

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

In the Matter of)	
)	
ARCOS-1 USA, Inc.)	
A.SurNet, Inc.)	
Columbus Networks USA, Inc.)	
<i>Licensees,</i>)	File No. SCL-T/C-20141121-00013
)	File No. SCL-T/C-20141121-00014
Columbus Networks, Limited)	
<i>Transferor,</i>)	
)	
and)	
)	
Cable & Wireless Communications Plc)	
<i>Transferee</i>)	
)	
Application for Transfer of Control of)	
Cable Landing Licenses)	
)	
Columbus Networks)	File No. ITC-T/C-20141121-00304
Telecommunications Services USA, Inc.)	File No. ITC-T/C-20141121-00307
and Columbus Networks Puerto Rico, Inc.)	
)	
Applications for Transfer of Control)	
of International Section 214 Authority)	

RESPONSE TO PETITION TO IMPOSE PROTECTIVE CONDITIONS

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TABLE OF CONTENTS

	Page
SUMMARY	ii
I. DIGICEL’S ALLEGATIONS OF COMPETITIVE HARM ARE NOT SUPPORTED BY THE FACTS	2
A. Digicel’s assertions that competition will be adversely impacted for telecommunications services between the U.S. and foreign points are unsupported and factually baseless	2
B. Digicel’s allegations that the Proposed Transaction will enable C&W to eliminate its primary competitor in the Caribbean are incorrect	3
C. Digicel is incorrect that the Proposed Transaction will narrowly constrain competition in submarine cable capacity to certain Caribbean markets	4
D. Digicel is incorrect that C&W and Columbus operate entrenched duopolies	13
II. DIGICEL’S REQUESTS FOR RELIEF ARE UNNECESSARY, MISGUIDED, AND WOULD BE UNPRECEDENTED	15
A. Digicel’s request that the FCC classify the merged entity as a dominant carrier on all U.S. routes to the countries where C&W is affiliated with foreign carriers that have market power is unnecessary	15
B. Digicel overreaches with its argument that both the ARCOS-1 and CFX-1 Cables should be reclassified and regulated as common carrier systems	16
C. Digicel overreaches with its argument that the FCC should impose rate regulation on C&W	18
III. THE C&W / COLUMBUS STRATEGIC ALLIANCE DID NOT CONSTITUTE A TRANSFER OF CONTROL	19
CONCLUSION	22

SUMMARY

Digicel International, Inc.'s ("Digicel") petition to impose preventive conditions on the applications filed by Columbus Networks, Limited and its affiliates ("Columbus") and Cable & Wireless Communications Plc and its affiliates ("C&W" and together with Columbus "the Applicants"), does not present any rationale for imposing conditions on the proposed transaction. The Applicants have met their burden of proving that the proposed transaction serves the public interest, and no party has filed any opposition to the applications.

Digicel is a major competitor in the markets where it claims the proposed transaction will create a monopoly and has failed to provide meaningful factual or legal support for its claims that the proposed transaction harms the U.S. telecommunications market. As noted more fully herein, the Applicants refute numerous irrelevant, false and/or misleading factual allegations presented by Digicel in a weak attempt to support the imposition of unprecedented conditions on the proposed transaction.

Specifically, the Applicants maintain that (i) Digicel's assertions that competition will be adversely impacted for telecommunications services between the U.S. and foreign points are unsupported and factually baseless; (ii) Digicel's allegations that the proposed transaction will enable C&W to eliminate its primary competitor in the Caribbean are incorrect, as Digicel is C&W's primary retail competitor and is a major competitor for international wholesale capacity; (iii) Digicel's argument that the proposed transaction will narrowly constrain competition in submarine cable capacity to certain Caribbean markets is misplaced, as the Commission typically and appropriately employs a regional analysis and Digicel does not demonstrate any harm on regional routes; (iv) Digicel misstates several facts regarding ownership interests of C&W and Columbus, improperly raising the specter of "monopoly control" with respect to cables landing in

several Caribbean countries, notwithstanding that the Applicants operate a regional business in 42 countries throughout the Americas; and (v) Digicel is incorrect that C&W and Columbus operate entrenched duopolies in particular Caribbean markets, overstating the strength of C&W and/or Columbus in the cited markets and demonstrating no harm to competition in the U.S.

Digicel's requests for relief, including requests for additional dominant carrier safeguards, common carrier reclassification, and rate regulation, are unprecedented, unnecessary and/or misguided. The Applicants have agreed to accept dominant carrier safeguards with respect to certain international routes, where appropriate, and Digicel fails to demonstrate why compliance with these safeguards would be insufficient to address any issues the Commission might have with respect to competition on the relevant routes. Moreover, there is no legal or policy basis for regulatory conditions beyond the dominant carrier safeguards already agreed to by the Applicants. Imposition of any other remedy requested by Digicel would be in direct opposition to recent Commission reforms and would harm, rather than promote, competition.

Finally, the Commission should reject Digicel's unfounded request to conduct an inquiry into whether the Applicants' widely publicized 2013 strategic alliance effectuated an unauthorized *de facto* transfer of control. The strategic alliance did not constitute a transfer of control and all necessary regulatory requirements were complied with in the U.S. and elsewhere.

In sum, the Applicants respectfully submit that the Commission should summarily reject Digicel's petition and expeditiously approve the proposed transaction without any additional conditions.

