

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Applications of American Samoa
Telecommunications Authority for
Broadband Personal Communications
Services and Advanced Wireless Service
Licenses
Informal Request for Commission Action of
AST Telecom, LLC
FCC File Nos. 0003065926, 0003574302,
and 0003574310

ORDER

Adopted: January 21, 2011

Released: January 21, 2011

By the Associate Chief, Wireless Telecommunications Bureau:

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## I. INTRODUCTION

1. This Order denies two petitions by AST Telecom, LLC, doing business as Blue Sky Communications (“Blue Sky”), requesting that the Commission deny the long-form applications submitted by the American Samoa Telecommunications Authority (“ASTCA”) for certain licenses it won in two Commission spectrum auctions. The Order finds that Blue Sky has failed to substantiate its allegations that ASTCA engaged in prohibited communications with Samoa Technologies, Inc. (“STI”) and that ASTCA did not properly disclose an agreement with STI as required by Commission rules. In addition, the Order rejects Blue Sky’s assertions that grant of ASTCA’s applications would harm competition in the American Samoa market, subject to effectuation of a voluntary spectrum divestiture by ASTCA in this market. The Order also denies Blue Sky’s Informal Request seeking sanctions on STI and its principals based on its participation in Auction 71.

## II. BACKGROUND

2. The challenges to ASTCA’s applications arise out of two Commission auctions of broadband Personal Communications Services (“PCS”) and Advanced Wireless Service (“AWS”) licenses, Auctions 71 and 78, which were held in 2007 and 2008, respectively. As described more fully below, Blue Sky’s challenges to ASTCA’s applications assert that ASTCA violated the Commission’s competitive bidding rules.<sup>1</sup> Blue Sky alleges ASTCA engaged in behavior with STI, another participant in Auction 71, in violation of section 1.2105 of the Commission’s rules, which prohibits certain communications between auction applicants, and requires disclosure of certain agreements of auction applicants.

3. Blue Sky also contends that grant of ASTCA’s applications would harm competition in the American Samoa market. Following the conclusion of the auctions, Blue Sky filed petitions to deny against ASTCA’s long-form applications for four licenses it won in Auction 71 and six licenses it won in Auction 78.<sup>2</sup> To better understand the nature of these complaints, we provide some background of the Commission’s auction process and the circumstances that arose in Auctions 71 and 78.

### A. Short-Form Application Process

4. Under the Commission’s standard auction procedures, an entity seeking to participate in a Commission auction must submit a short-form application (FCC Form 175). The Wireless Telecommunications Bureau reviews the initial short-form application submission to determine whether it is complete or has any deficiencies.<sup>3</sup> An auction applicant whose short-form application is complete on initial review becomes a qualified bidder in an auction provided it timely submits a sufficient upfront payment. An applicant whose short-form application is incomplete upon initial review is provided with

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<sup>1</sup> Blue Sky and ASTCA participated in both Auction 71 and Auction 78, while STI participated only in the earlier auction, Auction 71.

<sup>2</sup> Petition to Deny of AST Telecom, LLC, filed by AST Telecom, LLC, dated July 5, 2007 (the “Auction 71 Petition”); Petition to Deny of AST Telecom, LLC, filed by AST Telecom, LLC, dated October 20, 2008 (the “Auction 78 Petition”). ASTCA was the winning bidder for the BTA492-C3, BTA492-C4, BTA492-C5, and MTA051-A licenses in Auction 71 (the “Auction 71 Licenses”) and the BEA175-C, REA011-D, REA011-E, BTA492-D, BTA492-E, and BTA492-F licenses in Auction 78 (the “Auction 78 Licenses”). Each of the Auction 71 Licenses and the Auction 78 Licenses covers American Samoa.

<sup>3</sup> See 47 C.F.R. § 1.2105; see also “Auction of Broadband PCS Spectrum Scheduled for May 16, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction No. 71,” *Public Notice*, 22 FCC Rcd 433, 458 ¶¶ 84-85 (2007) (“*Auction 71 Procedures Public Notice*”).

an opportunity to correct minor errors and make other curative amendments.<sup>4</sup> Such an applicant may become a qualified bidder if it timely corrects the deficiencies in its application and submits the required upfront payment.

5. Under section 1.2105(c) of the Commission's rules, applicants for licenses in any of the same geographic license areas are prohibited from communicating with each other about bids, bidding strategies, or settlements unless such applicants have identified each other on their short-form applications as parties with whom they have entered into a bidding agreement or understanding pursuant to section 1.2105(a)(2)(viii). This prohibition begins at the short-form application filing deadline and ends at the down payment deadline after the auction.<sup>5</sup> The prohibition deters collusive behavior and promotes the competitiveness of the auction process by requiring an applicant to disclose publicly the existence of any bidding-related agreements.<sup>6</sup> Auction applicants are also subject to a requirement to disclose the identities of all parties with whom they have entered into any agreements, arrangements, or understandings of any kind relating to the licenses being auctioned, including any agreements relating to post-auction market structure.<sup>7</sup>

## **B. Auction 71**

### **1. Disclosures in the ASTCA and STI Short-Form Applications for Auction 71**

6. Following the Commission's announcement that it would offer 38 PCS licenses in Auction 71, beginning on May 16, 2007, Blue Sky, ASTCA, and STI each timely submitted a short-form application to participate in the auction.<sup>8</sup>

7. According to the information provided in its short-form application, ASTCA is a semi-autonomous agency of, and is wholly owned by, the American Samoan Government.<sup>9</sup> A five-member Board of Directors governs ASTCA and appoints its Executive Director, who bears the primary employment and management responsibilities. The Executive Director of ASTCA is Aleki Sene.<sup>10</sup>

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<sup>4</sup> See 47 C.F.R. § 1.2105(b)(2).

<sup>5</sup> See 47 C.F.R. §§ 1.2105(a)(2)(viii), 1.2105(c)(1); see also *Auction 71 Procedures Public Notice*, 22 FCC Rcd at 439-42 ¶¶ 13-21.

<sup>6</sup> See *In the Matter of Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, *Second Report and Order*, 9 FCC Rcd 2348, 2386-88 ¶¶ 221-25 (1994); see also *Star Wireless, LLC v. Federal Communications Commission*, 522 F.3d 469, 475 (D.C. Cir. 2008) (noting that section 1.2105, the Commission's prohibition on certain types of communications between auction applicants, "is aimed, in part, at "strengthen[ing] confidence . . . in the bidding process."").

<sup>7</sup> 47 C.F.R. §§ 1.2105(a)(2)(viii), (c)(1).

<sup>8</sup> On their short-form applications, ASTCA and Blue Sky each applied for all 7 licenses covering American Samoa. STI applied for only 3 licenses, all of which were located in American Samoa. These licenses were: BTA492-D; BTA492-E; and BTA492-F.

<sup>9</sup> See Short-Form Application (FCC Form 175) of American Samoa Telecommunications Authority (filed March 16, 2007), as amended.

<sup>10</sup> *Id.*

8. STI disclosed in its short-form application that it is an American Samoan corporation in which four children of Aleki Sene, namely, Alex Sene, Carl Sene, Denis Sene, and Esther Prescott, hold a combined 91.4% ownership interest.<sup>11</sup>

9. Blue Sky reported that it is a Delaware limited liability company, whose primary shareholder is R. Allen Stanford.<sup>12</sup> Mr. Stanford is an American citizen, and holds his ownership interest by means of several intermediate entities. These entities include Stanford International Bank, Ltd. and Stanford International Bank Holdings Limited, which are both corporations registered in Antigua and Barbuda.

## 2. Initial Status of Short-form Applications

10. In their short-form applications as initially filed, ASTCA and STI each stated that they had not entered into any bidding agreement or understanding with another party concerning the licenses made available in Auction 71.<sup>13</sup> Following its initial review, the Commission announced that the short-form application of ASTCA was complete, while that of STI was incomplete.<sup>14</sup> STI subsequently resubmitted its application by the applicable April 20, 2007 deadline.<sup>15</sup> This was also the deadline for the submission of upfront payments. ASTCA, STI, and Blue Sky each made a sufficient upfront payment in a timely manner.

## 3. Disclosure of Mutual Understanding Between ASTCA and STI

11. On May 1, 2007, ASTCA and STI each submitted letters disclosing the existence of a “mutual understanding” between ASTCA and STI that had been formed prior to the short-form application deadline.<sup>16</sup> At that stage of the auction process, applicants were not able to electronically make changes to their short-form applications through the Commission’s Integrated Spectrum Auction System (ISAS). ASTCA and STI requested in their letters that the Commission change their respective electronic short-form applications in order to indicate the existence of a bidding agreement.<sup>17</sup> In the separate letters, each applicant discloses for the first time that Aleki Sene, the Executive Director of

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<sup>11</sup> See Short-Form Application (FCC Form 175) of Samoa Technologies, Inc. (filed March 16, 2007), as amended. The short-form application of STI disclosed the following ownership interests for the Sene siblings: Alex Sene: 33%; Carl Sene: 29.1%; Esther Prescott: 14.6%; Denis Sene: 14.7%. Their brother, Barney Sene, also holds an ownership interest in STI, which is less than 10% and therefore not subject to the short-form application disclosure requirements.

<sup>12</sup> See Short-Form Application (FCC Form 175) of AST Telecom, LLC (filed March 16, 2007), as amended.

<sup>13</sup> See Short-Form Application (FCC Form 175) of American Samoa Telecommunications Authority (filed March 16, 2007), as amended; see also Short-Form Application (FCC Form 175) of Samoa Technologies, Inc. (filed March 16, 2007), as amended.

<sup>14</sup> “Auction of Broadband PCS Spectrum Licenses; Status of Short-Form Applications to Participate in Auction No. 71,” *Public Notice*, 22 FCC Rcd 6715 (2007). The short-form application of Blue Sky was found incomplete upon initial review.

<sup>15</sup> See 47 C.F.R. § 1.2105(b)(2). Blue Sky also resubmitted its application by the deadline.

