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1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036
TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM
ATTORNEYS AT LAW

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Federal Communications Commission
Office of the Secretary

BY HAND DELIVERY

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

Re: Joint Cable Landing License Application of American Samoa Hawaii Cable, LLC, Pac-Rim Redeployment, LLC, and AST Telecom, LLC, FCC File No. SCL-LIC-20080814-00016

Dear Ms. Dortch:

By their counsel, American Samoa Hawaii Cable, LLC (“ASHC”), Pac-Rim Redeployment, LLC (“PRR”), and AST Telecom, LLC, d/b/a/ Blue Sky Communications (“Blue Sky”) (together with ASHC and PRR, “Applicants”), hereby respond to questions posed by International Bureau staff in an August 11, 2008, telephone call regarding the Applicants’ cable landing license application for the American Samoa-Hawaii Cable System (“ASHC System”).¹ This letter addresses questions regarding the regulatory status of the ASHC System and the contractual arrangements between ASHC and AT&T regarding the Keawaula, Hawaii landing.

I. Regulatory Status of the ASHC System

The International Bureau staff requested additional information about the application of the first prong of the *NARUC I* test to the proposed cable system. In response, the Applicants provide the following additional information to support non-common-carrier status for the ASHC System.

¹ See Joint Application of American Samoa Hawaii Cable, LLC, Pac-Rim Redeployment, LLC, and AST Telecom, LLC, d/b/a/ Blue Sky Communications for Cable Landing License, FCC File No. SCL-LIC-20080814-00016 (filed Aug. 13, 2008) (“Application”).

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Applying the two-pronged test for common carriage, as set forth by the U. S. Court of Appeals for the District of Columbia Circuit, the Commission has authorized undersea cable systems on a non-common-carrier basis where: (1) there is no legal compulsion to serve the public indifferently, and (2) there are no reasons implicit in the nature of the operations of the submarine cable system to expect an indifferent holding-out to the eligible user public.² In the Application, the Applicants stated that under existing judicial and Commission precedent, the Commission should not subject the ASHC System—which will connect Oahu, Hawaii; Iliili, American Samoa; and Apia, in the Independent State of Samoa (“Samoa”)—to common carrier regulation because it will not operate as a common carrier and because there is no legal compulsion or other public interest reason for the Applicants to operate the ASHC System in such a manner.³

Under the first prong of the *NARUC I* test, the Commission must determine whether the public interest requires common carrier operation of the cable system.⁴ Traditionally, this public interest analysis has focused on the availability of alternative facilities to constrain an applicant’s exercise of market power. But the Commission “is not limited to that reasoning” and has looked more broadly to determine whether common carrier licensing is in the public interest.⁵

² *Nat’l Ass’n of Regulatory Util. Comm’rs. v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“*NARUC I*”); *Tel-Optik Limited*, Memorandum Opinion and Order, 100 FCC 2d 1033, 1040-42 (1985). With regard to the second prong, the Application demonstrated that, consistent with Commission, precedent, the ASHC System will not sell capacity indifferently to the user public, but rather provide capacity to particular users on an individualized basis. Application at 6-7.

³ See Application at 6-8.

⁴ *NARUC I*, 525 F.2d at 642.

⁵ See *AT&T Corp. et. al., Cable Landing License*, 14 FCC Rcd. 13,066, 13,080 ¶ 39 (2000) (“*Japan-U.S. Order*”) (stating that “[a]lthough this public interest analysis has generally focused on the availability of alternative facilities, we are not limited to that reasoning.”); *Australia-Japan Cable (Guam) Limited, Cable Landing License*, 15 FCC Rcd. 24,057, 24,062 ¶ 13 (Int’l Bur. 2000) (stating that “[t]his public interest analysis generally has focused on whether an applicant will be able to exercise market power because of the lack of alternative facilities, although the Commission has not limited itself to that reasoning.”); *Telefonica SAM USA, Inc. et. al., Cable Landing License*, 15 FCC Rcd. 14,915, 14,920 ¶ 11 (Int’l Bur. 2000) (“*Telefonica SAM Order*”) (stating that “[t]his public interest analysis has focused on the availability of alternative facilities, although the Commission has stated it is not limited to that reasoning.”).

