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June 4, 2012

VIA HAND DELIVERY

FILED/ACCEPTED

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

JUN - 4 2012

Federal Communications Commission  
Office of the Secretary

Attn: Chief, International Bureau

**Re: File No. SCL-LIC-20120330-00002, Latam Application for a License to Construct, Land and Operate an Undersea Cable System on a Private Carrier Basis**

Dear Ms. Dortch:

San Juan Cable, LLC d/b/a OneLink ("OneLink"), through counsel hereby submits its *Reply Comments of San Juan Cable LLC* with regard to the above-referenced application.

Should additional information be necessary in connection with this matter, please communicate directly with the undersigned.

Respectfully submitted,



James A. Stenger

Enclosure

cc: (via first class mail):  
Nancy J. Victory, Esq., Counsel for Applicant



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Application for a License to Construct,	)	
Land and Operate an Undersea Cable System	)	File No. SCL-LIC-20120330-00002
Linking the Continental United States,	)	
the Dominican Republic, Puerto Rico, Brazil,	)	
Columbia, Guatemala, and Mexico	)	
	)	
	)	
To: The Chief, FCC International Bureau	)	

**REPLY COMMENTS OF SAN JUAN CABLE LLC**

San Juan Cable LLC, d/b/a OneLink (“OneLink”), through its undersigned counsel and pursuant to Section 1.767 of the Commission’s Rules,<sup>1</sup> replies to the Opposition of Latam Telecommunications, LLC ("Latam") filed on May 22, 2012. Latam does not deny that it is owned and controlled by America Movil and that America Movil is the dominant carrier as to most of the proposed cable routes, particularly the route to Mexico. The Government of Mexico found that America Movil willfully and repeatedly violated Mexican telecommunications and anti-monopoly laws to the great detriment of other carriers and ultimately consumers. Those violations cannot be ignored and unequivocally demonstrate that Latam is not entitled to streamlined processing or to operate the proposed cable on a private carrier basis, free of the Commission's common carrier regulations.

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<sup>1</sup> 47 C.F.R. § 1.767.

**Mexico Did Not "Revoke" Its Findings That America Movil Willfully And Repeatedly Violated Telecommunications And Anti-Monopoly Laws**

Latam claims that it is entitled to streamlined processing and to operate the proposed cable on a private carrier basis because Latam "will agree to the reporting requirements in Section 1.767(1) of the FCC's rules."<sup>2</sup> According to Latam, the violations of law by its Mexican affiliates are "irrelevant to eligibility for non-common carrier status and streamlined treatment." Further, according to Latam, "the fine proposed by the Mexican government on the Applicants' affiliate, Telcel, has been revoked."<sup>3</sup>

The record fine was merely suspended during the pendency of a petition for reconsideration. Latam's representation to this Commission that the fine was "revoked" is patently false, according to America Movil's own sworn filings with the U.S. Securities & Exchange Commission (SEC).<sup>4</sup> The record in this proceeding to date shows that: a) America Movil is the ultimate owner of Latam and, therefore, the real party in interest with respect to the proposed submarine cable and the party that ultimately will control the cable; b) America Movil is the ultimate owner and, therefore, the real party in interest and exercised ultimate control over Telcel; c) the Government of Mexico found that Telcel engaged in willful and repeated violations of Mexican telecommunications and antitrust laws; d) the Government of Mexico imposed on Telcel the maximum possible fine; e) the fine imposed on Telcel is the largest fine ever imposed by the Government of Mexico on any telecommunications carrier; d) in an attempt to persuade the Government of Mexico to revoke the fine, America Movil submitted a petition

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<sup>2</sup> Opposition at 23.

<sup>3</sup> Opposition at 21.

<sup>4</sup> Id.

for reconsideration that includes a "series of undertakings", *i.e.*, promises to comply with the law; and e) the matter remains on reconsideration, the fine is merely suspended while the matter is on reconsideration and it remains to be seen whether the fine will ever be "revoked."<sup>5</sup>

As to America Movil's "undertakings", *i.e.*, promises to begin to comply with the law in Mexico, it remains to be seen whether the Government of Mexico will accept those promises as sufficient to remedy the violations and whether, in fact, America Movil will fulfill any of those commitments. Even if it does, America Movil will have been brought into compliance only by virtue of an extraordinary effort by the Government of Mexico. While Latam claims that the fine was revoked, it never claims that the findings of willful and repeated violations of law were revoked. Rather, America Movil confirmed those findings by its belated promises to stop violating the law. Only after years of litigation against America Movil and imposition of the maximum fine and the largest fine in history has the Government of Mexico finally persuaded America Movil to promise to comply with the law.

