

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

STANFORD SPRINGEL AS CHAPTER 11 TRUSTEE
FOR THE BANKRUPTCY ESTATE OF
INNOVATIVE COMMUNICATION
CORPORATION,
Transferor and Assignor,

WC Docket No. 09-82

and

NATIONAL RURAL UTILITIES COOPERATIVE
FINANCE CORPORATION AND ITS
SUBSIDIARIES,
Transferee and Assignees,

Applications for Consent to Transfer Control
and Assign Commission Licenses and
Authorizations Pursuant to Sections 214(a) and
310(d) of the Communications Act of 1934, as
Amended

JOINT OPPOSITION TO PETITION TO DENY

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EXECUTIVE SUMMARY

The Commission should deny the petition to deny of Atlantic Tele-Network, Inc. (“ATN”), as a meritless effort to protect ATN’s own broadband business from competition and perhaps even to acquire the cable business of debtor Innovative Communication Corporation (“New ICC”) at a depressed price. ATN’s public-interest arguments have no basis whatsoever in law or Commission precedent. In particular, the Communications Act of 1934, as amended (the “Communications Act”), expressly permits the combination of a local exchange carrier such as the Virgin Islands Telephone Corporation (“Vitelco”) with a small cable operator such as New ICC’s cable systems—a particular combination that has existed since 1998 and to which ATN has not previously objected.

ATN has abused the Commission’s transaction review process to further its own commercial interests and to settle old scores. ATN failed to achieve its preferred purchase terms in abortive negotiations with Mr. Stanford Springel, as Chapter 11 trustee for the bankruptcy estate of New ICC (“Mr. Springel” or “Chapter 11 Trustee”) and the Rural Telephone Finance Cooperative (“RTFC,” as New ICC’s senior secured creditor) for New ICC’s “Group 1 assets.” ATN’s rehashing of allegations about various pre-petition matters merely perpetuates its long-running feud with Vitelco. ATN co-owned Vitelco from 1987 until the two companies split in 1996.

The Commission should reject ATN’s collateral attack on the bankruptcy process. The U.S. District Court of the U.S. Virgin Islands, Division of St. Thomas and St. John, Bankruptcy Division (the “Bankruptcy Court”) has already found that the Chapter 11 Trustee has administered New ICC’s bankruptcy estate in accordance with the requirements of the U.S. Bankruptcy Code and conducted a marketing and sale process in accordance with the U.S.

Bankruptcy Code and the Court’s own procedures. Furthermore, the Bankruptcy Court has found that acquisition of New ICC’s Group 1 assets by National Rural Utilities Cooperative Finance Corporation (“CFC,” as RTFC’s assignee) is in the best interest of New ICC’s bankruptcy estate and creditors and that CFC is a qualified purchaser. The Commission should reject ATN’s invitation to second-guess the Bankruptcy Court on matters of U.S. bankruptcy law.

CFC and the Chapter 11 Trustee have sought Commission consent for the Proposed Transaction (as defined in the underlying applications) in order to permit New ICC’s operating businesses to flourish following New ICC’s lengthy bankruptcy. CFC’s acquisition of certain New ICC businesses—including Vitelco, the incumbent local exchange carrier (“LEC”) in the U.S. Virgin Islands, and two USVI cable operators, Caribbean Communications Corp., d/b/a Innovative Cable TV - St. Thomas - St. John (“Innovative Cable STT-STJ”) and St. Croix TV, Inc., d/b/a Innovative Cable TV St. Croix (“Innovative Cable STX”)—will ensure continuity of service and rehabilitation of the businesses, to the manifest benefit of USVI consumers. Indeed CFC represents the only realistic option for such continued operation and rehabilitation. No other party submitted a sufficient bid for all or part of New ICC’s Group 1 assets, which include Vitelco, Innovative Cable STT-STJ, and Innovative Cable STX.

