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

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| In the matter of | ) | |
| Eastlink International (USA) Inc. | ) | IB Docket No. 12-311 |
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| Petition to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Bermuda Route | ) | File Nos. ISP-PDR-20120622-00002 and ITC-MOD-20120622-00263 |

## MEMORANDUM OPINION AND ORDER

Adopted: June 11, 2013 Released: June 11, 2013

By the Chief, International Bureau:

## I. INTRODUCTION

1. In this Order, we grant the request of Eastlink International (USA) Inc. ("Eastlink") to modify its regulatory classification from dominant to non-dominant on the U.S.-Bermuda route.[1] In addition, we grant Eastlink's request that its affiliate, LinkBermuda Ltd. ("LinkBermuda")[2] be removed from the Commission's *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets* ("*Foreign Carriers List*").[3] We find that Eastlink has shown that LinkBermuda has less than 50 percent market share and lacks market power in the local access market, inter-city facilities or services market, and international transport market in Bermuda and thus has met the test to be reclassified as non-dominant on the U.S-Bermuda route and to have LinkBermuda removed from the *Foreign Carriers List*.

## II. BACKGROUND

2. In the *Foreign Participation Order*,[4] the Commission established a framework to encourage competitive entry into the U.S. telecommunications market, in fulfillment of the U.S.

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[1] *Petition for Declaratory Ruling under the List of Foreign Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets and Reclassification of Section 214 License to Non-Dominant Status under Section 63.10 of the Commission's Rules.* File Nos. ISP-PDR-20120622-00002 and ITC-MOD-20120622-00263 (filed June 22, 2012) ("Petition").

[2] LinkBermuda was formerly known as Cable & Wireless Bermuda Ltd. For purposes of this Order we shall refer to the company as LinkBermuda.

[3] *International Bureau Revises and Reissues the Commission's List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, DA 07-233, 22 FCC Rcd 945 (Int'l Bur. 2007). The *Foreign Carriers List* is available at http://www.fcc.gov/ib as "*Resources, Foreign Carriers Presumed to Possess Market Power*."

[4] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142, 95-22, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*"); Order on Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000).

commitments under the World Trade Organization ("WTO") Basic Telecom Agreement.[5] The Commission expressed concern, however, that a foreign carrier with market power[6] in an input market[7] on the foreign end of a U.S. international route has the ability to "leverage" that market power into the U.S. market for international telecommunications services, *i.e.*, use market power in its home market to affect competition adversely in the U.S. market, thereby harming U.S. consumers.[8] Firms with market power in an "upstream" input market can engage in discrimination in a "downstream" market by favoring one downstream entity at the expense of its competitors.[9] Where the upstream firm possesses market power, downstream competitors have few, if any, alternatives for the inputs that the upstream firm provides.[10] In order to complete a U.S. international call, a U.S. carrier must obtain as inputs various call termination services from foreign carriers in the destination country of the U.S. call, including international transport services, inter-city services within the destination country, and terminating access services within the local exchange of the called party.[11] A foreign carrier with market power in these input markets could favor one U.S. international carrier at the expense of its rivals by denying rivals access to these crucial termination services, or by providing the services at non-competitive prices or inferior service quality levels.[12] The ultimate effect of such discrimination would be to affect adversely competition in the U.S. international services market and harm U.S. consumers.[13]

3. The Commission found that an ownership affiliation between a U.S. carrier and a foreign carrier creates a heightened ability and incentive to engage in anti-competitive behavior.[14] Accordingly, the Commission adopted certain safeguards to ensure that U.S. affiliates of foreign carriers with market power on the foreign end of the route do not harm competition in the United States. Under the Commission's rules, a U.S. carrier that is affiliated with a foreign carrier that has market power on the foreign end of a route is presumptively classified as dominant for the provision of international telecommunications services on that route.[15] U.S. international carriers classified as dominant on a particular route are subject to certain requirements to safeguard competition.[16] These requirements include

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[5] The results of the World Trade Organization's basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services ("GATS") by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

[6] The Commission has defined market power as a carrier's ability to raise prices by restricting its output of services. *See Foreign Participation Order*, 12 FCC Rcd at 23951-52, ¶ 144.