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RESPONSE TO PETITION TO IMPOSE PROTECTIVE CONDITIONS

Columbus Networks, Limited (“CNL”), ARCOS-1 USA, Inc. (“ARCOS”), A.SurNet, Inc. (“ASN”), Columbus Networks USA, Inc. (“CNUSA”), Columbus Networks Telecommunications Services USA, Inc. (“CNTSUSA”), Columbus Networks Puerto Rico, Inc. (“CNPR”) and Cable & Wireless Communications Plc (“C&W” and together with CNL, ARCOS, ASN, CNUSA, CNTSUSA and CNPR, the “Applicants”), through their undersigned counsel, hereby respond to the petition filed by Digicel International, Inc. (“Digicel”), with respect to their applications seeking

Commission approval for the transfer of control of the FCC licenses held by Columbus' operating subsidiaries to C&W (the "Proposed Transaction").¹

In their applications, the Applicants have met their burden of proving, by a preponderance of the evidence, that the Proposed Transaction, on balance, serves the public interest. No party has filed any opposition to the grant of the applications. Digicel itself acknowledges that the transaction is in the public interest and should be granted.² Digicel meanwhile has failed to provide any meaningful factual or legal support for imposing any conditions on the approval of the Proposed Transaction. Instead, Digicel, which itself is a major competitor in the markets where it claims the Proposed Transaction will create a monopoly, puts forth numerous irrelevant, false and/or misleading factual allegations, in a weak attempt to support the imposition of a number of overreaching, unnecessary, burdensome and unprecedented conditions on the Proposed Transaction. For the reasons that follow, the Applicants respectfully submit that the Commission must summarily reject Digicel's Petition and expeditiously approve the Proposed Transaction without any additional conditions.

I. DIGICEL'S ALLEGATIONS OF COMPETITIVE HARM ARE NOT SUPPORTED BY THE FACTS.

A. Digicel's assertions that competition will be adversely impacted for telecommunications services between the U.S. and foreign points are unsupported and factually baseless.

In its Petition, Digicel provides *no* support for its arguments related to services to and from the U.S., but instead focuses its discussion on foreign local markets in the Caribbean. There is no evidence that the Proposed Transaction (which involves 42 markets across the Americas) will have a substantial adverse impact on competition between the U.S. and foreign points, as less than 20%

¹ All references herein to "Columbus," refer to Columbus International Inc., and its operating subsidiaries, including CNL, ARCOS, ASN, CNUSA, CNTSUSA and CNPR.

² Petition to Impose Protective Conditions of Digicel International, Inc., File No. SCL-T/C-20141121-00013, at 9 (filed Dec. 31, 2014) ("Petition").

of the Americas region international subsea capacity market is affected by the Proposed Transaction.

The Proposed Transaction in fact raises no concerns for U.S. carriers for a number of reasons: (i) each of Columbus and C&W are relatively small players in the international transport business in the Americas; (ii) most traffic on cables between the U.S. and the Caribbean is outbound, for Caribbean telecommunications operators to access IP-based video content in the U.S. for their local customers; (iii) U.S. carriers are strong and sophisticated customers, who exercise significant countervailing market power; (iv) many submarine cable systems in the region, including the ARCOS-1 Cable and MAYA-1 are consortium cables, where parties other than Columbus and C&W have access to significant amounts of capacity and/or control the critical facilities and landing stations in the applicable jurisdictions; and (v) the parties already operate a strategic alliance for international submarine wholesale capacity since May 2013, where multiple customers, including Digicel, have obtained access to significant amounts of capacity at very competitive rates and without any competitive concerns.

B. Digicel’s allegations that the Proposed Transaction will enable C&W to eliminate its primary competitor in the Caribbean are incorrect.

Digicel argues that the Proposed Transaction “will enable C&W to eliminate its primary competitor, and to consolidate and extend its market dominance.”³ As a preliminary point, it is important to distinguish between domestic retail markets in the Caribbean, as opposed to international wholesale capacity to and from the U.S., the latter being the only one relevant to the submarine cable landing applications under review by the Commission.

In any event, Digicel’s argument is incorrect at the retail level and, more pertinently to the Commission, at the wholesale level. As discussed in detail below, and while not relevant to the

³ Petition at 2.

submarine cable applications, Digicel is actually C&W's primary competitor at the retail level. It is not Columbus. Digicel is a well-funded and fast-growing player in the Caribbean telecommunications market, and more recently became the owner of a subsea network serving part of the Caribbean by way of its acquisition of major parts of Global Caribbean Network ("GCN").⁴ The Proposed Transaction will enable C&W to compete more effectively against its larger and better-financed rival, establishing a firm basis for long-term competition in the Caribbean region.

With regard to international wholesale capacity, C&W's main competitors are large, well-financed, international operators such as Level 3 Communications, France Telecom, Telefonica, GlobeNet, America Movil and Digicel itself. As previously noted, Digicel owns or has interests in the GCN network of cable systems in the eastern Caribbean and is a notable competitor to C&W and Columbus in the market for international wholesale capacity in that region.

The Proposed Transaction has been notified to applicable U.S. antitrust authorities and all waiting periods under the Hart–Scott–Rodino Antitrust Improvements Act of 1976 have expired. No action was taken by the Department of Justice or the Federal Trade Commission.

Finally, C&W and Columbus are engaging with regulators across the Caribbean at national and supranational levels. An open and honest dialogue to address any competition concerns in Caribbean jurisdictions is already underway.

C. Digicel is incorrect that the Proposed Transaction will narrowly constrain competition in submarine cable capacity to certain Caribbean markets.

