

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
ARCOS-I USA, Inc.)	
A.SurNet, Inc.)	
Columbus Networks USA, Inc.)	
<i>Licensees,</i>)	File No. SCL-T/C-20141121-00013
)	
Columbus Networks, Limited)	
<i>Transferor,</i>)	
)	
and)	
)	
Cable & Wireless Communications Plc)	
<i>Transferee</i>)	
)	
Application for Transfer of Control of)	
Cable Landing Licenses)	
)	
Applications for)	
)	
Columbus Networks)	
Telecommunications Services USA, Inc.)	File No. ITC-T/C-20141121-00304
and Columbus Networks Puerto Rico, Inc.)	File No. ITC-T/C-20141121-00307
Applications for Transfer of Control from)	
Columbus Networks, Limited to)	
Cable & Wireless Communications Plc)	
_____)	

Accepted/Files

JAN 21 2015

Federal Communications Commission
Office of the Secretary

Reply to Response

By its attorney, Digicel International, Inc. and its subsidiaries (collectively, "Digicel") hereby reply to the January 14, 2014 Response of Columbus Networks, Limited, ARCOS-1 USA, Inc., A.SurNet, Inc., Columbus Networks USA, Inc., Columbus Networks Telecommunications Services USA, Inc., Columbus Networks Puerto Rico, Inc. (collectively, "Columbus") and Cable & Wireless Communications Plc ("Cable &

Wireless” and, together with Columbus, the “Applicants”) in the above-captioned matter. In their Response, Applicants boldly assert that their proposed merger “raises no concerns for U.S. carriers,” that there is no “rationale for imposing conditions on the proposed transaction,” and that the protective conditions Digicel requests are “unprecedented, unnecessary and misguided.”¹ For the reasons set forth below, Digicel respectfully submits that these arguments are without merit, inconsistent with the facts at hand, and cannot be squared with long standing Commission precedent. Digicel further submits that Applicants’ showing is replete with misrepresentations belied by the public record (and in some cases, Applicants’ own web sites) and distortion of market realities, and thus raises substantial and material questions of fact which mandate that their Applications be set for hearing.

I. The Anti-Competitive Impact of the Proposed Merger is Beyond Dispute

Applicants contend that “there is no evidence that the Proposed Transaction ...will have a substantial adverse impact on competition between the U.S. and foreign points, *as less than 20% of the Americas regional international subsea capacity market is affected by the Proposed Transaction.*” Response, pp. 2-3 (emphasis added). To buttress their case that the impact of their merger will be minimal, Applicants further argue that “the combined activated capacity between the Caribbean and the Rest of the World (“RoW”) held collectively by Columbus and C&W is less than 10%.” Id. at p. 5.

Digicel respectfully submits, however, that the more appropriate analysis in this proceeding is not on the whole of the Americas region, but in the Caribbean sub-

¹ Response, pp. iii, 3.

region, and particular islands within that region, where the market power held by Columbus and C&W will be most concentrated. Such a route-specific analysis of international transport capacity is consistent with Commission precedent, and more relevant where, as here, distinct routes to particular islands are particularly affected by the proposed transaction.² Likewise, the appropriate analysis for the Commission should not be between the Caribbean region and the rest of the world, as Applicants urge, but between the United States and the Caribbean region, and particular islands within that region.

Analyzing the available data from this framework, one arrives at a much different conclusion than that which Applicants advocate. According to the Commission's 2012 Section 43.82 Circuit Status Data Report, released May 2014, in the Americas region there are projected to be 182,133,827 64 Kbps submarine cable circuits in 2015.³ Of these circuits, however, 74,450,900 circuits are from the SAM, SAC and PAC cables which do not have landing points between the US and the Caribbean. Accordingly, in the Caribbean sub-region, there are, according to the Commission's report, only 107,682,927 circuits. Of these circuits, nearly half (48.49%) are from submarine cables in which, according to public sources, Columbus and/or Cable & Wireless hold ownership interests (Taino Carib, Antillas 1, PANAM, Americas 2, Maya 1, CFX, Gemini, CBI and PCCS).⁴

² *In the Matter of Applications Filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer of Control*, DA 11-1643, released September 29, 2011, ¶ 31 and cases cited therein.