<sup>16</sup> Letter from David L. Sieradzki and David L. Martin, Counsel to the American Samoa Telecommunications Authority, to Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, dated May 1, 2007 (the “ASTCA Disclosure Letter”); see also Letter from Robert L. Thompson, Counsel to Samoa Technologies, Inc., to Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, dated May 1, 2007 (the “STI Disclosure Letter”; collectively, the “Disclosure Letters”).

<sup>17</sup> Disclosure Letters at 2.

ASTCA, is the father of Alex Sene and Carl Sene, who have ownership interests in STI.<sup>18</sup> ASTCA and STI also disclose for the first time that Alex Sene serves as ASTCA's Deputy Director of Engineering and Carl Sene is ASTCA's Internet Engineering Manager.

12. ASTCA described the "mutual understanding" of ASTCA and STI as being that "to the extent both entities entered Auction No. 71, Alex Sene . . . would continue in his pre-existing positions" at each applicant.<sup>19</sup> STI characterized the agreement in similar, but not identical, terms. The applicants stated that "[b]eyond the continued involvement of Alex Sene in these dual roles, there is no agreement to coordinate the bids of the two entities."<sup>20</sup> Each applicant explained that although they had not initially considered this understanding to constitute a reportable agreement, that they had each since determined, after consultations with counsel and a review of relevant FCC precedent, that, out of an abundance of caution, the understanding should have been reported on the short-form application.<sup>21</sup>

#### 4. Qualified Bidders for Auction 71 and Auction Results

13. On May 2, 2007, the Commission released a *Public Notice* that identified the 23 bidders qualified to bid in Auction 71.<sup>22</sup> The *Public Notice* identified ASTCA, STI, and Blue Sky as qualified bidders, and showed that STI was seeking a 25 percent bidding credit.<sup>23</sup>

14. Auction 71 began on May 16, 2007, and closed on May 21, 2007, after 21 rounds of bidding. ASTCA submitted winning bids for the four Auction 71 Licenses. Neither STI nor Blue Sky submitted any winning bids.

15. Following the close of the auction, ASTCA timely submitted its Auction 71 long-form application (the "Auction 71 Application"), as well as the full payment for the Auction 71 Licenses. On June 25, 2007, the Bureau announced that the long-form applications of the winning bidders in Auction 71, including ASTCA's, had been accepted for filing upon initial review.<sup>24</sup>

#### 5. Blue Sky's Petition to Deny ASCTA's Auction 71 Long Form

16. Blue Sky requests that the Commission deny the Auction 71 Application, re-auction the Auction 71 Licenses, and refer ASTCA and its principals to the Commission's Enforcement Bureau for sanctions, including barring ASTCA from participating in future auctions. In its petition to deny ASTCA's Auction 71 Application, Blue Sky alleges that ASTCA engaged in prohibited communications

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<sup>18</sup> *Id.* at 1-2. As noted above, Aleki Sene is also the father of Denis Sene, Barney Sene, and Esther Prescott, who each hold ownership interests in STI. However, the filings suggest that, unlike their brothers Alex and Carl Sene, these three siblings have no employment relationship with ASTCA.

<sup>19</sup> ASTCA Disclosure Letter at 1.

<sup>20</sup> *Id.*

<sup>21</sup> Disclosure Letters at 1.

<sup>22</sup> "Auction of Broadband PCS Spectrum Licenses: 23 Bidders Qualified to Participate in Auction No. 71; Limited Information Disclosure Procedures to be Used," *Public Notice*, 22 FCC Rcd 8347 (2007).

<sup>23</sup> In Auction 71, bidding credits of 15 percent and 25 percent were available to applicants that met certain qualifying criteria as "small" or "very small businesses." See *Auction 71 Procedures Public Notice*, 22 FCC Rcd at 448-50 ¶¶ 46-49.

<sup>24</sup> "Wireless Telecommunications Bureau Announces That Applications For Broadband Personal Communications Services (PCS) Licenses Are Accepted For Filing," *Public Notice*, 22 FCC Rcd 11,505 (2007) ("*Accepted for Filing Public Notice*"). The *Accepted for Filing Public Notice* provided that petitions to deny these long-form applications had to be filed no later than July 5, 2007.

with STI in violation of section 1.2105(c) of the Commission's rules.<sup>25</sup> The Auction 71 Petition asserts that the bidding patterns of ASTCA and STI are indicative of collusion. Blue Sky also asserts that ASTCA violated the Commission's rules by not disclosing necessary information in a timely and proper fashion.

17. In addition, the Auction 71 Petition asserts that the grant of ASTCA's Auction 71 application would harm competition in the American Samoan market by allowing ASTCA to hold a total of 85 megahertz of spectrum in a market where only one other CMRS competitor, Blue Sky, currently operates.<sup>26</sup> Blue Sky states that, as far as it is aware, the most spectrum the Commission has allowed a licensee to hold in any single market is 90 megahertz, and that was in an area with a number of competitors.<sup>27</sup>

18. In its opposition, ASTCA maintains that it did not violate the Commission's prohibition on certain communications during the auction and that the Commission should reject Blue Sky's claims.<sup>28</sup> ASTCA also asserts that there is no longer any CMRS spectrum cap and that ASTCA's 85 megahertz of total post-acquisition spectrum would be less than the 90 megahertz that Blue Sky admits that the Commission has allowed in other cases.<sup>29</sup>

19. In a reply, Blue Sky seeks to rebut the arguments of ASTCA concerning its compliance with section 1.2105(c)'s prohibition on certain communications.<sup>30</sup> It also advocates that the Commission evaluate whether granting the Auction 71 Application would "result in an anti-competitive excessive concentration of CMRS spectrum in American Samoa."<sup>31</sup>

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<sup>25</sup> Auction 71 Petition.

<sup>26</sup> Auction 71 Petition at 10; Auction 71 Reply at 2, 19-20. Blue Sky's calculation that ASTCA would hold a total of 85 megahertz of spectrum in the American Samoan market does not take into account 12 megahertz of 700 MHz band spectrum currently held by ASTCA, which is included in our competitive analysis, consistent with the Commission's recent wireless transaction orders. *See, e.g.,* Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless For Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement, WT Docket No. 09-104, *Memorandum Opinion and Order*, 25 FCC Rcd 8704, 8723-24 ¶¶ 39, 40 (2010) ("AT&T-Verizon Wireless Order"). Applications of AT&T Inc. and Centennial Communications Corporation For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, WT Docket No. 08-246, *Memorandum Opinion and Order*, 24 FCC Rcd 13,915, 13,935 ¶ 43 (2009) ("AT&T-Centennial Order").

<sup>27</sup> Auction 71 Petition at 10. Blue Sky also contends that by acquiring 85 megahertz of spectrum in Auction 71, and preventing Blue Sky from acquiring the rest, ASTCA has thwarted additional competition in the American Samoan market. *Id.*

<sup>28</sup> Opposition of American Samoa Telecommunications Authority to the Petition to Deny of AST Telecom, LLC, filed by American Samoa Telecommunications Authority, dated July 12, 2007 (the "Auction 71 Opposition").

<sup>29</sup> Auction 71 Opposition at 6-7, n.9. ASTCA also points out that its 85 megahertz of post-acquisition spectrum would be less than the 90 megahertz which any bidder in the auction could have obtained in American Samoa, given that, in contrast to certain other auctions, the Commission did not limit the amount of spectrum any one bidder could obtain in Auction 71. *Id.*

<sup>30</sup> Reply to Opposition to Petition to Deny, filed by AST Telecom, LLC, dated July 19, 2007, at 20 (the "Auction 71 Reply"). Blue Sky also calls upon the Commission to conduct a hearing to resolve the "substantial questions of material fact" it claims to have raised. *Id.* at 27.

<sup>31</sup> *Id.* at 20. *See also* Auction 71 Petition at 10.



## 6. Blue Sky's Informal Complaint Against STI

20. Even though STI was not a winning bidder and did not have an application pending, on July 6, 2007, Blue Sky filed an informal request asking the Commission to investigate whether STI's behavior violated the Commission's rules and impose sanctions upon STI and its principals.<sup>32</sup> STI denied Blue Sky's allegations in its Opposition and requested the dismissal of the Informal Request.<sup>33</sup> Blue Sky then filed a Reply.<sup>34</sup>

### C. Auction 78

21. In 2008, the Commission held Auction 78, in which it offered both broadband PCS and AWS licenses.<sup>35</sup> ASTCA and Blue Sky each timely submitted a short-form application to participate in Auction 78. STI, however, did not apply to participate in Auction 78.

#### 1. Initial Status of ASTCA and Blue Sky Short Forms

22. Upon initial review of the short-form applications of Blue Sky and ASTCA, the Commission announced on July 7, 2008 that each application was complete.<sup>36</sup>

#### 2. Blue Sky's Motion to Dismiss ASTCA's Short Form

23. Shortly before the start of bidding, on July 16, 2008, Blue Sky submitted a Motion to Dismiss and Petition to Deny, which urged the Commission to dismiss ASTCA's Auction 78 short-form application and disqualify ASTCA from the auction, primarily on the basis of the allegations made in Blue Sky's Auction 71 Petition.<sup>37</sup> ASTCA responded to Blue Sky's motion,<sup>38</sup> and Blue Sky replied.<sup>39</sup>

24. The Bureau's Auctions and Spectrum Access Division subsequently responded by letter to Blue Sky's Motion, stating that it is generally more prudent to address allegations like those of Blue

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<sup>32</sup> Informal Request at 1-2.

<sup>33</sup> Opposition to Informal Request, filed by Samoa Technologies, Inc., dated July 16, 2007 (the "STI Opposition").

<sup>34</sup> Reply to Opposition to Informal Request, filed by AST Telecom, LLC, dated July 26, 2007 (the "Reply to STI Opposition").

<sup>35</sup> Auction 78 offered licenses that went unsold in Auction 71, along with other licenses that had become available due to the cancellation or termination of licenses that had been offered in earlier auctions. Auction 78 made available 35 AWS-1 licenses and 20 PCS licenses. See "Auction of AWS-1 and Broadband PCS Licenses Scheduled for July 29, 2008; Comment Sought on Competitive Bidding Procedures for Auction 78," *Public Notice*, 23 FCC Rcd 5484 (2008).