Digicel's main argument in the Petition is that the Proposed Transaction will distort competition in submarine cable capacity to markets like Jamaica, the Cayman Islands, the

⁴ The GCN network is a submarine cable system of about 3,000 km providing 1.2 Tbits/s capacity serving 14 countries. The GCN network has been licensed by the Commission, *see* File No. SCL-LIC-20050418-00010, and was recently acquired by Digicel. *See Action Taken under Cable Landing License Act*, Public Notice Report No. SCL-00154, DA-14-1311 (rel. Sept. 10, 2014).

Dominican Republic, Haiti, British Virgin Islands (“BVI”), Anguilla and Turks & Caicos.⁵ As an initial matter, Digicel’s emphasis on cables serving specific nations is misplaced. As Digicel itself notes, the Commission typically and appropriately employs a regional analysis, and focuses on the impact on traffic between the U.S. and the Atlantic, Pacific, and Americas regions.⁶

Digicel does not demonstrate in its Petition any harm to competition on regional routes to the U.S., which can take many paths from a given foreign point. The Commission’s approach accords with the realities of market practice by which international carrier customers contract on a regional basis. In general, contracts for international wholesale capacity are agreed at the regional level, with no significant regard to the detail of access to any individual country in particular. Large wholesale customers place large orders across the region and wield significant bargaining power. It is therefore irrelevant to look narrowly at small, individual routes when trying to understand how commercial wholesale capacity transactions are actually consummated with customers.

C&W and Columbus do have substantial ownership interest in submarine cable systems serving the Caribbean region, but the actual numbers put C&W’s and Columbus’ interests in context. The Applicants estimate 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%. This leaves unaffiliated third parties, including Digicel, with a significant majority of activated capacity. Third parties also hold a substantial majority of the design capacity. As such, there is no shortage of third-party international wholesale capacity between the Caribbean and the RoW, including the U.S. This capacity is available for lease or purchase by other U.S. and international carriers.

Within the Caribbean, the Applicants also hold less than a majority of activated and design capacity; leaving unaffiliated third parties, including Digicel, with most of the total available

⁵ Petition at 9-11.

⁶ *Id.* at 9.

capacity. As such, there is no shortage of third-party international wholesale capacity in the Caribbean. Again, this capacity is also available for purchase by U.S. carriers.

Moreover, in its Petition Digicel conveniently omits mention of AMX-1, the America Movil state-of-the-art new submarine cable system which is now operational and serves the Dominican Republic, Puerto Rico and other Columbus markets, and which adds much more international capacity to the Caribbean that does not involve either Columbus or C&W.⁷

Even with respect to specific Caribbean countries, Digicel is wrong on the facts. Specifically:

- Digicel overstates the ownership interests of C&W and Columbus in certain cables, and understates the importance of competing cables. As an example, contrary to Digicel's assertions,⁸ Columbus does not own or operate the Americas II, Pan Am, Taino-Caribe or Antillas-1 cables. Columbus has no participating interest in any of those cables.
- Digicel cites ownership scenarios that are not affected by the Proposed Transaction (*i.e.*, where the Proposed Transaction does not increase market concentration in any way).
- Digicel improperly raises the specter of "monopoly control" in scenarios where there is actually significant capacity under third-party control. Many of the cables noted by Digicel as "controlled by the Applicants" are in fact consortium cables where the Applicants have a minority interest.⁹ Moreover, a single owner of one or more cables is not unusual and does not itself constitute a "monopoly" in control of capacity on the cable overall.

An analysis of the specific markets cited by Digicel in its Petition, demonstrates these errors:

⁷ In addition to Puerto Rico, the AMX-1 cable lands in Miami and Jacksonville, Florida and has been licensed by the Commission. *See* File No. SCL-LIC-20120330-00002.

⁸ Petition at 5.

⁹ Examples of these cables include: MAYA-1, PCCS, Antillas-1, Taino-Caribe, Pan Am, ECFS and Americas-II.

1. Jamaica.

Digicel states that four of five cables landing in Jamaica are owned by C&W and/or Columbus, which post-transaction will “be under C&W’s monopoly control.”¹⁰ This statement is misleading.

C&W and Columbus do have interests in the majority of cable systems landing in Jamaica, but this in no way implies that there is a competition problem for Digicel, or any other market player. Critically, Digicel benefits from a hugely competitive market. Digicel has already secured significant amounts of long term capacity from C&W/Columbus in Jamaica at advantageous volume discounts.

In addition to the capacity already secured by Digicel, third parties hold significant capacity and have available many more times spare design capacity than the total international wholesale activated capacity on the Applicants’ cable systems landing in Jamaica. Spare design capacity can quickly and easily be brought on line by third parties in response to customer demand. Therefore, third-party capacity alone is sufficient to meet all demand in Jamaica for the foreseeable future – meaning that all customers will retain choice over carrier and will be able to purchase international wholesale capacity without relying on C&W after the Proposed Transaction is completed.¹¹

Furthermore, even in connection with capacity owned by the combined Columbus/C&W business after consummation of the Proposed Transaction, third parties effectively will control large volumes of the capacity on these cables on a long-term basis. For example, Digicel holds large

¹⁰ *Id.* at 10.