³ https://apps.fcc.gov/edocs_public/attachmatch/DOC-327090A2.pdf

⁴ To make their case, Applicants conveniently omit from their calculations cables in which, according to public sources, one or both of them hold ownership interests – Taino Caribe, Antillas 1, Americas II, and Pan Am, and assert that Columbus has no ownership interests in these systems. This

Even this calculation, however, greatly understates the impact of the proposed transaction on the region. The Commission's Section 43.82 Circuit Status Report, for example, reflects no submission by ARCOS which, according to the Columbus web site, has 450 Gbps lit capacity.⁵ Nor does it include the capacity of other affiliated submarine cable networks in the Caribbean region appearing in the Columbus web site: Fibralink (40 Gbps); EC Link (40 Gbps); Gemini Bermuda and CBUS (160 Gbps); CJFS and JSCFS (450 Gbps); and East-West Cable (40 Gbps); ECFS (200 Gbps).⁶ Applicants' decision to exclude these systems from their competitive analysis is clearly self-serving and casts doubt on their many assertions that they "hold less than a majority of activated and design capacity" within the Caribbean, and that there is "significant capacity under third party control." Response at pp. 5, 6.

Other aspects of Applicants' competitive analysis are plainly flawed as well. In Jamaica, Applicants acknowledge that they have interests in a majority of cable systems, but deny that this poses a competition problem since Digicel and other customers can either purchase capacity on the ALBA system to Cuba or build their own network to Jamaica. Neither of these are plausible alternatives in the foreseeable future. Applicants neglect to mention, for example, that the ALBA cable laid dormant for 2 years, and is not immediately accessible.⁷ Nor do they provide any basis to suggest that it would be economical or timely to lay a new undersea cable

assertion cannot be squared with Columbus' own web site, see *infra*, and with publicly available information on the ownership of submarine cable networks in the Caribbean. See www.submarinemap.com.

⁵ <http://www.columbus-networks.com/network-systems#ARCOS-1>.

⁶ <http://www.columbus-networks.com/network-systems#subsea>

⁷ See <http://research.dyn.com/2014/12/whats-next-cuba/#!prettyPhoto>.

could be laid in any reasonable period.⁸ In their analysis, Applicants also overlook the fact that in Jamaica, they control over 98% of the market for residential internet and telephone service.⁹

Similarly, Applicants contend that “the Proposed Transaction will have no impact in the Cayman Islands as Columbus controls no submarine landing in the Cayman Islands.” Response at p. 8. As Digicel has noted, however, in the Cayman Islands, there are only two submarine cable systems, CJFS, owned by C&W, and Maya-1, in which both C&W and Columbus hold ownership interests. While Applicants attempt to minimize the competitive issues this scenario presents by claiming that both hold only a minority interest in the Maya -1 network, the fact remains that after the merger only one company, Cable & Wireless, will have ownership interests in the Cayman Islands’ two cable networks.

In the Dominican Republic, Applicants similarly allege that Digicel’s assertion that five of the four cables landing in the DR are owned in whole or in part by Cable

⁸ Applicants also provide a fascinating reinterpretation of their strategic alliance, suggesting that Digicel have benefited price reductions offered by the alliance and that “Digicel’s significant market power, both in Jamaica and across the region, ensures that the combined business cannot discriminate against it.” Response, p. 8. While Digicel negotiated a short term contract with the alliance last year, its ability to negotiate such arrangements in the future with a monopoly carrier will be substantially compromised. Applicants’ assurance that Digicel’s “significant market power” is patently absurd, given the realities of the marketplace in the region, and yet another example of the Applicants’ arrogance.

⁹ Columbus and Cable & Wireless also control the fixed broadband market in Jamaica. See <http://www.jamaicaobserver.com/business/Flow-now-has-half-of-fixed-broadband-market-16812160>. Recognizing the anticompetitive implications of the proposed transaction, the Jamaica Ministry of Science, Technology, Engineering and Mining has imposed a condition on the merger, requiring Cable & Wireless to provide access to International bandwidth on a non-discriminatory basis noting that effective competition in this market segment necessitates that smaller operators have access to concessionary terms to enable competitive resale of services. A copy of this ruling is available upon request.

& Wireless or Columbus is “misleading” since “unaffiliated third parties own a substantial majority of the activated and design capacity across all cables landing in the Dominican Republic.” Response, p. 9. Nothing in the Commission’s Section 43.82 Circuit Status Report, however, supports this contention, and Applicants have cited no evidentiary support themselves. What is verifiable is that, of the 5 submarine cable networks landing in the Dominican Republic, Applicants have ownership interests in four (Fibralink, East-West, ARCOS, and Antillas 1).¹⁰

Applicants likewise label as “misleading” the fact that Haiti is served by only two cables, one of which is owned by Columbus (Fibralink) and the other in which Cable & Wireless hold a majority ownership interest through its subsidiary The Bahamas Telecommunications Company Limited. While it is true, as Applicants state, that unaffiliated third parties such as Digicel can provide wholesale capacity in Haiti, they can only do so by purchasing the underlying capacity from either Columbus or Cable & Wireless.