<sup>36</sup> "Auction of AWS-1 and Broadband PCS Licenses: Status of Short-Form Applications to Participate in Auction 78," *Public Notice*, 23 FCC Rcd 10,374 (2008) ("Auction 78 Status Public Notice").

<sup>37</sup> Motion to Dismiss and Petition to Deny, filed by AST Telecom, LLC, dated July 16, 2008 (the "July 16th Motion"). Blue Sky also requested leave to supplement the Auction 71 Petition with the July 16<sup>th</sup> Motion. Motion for Leave to Supplement Petition to Deny of AST Telecom, LLC, filed by AST Telecom, LLC, dated July 16, 2008; see also Supplement to Petition to Deny of AST Telecom, LLC, filed by AST Telecom, LLC, dated July 16, 2008.

<sup>38</sup> Letters from David L. Sieradzki, Counsel for the American Samoa Telecommunications Authority, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated July 28, 2008.

<sup>39</sup> Reply to Opposition to Motion for Leave to Supplement Petition to Deny of AST Telecom, LLC, filed by AST Telecom, LLC, dated August 4, 2008, and Reply to ASTCA Response to AST Telecom, LLC Motion to Dismiss and Petition to Deny, dated August 4, 2008.

Sky after the submission of long-form applications when there is greater opportunity for investigation and finding no basis for departing from its practice in this instance.<sup>40</sup>

### 3. Qualified Bidders for Auction 78 and Auction Results

25. The Bureau identified Blue Sky and ASTCA as among the 23 qualified bidders for Auction 78 in a Public Notice released on August 4, 2008.<sup>41</sup> Auction 78 began on August 13, 2008 and closed on August 20, 2008, with ASTCA having submitted winning bids for the six Auction 78 Licenses.<sup>42</sup> Blue Sky submitted winning bids for two licenses.<sup>43</sup>

26. Following the close of Auction 78, ASTCA timely submitted its Auction 78 long-form application (the “Auction 78 Application”), as well as payment in full for the six Auction 78 Licenses. The Bureau subsequently announced in two separate *Public Notices* that the long-form applications of the winning bidders in Auction 78 had been accepted for filing upon initial review.<sup>44</sup>

### 4. Blue Sky’s Petition to Deny ASCTA’s Auction 78 Long Form

27. In a petition to deny the Auction 78 Application, Blue Sky reiterates its allegations previously made with regard to ASCTA and STI in Auction 71.<sup>45</sup> ASTCA filed an Opposition,<sup>46</sup> and Blue Sky replied.<sup>47</sup>

### D. Voluntary Commitment of Divestitures

28. Grant of ASTCA’s Auction 71 and 78 applications would result in ASTCA holding 132 to 157 megahertz of cellular, PCS, AWS-1, and 700 MHz spectrum throughout CMA 733 (American Samoa). ASTCA has voluntarily agreed to divest 20 megahertz of licensed spectrum in this CMA.

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<sup>40</sup> Letter from Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, to Gregory W. Whiteaker, Counsel for AST Telecom, LLC, dated August 8, 2008.

<sup>41</sup> “Auction of AWS-1 and Broadband PCS Licenses: 23 Bidders Qualified to Participate in Auction 78,” *Public Notice*, 23 FCC Rcd 11,850 (2008).

<sup>42</sup> “Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78,” *Public Notice*, 23 FCC Rcd 12,749 (2008).

<sup>43</sup> *Id.*

<sup>44</sup> “Wireless Telecommunications Bureau Announces that Applications for Broadband PCS Licenses Are Accepted for Filing,” *Public Notice*, 23 FCC Rcd 14,773 (2008); *see also* “Wireless Telecommunications Bureau Announces that Applications for Advanced Wireless Service Licenses Are Accepted for Filing,” *Public Notice*, 23 FCC Rcd 14,895 (2008).

<sup>45</sup> Auction 78 Petition. Blue Sky also requested that the Commission incorporate the Auction 78 Petition into the record for the Auction 71 Petition. Motion for Leave to Further Supplement Petition to Deny of AST Telecom, LLC, dated October 20, 2008; Further Supplement to Petition to Deny of AST Telecom, LLC, dated October 20, 2008. The Motion for Leave to Supplement Petition to Deny of AST Telecom, LLC, filed by AST Telecom, LLC, dated July 16, 2008 and the Motion for Leave to Further Supplement Petition to Deny of AST Telecom, LLC, dated October 20, 2008 are collectively the “Blue Sky Motions to Supplement.”

<sup>46</sup> American Samoa Telecommunications Authority Opposition to Petition to Deny, filed by the American Samoa Telecommunications Authority, dated October 27, 2008, and Letter from David L. Sieradzki, Counsel to the American Samoa Telecommunications Authority, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated October 28, 2008.

<sup>47</sup> Reply to Opposition to Petition to Deny of AST Telecom, LLC, filed by AST Telecom, LLC, dated November 3, 2008 (the “Auction 78 Reply”).



ASTCA has indicated that if it does not file assignment applications with the Commission to divest 20 megahertz of licensed spectrum in CMA733 American Samoa, it would surrender licenses for 20 megahertz of licensed spectrum within six months of the date of the issuance of the licenses.<sup>48</sup>

### III. DISCUSSION

29. We address Blue Sky's filings in both Auction 71 and Auction 78 in this Order because they contain similar allegations arising from a common set of facts. We are unable to conclude from the arguments presented by Blue Sky and our own review of the applicants' disclosures and bidding activities that ASTCA or STI violated the Commission's rule prohibiting certain communications between auction applicants or other competitive bidding rules regarding disclosure of agreements. Further, we reject Blue Sky's assertions that grant of ASTCA's applications would harm competition in the American Samoa market, subject to effectuation of a voluntary spectrum divestiture by ASTCA in this market.

30. This Order first examines the claims made by Blue Sky in respect to Auction 71, and then considers those regarding Auction 78.

#### A. Auction 71

##### 1. Allegations of Collusive Bidding and Strategic Withdrawals

31. We are not persuaded that the arguments and factual information presented by Blue Sky demonstrate that ASTCA or Blue Sky violated section 1.2105(c)'s prohibition on certain communications in connection with their participation in Auction 71.

32. Blue Sky argues that the bidding patterns of ASTCA and STI in Auction 71 provide evidence of collusive bidding.<sup>49</sup> Blue Sky also contends that ASTCA made and then withdrew certain winning bids with the intent of harming Blue Sky.<sup>50</sup> It seeks to support these assertions with a number of specific arguments based on its interpretation of ASTCA's bids.

##### a. Allegations Based on Bidding Results

33. Blue Sky offers a detailed account of the bids made by ASTCA and STI on the available licenses in American Samoa.<sup>51</sup> It notes that ASTCA and STI only bid against each other in the first round of the auction, on the E block license.<sup>52</sup> After the first round, ASTCA did not bid again on this license until STI had ceased bidding in the auction, which Blue Sky asserts is evidence of collusion or coordinated bidding.<sup>53</sup>

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<sup>48</sup> See Letter from Aleki Sene, Executive Director, ASTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 19, 2010 (appended to ASTCA Application File Nos. 0003065926, 0003574302, and 0003574310 Nov. 24, 2010 to associate the letter) ("ASTCA Commitment Letter"). In its letter, ASTCA urged the Commission to act on its long-form applications "as quickly as possible and in any event within the next 60 days."

<sup>49</sup> Auction 71 Petition at 6-11.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; Informal Request at 7-11.

<sup>52</sup> Auction 71 Petition at 6-7. Blue Sky notes that STI's first bid on this license was one bid increment higher than the minimum acceptable bid. It suggests that this was a signal to ASTCA that STI was bidding on this license.

<sup>53</sup> *Id.*

**b. Bidding Results in Round 1**

34. ASTCA denies Blue Sky's allegations and asserts that "there was absolutely no communication between STI and ASTCA regarding the auction" during the relevant time period, and "there was no coordination of bids before or during the auction."<sup>54</sup> ASTCA explains its bidding activity, stating that it entered Auction 71 intending to bid on the seven available American Samoan licenses for which it had applied, while not exceeding \$1 million in total bids.<sup>55</sup> ASTCA maintains that, as a result of limited information procedures that were in effect for Auction 71 and the non-public correspondence that it had received from the Bureau pursuant to those procedures, it knew only that 15 entities, including Blue Sky and STI, had applied for at least one of the same markets that ASTCA had selected in its short-form application.<sup>56</sup>

35. ASTCA explains that it opened its bidding by submitting the minimum acceptable bid in Round 1 of the auction for each of the seven American Samoan licenses. These bids made ASTCA the provisional winning bidder for all of the Samoa licenses, except the E block license.<sup>57</sup> ASTCA states that it was unaware of the identity of the provisional winning bidder for the E block license in that round.<sup>58</sup> In response to Blue Sky's claim that STI may have signaled to ASTCA by bidding more than the minimum acceptable bid on the E block license in the first round, ASTCA states that it discerned "nothing revealing" from the fact that the provisionally winning bid in that round was one bid increment higher than the minimum acceptable bid for the license.