The Commission should deny ATN’s petition for three principal reasons. *First*, ATN’s petition is legally deficient. ATN complains that CFC would own both telephone and cable companies in the U.S. Virgin Islands. But these companies have already operated under common control for more than a decade. In transaction reviews, the Commission addresses only transaction-specific harms, and ATN’s alleged “harm” exists “both before and after the proposed

transaction.”¹ ATN calls on the Commission to use this proceeding as a “unique opportunity” to improve upon the *status quo* and impose a novel market structure in the U.S. Virgin Islands.² Such requests are beyond the scope of this proceeding and are inconsistent with the standard of review for an acquisition transaction. Regardless, the Proposed Transaction would promote competition in the U.S. Virgin Islands by creating the conditions in which New ICC’s cable companies could offer broadband-over-cable services in competition with the service offered by ATN’s subsidiary Choice Communications, LLC. Moreover, on July 14, 2009, the Federal Trade Commission terminated early its review of the Proposed Transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1975 (“HSR Act”), having concluded that the sale did not raise competition issues that would warrant further investigation.

ATN’s petition is also legally deficient because it asks the Commission to prohibit a market structure explicitly blessed by Congress. ATN resorts to vague arguments about Congress’s “underlying policy” as a basis for prohibiting common ownership of a LEC and a cable system serving the same area. But the law is not on ATN’s side. Section 652 applies only to “buy-outs,” *i.e.*, the acquisition by a LEC or its affiliate of a cable operator or vice-versa. The Proposed Transaction, however, involves neither, as it would continue a combination dating back to 1998, when Vitelco’s affiliate New ICC bought Innovative Cable STT-STJ and Innovative Cable STX. ATN did not object then, and its objection now is at best untimely. Moreover, even if Section 652 did apply to the Proposed Transaction, Section 652 expressly permits the

¹ *Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees; For Consent To Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 21 FCC Rcd. 7358, 7364 ¶ 15 (2006) (“*Nextel-Nextel WIP Order*”).

² See Petition of Atlantic Tele-Network to Deny or, Alternatively, to Grant With Conditions at 6 (“ATN Petition”).

combination of a LEC, such as Vitelco, and a small cable system in a non-urban area, such as Innovative Cable STT-STJ and Innovative Cable STX. The Commission should therefore reject ATN's proposed remedy as patently inconsistent with the Communications Act.

Second, ATN's proposal for the Commission to second-guess the Bankruptcy Court would disserve the public interest by prolonging New ICC's bankruptcy, depriving New ICC's operating companies of access to new capital and thwarting their rehabilitation. The Commission has long recognized the economic and social benefits of enabling parties to emerge from bankruptcy. Here, those benefits are especially significant, as rehabilitation of the companies requires a swift exit from bankruptcy.

A divestiture condition would make a swift exit impossible. Although the Chapter 11 Trustee has stabilized New ICC's businesses, those businesses still lack access to fresh capital that would permit their rehabilitation. By imposing a divestiture condition on the Proposed Transaction, RTFC (which made a credit bid for New ICC's Group 1 assets as the principal secured creditor because the Chapter 11 Trustee received no sufficient bids for all or part of those assets) and the Chapter 11 Trustee would have the right to walk away from the Proposed Transaction, leaving the Chapter 11 Trustee to recommence marketing and sales efforts at considerable expense in the midst of terrible market conditions. Renegotiation of the agreement between RTFC and the Chapter 11 Trustee alone would require such expenses with respect to the non-cable businesses. And any new or modified transactions would be subject to approval in additional—and likely very contentious—Bankruptcy Court proceedings. Under these conditions, it would be very difficult for New ICC's operating companies to improve their services or to offer new services to their subscribers.

Third, contrary to ATN's suggestions, CFC is more than sufficiently qualified to own New ICC's USVI telecommunications and cable businesses. CFC's knowledge and experience with rural-utilities-related businesses, and its access to capital, will be invaluable assets for running telecommunications businesses in the U.S. Virgin Islands. And its position as the owner of New ICC's principal secured creditor provides it with a powerful incentive to rehabilitate the New ICC businesses and to attract qualified management to run those businesses.

The Proposed Transaction represents the best option for the rehabilitation of the principal providers of telecommunications and cable television services in the U.S. Virgin Islands and will best serve the interests of U.S. Virgin Islanders, the bankruptcy estate, and the creditors. The Commission should therefore grant consent expeditiously.

