must terminate all traffic in Independent Samoa through SamoaTel, when in fact it is entitled under Independent Samoa law and regulation to terminate traffic directly with other Independent Samoa carriers.

- The only purported evidence offered by ASTCA of discrimination was in fact a commercially reasonable response of SamoaTel's new owner to collect unpaid bills. ASTCA had failed to make any settlement payments for a whopping 16 months.

- Finally, ASTCA wholly fails to address the Commission's market-power test or provide any factual information to support its allegations, relying instead on unsupported conclusory statements.

The Commission should therefore reject ASTCA's attempt to saddle the Licensees with needless additional regulatory burdens on the American Samoa-Independent Samoa route. ASTCA seeks only to gain a competitive advantage over Blue Sky and its affiliates, ASTCA's principal competitors in American Samoa and on the American Samoa-Independent Samoa route.

I. The Licensees and SamoaTel Do Not Control Bottleneck Facilities

ASTCA suggests that the Licensees and SamoaTel can and will discriminate against ASTCA on the American Samoa-Independent Samoa route through control of bottleneck facilities.[3] However, that is impossible.

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[3] ASTCA April 21 Submission at 3; ASTCA May 5 Submission at 2.

A. ASTCA Owns Its Own Competing End-to-End Facilities on the American Samoa-Independent Samoa Route, on Which It Previously Held an Effective Monopoly

ASTCA is the government-owned telephone company of American Samoa. ASTCA competes in American Samoa with Blue Sky, which provides mobile and fixed wireless communications services in American Samoa. ASTCA delivers its traffic from American Samoa to Independent Samoa over its own terrestrial microwave facilities between the islands of Tutuila (American Samoa) and Upolu (Independent Samoa), whose nearest points lie 36 miles apart.[4] The antennas and transmitting equipment on both the American Samoa and Independent Samoa ends of ASTCA's microwave link are owned and operated by ASTCA.[5]

Until late 2008, ASTCA held an effective monopoly for transport and termination of traffic on the American Samoa-Independent Samoa route. During that period, ASTCA and SamoaTel (then still wholly owned by the Government of Independent Samoa) had an exclusive arrangement which required Blue Sky to transit Blue Sky's American Samoa-originated traffic destined for Independent Samoa through ASTCA, using ASTCA's microwave link. Blue Sky ultimately entered into a traffic exchange arrangement directly with Digicel Samoa, the largest telecommunications provider and principal mobile carrier in Independent Samoa, but Blue Sky was unable to persuade SamoaTel to enter into a termination agreement with Blue Sky until Blue Sky acquired control of SamoaTel in 2011.

On July 7, 2009, the Samoa-American Samoa Cable (owned by SASC, with Blue Sky owning the American Samoa cable station and SamoaTel owning the Independent Samoa cable station) entered into service in direct competition with ASTCA on the American Samoa-Independent Samoa route.[6] ***ASTCA, however, does not transport any traffic from American Samoa to Independent Samoa using the SASC Cable. In fact, it has never approached the Licensees about purchasing capacity on the SASC Cable for the transport of any traffic.*** Consequently, there is no factual basis for ASTCA's professed concerns about discrimination on the American Samoa-Independent Samoa route.

Moreover, if ASTCA did seek to use capacity on the Samoa-American Samoa Cable to terminate traffic with other carriers in Independent Samoa, it could avail itself of the protections of Independent Samoa's Telecommunications Act (No. 20) 2005 (the "Telecommunications

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4 *See* ASTCA April 21 Submission at 3 n.12.

5 The tower structure on which ASTCA's microwave antenna is located in Independent Samoa is owned by SamoaTel, though ASTCA does not pay any rent for use of SamoaTel's tower.

6 Between late 2008 and the launch of the SASC Cable in July 2009, Blue Sky used satellite capacity to deliver traffic to Independent Samoa.

Act") and of the protections of an independent regulator.[7] The Telecommunications Act established a transparent and enforceable framework for market entry, competition, regulation of market dominance, and interconnection. The Telecommunications Act also established the Office of the Regulator (the "Samoa Regulator"). The Samoa Regulator is responsible for, among other things, granting licenses to undersea cables landing in Independent Samoa, fostering cost-based interconnection and competition in the telecommunications sector, and enforcing prohibitions on abuse of dominant market position and on other anticompetitive activities.[8] The Samoa Regulator has required SamoaTel to provide Digicel Samoa and the Internet service provider CSL full access to SamoaTel's cable station. Indeed, Digicel Samoa and CSL operate their own international gateways.[9]

B. ASTCA Is Entitled to Direct Interconnection Arrangements with All Independent Samoa Carriers

Independent Samoa law and regulation entitle ASTCA to terminate traffic directly with other Independent Samoa carriers. ASTCA's suggestion that it must terminate all traffic in Independent Samoa through SamoaTel is therefore baseless.