¹¹ Much third-party capacity in Jamaica exists through the ALBA cable via Cuba to Venezuela. Venezuela itself is served by a further six cable systems, three of which offer direct connections to the U.S. with the remaining three all capable of carrying traffic to the U.S. via existing interconnections. Establishing interconnections between the ALBA cable and one or more of these other systems, to the extent they do not exist today, would not be an onerous task for a carrier. Further, as relations between Cuba and the U.S. are improving rapidly, this is expected to become an increasingly important asset and, even now, carriers are able to obtain an authorization from the U.S. Treasury Department’s Office of Asset Controls to carry traffic on cable assets connecting to Cuba.

amounts of capacity to Jamaica in the form of an Indefeasible Right of Use (“IRU”). This means that, effectively, Digicel already has access to all the cable systems that C&W and Columbus own on this route, and thus the ability to satisfy its own requirements and sell to other third parties in competition with Columbus and C&W. As the Commission is aware, pricing and availability under IRU contracts is fixed at contract inception and therefore guaranteed over the long term. Since the establishment of their strategic alliance, C&W and Columbus have lowered rates for international capacity including new IRUs. All customers including Digicel have benefited from these price reductions. Digicel’s significant market power, both in Jamaica and across the region, ensures that the combined business cannot discriminate against it.

Finally, there is little doubt that Digicel has the technical and financial resources to build its own system to Jamaica if it so desired. Instead, Digicel appears not to view a build to Jamaica as a priority. Under such circumstances, it seems reasonable for Digicel to continue its current arrangements with the strategic alliance, which arrangements will remain unchanged after the closing of the Proposed Transaction.

2. Cayman Islands.

Digicel asserts that, after the closing of the Proposed Transaction, both of the cables landing in the Cayman Islands will “be under C&W’s monopoly control.”¹² This statement is false.

The Proposed Transaction will have no impact in the Cayman Islands as Columbus controls no submarine cable landing in the Cayman Islands. While the CJFS cable is owned 94.7% by C&W, unrelated third parties own 5.3% of the cable. Most importantly, however, the MAYA-1 cable is a high-capacity submarine cable system providing service from Hollywood, Florida to Colombia with landings in Mexico, Honduras, Cayman Islands, Costa Rica, Panama, and

¹² Petition at 11.

Colombia.¹³ The MAYA-1 cable is a consortium cable, with more than 30 different owners, including the U.S.'s largest carriers, such as AT&T, Verizon and Sprint. Each of C&W and Columbus hold a minority interest in the MAYA-1 cable. The MAYA-1 cable was upgraded in 2014 and there is significant capacity available for purchase by Digicel from unrelated U.S. carriers. In fact, Applicants understand that in 2014, Digicel acquired significant amounts of capacity (in the form of an IRU) from a third-party MAYA-1 cable consortium member.

Further, Digicel notes that “the adverse impact [of the Proposed Transaction] is compounded by the fact that Caymans’ (sic.) only connectivity in the Caribbean region is to Jamaica.”¹⁴ This assertion ignores the fact that the Cayman Islands are directly connected to the U.S. through the MAYA-1 system’s landing in Hollywood, Florida and are directly connected to Central and South America through the MAYA-1 system’s landing in Honduras, Costa Rica, Mexico, Panama and Colombia. Each of these countries has multiple submarine and terrestrial alternate routes to the U.S. All of these routes are controlled by unaffiliated third parties and are available to other U.S. carriers.

3. Dominican Republic.

Digicel states that four of the five cables landing in the Dominican Republic “are owned in whole or in part by C&W and Columbus.”¹⁵ This statement is misleading.

Unaffiliated third parties own a substantial majority of the activated and design capacity across all cables landing in the Dominican Republic. Moreover, neither Columbus nor C&W have any significant retail operations in the Dominican Republic. The market is dominated by Codetel, an affiliate of America Movil, along with other large players like Orange/Altice, which not only

¹³ The MAYA-1 cable has been licensed by the Commission. See File No. SCL-LIC-19990325-00006.

¹⁴ Petition at 11.

¹⁵ *Id.*

owns a significant consortium interest in the Antillas-1 cable, but is also the second largest domestic retail telecommunications provider in the Dominican Republic.

Contrary to Digicel's assertions, the Applicants do not control significant landing stations in the Dominican Republic.¹⁶ Codetel is an ARCOS-1 Cable consortium member and is the owner and operator of the two ARCOS-1 Cable landing stations in the Dominican Republic. In turn, the EWC cable station in the Dominican Republic is operated by Wind Telecom (C&W's Dominican affiliate is co-located in Wind Telecom's facilities).

As noted above, the new state-of-the-art AMX-1 cable also lands in the Dominican Republic and provides a direct connection to the United States. This cable is also controlled by Codetel. The Dominican Republic is a vibrant and competitive market where the operations of the Applicants are not significant.

4. Haiti.

Digicel contends that Haiti is served by only two cables, one of which is owned by Columbus, and the other in which C&W holds a major ownership interest through its subsidiary, The Bahamas Telecommunications Company Limited ("BTC").¹⁷ This statement is misleading.

As an initial matter, unaffiliated third parties hold all of the capacity on land routes to the Dominican Republic, making international wholesale submarine cable capacity less relevant than in other island jurisdictions. Second, there are multiple third-party options for the underdeveloped international wholesale submarine capacity market to Haiti, including Digicel.

The Applicants note that, while Columbus has original ownership of all of the capacity on the Fibralink spur connecting Haiti to the Dominican Republic, most important, however, is the fact that Digicel has long term rights to use the Columbus Fibralink spur, as it helped to finance the

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 11. Note that C&W owns only 49% of BTC.

project and received long-term capacity rights on the cable in exchange for its financial support of the project. These rights are enforceable under contract; they cannot and will not be prejudiced by the Proposed Transaction. Moreover, Digicel fails mention that a Digicel affiliate is the landing party of the Fibralink cable in Haiti and operates Fibralink's cable landing station outside of Port au Prince, Haiti.