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The Commission should deny the petition to deny of Atlantic Tele-Network, Inc. (“ATN”), as a meritless effort to protect ATN’s own broadband business from competition and perhaps even to acquire the cable business of debtor Innovative Communication Corporation (“New ICC”) at a depressed price.³ ATN’s public-interest arguments have no basis whatsoever in law or Commission precedent. In particular, the Communications Act of 1934, as amended (the “Communications Act”), expressly permits the combination of a local exchange carrier such

³ See ATN Petition.

as the Virgin Islands Telephone Corporation (“Vitelco”) with a small cable operator such as New ICC’s cable systems—a particular combination that has existed since 1998 and to which ATN has not previously objected.

ATN has abused the Commission’s transaction review process to further its own commercial interests and settle old scores. ATN failed to achieve its preferred purchase in abortive negotiations with Mr. Stanford Springel, as Chapter 11 trustee for the bankruptcy estate of New ICC (“Mr. Springel” or “Chapter 11 Trustee”) and the Rural Telephone Finance Cooperative (“RTFC,” as the bankruptcy estate’s senior secured creditor) for New ICC’s Group 1 assets. ATN’s rehashing of allegations about various pre-petition matters merely perpetuates its long-running feud with Vitelco. ATN co-owned Vitelco from 1987 until an acrimonious 1996 split between ATN’s chairman and largest shareholder and New ICC’s former owner.

The Commission should reject ATN’s collateral attack on the bankruptcy process. The U.S. District Court of the U.S. Virgin Islands, Division of St. Thomas and St. John, Bankruptcy Division (the “Bankruptcy Court”) has already found that the Chapter 11 Trustee has administered New ICC’s bankruptcy estate in accordance with the requirements of the U.S. Bankruptcy Code and conducted a marketing and sale process in accordance with the U.S. Bankruptcy Code and the Court’s own procedures. Furthermore, the Bankruptcy Court has found that acquisition of New ICC’s Group 1 assets by National Rural Utilities Cooperative Finance Corporation (“CFC”) is in the best interest of New ICC’s estate and creditors and that CFC is a qualified purchaser. The Commission should reject ATN’s invitation to second-guess the Bankruptcy Court on matters of U.S. bankruptcy law.⁴

⁴ The Commission should also summarily deny the objections filed by Jeffrey B.C. Moorhead. *See* Petition to Deny of Jeffrey B.C. Moorhead, WC Docket No. 09-82 (filed July 7, 2009); Letter from Jeffrey B.C. Moorhead to the FCC, WC Docket No. 09-82 (dated July 6, 2009).

CFC and the Chapter 11 Trustee have sought Commission consent for the “Proposed Transaction” in order to permit New ICC’s operating businesses to flourish following New ICC’s lengthy bankruptcy. CFC’s acquisition of certain New ICC businesses—including Vitelco, the incumbent local exchange carrier (“LEC”) in the U.S. Virgin Islands, and two USVI cable operators, Caribbean Communications Corp., d/b/a Innovative Cable TV - St. Thomas - St. John (“Innovative Cable STT-STJ”) and St. Croix TV, Inc., d/b/a Innovative Cable TV St. Croix (“Innovative Cable STX”)—will ensure continuity of service and rehabilitation of the businesses, to the manifest benefit of U.S. Virgin Island consumers. Indeed CFC represents the only realistic option for such continued operation and rehabilitation. No other party submitted a sufficient bid for all or part of New ICC’s Group 1 assets, which include Vitelco, Innovative Cable STT-STJ, and Innovative Cable STX.

For the reasons set forth in the original applications and highlighted again below, the Proposed Transaction represents the best option for the rehabilitation of the principal providers of telecommunications and cable television services in the U.S. Virgin Islands and will best serve the interests of U.S. Virgin Islanders, the bankruptcy estate, and the creditors. The Commission should therefore grant consent expeditiously.

