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By Electronic Mail

Ms. Rhonda Schnare
Office of General Counsel
Attn: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508
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***Re: 2003 Section 1377 Review—Antigua & Barbuda and Cable & Wireless
Monopolies in the Caribbean***

Dear Ms. Schnare:

AT&T Wireless Services, Inc. (“AWS”), hereby responds to the November 29, 2002, Federal Register notice of the Office of the United States Trade Representative (“USTR”) requesting comments on U.S. trading partners’ compliance with telecommunications trade agreements.¹ AWS, a provider of mobile wireless communications services, is expanding rapidly in Caribbean markets. But AWS’ ability to offer service and to profit from its investments in those markets has been stymied by outright violations of telecommunications trade agreements (as in Antigua & Barbuda) and by the monopoly position of Cable & Wireless plc and its subsidiaries (“C&W”) in many of those markets, which many national governments are still seeking to curtail.

¹ See 67 Fed. Reg. 71,229 (Nov. 29, 2002); Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, *codified at* 19 U.S.C. § 3106.

I. ANTIGUA & BARBUDA: FAILURE TO COMPLY WITH THE WTO AGREEMENT ON BASIC TELECOMMUNICATIONS AND THE WTO GENERAL AGREEMENT ON TARIFFS AND TRADE

Antigua & Barbuda imposes discriminatory and *ad hoc* regulatory requirements and demands on AWS, in violation of Antigua & Barbuda's schedule of commitments under the WTO Agreement on Basic Telecommunications, which includes adoption of the WTO Reference Paper.² Indeed, the Government of Antigua and Barbuda ("GOAB") has suggested that Antigua & Barbuda is not required to open its mobile wireless market to competition until 2012, when, in fact, Antigua & Barbuda committed to such liberalization effective in 1998. These violations constrain AWS's ability to provide mobile wireless services in Antigua & Barbuda and to profit from its investment in the Antiguan market. These violations serve only to enrich the GOAB itself and to protect the GOAB's own mobile wireless service provider, the Antigua Public Utilities Authority ("APUA"), from competition.

In March 2002, AWS purchased a controlling interest in Antigua Wireless Ventures Limited ("AWVL"), a wireless carrier providing cellular services in Antigua & Barbuda. Locally-owned prior to the acquisition by AWS, AWVL was previously known by the names Observer Cellular Limited and AirTel. The GOAB licensed AWVL to provide such services in December 1997. Under Antiguan law, no prior government approval was required for AWS's acquisition of AWVL. AWVL's license authorizes it to operate in the 800 MHz band (824-894 MHz), the 900 MHz band (925-960 MHz), and the 1900 MHz band (1910-1990 MHz), and does not dictate the use of any particular wireless technology (*e.g.*, CDMA, TDMA, or GSM). AWVL does not now use all of its licensed frequencies. AWVL, with the additional capital provided by AWS, now seeks to upgrade its network by replacing outdated AMPS and TDMA technology with GSM technology (as AWS is doing in the United States), and by expanding AWVL's network coverage. AWS hopes to build its business by combining GSM roaming services for American and European tourists with a robust local service.

Two other wireless carriers compete with AWVL in Antigua & Barbuda. One is the GOAB itself, which acts as a wireless carrier using GSM technology (in competition with AWVL's proposed upgrades) through the APUA. APUA is a government agency that also owns and operates the monopoly local telephone company. AWVL's other competitor is Cable & Wireless (West Indies) Ltd., a subsidiary of the U.K. company Cable & Wireless plc, which also holds a monopoly on international long-distance services in Antigua & Barbuda until 2012.

² WTO Doc. GATS/SC/2/Suppl.1.

A. Frequency-Use Restrictions

In spite of AWVL's licenses for particular bands of frequencies, the GOAB has refused to allow AWVL to use the specific frequencies it needs to expand its service, thereby restricting AWVL's operations and ability to serve existing and potential new customers. GOAB has not subjected APUA or C&W to the undue delay suffered by AWS. These actions violate Antigua & Barbuda's national treatment, most-favored nation ("MFN"), and market access obligations under the WTO Agreement on Basic Telecommunications.