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A. The ASHC System Will Not Be a Bottleneck Facility

Even construing the first prong of *NARUC I* as solely concerned with market competition, non-common-carrier treatment is appropriate for the ASHC System because there are sufficient alternative facilities to constrain Applicants from exercising market power on the Hawaii-American Samoa route or the American Samoa-Samoa route. In applying this test, the Commission often has looked beyond existing cable facilities to take into account planned cable systems that will compete with the proposed system.⁶

Here, as in those precedents, competition from a planned cable system will prevent Applicants from exercising market power. In describing alternative international facilities in the Application, the Applicants neglected to mention the planned South Pacific Islands Network (“SPIN”) a cable system announced in July 2008 to improve connectivity between South Pacific markets. SPIN will span the Hawaii-Australia route, with connecting cables east to west across the South Pacific, connecting Papeete (Tahiti, French Polynesia), Niue, Pago Pago (American Samoa), Wallis (Wallis and Futuna), and Noumea (New Caledonia).⁷ Thus, SPIN will provide significant high-speed international connectivity for telephone, data, and Internet traffic originating and terminating in American Samoa in competition with the ASHC System. This planned cable system along with the threat of other new entrants along these routes will prevent the ASHC System from becoming a bottleneck facility capable of exercising market power.

Furthermore, the Commission has found common carrier treatment unwarranted, even on routes with little or no available common carrier cable operations, where “competing facilities will at least partially constrain the operations of the [cable system] so that it will not become a

⁶ See, e.g., *General Communication, Inc., Cable Landing License*, 12 FCC Rcd. 18,292, 18,297 ¶ 16 (Int’l Bur. 1997) (“*Alaska United Order*”) (citing competition from planned Northstar Cable System – Extension); *AT&T Corp., et. al., Cable Landing License*, 14 FCC Rcd. 1923, 1927 ¶¶ 10-11 (1998) (“*Guam-Phillipines Order*”) (considering “other submarine cable systems . . . planned in the Pacific, including the PC-1 cable system and the China-US Cable Network” and finding that “the prospect of future cable construction” would “constrain the ability of the [cable system] to exercise market power”); *AT&T Corp. et. al, Cable Landing License*, 13 FCC Rcd. 16,232, 16,238 ¶¶ 12-13 (Int’l Bur. 1998) (stating “significant new transpacific capacity is expected to become available soon” and noting Applicant’s argument that “several submarine cable systems have been announced . . . namely, Pacific Crossing 1, Project Neptune, and Project Oxygen.”) (“*China-U.S. Cable Order*”); *Japan-U.S. Order*, 14 FCC Rcd. at 13,080 n.56 (“The US-Japan route is also served by a number of existing and *planned* fiber optic cable system.”) (emphasis added).

⁷ See *SPIN, Offering better connectivity between South Pacific Markets*, at 8 (presented at Oceania.com, Sydney, July 2007) (attached as Exhibit 1 to this letter).

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bottleneck facility.”⁸ Under the first prong of *NARUC I*, the Commission has considered competition from intermodal facilities, including satellite facilities⁹ and terrestrial microwave facilities.¹⁰ In so doing, the Commission has recognized that the existence of facilities that are technically inferior to (and thus not perfect substitutes for) the proposed cable system can sufficiently constrain the exercise of market power to make common carrier regulation unnecessary.¹¹

Applying this precedent here, intermodal facilities are sufficiently available to constrain Applicants’ operations to prevent the exercise of market power, making common carrier regulation unnecessary. In addition to the planned SPIN cable system discussed above, several satellite facilities provide competing services along the Southern Pacific Route, including Intelsat’s IS-602, IS-701 and SES New Skies’ NSS-5, which will compete with the ASHC System.¹² Together, these facilities include up to 158 C-Band transponders and 56 Ku-Band transponders, providing substantial communications capacity.¹³ Extensive terrestrial satellite

⁸ *Japan-U.S. Order*, 14 FCC Rcd. at 13080 ¶ 39; *AT&T Submarine Systems, Inc. Cable Landing License*, 11 FCC Rcd. 14,885, 14,900 ¶ 51 (Int’l Bur. 1996) (“*St. Thomas-St. Croix Cable Order*”) (declining to require common carrier treatment for first fiber optic cable facility given existing, albeit technically inferior, facilities); *Guam-Philippines Order*, 14 FCC Rcd. at 1927 ¶ 10 (finding, where existing cable facilities on the route had reached capacity limits, “that alternative indirect routes, circuits on non-common carrier cable systems, satellite links, and the prospect of future cable construction constrain the ability of the G-P Cable System to exercise market power”).