SamoaTel does transit ASTCA traffic from ASTCA's microwave facilities in Independent Samoa to Digicel Samoa. This arrangement reflects a historically cozy relationship between ASTCA and SamoaTel—one which ended with the commercial launch of the Samoa-American Samoa Cable (for which SamoaTel is the Independent Samoa landing party) and the advent of competition on the American Samoa-Independent Samoa route. Nevertheless, ASTCA is not required to use SamoaTel's facilities to transit traffic to Digicel Samoa, and SamoaTel cannot preclude ASTCA from directly terminating traffic with Digicel Samoa. Under

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7 *See* Telecommunications Act (No. 20) 2005, as amended, attached as Exhibit 1 to the Cable Landing Licensees FCN.

8 Ironically, in American Samoa, where ASTCA is the powerful, government-owned incumbent, there is no independent regulator. (Unlike Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, American Samoa has no public utilities commission or equivalent regulator of intra-territory telecommunications.) American Samoa also does not have a transparent and enforceable framework for market entry, competition, regulation of market dominance, or interconnection at the territorial level.

9 *See* Individual Licence Granted by the Regulator Under the Telecommunications Act 2005 to American Samoa Hawaii Cable, LLC, for the Establishment and Operation of a Submarine Cable System in Samoa, to Be Known as the Samoa-American Samoa Cable System § 10.1 (May 2009), attached as Exhibit 2 to the Cable Landing Licensees FCN.

Independent Samoa law, ASTCA is entitled to direct interconnection arrangements with other Independent Samoa carriers.[10]

C. SamoaTel Temporarily Disconnected ASTCA Due to ASTCA's Longstanding Failure to Pay SamoaTel

ASTCA's sole asserted evidence of discrimination—SamoaTel's temporary disconnection of certain ASTCA traffic—was in fact a commercially reasonable response to ASTCA's continuing failure to pay SamoaTel. SamoaTel briefly disconnected ASTCA's traffic bound for Digicel Samoa because ASTCA was many months in arrears its international settlement payments, though ASTCA glosses over the extent of the nonpayment.[11] In fact, ASTCA had not paid SamoaTel *any* settlement payments for 2010 traffic at the time SamoaTel ceased to transit ASTCA's traffic to Digicel Samoa on April 27, 2011.[12] SamoaTel was not under any obligation to provide ASTCA a service for free, much less for an extended period of time.

As the new owner of SamoaTel, Blue Sky has undertaken to transition SamoaTel from a traditional government-owned enterprise to a more commercially-minded and growth-oriented one. The decision to disconnect ASTCA for non-payment was not a sinister attempt to discriminate against ASTCA, but instead a rational post-acquisition decision to improve SamoaTel's finances, collect unpaid bills from delinquent customers, and regularize on an arms-length basis the historically cozy relationship between SamoaTel and ASTCA.[13]

As to ASTCA's allegation that SamoaTel singled out ASTCA,[14] SamoaTel did not disconnect all traffic bound for Digicel Samoa, as SamoaTel's payment dispute was with *ASTCA*, not Digicel Samoa. Moreover, as described in part I.B above, ASTCA is free to

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10 *See* Telecommunications Act (No. 20) 2005, as amended, Part VII – Interconnection, attached as Exhibit 1 to the Cable Landing Licensees FCN.

11 *See* ASTCA May 5 Submission at 1-2.

12 In light of ASTCA's substantial payment delinquency, it is little wonder that ASTCA expressly asked that the Commission not to intervene in the settlements dispute. *See id.* at 2.

13 ASTCA admits as much. *See id.* (stating "ASTCA and SamoaTel, and their predecessors, have been doing business together for the past 40 plus years, however, this is the first time that a billing dispute between the carriers has resulted in disconnection.").

14 *See id.*

interconnect directly with Digicel Samoa rather than use SamoaTel as a transiting carrier. Alternatively, ASTCA is free to use another carrier for transit to Digicel Samoa, which it did.[15]

II. ASTCA Fails to Address the Commission's Market-Power Test

ASTCA's unsupported, hypothetical, and conclusory assertions do not address the Commission's well-established test for evaluating market power[16] or provide the Commission with any data to support the claim that SamoaTel has market power on the foreign end of the American Samoa-Independent Samoa route which could affect competition adversely in the U.S. market.[17] In applying that test, the Commission has considered intermodal competition, a component wholly ignored by ASTCA.[18] On Independent Samoa, there are more subscribers to mobile voice services than traditional landline voice services. The largest telecommunications provider in Independent Samoa is Digicel Samoa, with more than 80 percent of the wireless market share. Blue Sky estimates that Digicel Samoa has more than 50,000 mobile subscribers, whereas SamoaTel has approximately 12,000 fixed subscribers and 13,000 mobile subscribers.[19] Significantly, ASTCA does not dispute Blue Sky's subscriber counts in either of ASTCA's written *ex parte* submissions. The mobile penetration rate in Independent Samoa, where wireless customers far exceed the number of landline subscribers, shows that wireless is a substitute for landline service in Independent Samoa.

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[15] *See* ASTCA May 5 Submission at 2 (stating that ASTCA routed its traffic to Independent Samoa through a New Zealand carrier).

