

# **ATTACHMENT 3**

Tuesday, February 17, 2015

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# Gov't approves LIME/Flow merger

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KINGSTON, Jamaica - Minister of Science, Technology, Energy, and Mining Phillip Paulwell on Thursday approved the transfer of control of Columbus Communications Jamaica Limited (FLOW) and Columbus Networks Jamaica Limited (CNJL) from their parent company Columbus International Inc to Cable and Wireless Communications Plc (CWC).

A statement from the ministry said that Paulwell was formally advised of the agreement to acquire all the shares of Columbus International Inc in November 2014, at which time a request was made for ministerial approval to transfer the control of FLOW and CNJL from Columbus International Inc to CWC.

CWC is the parent company of Cable and Wireless Jamaica Limited (LIME), which has fixed and mobile carrier and service provider licences to own and operate networks and provide telecommunications services into, out of and throughout Jamaica.

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**See the statement from the Ministry of Science, Technology, Energy, and Mining below:**

Minister of Science Technology Energy and Mining today, (January 15) approved the transfer of control of Columbus Communications Jamaica Limited (FLOW) and Columbus Networks Jamaica Limited (CNJL) from their parent company Columbus International Inc. to Cable and Wireless Communications Plc.

Cable and Wireless Communication Plc (CWC) by way of letter dated November 6, 2014 and Columbus November 7, 2014, formally advised the Minister of its agreement to acquire all the shares of Columbus International Inc. and concurrently requested Ministerial approval to transfer the control of Columbus Communications Jamaica Limited (FLOW) and Columbus Networks Jamaica Limited (CNJL) from their parent company Columbus International Inc. to CWC.

CWC is the parent company of Cable and Wireless Jamaica Limited (LIME) which has fixed and mobile carrier and service provider licences to own and operate networks and provides telecommunications services into, out of and throughout Jamaica.

The authority and actions of the Minister in relation to the assignment or transfer of control of licences is provided for in section 17 (2) and (3) of the Act.

In order to be satisfied as the Minister with responsibility for Telecommunications, advice was sought from the Office of Utilities Regulation. Further, in arriving at his decision note was taken of previous advice received from the Attorney General in relation to the Digicel Claro merger that the Telecommunications Act did not expressly authorise him to impose conditions in relation to the transaction.

"Nonetheless, taking into consideration the various concerns and views expressed publicly regarding the possible implications of the transaction, and as such certain assurances were sought and received including: existing termination rates agreed as a part of existing interconnection agreements will remain in effect until a new fixed termination rate is established by the OUR; CWC will be required to observe and comply with any limitations and or requirements of the licences whose control are being transferred to CWC. ; should there be a rationalization of the networks and/or the provision of different service packages offered by Flow and LIME, customers should have the option to keep their existing package or transfer to a more favourable one; customers opting to terminate their contracts should be allowed to do so without penalties; CWC should 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; all efforts and resources will be provided to ensure that the operations of LIME and Flow are ready to enable the implementation of number portability on by May 31, 2015; and in regards to Infrastructure or Facilities Sharing CWC should ensure that other Licensees are provided with non-discriminatory access to tangibles (including ducts, poles and landing stations) which could act as a competitive bottleneck prior to the development of rules governing infrastructure sharing.

"With respect to access to International Bandwidth through their subsea joint venture, CNL-CWC Networks, Inc. ("JVCO") CWC has indicated that the proposed CWC/Columbus merger has a zero net impact on JVCO or the subsea systems in Jamaica, which were already effectively operating together since the closing of the JVCO transaction in June 2013. JVCO nevertheless has sought to address the concerns by offering to continue to operate the subsea network business independently of the other business lines of CWC/Columbus as it has to date in providing all carrier and service provider customers with the requisite contractual assurances of confidentiality and that its information will not be used for unlawful activities such as price fixing and other anticompetitive behaviour", the Minister emphasized.