Specifically, AWVL must notify the GOAB whenever it wants to operate on particular frequencies within its licensed spectrum, and the GOAB is supposed to provide an acknowledgement—after which the additional frequencies may be used. With its acquisition by AWS, AWVL has notified the GOAB that it seeks to use particular frequencies, but no final approval has been received after months of waiting—and the GOAB has offered no legitimate explanation for the delay.

B. Equipment and Antenna Siting Lease Restrictions

To expand the AWVL network, AWVL must build new cell sites. AWS sought to ensure that as many sites as possible would be built on land leased from the GOAB itself, so that the country as a whole would benefit economically from the construction. AWS has submitted proposed leases to build numerous sites on government land. But the GOAB then refused, without further explanation or consultations, to act on the proposed leases for any of those sites—thus arbitrarily restricting AWVL's operations. These actions, too, violate Antigua & Barbuda's national treatment, MFN, and market access obligations under the WTO Agreement on Basic Telecommunications.

C. Regulatory Transparency and Regulator Independence

Antigua & Barbuda has failed to establish a transparent regulatory process for carriers such as AWVL and investors such as AWS, and to establish an independent regulator. These shortcomings impair AWS's ability to operate and upgrade AWVL's networks, and violate Antigua & Barbuda's obligations under sections 4 and 5 of the WTO Reference Paper.

Specifically, the GOAB has failed to promulgate publicly available standards and procedures for licensing, ongoing regulation, other regulatory requirements, and dispute resolution, and to provide written documentation regarding GOAB decisions with respect to AWVL. The GOAB has never promulgated publicly available or clear standards and procedures for frequency use requests or for antenna siting leases. AWS has met with the GOAB Prime Minister on multiple occasions and has had numerous telephone conversations with (and made written requests to) other government officials in an effort to address service provision and related equipment

importation (discussed below) issues. But these contacts with the GOAB have provided no relief, as the GOAB lacks a transparent regulatory process by which AWS can challenge the government's actions—or even understand the basis for the government's actions or lack of action. The GOAB has promised to provide AWS with decisions in writing, and has consistently failed to do so.

Antigua & Barbuda has also failed to establish an independent regulator. It remains wholly unclear who in the GOAB retains responsibility for regulating telecommunications carriers in Antigua & Barbuda. At different times, AWS has been asked to deal directly with various governmental representatives (including the Prime Minister, the Cabinet, and the Agriculture Minister) and non-governmental representatives. Moreover, the GOAB's actions to date reflect the GOAB's failure to separate its regulatory mandate from its operation of a carrier—APUA—that should be subject to that mandate.

D. Differential Duties and Customs Fees

Antigua & Barbuda imposes differential duties and customs fees on imports of telecommunications equipment, depending on the nationality of the importer and its relationship to the GOAB, in violation of Antigua & Barbuda's tariff bindings under the General Agreement on Tariffs and Trade 1994 ("GATT"), as well as its national treatment and MFN obligations under the GATT. These duties and fees impede the importation of equipment critical to AWS's operation and upgrade of AWVL's network, and discriminate against AWS as compared with its competitors, APUA and C&W.

Specifically, the GOAB has prevented AWS from importing US \$3.4 million of advanced telecommunications equipment unless AWS agrees to pay a combined duty and customs fee rate of approximately 50 percent on the equipment. Yet until its acquisition by AWS, the GOAB allowed AWVL to import such equipment on a duty- and customs-fee-free basis. Moreover, it appears that both APUA and C&W have been and continue to enjoy duty- and customs-fee-free concessions for their own imported equipment. Most recently, the GOAB has scheduled an auction for AWS's equipment, which has remained on the docks in Antigua & Barbuda.

The exact combined duty/customs fee rate for telecommunications equipment under Antigua & Barbuda's tariff bindings is unclear.³ But the discriminatory application of those duties and fees certainly violates Antigua & Barbuda's national treatment and MFN obligations under the GATT.

³ See Schedule XCVII – Antigua & Barbuda, Part I – Most-Favored Nation Tariff, Section II – Other Products.