5. British Virgin Islands.

Digicel states that C&W currently holds ownership interests in all three of the cables landing in the BVI providing connectivity to the U.S. and within the region (PCCS, CBUS and EWC).¹⁸ This statement is misleading.

Columbus has no share in any international submarine cable system in the BVI whatsoever, meaning that the Proposed Transaction will have no effect on this market. Moreover, the new state-of-the-art PCCS cable connects the BVI with Jacksonville, Florida, Puerto Rico, Aruba, Panama and Colombia.¹⁹ The PCCS cable is a consortium cable where the substantial majority of the capacity on the cable is owned by unaffiliated third parties, including Telefonica and its affiliates, along with Cable Andino, SETAR and UTS. The PCCS cable is scheduled to become operational in 2015 and will significantly expand the capacity between the U.S. and the BVI. As in all previously analyzed markets, third party capacity is easily able to meet all demand in the BVI for the foreseeable future – meaning that all customers will have choices and will be able to continue to purchase international wholesale capacity without relying on C&W.

¹⁸ Petition at 11. There are in fact five cables serving, or that will soon serve, BVI: PCCS (expected to come into service in 2015), CBUS, Taino-Caribe, ECFS, and EWC.

¹⁹ The PCCS cable has been licensed by the Commission. See File No. SCL-LIC-20130122-00001.

6. Anguilla.

Digicel states that Anguilla's sole connectivity is through a C&W cable (ECFS).²⁰ This statement is misleading.

It is correct that ECFS is the sole submarine cable system landing in Anguilla, but ECFS is not owned by C&W and is in fact a consortium cable system. Moreover, it is possible to connect Anguilla to St. Martin/St. Maarten using high capacity microwave links, permitting interconnections to multiple third-party systems (including Digicel's own GCN system) that, in turn, land in two of the major access hubs for the Caribbean (*i.e.*, Puerto Rico and the U.S.V.I.).

More importantly, Columbus has no share in the ECFS system, meaning that the Proposed Transaction will have no impact on this market, as there will be no increment to C&W's existing market share.

7. Turks & Caicos.

Digicel states that Turks and Caicos sole connectivity is through Columbus' ARCOS-1 Cable.²¹ This statement is misleading.

C&W currently does not own any submarine cables landing in Turks & Caicos and does not have any third-party wholesale capacity customers in Turks & Caicos. The Proposed Transaction therefore does not result in the creation of any material overlap between the Applicants in the supply of international wholesale capacity. In addition, third parties hold sufficient international wholesale capacity to ensure ongoing and vibrant competition in the market.

²⁰ Petition at 11.

²¹ *Id.*

D. Digicel is incorrect that C&W and Columbus operate entrenched duopolies.

In its Petition, Digicel contends that “in six of these markets, C&W and Columbus affiliates currently enjoy entrenched duopolies for telephone, residential internet and cable television service (Jamaica, Barbados, Trinidad & Tobago, Grenada, St. Lucia and St. Vincent & Grenadines).”²² Digicel further claims that the Proposed Transaction will eliminate retail competition and create a “pure monopoly provider” in those markets.²³

As a preliminary matter, Digicel’s emphasis on local markets is misplaced. Digicel demonstrates no harm to competition in the U.S. As noted above, even if harm were to be caused in these local markets, these are issues for the local Caribbean regulators, with whom the Applicants have already opened dialogue. Moreover, the Proposed Transaction is not a Caribbean-specific deal as Digicel will have the Commission believe. The Proposed Transaction involves assets and operations in 42 markets across the Americas, including large and competitive markets like Colombia, Guatemala and Mexico.

In any event, Digicel provides no basis for its cursory conclusions regarding competition in these local markets, and is wrong on its facts. Digicel overstates the strength of C&W and/or Columbus in the cited markets. Moreover, Digicel neglects the competitors and, above all, fails to mention its own quick rate of growth in these markets. Its allegations of monopoly or duopoly in these markets are unfounded.

Columbus is not a primary competitor of C&W in these markets. Digicel is C&W’s primary competitor. As Digicel notes, it is an international mobile telecommunications carrier with

²² *Id.* at 12.

²³ *Id.*

operations in 33 markets in the Caribbean, South America and Central America. It also controls a submarine cable in the region, and holds Section 214 authority.²⁴

Given that any competitive issue in these markets is a local issue that does not affect competition in the U.S., the Applicants submit that there is no need to rebut Digicel's contentions on a market-by-market basis. The Applicants stress that Digicel is a major competitor in each of these island nations and has significant customer bases and facilities in each of these markets. In these local markets, the Proposed Transaction will allow the Applicants to combine their complementary businesses to better compete against Digicel. Digicel is a large, well-resourced and nimble competitor, which has a strong and growing presence across all segments of the communications market in the Caribbean (as evidenced most recently by its acquisition of GCN, which makes Digicel an owner-operator of subsea networks). This intense competition will likely further intensify as a result of the Proposed Transaction.

Moreover, in its Petition, Digicel takes a highly static view of the markets, failing to take into account fixed-mobile voice substitution, competition in broadband markets from wireless technologies, low levels of penetration, and the advent of convergence. Digicel fails to give a full account of how its own dominant offering in mobile gives it great power as the market converges.