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# **ATTACHMENT 4**

**ASSURANCES AND COMMITMENTS FROM CABLE AND WIRELESS  
COMMUNICATIONS PLC (CWC) RE THE TRANSFER OF CONTROL OF COLUMBUS  
COMMUNICATIONS JAMAICA LIMITED (FLOW) AND COLUMBUS NETWORKS  
JAMAICA LIMITED (CNJL) FROM THEIR PARENT COMPANY COLUMBUS  
INTERNATIONAL INC.**

Ministry of Science, Technology, Energy and Mining  
January 20, 2015

The authority and actions of the Minister in relation to the assignment or transfer of control of licences is provided for in section 17 (2) and (3) of the Telecommunications Act ("the Act") which states respectively:

- (2) *A licensee may, with the prior approval of the Minister, assign its licence or any rights thereunder or transfer control of its operations.*
- (3) *An application for approval of an assignment or transfer under this section shall be made in writing to the Minister who shall grant such approval if he is satisfied that the assignee satisfies the requirements of section 11 (1) (a) to (b) as regards the obligations imposed on a licensee by this Act or the licence.*

In order to be satisfied as the Minister with responsibility for Telecommunications, advice was sought from the Office of Utilities Regulation (OUR). Further, the Minister in arriving at his decision took note of previous advice received from the Attorney General in relation to the Digicel Claro merger that Act did not expressly authorise the Minister to impose conditions in relation to the transaction.

Nonetheless, taking into consideration the various concerns and views expressed publicly regarding the possible implications of the transaction, the Minister's consideration with respect to the requirements of section 11(1) (a) to (b) of the Act took into account a number of issues and the following assurances from CWC were sought in these regard:

1. Existing termination rates agreed as a part of existing interconnection agreements will remain in effect until a new fixed termination rate is established by the OUR.
2. No additional joining service charges should be imposed because of the migration of customers from one network to another.
3. CWC will be required to observe and comply with any limitations and or requirements of the licences whose control are being transferred to CWC.

4. Should there be a rationalization of the networks and /or the provision of different service packages offered by Flow and LIME, customers should have the option to keep their existing package or transfer to a more favourable one. Customers opting to terminate their contracts should be allowed to do so without penalties. Customer-centric arrangements should remain in place for a period of not less than 15 months after approval of the transaction.
5. Connect with the internet exchange point (IXP) and peering with other users of same should be undertaken by January 31, 2015. In relation to the IXP CWC should refrain from;
  - 5.1. behaviour which is not in the best interest of the development of a vibrant Information and Communications Technology sector; and
  - 5.2. advocating for or subscribing to any governance structure that would result in tiered membership of the IXP or otherwise prevent open membership and participation in the IXP by all possible participants whether they are other Internet or network services providers, telecommunications companies or content providers.
6. CWC should 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.
7. All efforts and resources will be provided to ensure that the operations of LIME and Flow are ready to enable the implementation of number portability on by May 31, 2015.
8. With regard to Infrastructure/Facilities Sharing CWC should ensure that other Licensees are provided with non-discriminatory access to tangibles (including ducts, poles and landing stations) which could act as a competitive bottleneck prior to the development of rules governing infrastructure sharing by the OUR.
9. CWC will offer capacity to Resale and Indirect Access operators. Further where such contracts are currently in place the terms and conditions of same should be grandfathered into any new successor contracts arising from the transaction.

# **ATTACHMENT 5**



## **Update on regulatory processes in Caribbean**

### **1. Bill Woodcock Presentation**

The Caribbean Telecommunications Union ('CTU') is an intergovernmental organization that facilitates the exchange of knowledge by regulatory bodies in the region.

The CTU held a workshop on 10 December 2014 in Trinidad & Tobago at which the proposed acquisition was discussed.

Mr. Bill Woodcock, Executive Director of Packet Clearing House, gave a presentation on the impact of the proposed transaction on sub-sea fibre in the Caribbean region.

Packet Clearing House is a non-profit research institute based in San Francisco dedicated to understanding and supporting Internet traffic exchange technology, policy, and economics.