[16] The Commission focuses on: "(1) the foreign incumbent's market share in the relevant terminating market on the foreign end of the particular route; (2) the supply elasticity of the market; (3) the demand elasticity of the market's customers; and (4) the foreign incumbent's cost structure, size, and resources." *Americatel Corporation and Telecom Italia of North America, Inc.; Application to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Brazil Route, Memorandum Opinion and Order*, 19 FCC Rcd. 9672, 9683-84 ¶ 20 (Int'l Bur. 2004) ("*Americatel Brazil*"); *see* Cable Landing Licensees FCN at 11-13.

[17] *See* ASTCA April 21 Submission at 1.

[18] *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, 25 FCC Rcd. 11,407, 11,434 (2010) (observing that wireless and wireline providers are intermodal competitors for purposes of market power analysis); *Americatel Brazil*, 19 FCC Rcd. at 9685.

[19] *See* Cable Landing Licensees FCN at 12; ASLI FCN at 10.

Simply put, ASTCA's claim that SamoaTel has market power in providing terminating local access ignores the reality of intermodal competition. Based on the number of subscribers, the Licensees are confident that Digicel Samoa, not SamoaTel, terminates more calls in Independent Samoa. Indeed, the market share of SamoaTel in the terminating market of Independent Samoa is half that of Digicel Samoa.

Furthermore, as set forth in the above-captioned notifications, the Independent Samoa market for local termination is characterized by significant elasticity with respect to both supply and demand. With respect to supply elasticity, there is a strong existing competitor and low market entry barriers. Digicel Samoa has captured more than 80 percent of the Independent Samoa mobile market and more than 70 percent of the aggregate local market (including both fixed and mobile services). With respect to demand elasticity, customers in Independent Samoa readily switch carriers to obtain desired price and quality. In the past few years, Digicel Samoa's subscriber base has swelled from 10,000 to 50,000, which includes many former SamoaTel subscribers.

III. ASTCA's Own Actions Assume SamoaTel's Lack of Market Power

The permissibility of ASTCA's exclusive traffic exchange arrangements with SamoaTel (discussed in part I.A above), which ended in late 2008, depended on ASTCA's understanding that SamoaTel did not have sufficient market power on the Independent Samoa end of the American Samoa-Independent Samoa route to affect competition adversely in the U.S. market. Otherwise, ASTCA's exclusive arrangements would have been prohibited under the Commission's "no special concessions" rule.

The Commission defines a "special concession" as:

> an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S. licensed carriers and involves:
> (1) Operating agreements for the provision of basic services;
> (2) Distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times.
> . . . .[20]

[20] 47 C.F.R. § 63.14(b).

ASTCA's prior exclusive arrangements with SamoaTel clearly fell within this definition. ASTCA and SamoaTel had an arrangement to require carriers competing with ASTCA in American Samoa to transit all their traffic to Independent Samoa through ASTCA and SamoaTel. They also precluded direct interconnection in Independent Samoa, requiring competing carriers to interconnect indirectly through SamoaTel and use SamoaTel's facilities. ASTCA, of course, has been required to comply with the "no special concessions" rule since it received authority in 1999 to provide international telecommunications services under Section 214 of the Communications Act of 1934, as amended.[21]

Such arrangements would have been permissible following the effective date of the narrowed "no special concessions" rules adopted by the Commission in 1997 only if SamoaTel lacked sufficient market power.[22] In seeking to impose dominant-carrier regulation on the Licensees based upon a finding of SamoaTel's market power, surely ASTCA did not intend to suggest that its own prior arrangements were prohibited.

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The Commission should reject ASTCA's bid to saddle the Licensees with unnecessary regulatory burdens. The Licensees and SamoaTel do not control bottleneck facilities on the American Samoa-Independent Samoa route, and SamoaTel lacks market power on the Independent Samoa end of the route.

Respectfully submitted,

Kent D. Bressie
Jonathan B. Mirsky

Counsel to AST Telecom, LLC, d/b/a Blue Sky Communications, American Samoa Hawaii Cable, LLC, Samoa American Samoa Cable, LLC, and American Samoa License, Inc.

Attachment

cc: David Krech

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21 *See* FCC File No. ITC-214-19990301-00145.

22 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23,891, 24,057-58 ¶ 158 (1997) (narrowing application of the "no special concessions" rule to dealings between U.S. carriers and foreign carriers with market power in the relevant market on the foreign end of an international route).

DECLARATION

I, Adolfo Montenegro, hereby declare that:

(1) I serve as President and Chief Executive Officer of AST Telecom, LLC d/b/a Blue Sky Communications ("Blue Sky"); President of American Samoa Hawaii Cable, LLC ("ASHC"); President of Samoa American Samoa Hawaii Cable, LLC ("SASC"); and President of American Samoa License, Inc. ("ASLI").

(2) I am authorized to make this declaration on behalf of Blue Sky, ASHC, SASC, and ASLI;

(3) The statements in the foregoing letter are true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of June 2011.

Adolfo Montenegro
President and CEO, Blue Sky
President, ASHC
President, SASC
President, ASLI