These duplicative and conclusory filings fail to satisfy the basic pleading requirements of 47 U.S.C. § 309(d) and 47 C.F.R. § 63.52(c). Far from being simply a resident and ratepayer in the U.S. Virgin Islands, Mr. Moorhead currently serves as counsel to Mrs. Dawn Prosser, wife of New ICC’s former owner and a party to various bankruptcy-related proceedings. Mr. Moorhead also served as a hearing examiner for the U.S. Virgin Islands Public Services Commission in a proceeding related to New ICC’s bankruptcy and made frequent appearances in bankruptcy court proceedings relating to New ICC until the Attorney General of the U.S. Virgin Islands intervened. The PSC later terminated its relationship with Mr. Moorhead.

I. ATN Seeks to Thwart or Acquire a Competitor

ATN's opposition to the Proposed Transaction comes with obvious ulterior motives. ATN's subsidiary, Choice Communications, LLC ("Choice"), provides wireless broadband and dial-up ISP services in the U.S. Virgin Islands in competition with New ICC's VI PowerNet division. (Innovative Cable STT-STJ and Innovative Cable STX do not currently provide broadband services.) Choice recently exited the wireless cable business.

In its petition, ATN almost offhandedly mentions that it participated in the auction process for the Group 1 assets⁵ but neglects to articulate the extent of its participation. In fact, ATN conducted extensive due diligence on New ICC's Group 1 assets during the bankruptcy process.⁶ ATN proposed an acquisition requiring substantial financing from RTFC, which was already owed more than \$500 million by New ICC.⁷ Nevertheless, ATN's bid was insufficient, and no agreement was ever reached. ATN was—and presumably remains—keenly interested in the assets of New ICC.

ATN and Choice presumably fear entry by a revamped Innovative Cable into the broadband market in the U.S. Virgin Islands—competition the Commission should be seeking to promote. By requesting the Commission to condition consent for the Proposed Transaction upon divestiture of New ICC's USVI cable businesses,⁸ ATN apparently seeks either to buy one or more of Innovative Cable's systems at depressed prices (allowing ATN to re-enter the video

⁵ ATN Petition at 3.

⁶ Transcript of Hearing before Hon. Judith K. Fitzgerald, United States Bankruptcy Court Judge, Bankruptcy No. 07-30012JKF, Docket Nos. 360, 1159 (Apr. 6, 2009) at 80:16-18 (testimony of the Chapter 11 Trustee) ("April 6 Hearing Transcript").

⁷ *Id.* at 123:6-14, 23-24 (testimony of the Chapter 11 Trustee); *id.* at 146:8-14, 147:18-19 (testimony of Adam Dunayer, Director of Houlihan Lokey, investment bankers retained by the Chapter 11 Trustee).

⁸ *E.g.*, ATN Petition at i.

business on the cheap and to acquire a better broadband platform) or to mire Innovative Cable and Vitelco in further bankruptcy court proceedings by scuttling the Proposed Transaction between the Chapter 11 Trustee and CFC, thereby sidelining a competitor. The Commission should reject these self-serving efforts by ATN.

II. ATN’s Petition to Deny Is Legally Deficient

ATN’s objections and proposed remedy lack any colorable basis in law or Commission precedent. The Commission should decline ATN’s invitation to engage in a sweeping market-restructuring exercise unrelated to the specifics of the Proposed Transaction. It should recognize the pro-competitive potential of the Proposed Transaction on USVI broadband competition. And it should reject ATN’s proposed remedy as patently inconsistent with the Communications Act provisions permitting common ownership of a LEC and a small cable operator in a non-urban area, particularly where that common ownership has already existed for more than 10 years.

A. ATN Fails to Allege Transaction-Specific Harms

The Commission should deny ATN’s petition because ATN fails to allege transaction-specific harms. The Commission conditions transaction approvals “to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission’s responsibilities under the Communications Act and related statutes.”⁹ The Commission has repeatedly explained that it considers only harms specifically created by a proposed

⁹ *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC; For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd. 17,444, 17,463 ¶ 29 (2008) (“*Verizon-ALLTEL Order*”).

transaction—not a harm that exists “both before and after the proposed transaction.”¹⁰ The rationale of this longstanding policy is obvious. It is necessary to prevent the hijacking of transfer and assignment proceedings to achieve a remedy unrelated to the transaction at issue.¹¹

The condition ATN seeks—divestiture of New ICC’s cable assets—would not address any transaction-specific harm. ATN complains that Vitelco and Innovative Cable are currently owned by the same company and that this common ownership would continue under the proposed transaction.¹² Thus, ATN calls on the Commission to use this proceeding as a “unique opportunity” to improve upon the *status quo*—to achieve a new market structure in the U.S. Virgin Islands “for the first time ever.”¹³ In short, ATN’s complaint is with a pre-existing condition—the pre-existing structure of the market—not with a new harm introduced by the Proposed Transaction. Such pre-existing conditions are not appropriately addressed in a transaction review proceeding.