**c. Bidding in Subsequent Rounds**

36. Blue Sky claims that STI's decision not to select the Samoa C block license on its short-form "strongly suggests an unreported understanding between STI and ASTCA" and that its claim finds further support in the fact that STI limited its bidding to the E block license and did not bid on other blocks on which STI could have placed bids.<sup>59</sup> Blue Sky asserts that it "is not aware of any rational reason for STI to significantly favor the E block PCS license over other available ... PCS licenses."<sup>60</sup> Blue Sky also draws inferences from the fact that ASTCA did not place a bid on the E block until after

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<sup>54</sup> Auction 71 Opposition at 7. ASTCA's Opposition is supported by a declaration from ASTCA's Executive Director, Aleki Sene. Affidavit of Aleki Sene, dated July 12, 2007, Auction 71 Opposition, Attachment A. STI's response to Blue Sky's accusations relies upon factual information contained in a Declaration of Esther Prescott. STI Opposition, Attachment A. Section 1.939(f) of the Commission's rules requires that the allegations of fact, or denials thereof, in an opposition be supported by the affidavit of a person with personal knowledge thereof. 47 C.F.R. § 1.939(f). STI's Opposition states that "logistical difficulties in faxing the Declaration from American Samoa to counsel's office in Washington, DC" caused Esther Prescott to request that STI's counsel sign the Declaration on her behalf. It states that "the original [copy of the declaration] executed by Ms. Prescott will be filed with the FCC subsequently." However, STI never submitted a copy of the declaration signed by Ms. Prescott. STI Opposition at 2, n.3. We are therefore unable to consider any arguments based solely on the facts presented in Esther Prescott's declaration.

<sup>55</sup> Auction 71 Opposition at 8-13.

<sup>56</sup> Following the submission of short-form applications to participate in Auction 71, the Bureau provided each applicant with a list of the other applicants that had applied for licenses in any of the same geographic areas. *Auction 71 Procedures Public Notice*, 22 FCC Rcd at 436 ¶ 6.

<sup>57</sup> Under Auction 71's limited information procedures, the fact that STI held the provisionally winning bid on that E block license remained non-public until it was publically disclosed by the Bureau after the close of the auction.

<sup>58</sup> Auction 71 Petition at 8-9.

<sup>59</sup> *Id.* at 8-9.

<sup>60</sup> *Id.* at 8.

STI lacked eligibility to place any bids, concluding that “[t]he division of the licenses between ASTCA and STI, and the timing of ASTCA’s ... bid on the E block license evidence a clear pattern of coordinated and collusive behavior.”<sup>61</sup>

37. ASTCA describes its bidding in the subsequent rounds of the auction as having been guided by the auction’s activity requirements.<sup>62</sup> For each auction, including Auction 71, the Bureau establishes both eligibility and activity rules.<sup>63</sup> Under these rules, the upfront payment submitted by a bidder determines its initial bidding eligibility, as expressed in bidding units. This initial eligibility indicates the maximum number of bidding units on which a bidder could be active, with each license in the auction having a specific number of bidding units assigned to it. Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction.<sup>64</sup> ASTCA had submitted an upfront payment sufficient to establish an initial bidding eligibility of 260,000 bidding units, which meant that it was required during Stage One of the auction to remain active on licenses with a bidding unit total of 208,000 or more. ASTCA maintains that the Stage One activity rule had the practical effect of requiring it to remain active on the 30 MHz A block license and five of the six available 10 MHz block licenses, i.e., the C3, C4, C5, D, E, and F block licenses, in order to avoid losing bidding eligibility.

38. ASTCA states that the activity rule led it to avoid bidding again on the E block license until Round 13 of the auction.<sup>65</sup> ASTCA points out that it could maintain its necessary activity level by bidding on the other 10 MHz block licenses, which were available at lower minimum acceptable bids.<sup>66</sup> ASTCA maintains that the lower acceptable prices explain why it did not bid again on the E block license until after STI had ceased doing so.<sup>67</sup> ASTCA concludes that it had legitimate reasons for each of its bids and that Blue Sky has provided neither factual nor circumstantial evidence to support its allegations.<sup>68</sup>

39. ASTCA maintains that its actions over the course of Auction 71 are compatible with its stated desire to win the 30 MHz block license and three of the 10 MHz block licenses offered for American Samoa while staying within its budget of \$1,000,000. ASTCA states that it did not bid on the E block license between Rounds 1 and 13, because it sought to satisfy the auction’s minimum activity requirement at the lowest possible cost. ASTCA describes its use of a waiver in Round 12 of the auction as consistent with this strategy. When it resumed bidding in Round 13, ASTCA asserts that it was logical to bid on the E block license for the first time since Round 1 because the minimum acceptable bid on that license was \$22,000 lower than that for the C4 block license.

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<sup>61</sup> *Id.* at 9.

<sup>62</sup> Auction 71 Opposition at 10.

<sup>63</sup> *Auction 71 Procedures Public Notice*, 22 FCC Rcd at 465-67 ¶¶ 115-125.

<sup>64</sup> Bidders that wished to maintain their current bidding eligibility were required to be active on licenses representing at least 80 percent of this eligibility in Stage One of the auction. During Stage Two of the auction, this activity level increased to 95 percent of current bidding eligibility. Stage One of Auction 71 consisted of Rounds 1 through 18. Stage Two began in Round 19, with Auction 71 closing after Round 21. The auction advanced to Stage Two when provisionally winning bids had been placed on 20 percent or less of the licenses being auctioned (as measured in bidding units). *Id.* at 466-67 ¶¶ 124-25.

<sup>65</sup> Auction 71 Opposition at 10-11.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 12.

<sup>68</sup> *Id.* at 13.

40. ASTCA appears to provide reasonable explanations of its bidding behavior in Auction 71. We are unable to find evidence of an undisclosed agreement or other violation of section 1.2105(c) prohibition on communications based solely on the inferences Blue Sky has drawn.<sup>69</sup> While STI twice exercised its discretion to bid one increment higher than the minimum acceptable bid on the E block license, we note that all bidders were provided with the ability to place bids at pre-defined increments above the minimum opening bid, and that it is not unusual for bidders to exercise this tool. Likewise we decline to draw any conclusion from STI's decision to raise its own provisionally winning bid on the E block license several times, as that practice was also permitted under procedures for this auction.

**d. Claim of Improper "Strategic Withdrawal" of Bid**

41. Blue Sky's filings also include a claim that ASTCA and STI engaged in "collusive behavior" with the objective of preventing Blue Sky from obtaining licenses by ASTCA's improper "strategic withdrawal" of its bids on the E block license after Blue Sky had lost its bidding eligibility.<sup>70</sup> Under procedures used in many Commission auctions, including Auction 71, bidders are permitted to withdraw in a limited number of rounds provisionally winning bids from previous rounds.<sup>71</sup> As a basis for its claims, Blue Sky notes that ASTCA increased its bids on licenses during the early rounds of the auction, and then withdrew its bids on the D, E, and F block licenses after Blue Sky had placed its final bid in Round 13.<sup>72</sup> Blue Sky asserts that ASTCA would have been aware that Blue Sky was no longer participating in the auction because competing bids were no longer being made against ASTCA at that point in the auction.<sup>73</sup>

42. In its Opposition, ASTCA denies that the three withdrawals it made late in the auction served any improper strategic or anti-competitive function.<sup>74</sup> ASTCA explains that its withdrawals were consistent with its goal of obtaining the 30 MHz A block license and three consecutive 10 MHz block licenses during the final rounds of the auction.<sup>75</sup> ASTCA describes this goal as leading it to a choice in Round 17 between two alternatives, which it terms the "DEF option" and the "C5 option."<sup>76</sup> The former consisted of "maintain[ing] its provisional wins for the consecutive D, E, and F block, and withdraw[ing] its bids on the C3 and C4 licenses," while the latter involved "pick[ing] up the C5 license, making a consecutive C3, C4, and C5 block, and withdraw[ing] its bids on the D, E, and F block licenses."<sup>77</sup> ASTCA states that it chose the so-called "C5 option" because it offered a \$20,000 savings relative to the

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<sup>69</sup> See, e.g., Application of Nevada Wireless For a License to Provide 800 MHz Specialized Mobile Radio Service in the Farmington, NM-CO Economic Area (EA 155) Frequency Band, *Memorandum Opinion and Order*, 13 FCC Rcd 11,973 (1998) (Bureau found that petitioner had not adequately demonstrated any auction-based collusion between competing auction applicants and that its allegations warranted no further investigation).

<sup>70</sup> Auction 71 Petition at 9-11; see also Informal Request at 10-11.

<sup>71</sup> See *Auction 71 Procedures Public Notice*, 22 FCC Rcd 473-75 ¶¶ 162-69.

<sup>72</sup> Auction 71 Petition at 9-10; see also Informal Request at 10-11.

<sup>73</sup> Auction 71 Petition at 9; Auction 71 Reply at 14.

<sup>74</sup> Auction 71 Opposition at 12-13

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* It should be noted that the Opposition's characterization of the D, E, and F block licenses as "consecutive" is inaccurate in terms of their actual frequencies. The E and F block licenses respectively occupied the consecutive frequency blocks of 1885-1890/1965-1970 MHz and 1890-1895/1970-1975 MHz, but the D block license occupied the 1865-1870/1945-1950 MHz block.

“DEF” option in terms of the total provisionally winning bid amounts each involved.<sup>78</sup> ASTCA states that, because limited information procedures were in effect, it could not have known that Blue Sky had dropped out of the bidding at the time it exercised its withdrawals.<sup>79</sup>

43. In response, Blue Sky reiterates its argument that ASTCA’s bids and withdrawals were intended to prevent Blue Sky from acquiring certain licenses.<sup>80</sup> Blue Sky maintains that ASTCA’s description of its auction goals does not adequately explain its behavior in Rounds 13 and later of the auction.<sup>81</sup> Blue Sky notes that in Round 13 ASTCA was the provisional winning bidder on the A, C3, D, E, and F block licenses, with total bids of \$1,015,000.<sup>82</sup> Blue Sky maintains that ASTCA should have been satisfied in this situation, if it accurately described its auction goals, because this put ASTCA only \$15,000 over its \$1 million auction budget while holding the A block license and four 10 MHz block licenses. Blue Sky suggests that in this situation it would have been logical for ASTCA to either take no action or withdraw one of its provisionally winning bids on a 10 MHz license.<sup>83</sup> Blue Sky suggests that ASTCA’s decision to place a provisionally winning bid of \$145,000 on the C4 block license in Round 15, which meant that ASTCA had provisionally winning bids on the 30 MHz C block license and five 10 MHz block licenses, totaling \$1,160,000, is evidence of ASTCA’s anti-competitive intentions.<sup>84</sup> According to Blue Sky, “ASTCA undoubtedly knew that the Commission would not grant it licenses that would bring its total spectrum holdings to 105 MHz in American Samoa.”<sup>85</sup> Blue Sky infers that the decision to bid on the C4 block license must therefore have been intended to prevent Blue Sky from acquiring licenses.<sup>86</sup>

44. Blue Sky also argues that “there is no logical reason” supporting STI’s claim that STI had identified the E block license as the one offering the best opportunities for further expansion.<sup>87</sup> Blue Sky bases its criticism of STI’s argument on its view that “PCS spectrum essentially is fungible” now that microwave relocation and cost sharing obligations no longer apply.<sup>88</sup> Blue Sky suggests that STI identified the E block license as particularly suitable for expansion because of a “tacit understanding with ASTCA regarding the availability of the D and F block licenses.”<sup>89</sup>

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<sup>78</sup> *Id.* at 13.