⁹ *Guam-Philippines Order*, 14 FCC Rcd. at 1927 ¶ 10 (“Satellite circuits, for example, may be inferior for carrying voice traffic, but can nevertheless compete with fiber optic circuits for providing many non-voice services”); *Japan-U.S. Order*, 14 FCC Rcd. at 13,080 n.56 (noting that the US-Japan route was also served “by satellite capacity over Intelsat and other satellite systems”); *Alaska United Order*, 12 FCC Rcd. at 18,297 ¶ 16 (proposed route served by “circuits on the Telstar 303 and Aurora 2 satellites”).

¹⁰ *Alaska United Order*, 12 FCC Rcd. at 18,297 ¶ 16 (proposed route served by “terrestrial microwave service”).

¹¹ *Guam-Philippines Order*, 14 FCC Rcd. at 1927 ¶ 10 (rejecting the argument that the Commission should not consider satellite services as a satisfactory competitive alternative).

¹² Potential competition also exists from satellites, such as AsiaSat 4 and Loral Skynet Telstar-18, which provide coverage to the South Pacific region, including Samoa and American Samoa.

¹³ Assuming a single transponder is capable of handling up to 155 million bits of information per second, see Intelsat: Satellite Basics, <http://www.intelsat.com/resources/satellite-basics/how-it-works.asp>, these satellite facilities provide an estimated capacity of up to 3,954 MBps.

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facilities also will provide competing services along the American Samoa-Samoa segment of planned system. While these intermodal facilities may not be full substitutes for the ASHC System, as the Commission has found in granting other licenses, they will still act to constrain Applicants from exercising undue market power.

By itself, the fact that the ASHC System will be the first fiber-optic facility to connect American Samoa, Samoa, and Hawaii does not require the Commission to regulate the system on a common carrier basis. As the Commission has explained, “requiring current identical substitute common carrier facilities before non-common carrier facilities will be authorized would serve as a disincentive for entities to take risks and expend capital to expand and upgrade facilities.”¹⁴ Indeed, if the Commission “were to require all cable systems that . . . increase the availability of advanced technology in a region to be common carrier, few cables would even qualify as non-common carrier.”¹⁵ Accordingly, the Commission has not imposed common carrier regulation on the first fiber-optic facility on a route where existing, albeit technically inferior, facilities provided competition and the market remained open to new fiber optic entrants.¹⁶ That reasoning equally applies here. Although the ASHC System will be the first fiber optic cable to serve the proposed route, it will not function as a bottleneck facility so as to warrant common carrier because SPIN and existing satellite and terrestrial microwave facilities will provide competitive alternatives.

B. The Public Interest Does Not Require Common Carrier Regulation

Looking beyond this competition inquiry, the Commission has repeatedly stated that the *NARUC I* public interest test is not limited to reviewing the availability of alternative facilities.¹⁷ Competitive concerns may be outweighed by “the importance of promoting the expansion of capacity and facilities-based competition, which will result in innovation and lower prices for U.S. consumers of international communications services.”¹⁸ In licensing the Japan-U.S. Cable Network, for example, the Commission found that “regulatory delay would harm the plans of carriers to commence service,” and concluded that “any public interest benefits of imposing additional burdensome regulation . . . would be outweighed by the benefits of promoting the certainty that the Japan-US CN will be deployed as scheduled.”¹⁹

¹⁴ *St. Thomas-St. Croix Cable Order*, 11 FCC Rcd. at 14,898 ¶ 44.

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *See* footnote 5 above.

¹⁸ *Telefonica SAM Order*, 15 FCC Rcd. at 14,923 ¶ 17.

¹⁹ *Japan-U.S. Order*, 14 FCC Rcd. at 13,079-80 ¶ 35, 39.