ATN seeks to avoid this conclusion by suggesting that the main issue is how to define the Proposed Transaction. ATN thus asks the Commission to focus on whether the transaction includes “merely the sale of the Group One assets to CFC” or whether it also includes “the

¹⁰ *Nextel-Nextel WIP Order*, 21 FCC Rcd. at 7364 ¶ 15. *Verizon-ALLTEL Order*, 23 FCC Rcd at 17,463 ¶ 29 (stating that the Commission “will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.”).

¹¹ *See, e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd. 473, 534 ¶ 131 (2004) (“*GM-News Corp. Order*”) (“An application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings.”).

¹² ATN Petition at 6-7.

¹³ *Id.* at 6.

auction process and the ultimate selection of CFC as the winning purchaser.”¹⁴ But this issue is irrelevant. Even if the Proposed Transaction included the auction process, the “harm” that ATN seeks to address still would still predate the Proposed Transaction. Vitelco and Innovative Cable were under common ownership long before the bankruptcy process began. Thus, the Proposed Transaction does not cause ATN’s alleged “harm.”

ATN implicitly acknowledges that it has failed to identify a transaction-specific harm and goes so far as to ask the Commission to “set aside” the long-established practice of considering only harms that are transaction-specific.¹⁵ Aside from its conclusory statement that “the public interest so requires,”¹⁶ ATN provides no factual allegations or legal or policy arguments that would justify any changes to the Commission’s longstanding policy. ATN’s request must be denied.¹⁷

B. The Proposed Transaction Will Help, Not Hinder, Competition

While ATN alleges a host of non-transaction specific “harms,” the truth is that the Proposed Transaction will help, not hinder, competition in the U.S. Virgin Islands. As discussed throughout this Opposition, the Proposed Transaction presents the only realistic prospect for the rehabilitation of the New ICC businesses—potentially including upgrades to New ICC’s cable plants for the provision of broadband over cable in competition with ATN’s subsidiary, Choice. As set forth in the Application, the Proposed Transaction will improve New ICC’s access to

¹⁴ *Id.* at 30.

¹⁵ *Id.* at 31.

¹⁶ *Id.*

¹⁷ *See* 47 U.S.C. § 309(d)(1); 47 C.F.R. § 63.52(c).

capital, enabling new investment in the businesses.¹⁸ Interim management has already initiated a network design study of Innovative Cable TV STT-STJ and Innovative Cable TV STX in order to determine the technical and economic feasibility of broadband-over cable-service. Such service would likely compete directly with the broadband service now offered by Choice. By contrast, were ATN to acquire New ICC's cable businesses, the prospect for such competition would disappear.

On July 14, 2009, the Federal Trade Commission terminated early its review of the Proposed Transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1975 ("HSR Act"), having concluded that the sale did not raise competition issues that would warrant further investigation. The Commission, too, should conclude that the Proposed Transaction poses no threat to competition and therefore would serve the public interest.

C. The Communications Act Expressly Permits the Combination of Vitelco, as a LEC, with a Small Cable Company, Such as Innovative Cable

The Commission should reject ATN's proposed divestiture condition as patently inconsistent with the Communications Act. ATN does not allege that the combination of Vitelco and Innovative Cable would violate the Communications Act. Instead, ATN asks the Commission to require divestiture based on a vaguely defined "underlying policy" behind Section 652.¹⁹ The Communications Act, however, does not permit the Commission to second-guess explicit congressional directives.