<sup>79</sup> *Id.* at 12.

<sup>80</sup> Auction 71 Reply at 14.

<sup>81</sup> *Id.* at 14-19; *see also* paragraphs 34, 36-39, above.

<sup>82</sup> *Id.* at 15-16.

<sup>83</sup> *Id.* at 16.

<sup>84</sup> *Id.* at 16-17

<sup>85</sup> *Id.* *See* Section III.A.4, below, for a discussion of Blue Sky’s arguments concerning the spectrum holdings of ASTCA.

<sup>86</sup> *Id.* at 17.

<sup>87</sup> Reply to STI Opposition at 5-7.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.* at 7. Blue Sky further asserts that ASTCA’s statement that it withdrew its bids on the D, E, and F block licenses, rather than those of the C3 and C4 block licenses, to reduce its total bid amounts was inaccurate when one factors in the potential liability of withdrawal payments. Auction 71 Reply at 18. The Commission’s rules provide that a provisionally winning bidder that withdraws its provisionally winning bid from a previous round during the auction is subject to the bid withdrawal payments specified in Section 1.2104(g). The full amount of a withdrawing bidder’s liability, if any, cannot be determined until after a subsequent auction is held. A bidder that withdraws a



45. We have scrutinized the bidding round results and arguments presented by Blue Sky, yet are unable to find that these arguments provide evidence of prohibited conduct when weighed against ASTCA's seemingly reasonable explanation of its efforts to minimize its bidding outlays. We are unable to find evidence of an undisclosed agreement or other violation of section 1.2105(c)'s prohibition on communications based solely on the inferences Blue Sky has drawn from these bid withdrawals and STI's apparent decision to pursue the E Block license. In the absence of any other facts, we conclude that Blue Sky has failed to substantiate its assertions based on Auction 71 bidding round results to the effect that ASTCA and STI engaged in conduct or an understanding in violation of section 1.2105(c).

2. **Disclosure of Mutual Understanding Between ASTCA and STI Pursuant to Section 1.2105(a)(2)(viii)**

a. **Timing of Disclosure and Bidding Agreement Certification**

46. Blue Sky also claims that ASTCA and STI violated the requirements of section 1.2105 by failing to timely and properly disclose the existence of a bidding-related agreement between them.<sup>90</sup> The Commission's rules do not prohibit applicants from entering into otherwise lawful bidding agreements before filing their short-form applications, as long as they disclose the existence of the agreement(s) in their short-form application.<sup>91</sup> Blue Sky's arguments in this regard focus upon the Disclosure Letters, which reported "out of an abundance of caution" the existence of a "mutual understanding" that had existed prior to the short-form application deadline under which Alex Sene "would continue in his pre-existing positions" with ASTCA and STI and that "[b]eyond the continued involvement of Alex Sene in these dual roles, there is no agreement to coordinate the bids of the two entities."<sup>92</sup>

47. Blue Sky contends that ASTCA and STI did not comply with section 1.2105 when they each disclosed the existence of a "mutual understanding" on May 1, 2007, because they failed to include those disclosures in their short-form applications as initially filed and had not made any such disclosures by the April 20, 2007 deadline for applicants to correct any minor defects in their applications.<sup>93</sup> Blue Sky asserts that, because ASTCA and STI had not disclosed an agreement by the short-form deadline, any sharing of information between them would have violated the Commission's rules.<sup>94</sup>

48. We are not persuaded that the disclosures by ASTCA and STI were procedurally improper, as Blue Sky contends. Blue Sky argues that the Disclosure Letters failed to meet the procedural requirements of section 1.917 and section 1.2105(a)(2)(viii) of the Commission's rules because each of the Disclosure Letters was signed by the respective outside counsel of ASTCA or STI, rather than "by an officer, director, or duly authorized employee of either company."<sup>95</sup> At the outset, we

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bid will not be responsible for any final withdrawal payment if there is a subsequent higher bid in the same or subsequent auction. *See Auction 71 Procedures Public Notice*, 22 FCC Rcd at 474-75 ¶ 167.

<sup>90</sup> Auction 71 Petition at 11-14; *see also* Informal Request at 11-14.

<sup>91</sup> 47 C.F.R. § 1.2105(c)(7)(i).

<sup>92</sup> ASTCA Disclosure Letter at 1.

<sup>93</sup> Auction 71 Petition at 11.

<sup>94</sup> *Id.* at 14.

<sup>95</sup> Auction 71 Reply at 22-23, *citing* 47 C.F.R. §§ 1.917 and 1.2105(a)(2)(viii). Section 1.917 of the Commission's rules establishes, *inter alia*, the requirements for who may sign an amendment for a Wireless Radio Services application. Section 1.2105(a)(2)(viii) is one of the Commission's competitive bidding rules and requires, *inter alia*, that a short-form application include an exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia, or other agreements, arrangements



note that section 1.917 applies to applications for Wireless Radio Services licenses.<sup>96</sup> Short-form applications are governed by the competitive bidding rules found in Part 1, Subpart Q, rather than by the more general requirements for long-form license applications found in Subpart F, which includes section 1.917.<sup>97</sup>

49. The Bureau routinely communicates with outside counsel on issues arising out of short-form applications when explicitly authorized to do so by the applicant's certifying official. Applicants often retain outside counsel to work with Bureau staff on addressing deficiencies identified during the review of short-form applications. Information submitted as part of that process may explain the basis for the applicant's certifications and otherwise address questions that arise during the review process. For example, an applicant may provide additional gross revenue information in support of a claim for a small business bidding credit.

50. We do not agree with Blue Sky that each Disclosure Letter should have contained a separate certification that the disclosures were being made under penalty of perjury, and should have been considered disqualifying "major changes" to the short-form applications.<sup>98</sup> As discussed above, properly authorized submissions of explanatory information relating to a short-form application are considered to be covered under the certifications made by applicant when it submits its application. Because both ASTCA and STI's short-form applications contain certifications that the information contained in the application had been provided under penalty of perjury, a separate certification in this regard was not necessary. Moreover, the submission of additional explanatory information that is consistent with an applicant's initial certification generally does not fall within the definition of a "major change" under section 1.2105(b)(2) of the Commission's rules.<sup>99</sup> We decline Blue Sky's suggestion to interpret section 1.2105(b)(2)'s definition of "major amendment" to include disclosures concerning a pre-existing agreement. Blue Sky is unable to cite an authority for its contention that the Disclosure Letters amounted to "a substantive change akin to an applicant attempting to change its designated entity status or the licenses for which it has applied."<sup>100</sup>

51. Based on our review of the record and the Auction 71 bidding, we are unable to conclude that the disclosures by ASTCA and STI after the April 20, 2007 deadline for the resubmission of short-form applications of the existence of their mutual understanding violated the procedural requirements of section 1.65 of the Commission's rules, as Blue Sky claims.<sup>101</sup> ASTCA points out that the parties sought to disclose a "preexisting understanding," which "provided notice to all other bidders of the employment of Alex Sene and Carl Sene at ASTCA, and their roles as officers, directors and shareholders of STI" prior to the commencement of the auction.<sup>102</sup> Specifically, ASTCA's Disclosure Letter states that "the understanding contemplated that, to the extent both entities entered Auction No. 71, Alex Sene ... would continue in his pre-existing positions as: (1) an officer, director and 33% shareholder in STI; and (2)

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or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

<sup>96</sup> Section 1.917 of the Commission's rules establishes, *inter alia*, the requirements for who may sign an amendment for a Wireless Radio Services application. 47 C.F.R. § 1.917.

<sup>97</sup> 47 C.F.R. §§ 1.917; 1.2101-1.2114.

<sup>98</sup> Auction 71 Reply at 23-24.

<sup>99</sup> 47 C.F.R. § 1.2105(b)(2).

<sup>100</sup> Auction 71 Reply at 25.

<sup>101</sup> *Id.* at 23-24.

<sup>102</sup> Auction 71 Opposition at 5, 15.

Deputy Director of Engineering at ASTCA” and that “[b]eyond the continued involvement of Alex Sene in these dual roles, there is no agreement to coordinate the bids of the two entities.<sup>103</sup> ASTCA further notes that it had not disclosed this understanding earlier because it was not aware that STI had filed a short-form application until after the short-form deadline had passed and it had been informed by the Commission that STI was an auction applicant.<sup>104</sup>

52. We are unable to conclude based on the facts in the record that the understanding did not exist at the time of the short-form deadline or that ASTCA and STI engaged in any communications or coordinated bidding in Auction 71 in violation of section 1.2105(c). Moreover, through the Disclosure Letters, ASTCA and STI certified that a mutual understanding had existed as of the short-form application deadline and therefore these disclosures do not reflect an event or change that would be subject to section 1.65. More importantly, although Blue Sky suggests that ASTCA and STI disclosed the existence of this understanding in an effort to “circumvent the anti-collusion rule,”<sup>105</sup> Blue Sky has provided no evidence that any information sharing or other communication relating to the auction in fact took place. For these reasons, we are not persuaded that the disclosures by ASTCA and STI were procedurally improper.<sup>106</sup>

#### **b. Sharing of Personnel and ASTCA’s Precautionary Measures**

53. Blue Sky has also failed to provide sufficient information to support its claims that the sharing of personnel between the applicants violated section 1.2105 and that precautionary measures instituted by ASTCA that were intended to prevent the Sene siblings from gaining improper access to auction-related information were ineffectual.<sup>107</sup>

54. Blue Sky claims that ASTCA and STI violated the Commission’s rules based on Alex Sene’s status as the Deputy Director of Engineering for ASTCA and as an officer, director, and 33 percent owner of STI, as well as Carl Sene’s role as ASTCA’s Internet Engineering Manager and his ownership interest in STI.<sup>108</sup> Blue Sky maintains that these positions give rise to “*per se* collusion.”<sup>109</sup> Blue Sky bases this claim on the *Lotus Communications* decision, in which we found a violation of section 1.2105 where one individual served as an officer for two different corporate applicants.<sup>110</sup> We

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<sup>103</sup> ASTCA Disclosure Letter at 1. ASTCA also reported that Carl Sene is a director and 29.1% shareholder of STI and works as ASTCA’s Internet Engineering Manager. *Id.* at 2.