[7] In producing goods or services, firms must obtain labor, capital, raw materials, and intermediate goods and services as "inputs" to the production process. The markets in which these inputs are obtained are termed "input markets." *Id.* at 23952-53, ¶ 145.

[8] *Id.* at 23952-53, ¶ 145, 23958, ¶ 157.

[9] *Id.* at 23952-53, ¶ 145. Markets in which a firm buys inputs to its production process are termed "upstream" relative to the market in which the firm sells its product, and a market in which a firm sells its product is termed "downstream" relative to the input markets.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 23952-53, ¶ 145, 23958, ¶ 157.

[13] *Id.* at 23958, ¶ 157.

[14] *Id.* at 23954, ¶ 147, 23992, ¶ 223.

[15] 47 C.F.R. § 63.10(a)(2), (3).

[16] 47 C.F.R. § 63.10(c), (e). *See also Foreign Participation Order*, 12 FCC Rcd at 23897-24022, ¶¶ 215-292.

separation requirements,[17] reporting requirements,[18] and certain conditions related to benchmark settlement rates.[19] Reclassification as non-dominant relieves a U.S. carrier of these requirements.

4. The Commission also found that a foreign carrier with market power can act anti-competitively with respect to the U.S. market even in the absence of a U.S. affiliate (*e.g.*, through a contractual agreement with a U.S. carrier).[20] Accordingly, the Commission established several competitive safeguards with which all U.S. international carriers must comply when providing international telecommunications services that terminate on the network of a foreign carrier with market power on the foreign end of a U.S. international route. These safeguards include the "No Special Concessions" rule[21] and a process by which the Commission or the International Bureau, on delegated authority, may consider actions in response to anticompetitive harm on a U.S.-international route.[22] Similarly, the Commission also has established competitive safeguards that apply to U.S. cable landing licensees when connecting with the network of a foreign carrier with market power on the foreign end of the U.S. international route.[23] The Commission's *Foreign Carriers List* identifies those foreign carriers with which exchange of traffic is subject to the requirements described above.[24] Removal of a foreign carrier from the *Foreign Carriers List* relieves U.S.-authorized carriers with which it corresponds of these requirements.

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[17] The U.S.-authorized carrier must provide service as an entity that is separate from its foreign affiliate. 47 C.F.R. § 63.10(c)(1). The U.S. carrier must have separate books of account and not jointly own transmission or switching facilities with its affiliate. 47 C.F. R. § 63.10(c)(1)(i)-(ii).

[18] The U.S.-authorized carrier must file quarterly traffic and revenue reports as well as quarterly provisioning and maintenance reports. 47 C.F. R. § 63.10(c)(2)-(3). The U.S.-authorized carrier also must file quarterly circuit status reports. 47 C.F.R. § 63.10(c)(4).

[19] The U.S. carrier may not provide facilities-based switched services on the route on which it is classified as dominant, unless its foreign affiliate on that route charges U.S. international carriers termination rates at or below benchmark settlement rates. 47 C.F. R. § 63.10(e). *See also International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC 19806 (1997) ("*Benchmarks Order*"); Report and Order on Reconsideration and Order Lifting Stay, FCC 99-124, 14 FCC Rcd 9256 (1999) ("*Benchmarks Reconsideration Order*"), *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

[20] *See Foreign Participation Order*, 12 FCC Rcd at 23954, ¶ 147, 23958, ¶ 157.

[21] Under the Commission's "No Special Concessions" rule, a U.S.-authorized international carrier is prohibited from accepting special concessions from a foreign carrier with respect to a route on the foreign end of which the foreign carrier possesses market power. 47 C.F.R. § 63.14(a) . For U.S. international carriers, special concessions are defined as exclusive arrangements involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangements are not offered to similarly situated U.S.-licensed carriers. 47 C.F.R. § 63.14(b). Such arrangements include operating agreements for the provision of basic services; distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operating characteristics such as provisioning and maintenance times; and any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers. 47 C.F.R. § 63.14(b)(1)-(3).

[22] *See* 47 C.F.R. § 63.22 (g); *International Settlements Policy Reform*, IB Docket No. 11-80, Report and Order, FCC 12-145, 27 FCC Rcd 15521 (2012).