II. CABLE & WIRELESS CARIBBEAN MONOPOLIES: DIFFICULTIES IN OBTAINING INTERCONNECTION

AWS urges USTR to monitor and support the efforts of Caribbean governments to check C&W's market power and limit its anticompetitive abuses, particularly with respect to interconnection.⁴ To date, C&W has failed to provide AWS with timely, nondiscriminatory, cost-oriented, unbundled, and transparent interconnection in St. Lucia, St. Vincent and the Grenadines, and Dominica, and AWS suspects that it may encounter similar problems as it expands into other Caribbean markets served by C&W. AWS therefore asks that USTR monitor and support the efforts of those governments to comply, where adopted, with their national treatment, MFN, and market access obligations under the WTO Agreement on Basic Telecommunications and with the interconnection obligations of the WTO Reference Paper.

As the former colonial telephone and telegraph company connecting the British empire, C&W continues to exercise *de jure* and *de facto* monopoly power in many of the domestic wireline, wireless, and international services markets in the Caribbean and Bermuda.⁵ Of those C&W markets, Antigua & Barbuda, Barbados, Dominica, Grenada, Jamaica, St. Kitts & Nevis, and Trinidad & Tobago have made specific commitments as part of the WTO Agreement on Basic Telecommunications, and of that subset, all but St. Kitts & Nevis have adopted the WTO Reference Paper.⁶ The U.S. Government also takes the position that British overseas territories are implicitly covered by the U.K. WTO commitments.⁷

The members of the East Caribbean Telecommunications Authority ("ECTEL")—Dominica, Grenada, St. Kitts & Nevis, St. Lucia, and St. Vincent & the Grenadines—have adopted model legislation governing telecommunications regulation and licensing, including interconnection matters, on a regional basis.⁸ In April 2001, ECTEL's members entered into an agreement with C&W providing for a transition to full competition and an end to the C&W monopolies in those

⁴ WTO Reference Paper, § 2, available at <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm>

⁵ C&W operates in the following independent Caribbean countries: Antigua & Barbuda; Barbados; Dominica; Grenada; Jamaica; St. Kitts & Nevis; St. Lucia; St. Vincent & the Grenadines; and Trinidad & Tobago. C&W also operates in the following British overseas territories in the Caribbean and mid-Atlantic: Anguilla; Bermuda; British Virgin Islands/Tortola; Cayman Islands; Montserrat; and Turks & Caicos Islands.

⁶ See List of WTO Telecommunications Commitments and Exemptions, <http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm>.

⁷ See *Cable & Wireless USA, Inc.*, 15 FCC Rcd. 3050, 3052 (Int'l Bur. 2000) (referencing a U.S. Department of State letter—issued over the objections of the British Embassy—concluding that Bermuda should be treated as subject to U.K. WTO commitments).

⁸ ECTEL Model Telecommunications Bill (June 29, 2000) ("ECTEL Model Bill"), available at <http://www.oecs.org/ectel/Ectel_Docs/Committee_legislation.pdf>.

markets.⁹ The ECTEL Model Bill, which the ECTEL members have all enacted at the national level, requires all carriers, including C&W, to interconnect with other requesting carriers, to respond to interconnection requests within a set time period, to refuse interconnection only on reasonable technical grounds, and to provide interconnection on a cost-oriented, unbundled basis.¹⁰ The ECTEL Model Bill does not, however, impose a deadline for concluding interconnection negotiations or resolving interconnection disputes.¹¹

But C&W has long tried to use its imposing economic power to delay or prevent ECTEL and its member governments from adopting new pro-competitive regulations—to the detriment of its potential competitors, such as AWS. For example, during the negotiations with the ECTEL member governments, C&W issued a press release and took out full-page newspaper advertisements in St. Lucia threatening to retreat from the St. Lucia market altogether.¹² And the transition since the conclusion of the C&W Agreement has not been a smooth one, with regulators complaining regularly and publicly about C&W backsliding.¹³

AWS's attempts to negotiate interconnection agreements with the C&W Carrier Services Group have been consistent with the experiences of the ECTEL member governments. For markets where ECTEL and the respective member government has granted AWS a license (in St. Lucia, St. Vincent & the Grenadines, and Dominica), the C&W Carrier Services Group has stalled interconnection negotiations in an effort to delay service offerings by AWS's affiliates in C&W's markets. For example, in St. Lucia, the C&W Carrier Services Group has:

- Failed to provide complete pricing information, even some twelve weeks after AWS (through its affiliate, Wireless Ventures (St. Lucia) Limited) first requested interconnection discussions;

⁹ Agreement Between the OECS Contracting States and Cable & Wireless (Apr. 2001) ("C&W Agreement"), available at <<http://www.oecs.org/ectel/Ectel Docs/OECS-C&WAgree.pdf>>.