<sup>104</sup> Auction 71 Opposition at 16, n.37.

<sup>105</sup> Auction 71 Reply at 25.

<sup>106</sup> While we find no impropriety in this case, our decision should not be taken to condone late disclosures of any information required under our competitive bidding rules.

<sup>107</sup> *Id.* at 5-6; *see also* Reply to STI Opposition at 8-11.

<sup>108</sup> Auction 71 Petition at 5, 15; *see also* Informal Request at 5-6, 15. Alex Sene’s positions with ASTCA and STI are the primary focus of Blue Sky’s argument, but it does also suggest that Carl Sene’s positions with each company further violate the prohibition of certain types of communications between auction applicants.

<sup>109</sup> Auction 71 Petition at 5.

<sup>110</sup> *Id.* at 15, *citing* Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Howard A. Kalmenson, Lotus Communications Corp., 21 FCC Rcd 520 (2006) (finding that an individual who was an officer for two different applicants was, for purposes of applying the prohibition on certain types of communications between auction applicants, the applicant with respect to each application; holding that in such a situation the bids and bidding strategies of one applicant are necessarily conveyed to the other applicant and, absent a disclosed bidding agreement, an apparent violation of the prohibition occurs) (“*Lotus Communication*”).

reasoned in that case that because the same person is considered to be an “applicant” for purposes of section 1.2105 with respect to each applicant, the bids and bidding strategies of one applicant are necessarily conveyed to the other applicant.<sup>111</sup> Here, however, Alex Sene serves as a corporate officer of only one of the applicants, STI, and Carl Sene appears to have no corporate role with either applicant. As a result, this is not an instance where the same individual would be considered an “applicant” with respect to each entity.<sup>112</sup>

55. While Blue Sky also argues that the Sene brothers might have learned of ASTCA’s auction plans as a result of their employment by ASTCA, Blue Sky is unable to provide any evidence to support this claim.<sup>113</sup> Similarly, Blue Sky suggests that “close business relations” between ASTCA and STI, including ASTCA’s purchase of international satellite earth station services from STI, provided “the opportunity and incentive for ASTCA and STI to collude on bidding strategy”.<sup>114</sup> Blue Sky offers no factual evidence to support its speculations about inappropriate information sharing that might have arisen because of shared personnel or other reasons. ASTCA denies these assertions, stating that “there was absolutely no communication between STI and ASTCA regarding the auction during the relevant period of March 16 to June 11, and there was no coordination of bids before or during the auction.”<sup>115</sup> ASTCA further states that it “took special precautions to insulate ASTCA employees Alex Sene and Carl Sene, as well as the other Sene family members with interests in STI, from auction-related information.”<sup>116</sup> While Blue Sky suggests that these precautionary measures were ineffective,<sup>117</sup> it has provided no verifiable facts in support of such claim. In the absence of any factual evidence of a prohibited communication, we are unable to conclude that a violation of section 1.2105 necessarily arose due to the Sene brothers’ employment by ASTCA.

### 3. STI’s Eligibility for Bidding Credits

56. In its Informal Request, Blue Sky argues that STI was not qualified to receive a 25 percent bidding credit.<sup>118</sup> Blue Sky’s arguments are based upon its reading of the rules governing the attribution of gross revenues for purposes of determining designated entity eligibility. Although STI did not bid on a license for which a bidding credit could have been used, and did not in fact win any licenses, Blue Sky claims that it was nonetheless harmed by STI’s participation in the auction.

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<sup>111</sup> *Lotus Communication*.

<sup>112</sup> Blue Sky claims that Alex Sene was a “key employee” of ASTCA, in an apparent effort to assert that his position is comparable to that of the corporate officer in *Lotus Communications*. Blue Sky does not offer any Commission precedent that supports this position. Blue Sky makes no showing that Alex Sene’s position at ASTCA would have imposed upon him a fiduciary duty similar to that of a corporate officer.

<sup>113</sup> Auction 71 Petition at 15, n.23.

<sup>114</sup> *Id.* at 3 and 5, nn.4-5; *see also* Informal Request at 3-4.

<sup>115</sup> Auction 71 Opposition at 7, *citing* Affidavit of Aleki Sene, dated June 12, 2007 (attached to Auction 71 Opposition).

<sup>116</sup> *Id.* at 8. ASTCA states that it first learned of STI’s participation in the auction with the April 9, 2007 Public Notice that first identified the entities that had submitted short-form applications. *Id.* at 5; *see also* “Auction of Broadband PCS Spectrum Licenses: Status of Short-Form Applications to Participate in Auction No. 71,” *Public Notice*, 22 FCC Rcd 6715 (2007).

<sup>117</sup> Auction 71 Reply at 5-6; *see also* Reply to STI Opposition at 8-11.

<sup>118</sup> Informal Request at 15-19. In Auction 71, bidding credits of 15 percent and 25 percent were available to applicants that met certain qualifying criteria as “small” or “very small businesses.” *See Auction 71 Procedures Public Notice*, 22 FCC Rcd at 448-50 ¶¶ 46-49.

57. Under the Commission's two-phased auction application process, parties desiring to participate in the auction must first file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications.<sup>119</sup> Eligibility to participate in bidding and claims of eligibility for bidding credits are based on information contained in the applicants' short-form applications and certifications as well as their upfront payments. The Commission has recognized that "applicants to participate in the Commission's spectrum auctions do so with the knowledge that they are bidding against entities whose short-form applications have been subject to only an initial screening process rather than an in-depth review of the applicants' qualifications."<sup>120</sup> In the second phase of the process, winning bidders must file a more comprehensive long-form application and must provide more detailed information supporting their legal, technical and financial qualifications to hold a license and their entitlement to a bidding credit.<sup>121</sup> Because STI was not a winning bidder in Auction 71, the Bureau did not need to make any final determination about STI's eligibility for a bidding credit, and need not do so now. Accordingly, we deny Blue Sky's Informal Request seeking sanctions on STI and its principals based on its participation in Auction 71.

#### 4. Spectrum Aggregation Issues

58. Blue Sky requests that the Commission evaluate ASTCA's spectrum holdings to determine whether the grant of ASTCA's applications will result in an anti-competitive concentration of CMRS spectrum in American Samoa.<sup>122</sup> In particular, Blue Sky asserts that ASTCA's applications should be denied to avoid anti-competitive spectrum concentration.

59. In the context of reviewing potential competitive effects of proposed wireless transactions affecting the mobile telephony market, the Commission's practice is first to define the relevant product and geographic markets, then to apply an initial screen to the spectrum holdings of the applicants, and then to conduct a market-by-market analysis of the markets captured by the initial screen.<sup>123</sup> Although we do not apply this standard competitive analysis to the instant auction applications of ASTCA in Auctions 71 and 78,<sup>124</sup> we find it instructive, particularly in considering Blue Sky's

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<sup>119</sup> See *Auction 71 Procedures Public Notice*, 22 FCC Rcd at 448 ¶¶ 42-45; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2376 ¶ 15 (1994).

<sup>120</sup> See, e.g., *Winstar Broadcasting Corp., Order on Reconsideration*, 20 FCC Rcd 2043, 2051 ¶ 17 (2005).

<sup>121</sup> 47 C.F.R. § 1.2107. If, during review of the long-form applications, an applicant is discovered to have made a false certification or to be ineligible for the license on which it bid, the Commission has a number of sanctions it can impose against the applicant, in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution. See *Auction 71 Procedures Public Notice*, 22 FCC Rcd at 448 ¶ 45.

<sup>122</sup> See Auction 71 Reply at 19-20; see also Auction 71 Petition at 9-10. A discussion of the spectrum aggregation argument also appears in the Auction 78 Petition. *Auction 78 Petition* at 6 n.15.

<sup>123</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8720 ¶ 30; *AT&T-Centennial Order*, 24 FCC Rcd at 13,931 ¶ 34; Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, *Memorandum Opinion & Order*, 19 FCC Rcd 21,522, 21,556 ¶ 68 (2004) ("*Cingular-AT&T Wireless Order*"); Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17,444, 17,468 ¶ 40 (2008) ("*Verizon Wireless-ALLTEL Order*"). See generally Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission (Aug. 19, 2010).

<sup>124</sup> In the *Verizon Wireless-Union Telephone Order*, the Commission stated that it intends to apply prospectively its standard competitive analysis to spectrum acquired via auction as well as via transactions. Auctions 71 and 78

assertions, to note that our standard competitive analysis, if applied, would conclude that competitive harm is unlikely in the mobile telephony/broadband market if these applications are granted, subject to effectuation of a voluntary spectrum divestiture by ASTCA.