The reporting requirements in Section 1.767(1) of Rules only require Latam to report facilities provisioned from its affiliates. That rule does not require Latam to report special concessions that Latam grants to its affiliates for their use of the Latam cable. The Commission has a rule in Section 43.51 that requires carriers to report special concessions granted to affiliate

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<sup>5</sup> "Telcel has submitted a petition for reconsideration (*recurso de reconsideración*) to Cofeco. Under Mexican law, the submission of this petition automatically suspends the effectiveness of the April 2011 resolution....If Cofeco resolves to uphold its determination regarding the fine or any part of it, Telcel plans to seek an injunction (*amparo*) from a Mexican court against Cofeco's resolution. While there can be no assurance, we believe that payment of a fine arising from the Cofeco's resolution is not probable. It is, however, possible that Telcel will be unsuccessful in its legal challenges to the fine, in which event our financial position would be negatively affected." America Movil, SEC Form 20-F filed April 30, 2012 at 7, *see* <http://www.sec.gov/Archives/edgar/data/1129137/000119312512196609/d341769d20f.htm>.

carriers, but that rule only applies to common carriers, as Latam well knows.<sup>6</sup> The request for streamlined processing and private carrier status must be seen for what it is, namely a request that this Commission abandon oversight of Latam and permit Latam to offer special concessions to its America Movil affiliates with no oversight by this Commission. Latam, controlled as it is by America Movil, can only be expected to use an absence of oversight to engage in discriminatory and monopolistic behavior.

Based upon the undisputed regulatory history, America Movil, through Latam, can only be expected to engage in offering special concessions to America Movil affiliates that will amount to discriminatory treatment of other carriers and their customers and monopolistic behavior. This Commission should not disregard the willful and repeated violations of the telecommunications and antitrust laws of Mexico by America Movil's other subsidiary, Telcel, as "irrelevant" and should not grant the request for streamlined processing or private carrier status. Rather, the Commission should pull this application from the processing line and thoroughly examine it to determine what conditions need to be imposed, including either full common carrier regulation or, at a minimum, the imposition of some common-carrier-like regulations, including compliance with Section 43.51 on reporting special concessions.

#### **The Case Law Does Not Support Unconditional Private Carrier Authority**

Latam's contention that "market power is not part of [the] analysis" of whether Latam is entitled to streamlined processing and private carrier operation is simply wrong.<sup>7</sup> According to Latam, so long as Latam "certified that they will accept and abide by reporting conditions on all routes in which they are considered dominant," then the Commission has no discretion to deny

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<sup>6</sup> 47 C.F.R. Section 43.51, Contracts and Concessions.

<sup>7</sup> Opposition at 16.

streamlined processing or private carrier operation. Latam misstates the law. The cases show that the Commission retains discretion to impose common carrier regulation and a range of common-carrier-like conditions on Latam that go beyond the reporting requirements applicable to private carriers.

In its Opposition, Latam introduces two new case citations, both of which simply underscore the inappropriateness of Latam's request for streamlined processing and private carrier authority. In *Telefonica* the Commission reviewed the degree of market power that Telefonica would wield on each of the proposed cable routes and the Commission exercised its discretion to impose special conditions on Telefonica, notwithstanding the grant of private carrier status, stating:

Notwithstanding a Commission decision not to require a submarine cable system to be operated on a common carrier basis, the Commission retains the authority to impose common carrier or common-carrier-like obligations on the operations of that cable system, if the public interest so requires.<sup>8</sup>

Thus, the Commission is not required to simply grant Latam private carrier status based upon a mere certification by Latam that Latam will comply with private carrier reporting requirements. On the contrary, *Telefonica* holds that under the *NARUC I* standard, the Commission retains the discretion to consider a range of options, from common carriage regulation to the imposition of "common-carrier-like obligations." The second case introduced in the Opposition, *In the Matter of Australia-Japan Cable*, follows *Telefonica* and reaches exactly the same holding, that common-carrier-like regulations can be imposed, including conditions applicable to service on particular routes in the case of multi-route cables.<sup>9</sup>

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<sup>8</sup> *In the Matter of Telefonica SAM USA, Inc.*, 15 FCC Rcd 14915 (Aug. 10, 2000) at 13.

