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August 28, 2009

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445-12th Street SW, Room TWB 204  
Washington, D.C. 20554

*Re: Ex Parte Submission in WC Docket No. 09-82*

Dear Ms. Dortch:

Atlantic Tele-Network, Inc. ("ATN"), by its attorneys, hereby submits this *ex parte* letter to update and correct the record regarding the Consolidated Applications filed in the above-referenced docket seeking the Commission's approval to transfer certain licenses and authorizations held by or on behalf of Innovative Communications Corporation ("ICC") to the National Rural Utilities Cooperative Finance Corporation ("CFC").

On July 7, 2009, ATN filed a petition [hereinafter "ATN Petition"] asking the Commission to deny the applications or, alternatively, to grant them on the condition that CFC fully divest all cable television operations in the U.S. Virgin Islands, including Caribbean Communications Corporation and St. Croix TV, Inc. ("Innovative Cable"). Alternatively, approval could be conditioned upon divestiture of the local ILEC, the Virgin Islands Telephone Corporation ("Vitelco").<sup>1</sup> The important issue is not which entity is divested, but ensuring separate ownership of Vitelco and Innovative Cable to promote broadband infrastructure and service development in the U.S. Virgin Islands. On July 22, 2009, Mr. Stanford Springel, the Chapter 11 Trustee ["Mr. Springel" or "Trustee"], submitted an opposition to ATN's petition [hereinafter "Trustee Opposition"], and on the same date Mr. Springel joined in an opposition submitted by CFC [hereinafter "Joint Opposition"].

<sup>1</sup> See ATN Petition at 2 n.1.

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***I. Key Broadband Policies Are At Stake.***

The Consolidated Applications represent a cynical “business as usual” approach with respect to the Commission’s broadband policies. It is undisputed that the people of the U.S. Virgin Islands have been denied entry into the Broadband Era. Vitelco itself presented testimony to the local regulator confirming that Virgin Islanders have access to few broadband services, and the few services provided are excessively priced and of poor quality.<sup>2</sup> This situation exists because the incumbent local exchange carrier (Vitelco) and the dominant pay-television services provider (Innovative Cable) do not compete with each other – they have been owned by the same entity (ICC) and operated as a unit for over 10 years. Thus, the wireline services market in the USVI has for years lacked the competitive spark that prompts carriers in other locations to upgrade facilities and provide new and enhanced services to customers. In asking the Commission to adopt an order perpetuating a market structure that discourages infrastructure investment and the introduction of advanced services, the applicants are insisting that the Commission eschew its avowed preference for promoting broadband deployment in rural areas in favor of the status quo.

The applicants state unapologetically (and without any evidentiary support) that intermodal competition between the ILEC and the cable television provider is inherently uneconomic and inefficient in a rural area such as the U.S. Virgin Islands.<sup>3</sup> ATN strongly disagrees. There are many rural areas in America today where the ILEC and the cable television provider are separately owned, thereby affording citizens the benefits of intermodal competition.<sup>4</sup> These Consolidated Applications provide the Commission with an opportunity to continue promoting intermodal competition in rural America and its oft-stated position that intermodal competition can and should play an important role in developing broadband infrastructure for all Americans.

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<sup>2</sup> See ATN Petition at 18-19 (reciting testimony of Dr. Jeffrey Eisenach for Vitelco); Joint Opposition at 4.

<sup>3</sup> *E.g.*, Trustee Opposition at 12 (“In the U.S. Virgin Islands’ market, fixed-line voice and video services are cost-effective only if those services are offered by a single provider”); *id.* (“Vitelco and Innovative Cable are simply not cost-effective as stand-alone businesses”); *id.* at n.25 (“it would not be cost effective to upgrade a stand-alone Vitelco[] network to provide broadband”).

<sup>4</sup> A good example is Guam, which as an island with 178,000 people, 65,000 landline phones, and 98,000 mobile phones is arguably analogous to the USVI. In Guam, there is competition in the provision of voice, video, and broadband data services between two separately owned companies -- MCV Broadband, the cable TV provider, and GTA Teleguam, the phone company.