### **2. Jamaica**

Jamaica does not have a formal merger control process. The consent of the Minister of Science Technology Energy and Mining (the 'Minister') to the transfer of control of a licensee is required.

There are no merger control provisions in Jamaican law. While the Fair Competition Act contains anti-trust provisions, a recent ruling by the Jamaican High Court held that these provisions are not a basis for conducting a de facto merger control review.

On this basis the Minister proceeded to grant his consent on 20<sup>th</sup> January 2015 in the absence of any formal investigation of the competitive effects of the transaction being undertaken in Jamaica.

As part of the Minister's approval the merging parties provided certain assurances which included:

- International bandwidth to be provided on a non-discriminatory basis; and
- Non-discriminatory access to landing stations.

A copy of the assurances is attached hereto. In addition to being somewhat loosely worded, Digicel understands that the assurances are not set out in a formal remedies agreement and no monitoring or enforcement provisions are provided for.

Digicel made submissions to the Fair Trading Commission ('FTC') requesting that it act to ensure that a remedies agreement in line with international best practice is signed by the merging parties that includes more specific details on the commitments of the merging parties including timeframes for the provision of cost based access to international cables and facilities, and effective monitoring and enforcement provisions.

The FTC also received a request from the Caricom Competition Commission to report on the transaction (see below for further details).

However on 16<sup>th</sup> February 2015 the FTC issued a press release stating that it would not take any further action in relation to the proposed acquisition. A copy of the FTC press release is attached hereto.

Further approvals required:

The Broadcasting Commission of Jamaica must approve the transfer of control of a broadcasting license

Digicel provided a detailed submission to the Broadcasting Commission on 16 January 2015 requesting that the Broadcasting Commission impose certain remedies as clearance conditions including the divestment of duplicate submarine cables.

However it is unclear whether the Broadcasting Commission will impose conditions as it may consider that its mandate is limited to a binary decision either approving the transfer of control without conditions or not approving the transfer.

Digicel understands that no decision has been taken to date.

**3. A summary of the regulatory review of the transaction in the relevant Caribbean countries and details on Submissions made by Digicel**

**Barbados**

- Barbados is the only jurisdiction in the Caribbean affected by the proposed acquisition with a formal merger control process set out in legislation
- The proposed acquisition was notified to the Fair Trading Commission ('FTC') in November 2014 whose investigation is continuing.
- In Barbados the proposed transaction will create a monopoly over fixed telephony, broadband provided by fixed infrastructure, and cable television services.
- The FTC extended its investigation beyond the initial three month period provided by the Fair Competition Act
- Digicel has met with FTC officials and has made a detailed submission, which included:
  - A request that the FTC define a relevant market of access to cable landing stations;
  - A request that the FTC mandate cost plus access pricing to cable landing stations;
  - Divestment of duplicate fixed infrastructure;
  - Prohibition of bundles that cannot be replicated by competitors until such time as competitors are in a position to offer similar bundles;
  - Structural & accounting separation of the merged entity
- Separately, the consent of the Minister responsible for Telecommunications to a change of ownership of a licensee is also required.

- In taking this decision the Minister is advised by the Chief Telecommunications Officer who has stated that he intends to consult third parties before arriving at a decision.

### **Caricom Competition Commission**

- The Caricom Competition Commission (the 'Commission') is an institution of the Caribbean Community ('Caricom') of fifteen member states and five associate members to monitor competition
- The Commission may investigate business conduct and make determinations regarding the compatibility of business conduct with the rules of competition and other related provisions of the Treaty by which it was established. (The Revised Treaty of Chaguaramas.)
- On 28 January 2015 the Commission requested competition authorities and telecommunications regulators of member states to investigate the proposed acquisition and to report to it within 30 days. As part of this investigation the Commission sent an information request to Digicel and other third parties on 12<sup>th</sup> February 2015 and Digicel will respond to this.
- Digicel is not aware of any precedent whereby the Commission intervened to impose conditions on merging parties.