¹⁸ See Description of the Proposed Transaction, Public Interest Showing, and Related Requests and Showings filed as Exhibit 1 to the Applications for Assignment and Transfer of Control, WC Docket No. 09-82 (filed May 19, 2009) at 17 ("Public Interest Statement").

¹⁹ ATN Petition at 10.

As explained in the underlying application, Section 652 prohibits a LEC from purchasing certain cable systems operating in the same area, and vice versa.²⁰ But the purchaser in the Proposed Transaction— CFC—is neither a LEC nor a cable system (nor an affiliate of one). Section 652 simply does not apply to the Proposed Transaction, as the Proposed Transaction does not create the combination at issue.

Even if Section 652 did apply, however, it would expressly permit the combination at issue, just as it did at the time of the original combination in 1998. Section 652 codifies Congress’s judgment that *some* affiliations between LECs and cable companies are harmful, while others are permissible. And Congress approved precisely the type of affiliation that exists between Vitelco, Innovative Cable STT-STJ, and Innovative Cable STX. Section 652(d)(5) expressly permits LECs that, like Vitelco, have less than \$100,000,000 in annual operating revenues to purchase “[s]mall cable systems in nonurban areas”²¹ like Innovative Cable TV STT-STJ and Innovative Cable TV STX. Section 652(d)(5) thus reflects Congress’s judgment that affiliations between LECs and small nonurban cable systems are not likely to harm competition and should be allowed. Given this provision, it would be nonsensical for the Commission to require divestiture based on the “underlying policy” behind Section 652. For these reasons as well, the Commission should deny the ATN Petition.

²⁰ See Public Interest Statement at 23; see also 47 U.S.C. § 572(a) (stating that “[n]o local exchange carrier or any affiliate . . . may purchase or otherwise acquire” a cable operator); 47 U.S.C. § 572(b) (stating that “[n]o cable operator or affiliate . . . may purchase or otherwise acquire” a LEC).

²¹ 47 U.S.C. § 572(d)(5).

III. The Commission Should Reject ATN's Petition as a Collateral Attack on the Bankruptcy Court Process that Would Disserve U.S. Virgin Islanders

The Bankruptcy Court has found that approving the Proposed Transaction is “in the best interests of the Debtor’s estate and its creditors”²² in part because it represents the best opportunity to resolve New ICC’s bankruptcy and to permit the rehabilitation of its telecommunications and cable television businesses. ATN asks the Commission to second-guess the Bankruptcy Court and to require a new sale of New ICC divested cable assets. In doing so, it suggests a false conflict between the best interests of the bankruptcy estate and the public-interest standard applied by the Commission.²³ No such conflict exists.

The Commission has long recognized that the public interest is served by “a telecommunications service provider’s successful emergence from bankruptcy,” which provides “economic and social benefits, especially including the compensation of innocent creditors.”²⁴

²² *Interim Order (A) Approving Sale of Group 1 Assets Free and Clear of All Liens, Claims, Encumbrances, and other Interests; (B) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and (C) Granting Related Relief*, Bankruptcy No. 07-30012JKF, Docket Nos. 360, 1159 (Bankr. D.V.I. April 9, 2009).

²³ ATN Petition at 6.

²⁴ *WorldCom, Inc. and its Subsidiaries (debtors-in-possession), Transferor, and MCI, Inc., Transferee, Applications for Consent to Transfer and/or Assign Section 214 Authorizations, Section 310 Licenses, and Submarine Cable Landing Licenses*, Memorandum Opinion and Order, 18 FCC Rcd. 26,484, 26,503 ¶ 29 (2003) (“*Worldcom Order*”). *See also, e.g., Application of Orbital Communications Corporation and ORBCOMM Global, L.P., Assignors, and ORBCOMM License Corp. and ORBCOMM LLC, Assignees, for Consent to Assign Non-Common Carrier Earth and Space Station Authorizations, Experimental Licenses, and VSAT Network*, Order and Authorization, 17 FCC Rcd. 4496, 4504 ¶ 15 (Int'l Bur. 2002) (“*ORBCOMM Order*”) (“Because this transaction permits the ORBCOMM system to emerge from bankruptcy and continue operations, the competitive impact will be beneficial. . . . Successful emergence from bankruptcy is critical to the continued operation and expansion of the ORBCOMM system.”); *Applications of Space Station System Licensee, Inc., Motorola Satellite Communications, Inc. and Wireless SP, Inc., Assignors, and Iridium Constellation LLC, Iridium Carrier Services LLC and Iridium Satellite LLC, Assignees, for Consent to Assignment of License Pursuant to Sections 214 and 310(d) of the Communications Act*, Memorandum Opinion and Order and Authorization, 17 FCC Rcd.