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At bottom, and despite its vague rhetoric about rehabilitating and strengthening ICC, ATN believes that CFC has no intention of investing significant funds into ICC's operations in the U.S. Virgin Islands in order to accelerate or promote the development of a true broadband infrastructure. Rather, CFC did not want these ICC assets sold during an economic recession when market prices were reduced, so CFC decided to hold onto these assets for some period of time so that it can re-offer them at a later date, hopefully when market conditions have improved and it can realize a better price. In short, CFC plans to be a caretaker for some period of time until it can mitigate its losses on what was inarguably a very bad investment.<sup>5</sup> We think the people of the U.S. Virgin Islands deserve better in the form of a long term operator, and therefore the Commission should deny the applications or impose the divestiture condition we have requested.

## ***II. What The Oppositions Do Not Say.***

Before we refute the reasons proffered by the Trustee and CFC for denying ATN's petition, it is useful to summarize what the applicants have not said or disputed:

- The Trustee and CFC do not dispute that Vitelco's network is an utter shambles – held together by “scotch tape and baling wire” and utilizing 1980s technology – despite many tens of millions of dollars in annual FCC subsidies over the past decade.<sup>6</sup>
- CFC has not offered any commitment (binding or otherwise) to invest the funds necessary to provide Virgin Islanders with a minimally adequate wireline network. Indeed, during the bankruptcy court hearing, the Trustee admitted on the stand that he asked RTFC to make funding available to improve Vitelco's network, and RTFC refused.<sup>7</sup>

<sup>5</sup> A recent presentation by the President of ICC confirms this likelihood. In remarks to business leaders on St. Croix, Clarke Garnett, President of ICC, discussed the transfer of control of ICC to CFC and “. . . said he anticipates an influx of capital [once the transfer is complete] for modernizations . . . as the new owners work to build the company's value before possibly selling it when the markets improve.” New Owner for Innovative Likely by Year's End, St. Thomas Source, August 28, 2009, available at <http://stthomassource.com/content/news/local-news/2009/08/27/new-owner-innovative-likely-years-end>.

<sup>6</sup> See ATN Petition at 5, 16-18 (reciting the Hearing Examiner's conclusions as well as the testimony of Mr. Keith Milner for Vitelco).

<sup>7</sup> See *In Re Innovative Communications Company, LLC*, Case No. 06-30008(JKF), Dist. Ct. of V.I., Bankr. Division, Transcript of Hearing on April 6, 2009, at 77 (“Q. Have you sought to have [RTFC] make any funding available for capital improvements of Vitelco during your administration of this estate? A. Yes. Q. And have they done so? A. No.”) [hereinafter “Bankruptcy Hearing”]. The Bankruptcy Court agreed that “RTFC has not agreed to lend any funds to the debtor so that it can make capital improvements to make

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- CFC does not deny that ICC has market power in the U.S. Virgin Islands with respect to its operation of the ILEC (Vitelco) and the pay-television services provider (Innovative Cable), as well as Internet access services through its VI PowerNet subsidiary.<sup>8</sup>
- CFC does not deny that ICC operates Vitelco and Innovative Cable so that they do not compete against each other in the provision of broadband services. More important, it is clear from the Joint Opposition that CFC plans to continue with this policy of denying Virgin Islanders the benefits of intermodal competition between Vitelco and Innovative Cable. Nothing in the Joint Opposition suggests any commitment on the part of CFC to upgrade both the phone and cable networks to provide broadband services.
- Apart from vague rhetoric about stabilizing and rehabilitating ICC's operations, CFC has made no binding commitments to make any specific infrastructure investments in the U.S. Virgin Islands.
- Nor has CFC made any binding commitments to introduce specific broadband services or applications to Virgin Islanders. The "major upgrades" ICC brags about in the local newspapers are "clear dial tone, call forwarding, call waiting and caller ID" for up to 1500 customers, to be provided using a new CALIX switch.<sup>9</sup> These services have been available on the mainland and in other Caribbean countries for decades.
- The applicants do not dispute that ICC's Chairman "upstreamed" tens of millions of dollars, including by all accounts FCC subsidies, from Vitelco for his personal use<sup>10</sup> while RTFC was making substantial loans to ICC, and that RTFC failed to detect this malfeasance.
- The Trustee and CFC agree that the Trustee's sole objective in packaging the ICC assets for sale, and selecting the winning bidder, was to maximize the value of the assets for the

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sure that the services continue to be provided to the citizens in the Virgin Islands." *Id.* at 260.

<sup>8</sup> See ATN Petition at 21-26 (documenting ICC's market power over fixed communications services in the U.S. Virgin Islands through Vitelco (ILEC); Innovative Cable (pay-television services); VI Powernet (Internet access); and Innovative Long Distance (long distance services)).