### **ECTEL markets**

- Five Eastern Caribbean nations operate a joint regulatory regime consisting of a regional body, the Eastern Caribbean Telecommunications Authority ('ECTEL') which advises and oversees the work of the National Telecommunications Regulatory Commission ('NTRC') in each member country.
- Three of the member countries are affected by the proposed transaction: Grenada, St. Lucia and St. Vincent & the Grenadines.
- The proposed transaction will create a monopoly over fixed telephony, broadband provided by fixed infrastructure, and cable television services in these countries.
- The position as regards international connectivity is less critical for these countries as the merging parties will face competition.
- ECTEL has requested the merging parties to submit an application for approval, however Digicel understands that no such application has been received.
- There is no formal merger control or anti-trust regime in these countries.
- A difficulty for these countries is that approval of the Telecommunications Minister is required only when there is a change in shareholding of an entity that is licensed in the country. Where a transaction concerns the transfer of shareholdings outside of the jurisdiction of each country the approval process does not apply.
- Digicel has made various submissions to ECTEL and the NTRCs however it is unclear whether these bodies have any ability to intervene.

## **Trinidad & Tobago**

- Trinidad & Tobago does not have a formal merger control process. The consent of the telecommunications regulator ('TATT') to the transfer of control of a licensee is required before it can be effected.
- TATT is conducting an assessment of the proposed transaction and has sought the views of third parties.
- Digicel has made detailed submissions to TATT.
- The position in Trinidad & Tobago is complicated by two additional factors, namely:
  - Cable & Wireless is a 49% shareholder in the incumbent fixed and mobile telecommunications operator in Trinidad & Tobago, TSTT.
  - TATT is conducting a tender for the award of a third mobile telecommunications concession and for LTE spectrum. Cable & Wireless and Columbus have both applied for these, while TSTT has also applied for the LTE spectrum.
- The impact of the proposed transaction on competition on retail markets in Trinidad & Tobago will depend to a large extent on how these issues are resolved.
- The position as regards international connectivity is less critical for these countries as the merging parties will face competition.
- Digicel has requested that TATT clarify the position as regards the shareholding of TSTT before turning to analyze the impact on competition of the proposed transaction.
- TATT's review is ongoing.

## **Other Submissions**

- Digicel has made submissions to the telecommunications regulators in Anguilla, the British Virgin Islands, the Cayman Islands, Haiti and in Turks & Caicos to request investigations into the monopolization of sub-sea fibre that will result from the proposed transaction and the imposition of conditions to ensure non-discriminatory access to these and to landing stations.
- Regulatory bodies in these countries have indicated their deep concern to Digicel.
- However, the ability of the regulatory bodies in these countries to intervene is unclear.

# **ATTACHMENT 6**



## **PRESS ADVISORY**

FAIR TRADING COMMISSION  
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TELEPHONE: (876) 960.0120-4  
FAX (876) 960.0763  
E-MAIL: [ftc@cwjamaica.com](mailto:ftc@cwjamaica.com)

February 16, 2015

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### **Court of Appeal decision halts FTC's investigation of LIME's acquisition of Flow**

In November 2014 the Fair Trading Commission (FTC), pursuant to Section 17 of the Fair Competition Act, commenced an investigation into the likely competitive effect of the proposal by Cable & Wireless Communications PLC (parent company of LIME) to acquire 100% ownership and control of Columbus International Inc (parent company of Flow).

However, the FTC has since discontinued its investigation based on a Judgment delivered by the Court of Appeal in December 2014. The Court held that while the FTC has jurisdiction over telecommunications matters and all agreements that are or are likely to be anti-competitive, it does not have such jurisdiction over agreements relating to the transfer of telecommunication licence, where such transfer has been approved by the relevant Minister pursuant to the Telecommunications Act.

The FTC has applied to the Court of Appeal for conditional leave to appeal the Court's decision before the Privy Council. The FTC is committed to fulfilling its mandate to maintain, encourage and promote competition in Jamaica for the benefit of businesses and consumers.

**David Miller**  
**Executive Director**