¹⁰ ECTEL Model Bill §§ 46, 48.

¹¹ *Id.* § 46.

¹² See Press Statement: Why Cable & Wireless is making plans to leave St. Lucia (Feb. 9, 2001) (stating that "[i]t is with regret that Cable & Wireless announces that, with the expiry of its existing licences on 31 March 2001, it is making plans to leave St. Lucia and has informed the Government of St. Lucia of this. Cable & Wireless is disappointed that its best efforts to resolve the issues in St. Lucia through negotiation have proved unsuccessful."), available at <<http://www.candw.ky/aboutus/pressreleases/PRpages/2001/feb9.html>>.

¹³ See, e.g., *Is C&W Stalling?*, ST. LUCIA MIRROR (Sept. 20, 2002) (quoting ECTEL chairman Calixte George as saying that "Cable & Wireless never gives full information"), available at <<http://www.stluciamirroronline.com/2002/sep20/lead.htm>>.

- Failed to provide any substantive details of the interconnection arrangements between itself and its wireless operations, stating instead that it provides interconnection to its wireless affiliate without any agreement at all, thus precluding any examination of whether the C&W Carrier Services Group grants any preferential and discriminatory treatment to its own wireless affiliate;
- Insisted on inclusion in the interconnection agreement of an Access Deficit Contribution (“ADC”)—an assessment roughly analogous to a universal service fund assessment—the rate for which AWS believes must be determined by the St. Lucian regulator pursuant to St. Lucian law, rather than by a contract between the carriers; and
- C&W failed to respond to AWS’s substantive comments and proposed revisions to the interconnection agreement, including a proposal for an interim interconnection agreement to be applied until the conclusion of a longer-term agreement and a request for early ordering for interconnection equipment.

As a result of C&W’s actions, AWS’s St. Lucian affiliate missed its proposed service launch date of December 2002. On December 20, 2002, AWS filed a complaint with St. Lucia’s National Telecommunications Regulatory Commission under its dispute resolution rules stating that C&W has failed to negotiate in good faith to provide timely interconnection as required by St. Lucian law. AWS remains hopeful that the St. Lucian regulator will enforce C&W’s interconnection obligations, and that complaints in other Caribbean markets will not be necessary. But AWS also expects that C&W will fight vigorously to protect its *de jure* and *de facto* monopolies.¹⁴

These C&W actions, if left unchecked by ECTEL and national regulators, would violate national treatment and MFN obligations under the WTO Agreement on Basic Telecommunications by affording more favorable treatment to the local C&W carrier and its U.K. parent than to AWS. They would also violate market access obligations under the WTO Agreement on Basic Telecommunications by precluding AWS from entering into local mobile wireless telecommunications markets for which it holds, or seeks to obtain, a license. Finally, these actions would violate the interconnection provisions of the WTO Reference Paper by denying to AWS timely, nondiscriminatory, cost-oriented, unbundled, and transparent interconnection between carriers with market power and other carriers.

¹⁴ AWS is not the only C&W competitor to have complained about C&W’s refusal to provide timely, nondiscriminatory, cost-oriented, unbundled, and transparent interconnection. In November 2002, Digicel—a competitive wireless carrier based in Jamaica and backed by Irish investors—filed formal complaints with regulators in St. Lucia and St. Vincent & the Grenadines in an effort to obtain interconnection with C&W in those markets.

* * *

For the reasons described above, AWS urges the U.S. Government to work aggressively to ensure Antigua & Barbuda's compliance with its WTO commitments and to monitor the efforts of Caribbean governments to curtail C&W's market power and anticompetitive abuses and to ensure timely, nondiscriminatory, cost-oriented, unbundled, and transparent interconnection pursuant to the WTO Agreement on Basic Telecommunications.

Respectfully submitted,

/s/

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