<sup>9</sup> "Innovative pushes major upgrades of DSL, lines on St. Croix, St. John," The Virgin Islands Daily News, July 6, 2009, at 20.

<sup>10</sup> See ATN Petition at 14-16 & 19-20 (documenting the "looting" of ICC by its former Chairman and the practice of "upstreaming" funds from Vitelco to ICC for his personal use).

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benefit of the creditors,<sup>11</sup> which in this case meant preserving ICC's entrenched market power rather than taking actions that would promote intermodal competition.

- The Trustee and CFC do not dispute that the Bankruptcy Court was not asked to address, and did not address, the telecommunications policy issues raised by ATN in its petition.

These undisputed facts create a relevant background for analyzing the applicants' responses to ATN's petition. In particular, there is nothing to show that granting the Consolidated Applications will facilitate the deployment of broadband infrastructure, or the introduction of broadband services and applications, in the U.S. Virgin Islands.

### ***III. There Is No Conflict With The Bankruptcy Court.***

As expected, the Trustee and CFC contend that the Commission is powerless to deny the Consolidated Applications, or to impose any conditions, on the ground that doing so would create a jurisdictional conflict with the Bankruptcy Court.<sup>12</sup> In effect, the applicants believe the only role available to the Commission here is to act as a rubber stamp approving any entity selected by the Bankruptcy Court. This position grossly misrepresents the Bankruptcy Court proceedings, and in any event it is an incorrect portrayal of the Commission's statutory authority in this proceeding.

Contrary to the applicants' argument, the Bankruptcy Court expressly designed the ICC bankruptcy proceeding to be a two-step proceeding so that the Commission, and other interested regulatory authorities, would have a full and complete opportunity to substantively review the proposed transaction prior to the final selection of the winning bidder. In particular, the Bankruptcy Court followed the somewhat unusual approach of adopting merely an "interim" order selecting CFC as the winning bidder in order to permit the regulatory agencies to review the transaction, which will be followed at a later date by a final order after all regulatory agencies have acted and further Bankruptcy Court hearings have been held.<sup>13</sup> In the April 6<sup>th</sup> hearing on

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<sup>11</sup> *E.g.*, Trustee Opposition at 3 (acknowledging the Trustee sought "to protect and preserve the estate assets and to administer such assets in the best interest of the creditors"). The Trustee provided similar testimony to the Bankruptcy Court. *See* Bankruptcy Hearing at 71 ("Q. And do you view, as part of your duties for ICC, LLC, an obligation to maximize the return to that estate? A. Yes.").

<sup>12</sup> Trustee Opposition at 207; Joint Opposition at 10-11.

<sup>13</sup> *See* "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," *In re Innovative Communication Corporation*, Bankruptcy No. 07-3001JKF, Dist. Of V.I., Bankr. Div., April 9, 2009. As the Bankruptcy Court stated, "[I]t is going to be an

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the interim order, the Bankruptcy Court made crystal clear that the only issue being considered was whether accepting CFC's credit bid was in the best interests of the creditors.

“The issue for today is whether or not the RTFC is an appropriate bidder because of the credit bid and whether or not, based on their bid, this bid is in the best interest of this estate and the highest and best bid that could be accepted, at least on this interim basis, to go forward with whether or not the regulatory approval processes can proceed, so that we can get then to a final hearing . . . .”<sup>14</sup>

As a result, far from being inconsistent with the Bankruptcy Court's interim order, the Commission's full and fair consideration of ATN's petition is precisely what the Bankruptcy Court intended to happen in the wake of its interim order. The Bankruptcy Court recognized the distinct possibility that a regulatory agency might not approve the transaction: “If the RTFC at some point is alerted that it's not going to get the regulatory approval, then at some point it may be necessary to withdraw or reformulate.”<sup>15</sup> Further, the applicants' assertions that ATN should have raised its telecommunications and broadband policy issues prior to adoption of the interim order<sup>16</sup> are specious. The Bankruptcy Court would not have considered any such issues given the limited nature of the inquiry in light of the interim order to be adopted, and in any event ATN is entitled to raise those issues in the first instance with the Commission.

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interim order at best. It's not going to be a final order, because to the extent the Court does anything, the only thing that will happen is that it will enable the parties to start a regulatory process and in no way would assume that there will be a final order.” *See* Bankruptcy Hearing at 66 (remarks of Bankruptcy Court judge from bench). Counsel for the Trustee confirmed that “[b]ecause regulatory approval . . . is required . . . what we have sought and are seeking today is the entry of an interim or initial order”). *Id.* at 12 (statement of Mr. Stewart for the Trustee).