60. In particular, we accept the voluntary commitment of ASTCA to file assignment applications with the Commission to divest 20 megahertz of licensed spectrum in CMA733 American Samoa, or to surrender licenses for 20 megahertz of licensed spectrum within six months of the date of the issuance of the licenses.<sup>125</sup> We therefore condition the grant of the above-referenced applications of ASTCA on its compliance with this commitment.<sup>126</sup>

#### a. Market Definition

61. *Product Market.* If we were to review the instant applications under the Commission's standard competitive analysis, we would apply the same product market definition for mobile telephony/broadband services as applied by the Commission in recent transactions.<sup>127</sup> Although the Commission has determined that there are separate relevant product markets for interconnected mobile voice services and mobile data services, and also for residential services and enterprise services,<sup>128</sup> it nevertheless analyzes all of these product markets under the combined market for mobile telephony/broadband services.<sup>129</sup> Based on consideration of various factors, including the nature of these services and their relationship with each other, the Commission has determined that this approach provides a reasonable assessment of any potential competitive harm resulting from transactions.<sup>130</sup>

62. *Geographic Market.* The Commission applies the "hypothetical monopolist test" to relevant geographic markets and has found that they are local, larger than counties, may encompass multiple counties, and, depending on the consumer's location, may even include parts of more than one

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occurred prior to the *Verizon Wireless-Union Telephone Order*, and therefore we conduct a competitive analysis as instructive. See *Union Telephone Company and Celco Partnership d/b/a Verizon Wireless; Applications for 700 MHz Band Licenses, Auction No. 73, Memorandum Opinion and Order*, 23 FCC Rcd 16,787, 16,791-92 ¶ 9 (2008) ("*Verizon Wireless-Union Telephone Order*").

<sup>125</sup> ASTCA Commitment Letter. We find that ASTCA's commitment to implement its voluntary divestiture of spectrum in six months represents a reasonable time period. In certain recent wireless transaction orders, we have required the final divestiture of business units, with spectrum, within 120 days from the closing of the transaction or five days after notice of entry of any Final Judgment, whichever is later, with an opportunity for a 60-day extension. See, e.g., *AT&T-Centennial Order*, 19 FCC Rcd at 13,962 ¶ 115; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,519 ¶ 166. Because those divestitures have involved operating business units, we required divestiture to a Management Trust, which is an interim step not required here where only spectrum need be divested.

<sup>126</sup> We note that assignment applications for divestiture of spectrum will be reviewed under the Commission's public interest analysis under Section 310(d) of the Communications Act, 47 U.S.C. § 310(d).

<sup>127</sup> See e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8721 ¶ 35; *AT&T-Centennial Order*, 24 FCC Rcd at 13,932 ¶ 37; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,469-70 ¶¶ 45-47; *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, 23 FCC Rcd 17,570, 17,586-89 ¶¶ 38-45 (2008) ("*Sprint Nextel-Clearwire Order*").

<sup>128</sup> See, e.g., *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,470 ¶ 45 n.198; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,586 ¶ 38 n.106.

<sup>129</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8721 ¶ 35; *AT&T-Centennial Order*, 24 FCC Rcd at 13,932 ¶ 37; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,469-70 ¶¶ 45; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,583-84 ¶ 26.

<sup>130</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8721 ¶ 35; *AT&T-Centennial Order*, 24 FCC Rcd at 13,932 ¶ 37; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,469-70 ¶¶ 45-47; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,586-88 ¶¶ 38-45.



state.<sup>131</sup> The Commission uses two sets of geographic areas that effectively may be used to define local markets – Component Economic Areas (CEAs) and Cellular Market Areas (CMAs).<sup>132</sup> Because these two sets of geographic areas come separately from the demand and supply sides – demand in the case of CEAs, supply in the case of CMAs – the Commission finds them to be useful cross-checks on each other and, together, they help ensure that the Commission’s analysis does not overlook local areas that require more detailed analysis.<sup>133</sup> We accordingly would use CMAs and CEAs as well if we were to apply the Commission’s standard competitive analysis to the instant applications.

63. *Input Market for Spectrum.* Consistent with the Commission’s recent wireless transaction orders, we also would examine the instant applications in light of the input market for spectrum associated with the provision of mobile telephony/broadband services in the affected market. Consistent with our determination of a product market for mobile telephony/broadband services, we would include all spectrum suitable for mobile voice and data services as well as spectrum suitable for the provision of wireless broadband over broadband networks. As previously explained by the Commission, suitability is determined by whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony/broadband service.<sup>134</sup> For purposes of evaluating spectrum aggregation issues associated with this transaction, we would include in both our market-specific spectrum screen as well as our in-depth analysis of spectrum designated for cellular, PCS, SMR, and 700 MHz services, as well as of AWS-1 and Broadband Radio Service (“BRS”) spectrum<sup>135</sup> where available.<sup>136</sup>

64. *Market Participants.* Consistent with recent wireless transaction orders, when computing initial measures of market concentration, we limit our competitive analysis involving mobile telephony/broadband services to cellular, PCS, and SMR facilities-based service providers, and exclude satellite service providers, nomadic wireless VoIP providers, mobile virtual network operators (MVNOs),

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<sup>131</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8722 ¶ 36; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,470-71 ¶ 49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21,562-63 ¶¶ 89-90.

<sup>132</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8722 ¶ 36; *AT&T-Centennial Order*, 24 FCC Rcd at 13,933 ¶ 38; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,470-71 ¶ 49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21,567-68 ¶ 105.

<sup>133</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8722 ¶ 36; *AT&T-Centennial Order*, 24 FCC Rcd at 13,933 ¶ 38; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,470-71 ¶ 49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21,567-68 ¶ 105.

<sup>134</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8723-24 ¶ 39; *AT&T-Centennial Order*, 24 FCC Rcd at 13,935 ¶ 43; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,473 ¶ 53; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,591-92 ¶ 53.

<sup>135</sup> The BRS spectrum reflects 55.5 megahertz of contiguous BRS spectrum (excluding BRS spectrum associated with the Middle Band Segment (MBS) channels, BRS Channel 1, and the J and K guard bands).

<sup>136</sup> AWS-1 spectrum is considered available if the relocation schedule for government transmitters or receivers in a CMA is 24 months or less. See National Telecommunications and Information Administration (NTIA), 1710-1755 MHz Introduction, <http://www.ntia.doc.gov/osmhome/reports/specelo/index.htm> (last visited Jan. 20, 2011) (provides information on AWS relocation, including a relocation schedule and cost summary for AWS-1 relocation). BRS spectrum is considered available if the transition is complete. See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8724, n.143; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,478 ¶ 65; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,597 ¶ 66.



and resellers from consideration.<sup>137</sup> If we were to apply the Commission's standard competitive analysis to the instant applications, we would find that mobile telephony/broadband services offered by facilities-based providers using cellular, PCS, and SMR spectrum and employing various technologies offer similar voice and data functionalities and are indistinguishable to the consumer.<sup>138</sup> In addition, to the extent that entities provide facilities-based mobile telephony/broadband services using 700 MHz, AWS-1, and BRS spectrum, we also would consider them to be market participants.<sup>139</sup>

#### b. Initial Screen

65. *Initial Screen.* When conducting a competitive analysis, the Commission generally applies a two-part initial "screen" that identifies those local markets in which there is no competitive harm arising from the transaction or spectrum acquisition. In the first part of our initial screen, the screen criteria identifies, for further case-by-case market analysis, those markets in which, post-transaction, the Herfindahl-Hirschman Index ("HHI") would be greater than 2800 and the change in HHI will be 100 or greater, or the change in HHI would be 250 or greater, regardless of the level of the HHI.<sup>140</sup> Since the acquisition of "greenfield" spectrum at auction does not result in service overlaps, the HHI screen would not be triggered by the instant applications.

66. The second part of the two-part initial screen examines the input market for spectrum available for the provision of mobile telephony/broadband services in each of the affected markets.<sup>141</sup> The screen criteria identifies, for further case-by-case market analysis, those markets in which, post-transaction, the Applicants would have, on a market-by-market basis, a 10 percent or greater interest in: 95 megahertz or more of PCS, SMR, and 700 MHz spectrum, where neither BRS nor AWS-1 spectrum is available; 115 megahertz or more of spectrum, where BRS spectrum is available, but AWS-1 spectrum is not available; 125 megahertz or more of spectrum, where AWS-1 spectrum is available, but BRS spectrum is not available; or 145 megahertz or more of spectrum where both AWS-1 and BRS spectrum are available.<sup>142</sup>

67. If we were to apply the Commission's standard competitive analysis to the instant applications, we would find that AWS-1 spectrum in this CMA is available for deployment by commercial licensees and would be included in the analysis of the competitive effects of this spectrum

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<sup>137</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8724 ¶ 41; *AT&T-Centennial Order*, 24 FCC Rcd at 13,936 ¶ 45; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,480-81 ¶ 71, 74; *Sprint/Clearwire Order*, 22 FCC Rcd at 17,600 ¶ 75.

<sup>138</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8724 ¶ 41; *AT&T-Centennial Order*, 24 FCC Rcd at 13,936 ¶ 45; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,480-81 ¶ 71; *Sprint/Clearwire Order*, 22 FCC Rcd at 17,600 ¶ 75.

<sup>139</sup> See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8724 ¶ 41; *AT&T-Centennial Order*, 24 FCC Rcd at 13,936 ¶ 45; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,480-81 ¶ 71; *Sprint/Clearwire Order*, 22 FCC Rcd at 17,600-01 ¶ 75.

<sup>140</sup> See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8725 ¶ 42; *AT&T-Centennial Order*, 24 FCC Rcd at 13,936 ¶ 46; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,477-78 ¶ 64; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,600 ¶ 74.

<sup>141</sup> See, e.g., *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,468-69 ¶ 41; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,591-92, 17,607 ¶¶ 53-55, 77.