<sup>9</sup> *In the Matter of Australia-Japan Cable*, 15 FCC Rcd 24057 (Dec. 8, 2000) at 15.

In this case, the record is not developed enough to know what conditions should be applied to Latam under applicable case law. *Telefonica* and *Australia Japan* simply follow *NARUC I* and its progeny, such as *Cable & Wireless*, which OneLink discussed in its Comments. Without repeating that discussion, suffice it to state that in those cases the Commission established a two prong test - - the first prong of which requires the applicant to provide the Commission with information sufficient to enable the Commission to assess the market conditions and make a public interest determination as to whether private carrier operation should be permitted or will jeopardize the rights of competitors and consumers.<sup>10</sup> Latam has not met this test. Latam stonewalls the Commission based upon the assertion that other applicants, such as AT&T and Verizon, were not required to provide more information than Latam is providing.<sup>11</sup> This analogy fails for several reasons.

First, Latam has not demonstrated that the information that Latam provides, which consists of vague statements about other submarine cables and satellites serving the region, is on par with the information provided by other applicants in prior proceedings.<sup>12</sup> Second, the Latam application is for a multi-route, multi-country regional service, not simply a point-to-point cable,

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<sup>10</sup> The second prong simply requires the applicant to demonstrate that it will in fact operate the cable as a private carrier and not hold out service to the public generally. Latam indeed can be expected to negotiate individualized deals and that is exactly OneLink's concern, namely that there will be no oversight of the special concessions that America Movil will cause Latam to grant to America Movil subsidiaries in order to enhance its monopoly power and discriminate against other carriers.

<sup>11</sup> Opposition at 6.

<sup>12</sup> OneLink stands by its position that undersea cables provide the vast majority of cross-sea communications and that satellites play only a minor role, as the Commission and the Department of Homeland Security recognized when they imposed additional, detailed technical reporting requirements on submarine cable operators based on national security concerns. *See* FCC Information requests to submarine cable operators May 16, 2008 and DHS Information Requests to submarine cable operators Sept. 23, 2008.

and, accordingly, involves a more complex market analysis than do point-to-point cable applications. And, of course, none of the applicants cited by Latam were found to have engaged in willful and repeated violations of telecommunications and anti-monopoly laws, as was Latam's affiliate in Mexico.

Latam should not be permitted to stonewall the Commission. Its application should be pulled from streamlined processing and complete information should be obtained from Latam to enable the Commission to exercise its discretion to impose common-carrier-like obligations in whole or in part, including on particular routes.

**Latam's Allegations Regarding Standing Show That America Movil Lacks Remorse For Its Unlawful Conduct And Cannot Be Trusted Without Common Carrier Regulation**

Latam claims that OneLink lacks standing to file these comments because OneLink has not shown how it could be harmed by the Latam application.<sup>13</sup> This allegation shows that Latam, owned as it is by America Movil, has no remorse for its willful and repeated violations of telecommunications and anti-monopoly laws in Mexico, and continues to believe that its competitors do not even have "standing" to complain about its unfettered exercise of monopoly power in any market in which it is able to acquire such power. It is important for the Commission to recognize the significant harm that results from America Movil's conduct.

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<sup>13</sup> Opposition at 2. Latam's purported reliance upon *Wireless Co., L.P.*, 10 FCC Rcd 13233 (June 23, 1995) is specious. That case involved a wireless spectrum auction and whether parties that did not participate in the auction had standing under the auction rules. Standing to comment on a submarine cable application is not limited to applicants for competing cables, in fact, submarine cable applications are by nature non-exclusive, non-competitive applications because they are wireline applications. The Commission's Public Notice putting the Latam application out for comment would be meaningless if only a competing applicant had standing to comment.