Finally and most importantly, in their section 214 applications, the Applicants have agreed to accept dominant carrier safeguards with respect to the international routes between the U.S. and these island nations (Barbados, Grenada, Jamaica, St. Lucia, St. Vincent & Grenadines, and

²⁴ *Id.* at 2. As noted in Digicel's profile at the International Telecommunications Union, "Digicel, first established April, 2001 in Jamaica. In the ten years since the initial launch, Digicel's Jamaican customer base has grown to over two million users. In Haiti, where they launched operations in May 2006, the company now has 2.4 million customers making Haiti Digicel's largest customer base to date. The company has a market share of over 70% in Jamaica. After ten years of operation, Digicel Group Limited has 11.5 million customers across its 32 markets in the Caribbean, Central America and the Pacific." See <http://www.itu.int/net4/ITU-D/CDS/SectorMembersPortal/index.asp?Name=43071>. Additional information about Digicel and its operations in each of these markets is available at Digicel's websites: www.digiceljamaica.com, www.digicelbarbados.com, www.digiceltt.com, www.digicelgrenada.com, www.digicelstlucia.com, and www.digicelsvg.com.

Trinidad and Tobago). Moreover, C&W's retail business in Trinidad and Tobago is conducted through Telecommunications Services of Trinidad and Tobago Limited ("TSTT"), in which it has only a minority stake to the government's majority; such an arrangement can hardly provide the foundation for a duopoly. As such, there is no need for additional remedies or competitive analysis by the Commission.

II. DIGICEL'S REQUESTS FOR RELIEF ARE UNNECESSARY, MISGUIDED, AND WOULD BE UNPRECEDENTED.

A. Digicel's request that the FCC classify the merged entity as a dominant carrier on all U.S. routes to the countries where C&W is affiliated with foreign carriers that have market power is unnecessary.

As Digicel acknowledges,²⁵ in their Section 214 transfer applications the Applicants have already agreed to comply with dominant carrier safeguards in all 17 routes where a C&W affiliate is presumed to have market power, as is required under the FCC rules and policies.²⁶ These routes include routes between the U.S. and landing points of the subject submarine cables, specifically the U.S.-Bahamas, U.S.-Panama and U.S.-Turks and Caicos routes for the ARCOS-1 Cable and the U.S.-Jamaica route for the CFX-1 Cable. It is unclear whether Digicel is asking for more, but if so, there is no reason for the FCC to go beyond its current rules and policies.²⁷

Digicel has not demonstrated why C&W's compliance with these dominant safeguards will not be sufficient to address any issues that the FCC might have with respect to competition on the relevant routes. Moreover, post-transaction, the Commission retains significant ability to impose additional remedies upon a finding of anticompetitive behavior not only by C&W, but by any other

²⁵ Petition at 14.

²⁶ 47 CFR §§ 1.768 and 63.10(c).

²⁷ As recently as April 2014, the Commission has recognized that "[w]e continue to apply the dominant carrier safeguards and reporting requirements in sections 63.10 and 1.767 of the rules, and the "no special concessions" rules in sections 63.14 and 1.767 of the rules, which help prevent certain anticompetitive strategies that foreign carriers can use to discriminate among their U.S. carrier correspondents." *See* Reform of Rules and Policies on Foreign Carrier Entry Into the U.S. Telecommunications Market, Report and Order, IB Docket No. 12-299 at ¶ 19 (rel. April 22, 2014) ("*ECO Test Report and Order*").

foreign carrier.²⁸ The Commission has significant tools at its disposal in the event of market distortions or anticompetitive behavior.

B. Digicel overreaches with its argument that both the ARCOS-1 and CFX-1 Cables should be reclassified and regulated as common carrier systems.

Digicel alleges that the merged entity will have “monopoly control” on critical cable landing and transport facilities in the region, and for that reason requests that the ARCOS-1 and CFX-1 Cables be reclassified and regulated as common carrier systems.²⁹ For the reasons given above, Digicel’s factual basis is flawed, and following consummation of the Proposed Transaction, U.S. and international carriers will continue to have a range of capacity options. There is no “monopoly” to be remedied.

Further, there is no legal or policy basis for regulatory conditions beyond the dominant carrier safeguards already agreed to by the Applicants. The FCC has previously found that these competitive safeguards should be sufficient in all but the most exceptional of circumstances to detect and deter any anticompetitive behavior that could result in harm to competition in the U.S. market associated with market power where U.S.-licensed cable systems land and operate.³⁰ Digicel has shown no such exceptional circumstances here and, in particular, has not demonstrated in any way a leveraging of foreign market power into the U.S. international services market.

²⁸ Among the remedies available to the Commission are: the re-imposition of the International Settlements Policy (“ISP”) on any particular route, directing U.S. carriers to renegotiate with foreign carriers, directing U.S. carriers to withhold payment to foreign carriers, or restricting U.S. carriers from paying a specific rate. *See, e.g., International Settlements Policy Reform et al.*, IB Docket Nos. 11-80, 05-254, 09-10 and RM-11322, Report and Order, 27 FCC Rcd 15521, 15523, at ¶ 50 *et. seq.* (2012) (“2012 ISP Reform Order”).

²⁹ Petition at 15.

³⁰ “The competitive safeguards that we adopt here similarly are targeted to detect and deter discrimination by a carrier with market power in any of these submarine cable foreign input markets that could result in harm to competition in the U.S. market. We find that this narrowly tailored set of safeguards should be sufficient in all but the most exceptional of circumstances to detect and deter any anti-competitive behavior associated with market power in foreign markets where U.S.-licensed cable systems land and operate.” *See* Review of Commission Consideration of Applications under the Cable Landing License Act, IB Docket No. 00-106 Report and Order, 16 FCC Rcd 22167, 22192-93, 51-52 at ¶ 25 (2001) (“2001 Submarine Cable Report and Order”).