<sup>142</sup> See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8725 ¶ 42; *AT&T-Centennial Order*, 24 FCC Rcd at 13,936 ¶ 46; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17,477-78 ¶ 64; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17,600 ¶ 74.

acquisition,<sup>143</sup> since it appears that there is no required relocation of transmitters or receivers by government users in the American Samoa CMA.<sup>144</sup> Because no BRS licenses have been issued in the American Samoa BTA that coincides with this CMA,<sup>145</sup> we would find that BRS spectrum would not be included in the analysis of the competitive effects for the American Samoa CMA. In the American Samoa CMA, the total amount of spectrum suitable for the provision of mobile telephony/broadband service is 370 megahertz, which includes approximately 200 megahertz of cellular, PCS, and SMR spectrum, 80 megahertz of 700 MHz spectrum, and 90 megahertz of AWS-1 spectrum. This translates to a spectrum aggregation screen of 125 megahertz.<sup>146</sup>

68. In applying the 125-megahertz spectrum aggregation screen to ASTCA's Auction 71 and Auction 78 applications, we would find that the American Samoa CMA requires further competitive review. ASTCA currently holds an attributable interest in 12 to 37 megahertz of spectrum in the American Samoan market.<sup>147</sup> By obtaining the Auction 71 Licenses, ASTCA would add 60 megahertz of spectrum to its holdings with four broadband PCS licenses in the American Samoan market.<sup>148</sup> In addition, by obtaining the Auction 78 Licenses, ASTCA would acquire an additional 60 megahertz of spectrum in the American Samoan market, including licenses in the AWS-1 and broadband PCS spectrum bands.<sup>149</sup> If the Bureau were to grant both sets of licenses, it would bring ASTCA's total spectrum holdings in the American Samoan market to 132 to 157 megahertz, exceeding the 125-megahertz spectrum aggregation screen.

### c. In-Depth Analysis

69. If we were to apply the Commission's standard competitive analysis to CMA733 American Samoa, including the voluntary commitment to divestiture by ASTCA described above, we would find that it would be unlikely that the grant of the applications of ASTCA for licenses associated with Auctions 71 and 78 would result in competitive harm. Grant of these applications would result in ASTCA holding 112 to 137 megahertz of spectrum in the American Samoa market after effectuation of ASTCA's spectrum divestiture. Consistent with our recent wireless transaction orders, further competitive review of this CMA would include a multi-factor, market-specific analysis, which draws competitive conclusions based on the totality of the circumstances present in a given market, including market shares, carrier launch and coverage information, spectrum holdings, and any unique characteristics of the market of concern. In this market, ASTCA and Blue Sky currently have sufficient market share,

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<sup>143</sup> AWS-1 spectrum is considered available if the relocation schedule provided by NTIA is 24 months or less. *See supra* note 136.

<sup>144</sup> *See supra* note 136 (NTIA website).

<sup>145</sup> The American Samoa BTA (BTA492) and the American Samoa CMA (CMA733) are coterminous.

<sup>146</sup> In its Auction 71 pleadings, Blue Sky makes no arguments regarding the application of an initial spectrum screen but instead asserts that, in the past, the most spectrum the Commission would allow a licensee to hold in any single market was 90 megahertz. *See* Auction 71 Petition at 10. We note that Blue Sky's pleadings were filed prior to the revisions to the spectrum screen in the *Verizon Wireless-ALLTEL Order* and the *Sprint Nextel-Clearwire Order*.

<sup>147</sup> In the American Samoan market, ASTCA currently holds the Cellular B-block (25 megahertz, only in part of the CMA) and 700 MHz Lower C-block (12 megahertz) licenses.

<sup>148</sup> In Auction 71, ASTCA was the winning bidder for the PCS licenses in the A Block (30 megahertz), C3 Block (10 megahertz), C4 Block (10 megahertz), and C5 Block (10 megahertz) in American Samoa.

<sup>149</sup> In Auction 78, ASTCA was the winning bidder for the AWS-1 licenses in the C Block (10 megahertz), D Block (10 megahertz), and E Block (10 megahertz) in American Samoa. In Auction 78, ASTCA was also the winning bidder for the PCS licenses in the D Block (10 megahertz), E Block (10 megahertz), and F Block (10 megahertz) in American Samoa.

coverage, and spectrum throughout the CMA to compete in the provision of mobile telephony services.<sup>150</sup> In this CMA, ASTCA has a market share of [REDACTED] percent<sup>151</sup> with coverage of 98 percent of the population and approximately 70 percent of the land area. Blue Sky has a market share of [REDACTED] percent<sup>152</sup> and covers 95 percent of the population and approximately 60 percent of the land area.<sup>153</sup> Further, several additional firms currently hold sufficient spectrum that would enable them either to expand their provision of services or to enter the market and begin providing services.<sup>154</sup>

#### 5. Motions to Supplement Auction 71 Petition are Untimely and Repetitious

70. In filing the July 16<sup>th</sup> Motion and the subsequent Auction 78 Petition, Blue Sky also filed motions requesting that it be granted leave to supplement the Auction 71 Petition with these later filings.<sup>155</sup> We find the Blue Sky Motions to Supplement are untimely, because they were submitted after the filing deadline for petitions to deny long-form applications for licenses offered in Auction 71, as established by section 1.2108 of the Commission's rules.<sup>156</sup> We further find that the Blue Sky Motions to Supplement merely seek to introduce into the record material that is repetitious of the filings previously made by Blue Sky in respect to Auction 71. We therefore deny the Blue Sky Motions to Supplement.

#### B. Auction 78

71. In the Auction 78 Petition and the Auction 78 Reply, Blue Sky asserts that the Auction 78 Applications should be denied on the basis of ASTCA's alleged behavior in Auction 71.<sup>157</sup> These documents are primarily a reiteration of Blue Sky's previous claims that ASTCA colluded with STI and acted to the detriment of Blue Sky during that auction. In fact, the Auction 78 Petition quotes at length from a prior filing made by Blue Sky in regards to Auction 71.<sup>158</sup> As discussed above, we find that Blue

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<sup>150</sup> If we were to make this determination for these markets, we would not consider or rely on information contained in the Numbering Resource Utilization and Forecast reports filed by, or disaggregated carrier-specific local number portability data related to, certain wireless telecommunications carriers with insufficient market share throughout the CMA to have a material effect on our market-by-market analysis.

<sup>151</sup> Letter from David L. Martin, Counsel to ASTCA, to Marlene Dortch, Secretary, Federal Communications Commission, dated July 31, 2009.

<sup>152</sup> Letter from Gladys A. Maldonado, Counsel to Blue Sky, to Kathy Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated July 30, 2009.

<sup>153</sup> Blue Sky currently holds 62 to 87 megahertz of spectrum in American Samoa: 700 MHz A-Block (12 megahertz); Cellular A-Block (25 megahertz, only held in part of the market); PCS B-Block (30 megahertz); and AWS A-Block (20 megahertz). We also note that in Auction 78, Blue Sky was the winning bidder for the AWS-1 licenses in the B Block (20 megahertz), and F Block (20 megahertz) in American Samoa.

<sup>154</sup> See *AT&T Aloha Order*, 23 FCC Red at 2237 ¶ 12. Sprint Nextel, a nationwide facilities-based carrier, currently holds 24 megahertz of spectrum in American Samoa (14 megahertz of SMR spectrum and 10 megahertz of PCS spectrum in the 1910-1915 MHz/1990-1995 MHz band). Club 42 currently holds 40 megahertz of spectrum in American Samoa: the 700 MHz B-block (12 megahertz), the 700 MHz C-block (22 megahertz), and the 700 MHz E-block (6 megahertz) licenses. In addition, Club 42 has Auction 78 applications pending for 40 megahertz of spectrum in the market.

<sup>155</sup> See *supra* note 45.

<sup>156</sup> 47 C.F.R. § 1.2108.

<sup>157</sup> Auction 78 Petition and Auction 78 Reply.

<sup>158</sup> Auction 78 Petition at 4, citing Auction 71 Petition at 18-19 and 25. The Auction 78 Petition also briefly reiterates the claim that the prospective spectrum holdings of ASTCA are subject to spectrum screen review. Auction 78 Petition at 6 n.15.

Sky has failed to show that ASTCA violated Commission rules in the course of Auction 71. We therefore have no basis to deny the Auction 78 Applications or take any of the other action requested by Blue Sky.

#### IV. CONCLUSION

72. Blue Sky has failed to substantiate its allegations that ASTCA engaged in behavior with STI in Auction 71 in violation of section 1.2105's prohibition on certain communications between auction applicants, and its requirements concerning disclosure of certain agreements between auction applicants. For the reasons discussed above, we reject Blue Sky's assertions that grant of ASTCA's applications would harm competition in the American Samoa market. We therefore deny the Auction 71 Petition, the Auction 78 Petition, the Informal Request, and the Blue Sky Motions to Supplement.

#### V. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED that, pursuant to authority granted in Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), the Auction 71 Petition and the Auction 78 Petition are DENIED. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.

74. IT IS FURTHER ORDERED that, pursuant to authority granted in Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), the Informal Request is DENIED. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.

75. IT IS FURTHER ORDERED that, pursuant to authority granted in Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), the Blue Sky Motions to Supplement are DENIED. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.

76. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, that the Wireless Telecommunications Bureau SHALL PROCESS File No. 0003065926, filed by the American Samoa Telecommunications Authority on June 11, 2007 and amended on April 28, 2009 and November 24, 2010, File No. 0003574303, filed by the American Samoa Telecommunications Authority on September 9, 2008, and amended September 24, 2008, and November 24, 2010, and File No. 0003574310, filed by the American Samoa Telecommunications Authority on September 9, 2008, and amended September 24, 2008 and November 24, 2010, consistent with this Order and the Commission's rules.

77. IT IS FURTHER ORDERED that any grant of File No. 0003065926, filed by the American Samoa Telecommunications Authority on June 11, 2007 and amended on April 28, 2009 and November 24, 2010, File No. 0003574303, filed by the American Samoa Telecommunications Authority on September 9, 2008, and amended September 24, 2008, and November 24, 2010, and File No. 0003574310, filed by the American Samoa Telecommunications Authority on September 9, 2008, and amended September 24, 2008 and November 24, 2010, shall be conditioned upon the implementation of the conditions for CMA733 American Samoa as described above.

FEDERAL COMMUNICATIONS COMMISSION

Jane E. Jackson  
Associate Chief  
Wireless Telecommunications Bureau