As a result, the Commission’s longstanding “policy [is] to support the goals of the bankruptcy laws and, where possible, to accommodate those goals with the goals inherent in the Communications Act, which [it is] charged to implement.”²⁵ Of course, assets in bankruptcy remain subject to the Commission’s oversight.²⁶ Resolution of bankruptcy, however, provides a considerable and independent public-interest benefit because it “would compensate creditors and other stakeholders, and avoid the considerable expense associated with arranging an alternative disposition of [a debtor’s] assets.”²⁷

Here, the public-interest benefits of facilitating the emergence of the operating companies from the shadow of New ICC’s bankruptcy—and the corresponding harm from second-guessing the Bankruptcy Court—are especially great, because rehabilitation of the business depends on a swift conclusion to the bankruptcy proceedings. A divestiture condition would impose expense and delay on companies that can ill afford them.

2271, 2286 ¶ 34 (Int’l Bur. 2002) (“Because this transaction permits the Iridium system to emerge from bankruptcy and continue operations, the competitive impact is likely to be beneficial.”).

²⁵ *WorldCom Order* at 26,503 ¶ 29.

²⁶ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd. 8203, 8323 ¶ 283 (2006) (“*Adelphia Order*”) (holding that “the Commission’s public interest inquiry under section 310(d) is in no way superseded by an obligation to refrain from disturbing the resolution of the bankruptcy court proceedings”).

²⁷ *Id.* at 8324 ¶ 286.

A. A Divestiture Condition Would Impose Costs on the New ICC Businesses and Delay Their Rehabilitation

A divestiture condition would disrupt the bankruptcy process, threatening rehabilitation of the New ICC businesses. Although the Chapter 11 Trustee has stabilized New ICC's businesses, those businesses still lack access to fresh capital that would permit their rehabilitation. Were the Commission to impose a divestiture condition on the Proposed Transaction, RTFC²⁸ and the Chapter 11 Trustee would have the right to walk away from the Proposed Transaction, leaving the Chapter 11 Trustee to recommence marketing and sales efforts at considerable expense in the midst of terrible market conditions. Even renegotiation of the agreement between RTFC and the Chapter 11 Trustee would incur such expenses.

Any new or modified transactions would be subject to approval in additional, time-consuming, and likely very contentious Bankruptcy Court proceedings—with no guarantee that the Court would approve a new transaction or transactions. Under these conditions, it would be very difficult for New ICC's businesses to improve their services or offer new services to their subscribers.

B. Forced Divestiture Would Not Result in Viable Bids for the New ICC Businesses

Although a divestiture condition would further hinder rehabilitation of the New ICC businesses, it would not result in new viable bids for those businesses. Before selecting CFC's bid, the Chapter 11 Trustee extensively marketed New ICC's assets to identify as many potential buyers as possible, conduct an auction, and secure the best sale terms for the benefit of New ICC's creditors. This process included contact with more than 200 potential purchasers

²⁸ RTFC which will assign its rights and claims to CFC prior to consummation of the Proposed Transaction.

(including ATN itself²⁹), entering into more than 125 nondisclosure agreements to give parties access to confidential information in a virtual data room, distributing 125 confidential offering memoranda, and making 10 in-person detailed management presentations.³⁰ Yet at the end of this process, no party other than CFC itself submitted a sufficient bid for New ICC's Group 1 assets.