[23] U.S. cable landing licensees are prohibited from accepting special concessions from any foreign carrier, including any entity that owns or controls a foreign cable landing station, with respect to a route on the foreign end of which the foreign carrier possesses sufficient market power to affect competition adversely in the U.S. market. 47 C.F.R. § 1.767(g)(5)(i) and Note to Paragraph (g)(5). In the case of cable landing licensees, special concessions are defined as exclusive arrangements involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary to land, connect, or operate submarine cables, where the arrangement is not offered to similarly situated U.S. submarine cable owners. 47 C.F.R. § 1.767(g)(5)(ii).

[24] *See Foreign Carriers List*. *See also* 47 C.F.R. § 1.767(g)(5) and Note to Paragraph (g)(5); § 63.22, Note 2.

## III. THE EASTLINK PETITION

5. Eastlink is authorized to provide U.S. international telecommunications services pursuant to Section 214 of the Communications Act of 1934, as amended.[25] In 2011, when Eastlink filed its international section 214 application, it acknowledged that it is affiliated with LinkBermuda,[26] which is included in the *Foreign Carriers List*.[27] Due to that affiliation, Eastlink agreed to be classified as a dominant carrier on the U.S.-Bermuda route.[28] Eastlink stated, however, that it did not believe that LinkBermuda had market power at that time, and that it might pursue reclassification at a later date.[29]

6. On June 22, 2012, Eastlink filed a request to modify its regulatory classification from dominant to non-dominant on the U.S.-Bermuda route and to have LinkBermuda removed from the Commission's *Foreign Carriers List*.[30] The International Bureau placed the Petition on public notice.[31] No comments were filed.

## IV. DISCUSSION

8. We find that Eastlink has demonstrated that LinkBermuda has less than 50 percent market share in (1) international transport facilities or services; (2) inter-city facilities or services; and, (3) local access facilities or services; and therefore presumptively lacks sufficient market power in these markets to affect competition adversely in the U.S. market for telecommunications services to Bermuda. Consequently, we will reclassify Eastlink as a non-dominant carrier on the U.S.-Bermuda route and remove LinkBermuda from the *Foreign Carriers List.*

9. Under section 63.13 of the Commission's rules,[32] a carrier that seeks to modify its regulatory status from dominant to non-dominant on a particular route must provide information to demonstrate that it qualifies for non-dominant classification under section 63.10 of the Commission's rules.[33] Section 63.10 states that "[i]f the U.S. carrier demonstrates that the foreign affiliate lacks 50 percent market share in the international transport and the local access markets on the foreign end of the route, the U.S. carrier shall presumptively be classified as non-dominant."[34] Similarly, under section 63.22 of the Commission's rules, a party seeking to remove a foreign carrier from the Commission's *Foreign Carriers List* bears the burden of submitting information to the Commission sufficient to demonstrate either that the foreign carrier on the *Foreign Carriers List* lacks 50 percent market share in the

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[25] 47 U.S.C. § 214. *See* Petition at 1, n.1. Eastlink holds international section 214 authorization ITC-214-20110624-00181.

[26] *See* Eastlink International USA Inc., Section 214 Application, ITC-214-20110624-00181 (filed June 24, 2011) ("214 Application"). Eastlink is affiliated with LinkBermuda under the Commission's rules because they are both wholly-owned subsidiaries of K-Right Communications Limited. *See* 47 C.F.R. § 63.09(e) (defining when carriers are affiliated).

[27] *Foreign Carriers List* at 3. The *Foreign Carriers List* uses LinkBermuda's prior name: Cable & Wireless Bermuda.

[28] 214 Application, Attachment 1. *See also* International Authorizations Granted, ITC-214-20110624-00181, Public Notice, DA 11-1960, 26 FCC Rcd 16360, 16361 (Int'l Bur. 2011).

[29] 214 Application at n.7.

[30] *See* Petition.

[31] *Petition of Eastlink International (USA) Inc. to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Bermuda Route*, Public Notice, DA 12-1703, 27 FCC Rcd 13288 (Int'l Bur. 2012).

[32] 47 C.F.R. § 63.13.