Also “misleading” according to Applicants is the Digicel’s assertion that Applicants hold ownership interests in all cables currently landing in the BVI and providing connectivity to the US and within the region. According to public records, however, Cable & Wireless and/or Columbus hold ownership interests in all four cables serving, or that will serve the BVI: CBUS, Taino-Caribe, ECFS, EWC, and PCCS.¹¹ Applicants also neglect to mention that Cable & Wireless will own and operate the cable landing station for the PCCS cable in the BVI, a fact which

¹⁰ <http://www.submarinecablemap.com/#/country/dominican-republic>

¹¹ See www.submarinecablemap.com

Applicants categorically deny in their Application.¹²

In sum, Applicants' competitive analysis is selective and self-serving, dismissing certain critical facts as "misleading," ignoring or denying other indisputable facts outright, raising multiple irrelevancies, and making other allegations without any proof whatsoever. This is not at all surprising, given Applicants' willingness in their Application itself to certify, for example, that Cable & Wireless "is not a foreign carrier, and does not directly own a cable landing station in any foreign country." Application, p. 14. Where, as here, the record presents substantial and material questions of disputed fact, the Commission has stated that it must designate the applications for hearing,¹³ and Digicel respectfully submits that it do so here.

II. The Commission Should Impose Additional Protective Conditions in this Case

In their Response, Applicants assert that the protective conditions sought by Digicel are unnecessary and unwarranted. The Commission has frequently affirmed however, that "our public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure the public interest is secured by the transaction."¹⁴ As Applicants themselves acknowledge, moreover, although the Commission generally imposes standard safeguards to detect and defer anti-competitive behavior associated with market

¹² See Cable & Wireless certification that "it is not a foreign carrier, and does not directly own a cable landing station in any foreign country." Application, p. 14.

¹³ *In the Matter of Applications Filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer of Control*, *supra* at ¶¶ 10 and 12 and cases cited therein.

¹⁴ *In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, FCC 08-258, released November 10, 2008, ¶ 29, and cases cited therein.

power in foreign markets, in “exceptional circumstances” additional protective conditions may be in order.

Digicel respectfully submits that such exceptional circumstances are operative here, where Applicants will have absolute monopoly control over landing facilities in Jamaica, the Cayman Islands, the Dominican Republic, Haiti, the British Virgin Islands, Anguilla, and Turks and Caicos. Contrary to Applicants, the additional conditions sought by Digicel – common carrier classification and rate regulation – are not unprecedented and, in the instant case would be entirely appropriate given the extraordinary nature and ramifications of the proposed transaction.

III. The Commission Should Designate the Applications for Hearing

In their joint Response, Applicants urge the Commission to reject Digicel’s “unfounded” request to conduct an inquiry into whether their 2013 strategic alliance effectuated in unauthorized *de facto* transfer of control. Response, p. 20. Applicants assert that “all necessary regulatory requirements were complied with” and that they were “transparent and honest” about their arrangement, but the fact of the matter is that they did not disclose their alliance with the Commission, much less seek its prior approval or ruling that no prior approval was required. While Applicants assert that no *de facto* or *de jure* transfer of control occurred, this assertion is patently self-serving, without evidentiary support, and reminiscent of Applicants’ assertions in their recent filings that, for instance, Cable & Wireless is not a foreign carrier, and that Columbus does not have an ownership interest in submarine cable systems despite evidence to the contrary on its own and other

reputable web sites. Digicel respectfully submits that the Commission should use its authority to investigate this matter and establish the true facts underlying the parties' alliance.

IV. Conclusion

For the reasons set forth above and in its original Petition, Digicel respectfully submits that the proposed merger will have a substantial adverse impact on competition for telecommunications services between the United States and other foreign points. Digicel urges the Commission to set the applications for hearing and to condition any grant of the Application on the imposition of protective obligations on the Applicants to address these adverse consequences. Digicel further urges the Commission to initiate an inquiry into whether the 2013 strategic alliance between Columbus and Cable & Wireless constituted a de jure or de facto transfer of control, in contravention of the Commission's rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric Fishman, do hereby certify that on this 20th day of January 2015, a copy of the foregoing Reply was served via electronic mail to the persons listed below:

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