Moreover, Digicel provides no argument or evidence showing how imposition of common carrier status would address any alleged harms not already addressed by these safeguards.

Since the 1990s, most submarine cables have been rightfully classified as non-common carrier facilities following the NARUC tests.³¹ Both the ARCOS-1 and CFX-1 Cables at the time of their licensing were properly classified by the Commission as non-common carrier cables and the Proposed Transaction does not, in any way, alter the regulatory classification of these facilities. The Applicants know of no precedent where the Commission in an analogous situation has reclassified a submarine private carrier as a common carrier. Private carrier status is consistent with the deregulatory approach of the FCC, including specifically as applied to submarine cables since 1985.³²

The submarine cables that are the subject of the applications are properly classified as private carrier systems. The Applicants do not hold themselves out as providing submarine cable capacity indiscriminately to the public. The Applicant's satisfy customers' demands for individually tailored offerings of bulk capacity. These are classic private-line customers. It is worth noting that Digicel has purchased capacity from the Applicants' strategic alliance, CNL-CWC Networks, Inc. ("CNL-CWC Co") using customized, deal-specific documentation. Common carrier re-classification would thwart these kinds of transactions in the future for Digicel.

The Commission has acknowledged over the years in its move to private carrier regulation in a variety of contexts that common carrier regulation imposes a number of burdens and actually

³¹ National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976), cert. denied, 425 US 992 (1976) ("NARUC").

³² See, e.g., Tel-Optik Limited, Application for a License to Land and Operate in the United States a Submarine Cable Extending Between the United States and the United Kingdom, File Nos. 1-SCL-84-002, 1-SCL-84-003, Submarine Lightwave Cable Company, Application for a License to Land and Operate in the United States a High Capacity Fiber Optic Digital Submarine Cable Extending between the United States and other North American Countries, on the one hand, and European Countries, on the Other Hand, Memorandum Opinion and Order, 100 FCC 2d 1033, 1040-42 (1985) ("Tel-Optik").

thwarts competition in a number of ways that are particularly applicable in this case: (i) common carrier status would thwart satisfaction of customer demands for individually-tailored offerings; (ii) common carrier status would inhibit the licensees' ability to respond to market trends and to innovate in services and offerings; (iii) common carrier status would prevent efficient use of capacity and cost-saving measures; and (iv) common carrier status would impose unnecessary regulatory costs on both the Applicants and the Commission.³³

For all of these reasons, common carrier status would harm, rather than promote, competition.

C. Digicel overreaches with its argument that the FCC should impose rate regulation on C&W.

Again, for the reasons given above, Digicel's factual basis for seeking rate regulation is flawed, and following consummation of the Proposed Transaction, U.S. and international carriers will continue to have a range of capacity options.

There is no legal or policy basis for conditions beyond the Commission's dominant carrier safeguards, which protect against competitive harm. The arguments above addressing common carrier status apply with even greater force to the proposal for rate regulation. To the Applicants' knowledge, it would be truly unprecedented for the Commission to cap rates in such a case in the current regulatory environment, and indeed it would be inconsistent with the deregulatory approach of the Commission in international communications.

Imposition of rate caps would be in direct opposition to recent reforms of the Commission. The FCC has recognized that international telecommunications are increasingly competitive, prices have been falling, and regulations of rates or imposition of additional remedies, like the ISP is

³³ See e.g., 2001 Submarine Cable Report and Order at ¶¶ 69-70; Tel-Optik at ¶ 18.

unnecessary.³⁴ Tariffing requirements have been largely eliminated and reporting requirements have been streamlined, while preserving the dominant carrier safeguards that will apply in this case.³⁵ All of the ways in which common carrier regulations may thwart competition (summarized above) apply with even greater force to rate caps. With increasing deregulation, the FCC has avoided rate regulation in particular.³⁶ The FCC has repeatedly outlined the advantages of private sale of bulk capacity on a non-tariffed basis for services such as submarine cables.³⁷

For all of these reasons, rate regulation would harm, rather than promote, competition.

III. THE C&W / COLUMBUS STRATEGIC ALLIANCE DID NOT CONSTITUTE A TRANSFER OF CONTROL.

In May 2013, C&W and Columbus formed a strategic alliance to market and sell both parties' international wholesale capacity across the Caribbean and Latin American regions. For that purpose, they established CNL-CWC Co, a company incorporated in Barbados. Since then, marketing and sales of international wholesale capacity for both parties across the region is managed jointly through CNL-CWC Co. The creation of CNL-CWC Co allowed C&W and Columbus to work together in a discrete area of their portfolios. Competition overall between Columbus and C&W retail business units remains unaffected.

The strategic alliance is an agency arrangement, allowing the parties to work together for operational purposes and to better serve their own customers. CNL-CWC Co has the sole right to market the international wholesale capacity of both C&W and Columbus as an agent for each of its principals (C&W and Columbus), which principal controls the capacity. Some of the benefits to

³⁴ See generally, 2012 ISP Reform Order.

³⁵ See generally, 2001 Submarine Cable Report and Order, 2012 ISP Reform Order; ECO Test Report and Order.

³⁶ See e.g., Second Computer Inquiry, 77 F.C.C.2d 384 (1980) ("Computer II").

³⁷ See Tel-Optik at ¶ 20.

customers include an expanded network with more bandwidth and broader reach, greater route choice, improved reliability, and higher performance.