[33] 47 C.F.R. § 63.10.

[34] 47 C.F.R. § 63.10(a)(3).

international transport and local access markets on the foreign end of the route served by the foreign carrier or that the foreign carrier nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market.[35]

10. Eastlink argues that LinkBermuda does not possess market power on the U.S.-Bermuda route.[36] Eastlink acknowledges that LinkBermuda was the monopoly provider of international service in Bermuda, but argues that the Bermuda telecommunications marketplace has undergone major liberalization since the mid-1990s, and multiple new facilities-based carriers have been licensed to compete against LinkBermuda.[37] Eastlink argues that under the Commission's rules, it should be presumptively classified as non-dominant because LinkBermuda now has a less than a 50 percent share in the three relevant markets in Bermuda: (1) international transport facilities and services, including cable landing station access; (2) inter-city facilities or services; and, (3) local access facilities and services.[38] Therefore, Eastlink states that LinkBermuda lacks sufficient market power in Bermuda to affect competition adversely in the U.S. market.[39]

11. In support of its arguments, Eastlink notes that LinkBermuda's Class A license issued in 1999 limits it to providing only international long distance service. Therefore, Eastlink asserts that LinkBermuda is not authorized to, nor does it, provide inter-city facilities or services or local access facilities or services.[40] Regarding the international transport facilities or services market, Eastlink states that the Bermuda Ministry of Environment, Planning and Infrastructure Strategy (MEIPS), the Bermuda government ministry responsible for the telecommunications sector, has found that LinkBermuda has less than 50 percent share of the international telecommunications facilities or services market in Bermuda.[41] Eastlink includes a letter dated October 11, 2011, from MEIPS stating that that Bermuda is served by three international long distance facilities-based carriers, including LinkBermuda, and four Voice over Internet Protocol (VOIP) resellers, none of which is specified as dominant by MEIPS.[42] The letter concludes that LinkBermuda "continues to be a competitive carrier with a market share that is less than 50 percent of its market and therefore is no longer subject to the obligations of a dominance specification."[43]

12. Based on the record in this proceeding, we find that Eastlink has shown that LinkBermuda lacks market power in the local access market and cannot leverage such power into the U.S. market for telecommunications services between the United States and Bermuda. We thus conclude that LinkBermuda lacks sufficient market power on the foreign end of the U.S.-Bermuda route to affect competition adversely in the U.S. market. Therefore we will reclassify Eastlink as a non-dominant carrier on the U.S.-Bermuda route and remove LinkBermuda from the *Foreign Carriers List.*[44]

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[35] 47 C.F.R. § 63.22, Note 2. *See Foreign Participation Order*, 12 FCC Rcd at 23952, ¶ 145, 23959-62, ¶¶ 161-63, and n.317 and n.318. *See also Foreign Participation Order*, 12 FCC Rcd at 23995-96, ¶¶ 231-233.

[36] Petition at 1.

[37] *Id.* at 4-6.

[38] *See id.* at 1, 7 (*citing* 47 C.F.R. § 63.10(a)(3)).

[39] *Id.*

[40] *Id.* at 4.

[41] *Id.* at 3-4.

[42] Petition at Exhibit D. The letter refers to LinkBermuda as "Cable and Wireless Ltd." or "CWBL," its prior name.

[43] *Id.*

[44] *See* 47 C.F.R. §§ 63.10(a)(3), 63.22, Note 2.

## V. ORDERING CLAUSES

14. Accordingly, it is ORDERED that pursuant to sections 63.10 and 63.13 of the Commission's rules, 47 C.F.R. §§ 63.10 and 63.13, the request of Eastlink International (USA) Inc. to modify its regulatory classification from dominant to non-dominant on the U.S.-Bermuda route IS GRANTED.

15. IT IS FURTHER ORDERED that pursuant to section 63.22 of the Commission's rules, 47 C.F.R. § 63.22, the request of Eastlink International (USA) Inc. to remove Cable & Wireless Bermuda, now known as LinkBermuda Ltd., from the Commission's List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets IS GRANTED.

16. This order is issued under section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, and is effective upon adoption. Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106 and 1.115, may be filed within 30 days of the date of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Mindel De La Torre
Chief, International Bureau