A forced divestiture would create a number of new economic difficulties with the sale of New ICC's Group 1 assets. *First*, as ATN itself points out, there are significant geographic, demographic, and other factors in the U.S. Virgin Islands that present exceptional difficulties for communications service providers.³¹ Indeed, for evidence of these difficulties, the Commission need look no further than ATN's recent exit from the pay-television market. *Second*, if separated, each of the entities would have to make a significant investment in infrastructure in order to offer new services. Requiring two companies to undertake such investments is unrealistic at present given the current state of their networks. *Third*, separating the cable and telephone businesses would radically change the cost structure of each. These companies have integrated back-office, technical, and maintenance operations, so separating them would mean that the divested company would have to duplicate the other company's back-room operations. And while facing this additional expense, each company would also have to support its back-room operation on its own revenues alone. Nor would the companies be free to recoup these

²⁹ ATN Petition at 3.

³⁰ *See id.*

³¹ *See generally Application of Choice Communications LLC For a New Educational Broadband Service Station on the A Group Channels at St. Thomas, Virgin Islands*, Memorandum Opinion and Order, 20 FCC Rcd 10,906, 10,912 ¶ 15 (Wireless Telecomm. Bur. 2005) (explaining, as described by Choice, the "problems caused by the Virgin Islands unique location").

increased costs through rate increases: both must first obtain approval of the U.S. Virgin Islands Public Services Commission to implement meaningful rate increases.³²

Thus, there is no reason to think that a divestiture would attract new or even renewed interest in New ICC's Group 1 assets, except at depressed prices. Indeed, this appears to be exactly what ATN wants—the chance to re-enter the video business it just exited on the cheap, while protecting its broadband business from potential competition. The delay, expense, and reduced competition of ATN's preferred outcome would greatly disserve the public interest.

IV. ATN's Attacks on CFC and RTFC Are Meritless and Self-Serving

As part of its collateral attack on the Bankruptcy Court process, ATN also launched a meritless and self-serving broadside against CFC and its fitness as a purchaser. Contrary to ATN's allegations,³³ CFC has ample qualifications to own and operate New ICC's USVI telecommunications and cable businesses.

As the underlying applications demonstrate, CFC's knowledge and experience with rural utilities-related businesses will be an invaluable asset for owning and operating New ICC's telecommunications businesses in the U.S. Virgin Islands. ATN does not seriously dispute this, nor does it dispute that under CFC's ownership, the operating subsidiaries will have improved access to capital and the ability to focus anew on their core businesses. Consequently, these businesses will be much better positioned to improve their operations, quality of service, and disaster planning and recovery. They will also be better positioned to evaluate their infrastructure and investment needs and plan for the provision of new and enhanced services. As for ATN's criticism that CFC has not previously engaged in the day-to-day management of a video

³² See 30 V.I.C. §§ 13, 20, 23.

³³ ATN Petition at 15-16.

company,³⁴ the Commission has no such requirement, and CFC's financial strength makes it uniquely qualified to hire experienced and able management.

Contrary to ATN's allegations,³⁵ CFC's affiliate RTFC did not stand by idly while New ICC's assets were "looted" by its prior owner. With more than \$500 million of unpaid outstanding loans to New ICC as of March 2009, RTFC had every reason to guard against the malfeasance by New ICC's former owner. Moreover, ATN does not suggest that RTFC or CFC benefited in any way from actions by New ICC's former owner. To the contrary, as court records reflect, RTFC has litigated for years seeking repayment of its loans.³⁶ RTFC has the largest economic exposure of any creditor in New ICC's bankruptcy and therefore has an overwhelming incentive to make itself (and CFC) whole by rehabilitating New ICC's USVI telecommunications and cable businesses.

³⁴ *Id.* at 13.

³⁵ *Id.* at 15-16.

³⁶ *See, e.g.*, Final Judgment, *RTFC v. ICC* and *RTFC v. Jeffrey Prosser*, Case Nos. 2004-CV-154 and 2004-CV-155 (D. V.I., entered June 9, 2006) (entering judgment in favor of RTFC for \$524,910,065).

CONCLUSION

The Proposed Transaction will enable the New ICC companies to emerge from bankruptcy and will permit rehabilitation of those business and improved service to residents of the U.S. Virgin Islands. For the reasons set forth above and in the Application, the Commission should deny the ATN Petition and approve the Proposed Transactions swiftly.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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