The Commission should reject Digicel's unfounded request to conduct an inquiry into whether the strategic alliance effectuated an unauthorized *de facto* transfer of control. The 2013 strategic alliance was widely publicized by the Applicants.³⁸ There was no intent to hide a transfer of control. Indeed, Digicel bases its argument on press reports from the time. If Digicel thought those reports described a potential transfer of control, it could have raised the issue at the time. To the Applicants knowledge, the FCC did not receive a single contemporaneous complaint. Moreover, as noted above, Digicel has entered into negotiations and has purchased capacity from the Applicants through CNL-CWC Co. Any implication that the Applicants were not transparent and honest about the strategic alliance is incorrect.

All necessary regulatory requirements were complied with in the U.S. and elsewhere. The Applicants assessed the terms of the venture for compliance with FCC rules and policy carefully, and came to the conclusion the strategic alliance did not constitute a transfer of control or require prior Commission approval under applicable Commission precedent.³⁹ Regulatory approval was not sought because no such approval was required. Among the factors supporting this conclusion were the following: (i) each party retained legal title and control to its respective networks and licenses and no assets were transferred to CNL-CWC Co; (ii) no contracts with existing customers were transferred to CNL-CWC Co, and each of C&W and Columbus continues to receive the economic benefits under contracts for capacity on their respective licensed systems; (iii) the shareholders' agreement of CNL-CWC Co requires each party's prior approval for certain

³⁸ See *CWC Agrees to Strategic Alliance with Columbus Networks*, Press Release (May 13, 2013), <http://www.cwc.com/assets/uploads/files/Press%20Releases/2013/CWC%20agrees%20strategic%20alliance%20with%20Columbus%20140513.pdf>

³⁹ See *In the Matter of Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963), and its progeny.

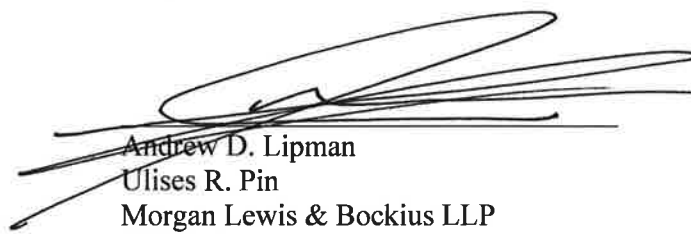
important governance and operational matters; (iv) each party continues to have unfettered access to its licensed facilities and equipment; (v) each party retains sufficient personnel and is in charge of employment, supervision, and dismissal of such personnel; (vi) each party is responsible for payment of expenses, including maintenance, insurance and network upgrades with respect to its systems; (vii) all contracts with new customers are entered into by CNL-CWC Co, as an agent for C&W or Columbus, as applicable, with C&W and Columbus as the principal in the agency relationship and ultimate owner of the capacity; and (viii) each party continues to have ultimate decision-making authority with respect to its licensed systems and controls all applications to the FCC.

No *de jure* or *de facto* transfer of control of the Applicant's networks or licenses will occur until consummation of the Proposed Transaction, which is obviously subject to prior Commission approval. Submission of the strategic alliance documents to the Commission for review will serve no purpose in view of the instant Proposed Transaction and the subject request for consent of a transfer of control.

CONCLUSION

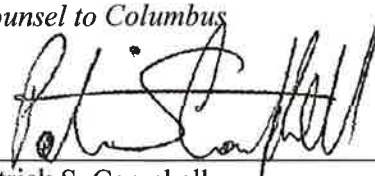
The Proposed Transaction will yield undisputed public interest benefits and there are no plausible claims of public interest harms. No party has filed in opposition of the applications. Therefore, the Applicants respectfully submit that the Commission should disregard Digicel's arguments and promptly grant the Applicants' requests for consent to transfer of control without any additional conditions.

Respectfully submitted,



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Date: January 14, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served this date upon the following:

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/s/ Denise S. Wood
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January 14, 2015

DECLARATION OF BRENDAN PADDICK

I, Brendan Paddick, declare under penalty of perjury on this 14th day of January, 2015 that:

1. I have reviewed the associated Response to Digicel's Petition to Impose Protective Conditions ("Response") which was prepared under my supervision and direction.
2. I am the president and chief executive officer of Columbus Networks, Limited.
3. The allegations of fact contained in the Response are true to the best of my knowledge, information and belief.



Brendan Paddick
president and chief executive officer
Columbus Networks, Limited

DECLARATION OF PAUL W. SCOTT

I, Paul W. Scott, declare under penalty of perjury on this 14th day of January, 2015 that:

1. I have reviewed the associated Response to Digicel's Petition to Impose Protective Conditions ("Response") which was prepared under my supervision and direction.
2. I am the president and chief operating officer of ARCOS-1 USA, Inc., A.SurNet, Inc., Columbus Networks USA, Inc., Columbus Networks Telecommunications Services USA and Columbus Networks Puerto Rico, Inc.
3. The allegations of fact contained in the Response are true to the best of my knowledge, information and belief.




Paul W. Scott

president and chief operating officer
ARCOS-1 USA, Inc., A.SurNet, Inc.,
Columbus Networks USA, Inc., Columbus
Networks Telecommunications Services USA,
Inc. and Columbus Networks Puerto Rico, Inc.

DECLARATION OF NICK COOPER

I, Nick Cooper, declare under penalty of perjury on this 14th day of January, 2015 that:

1. I have reviewed the associated Response to Digicel's Petition to Impose Protective Conditions ("Response") which was prepared under my supervision and direction.
2. I am the Company Secretary and Director of Cable & Wireless Communications Plc.
3. The allegations of fact contained in the Response are true to the best of my knowledge, information and belief.



Nick Cooper
Company Secretary and Director
Cable & Wireless Communications Plc