The Organization for Economic Cooperation and Development (OECD) issued a report that found that the monopolistic practices of America Movil in Mexico are so extensive that America Movil diverts from consumers an enormous amount of wealth that amounts to a substantial portion of the entire gross national income of Mexico.<sup>14</sup> It is difficult to conceive of a more impactful violation of telecommunications and anti-monopoly laws by any carrier. The OECD, not OneLink, reached this conclusion.<sup>15</sup> The OECD report confirms that virtually unprecedented harm has resulted from America Movil's conduct and, therefore, that OneLink is likely to be harmed by an unconditional grant of this application.

The OECD analysis of harm is founded on the bedrock premise that access to telecommunications services, particularly broadband, on reasonable and competitive terms, is essential to economic development. The Telecommunications Regulatory Board of Puerto Rico ("TRB"), which regulates both OneLink and America Movil affiliate Puerto Rico Telephone Company, has also concluded and has advised this Commission that availability of broadband on

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<sup>14</sup> "The consumer harm in Mexico is estimated at USD 129.2 billion, or an average of USD 25.8 billion per year in terms of purchasing power parity over the period 2005-09. The latter amount is equivalent to 1.8% of Mexican GDP per year." Estimation of Loss in Consumer Surplus Resulting from Excessive Pricing of Telecommunication Services in Mexico, OECD Report, Jan. 27, 2012. See [http://www.oecd-ilibrary.org/science-and-technology/estimation-of-loss-in-consumer-surplus-resulting-from-excessive-pricing-of-telecommunication-services-in-mexico\\_5k9gtw51j4vb-en](http://www.oecd-ilibrary.org/science-and-technology/estimation-of-loss-in-consumer-surplus-resulting-from-excessive-pricing-of-telecommunication-services-in-mexico_5k9gtw51j4vb-en).

<sup>15</sup> Despite protestations from America Movil, the OECD has not retreated from its report. See Setting the record straight: Response to comments regarding OECD Review of Telecommunications Policy and Regulation in Mexico, at [http://www.oecd.org/document/42/0,3746,es\\_36288966\\_36288553\\_49539306\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/42/0,3746,es_36288966_36288553_49539306_1_1_1_1,00.html).

reasonable terms and conditions is essential to economic development in Puerto Rico.<sup>16</sup> The TRB conclusion comes as no surprise to this Commission and follows this Commission's National Broadband Plan. Broadband service is by its nature interstate and international. The Puerto Rico Broadband Plan would be virtually meaningless if its scope were defined solely as the small island of Puerto Rico. Broadband depends for its value upon connectivity that extends beyond the confines of the island itself and, as such, depends upon access to undersea cable capacity on reasonable terms and conditions.<sup>17</sup>

OneLink, as a provider of broadband service to a significant segment of Puerto Rico, has standing to express concern on its own behalf and on behalf of its customers, with regard to the Latam application. The Commission should remove this application from streamlined and obtain complete information to assess what conditions need to be imposed on Latam to ensure that America Movil, through Latam, does not acquire a choke hold over submarine cable capacity necessary to implement the Puerto Rico Broadband Plan, among other competitive issues raised by this application.

### **Conclusion**

For the foregoing reasons, OneLink requests that the Latam application be removed from streamlined processing and that the applicant be ordered to provide additional information in support of the request to operate as a private carrier, or, that such request be denied.


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<sup>16</sup> TRB Notice of *Ex Parte* Presentation filed May 21, 2012 in WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, GN Docket No. 09-47, GN Docket No. 09-51, GN Docket No. 09-137.

<sup>17</sup> For example, the Puerto Rico Broadband Plan states, "A more robust backhaul and underwater cable infrastructure will support the expansion of Puerto Rico as a telecommunications and data hub for the Hemisphere."

Respectfully submitted,

SAN JUAN CABLE d/b/a ONELINK

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June 4, 2012

Its Counsel.

CERTIFICATE OF SERVICE

I, Lisa Colletti, a secretary in the law office of Chadbourne & Parke, LLP, hereby certify that a copy of the foregoing Comments of San Juan Cable LLC was served this 4th day of June 2012, by first class mail to:

Nancy J. Victory  
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Lisa Colletti