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The significant benefits from construction of the ASHC System outweigh any lingering competitive concerns. The proposed system will re-use existing fiber-optic cable to bring high-speed connectivity to American Samoa and Samoa. Notably, the population of the American Samoa is just over 57,000²⁰ with over 60 percent²¹ of the population below the federally-defined poverty line and no U.S. military presence. The ASHC System will bring to that U.S. territory the high quality, low priced communications services widely recognized as key for increased educational opportunities and economic productivity. For these reasons, the U.S. Department of the Interior (“DOI”), which administers American Samoa as an unincorporated territory of the United States, has expressed strong support for the expeditious grant of the Application as a means to promote the American Samoan economy and lower communications costs.²² As DOI explained, the development of an undersea fiber-optic system, like the ASHC System, will “improve connectivity beyond American Samoa,” “enhanc[e] Internet usage and penetration,” “foster the development of offshore industries,” and “encourage the use of telemedicine and distance learning, thereby contributing significantly to the quality of life of American Samoans.”²³

As in the *Japan-U.S. Order*, imposing common carrier obligations and regulatory delay on the ASHC System would “harm the plans of carriers to commence service.”²⁴ Applicants’ current business model is based on having the ability to make particularized decisions to sell capacity on individual terms and conditions. Imposing common carrier requirements on the ASHC System would require Applicants to change that business model and could impair the system’s commercial prospects. The public interest considerations here weigh in favor of non-common-carrier treatment for the ASHC System.

²⁰ U.S. Department of Commerce, News Release, *Census Bureau Releases Census 2000 Population Counts for American Samoa*, July 3, 2001, <http://www.census.gov/Press-Release/www/2001/cb01cn175.html>.

²¹ U.S. Census Bureau, *American Samoa 2000: Social, Economic, and Housing Characteristics*, June 2003, at 138 (Table 52), <http://www.census.gov/prod/cen2000/phc-4-as.pdf>.

²² See Letter from Nikolao I. Pula, Director of the Office of Insular Affairs, U.S. Department of the Interior, to Marlene H. Dortch, Secretary, Federal Communications Commission, FCC File No. SCL-LIC-20080814-00016 (filed Sept. 18, 2008).

²³ *Id.* at 1.

²⁴ See *Japan-U.S. Order*, 14 FCC Rcd. at 13,078-79 ¶ 35 (finding persuasive applicants’ statements that “regulatory delay would harm the plans of carriers to commence service.”)

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II. Contractual Arrangements between ASHC and AT&T with Respect to the Keawaula, Hawaii, Landing

The International Bureau staff also requested that the Applicants address an apparent “gap” between the termination date of ASHC’s agreement with AT&T with respect to the Keawaula landing and the expiration date of the expected cable landing license.²⁵ As the Applicants noted previously, the agreement with AT&T was to have a term of 10 years or until the ASHC System is retired, whichever is earlier.²⁶ As the ASHC System uses cable assets from the former PacRim East system, the ASHC System is expected to have a significantly shorter commercial lifespan than the typical undersea cable system anticipated by the Commission’s rules.

Nevertheless, to address the possibility that the commercial life of the ASHC System might extend slightly beyond the initial 10-year term of the AT&T agreement, ASHC has renegotiated its arrangements with AT&T. On September 11, 2008, ASHC executed an amendment to its agreement with AT&T providing that the agreement will have a term of 10 years or until the ASHC System is retired, whichever is later.

* * * * *

Should you have any questions regarding this letter or require additional information, please contact me by telephone at +1 202 730 1337 or by email at kbressie@harriswiltshire.com.

Respectfully submitted,



Kent D. Bressie
*Counsel for American Samoa Hawaii Cable, LLC,
Pac-Rim Redeployment, LLC, and AST Telecom, LLC
d/b/a Blue Sky Communications*

Attachment

cc: Imani Ellis-Cheek (IB)
David Krech (IB)
George Li (IB)
Susan O’Connell (IB)

²⁵ Pursuant to standard licensing conditions, the cable landing license would expire 25 years after entry into commercial service, unless renewed or extended. *See* 47 C.F.R. § 1.767(g)(14).

²⁶ *See* Application at 19.