<sup>14</sup> *See* Bankruptcy Hearing at 91 (remarks of Bankruptcy Court judge from bench). RTFC's Counsel agreed, stating “[w]e're asking for the Court to make findings about the integrity of the process, the good faith of the buyer, and the value, the fairness of the value that's being accomplished.” *Id.* at 184 (Comments of Mr. Greendyke, Counsel for RTFC). Parties' attempts to inject other issues into the hearing were rejected by the Bankruptcy Court. *E.g.*, Bankruptcy Hearing at 91-92 (refusing to consider whether certain releases executed by ICC's former Chairman are void); *id.* at 270-71 (postponing until the final hearing certain issues regarding the rights of preferred shareholders).

<sup>15</sup> *See* Bankruptcy Hearing at 260 (remarks of Bankruptcy Court judge from bench).

<sup>16</sup> *E.g.*, Trustee's Opposition at 2-7 (characterizing ATN's petition as an “untimely collateral attack” and accusing ATN of “[h]aving slept on its rights” by not raising FCC policy issues before the Bankruptcy Court).

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Further, as a legal and regulatory matter, the applicants are wrong to suggest that the Commission does not have sufficient authority to do anything other than rubber-stamp its approval of the transferee selected by the Bankruptcy Court. While the Commission's policy is to support the goals of the bankruptcy laws, the FCC's mandate from Congress is to implement the goals and objectives set forth in the Communications Act (the "Act"). Thus, the FCC has held that in fulfilling its obligations under the Act, it will accommodate the goals of the bankruptcy laws *only* "where possible."<sup>17</sup> To that end, the Commission has made clear that it defers to the Bankruptcy Court only with respect to matters within the Court's jurisdiction, and that it makes an independent assessment whether the proposed assignee or transferee is qualified to be an FCC licensee and whether the public interest is served by grant of the assignment or transfer application.<sup>18</sup> Importantly, the Bankruptcy Courts have expressly recognized the FCC's separate and independent authority under the Act, and have affirmed the right of the FCC to disapprove any transfer or assignment even where the Bankruptcy Court has approved the transferee or assignee.<sup>19</sup> Indeed, the Bankruptcy Courts have specifically held that the powers of the Court should not be used to force the FCC to prefer one applicant over the other.<sup>20</sup> Thus, the FCC's review of the Consolidated Applications is not simply "limited to the transferee presented in the application" as the Trustee asserts.<sup>21</sup>

<sup>17</sup> *WorldCom, Inc. and MCI, Inc., 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 26484, ¶ 29 (2003).

<sup>18</sup> *See Applications of Interactive Control Two, Inc., Wincom Corp., U.S. Telemetry-New Brunswick, Inc., U.S. Telemetry-Lancaster, Inc., For Consent to the Assignment of Licenses for Stations KIVD0063 and KIVD0247 in the 218-219 MHz Service*, Order on Reconsideration, 16 FCC Rcd 18948, 18960, n.96 (2001). The Commission readily defers to the Bankruptcy Court on assignments or transfers of control to trustees, on the grounds that these assignments or transfers are temporary in nature and the trustee operates under the direction of the Bankruptcy Court. But such deference does not extend to the approval of new, permanent licensees. *See Applications of D. H. Overmyer Telecasting Co., Inc.*, Memorandum Opinion and Order, 94 FCC 2d 117, ¶ 10 (1983), *citing Gulf Coast Radio, Inc.*, 45 FCC 1865, 1866 (1965).

<sup>19</sup> *See D.H. Overmyer Telecasting Co., Inc. v. Lake Erie Communications, Inc.*, 35 B.R. 400, 401 (Bankr. N.D. OH 1983).

<sup>20</sup> *Id.* at 405, *citing Jordan v. Randolph Mills, Inc.*, 716 F.2d 1053 (4<sup>th</sup> Cir. 1983). The Bankruptcy Court further noted that any attempt by a licensee or permit holder to use bankruptcy proceedings to limit the discretion of the regulatory body would be an attempt to enhance the debtor's property rights, contrary to the purpose of the Bankruptcy Code. *Id.*

<sup>21</sup> Trustee Opposition at 4.

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Consistent with its authority, the FCC has not hesitated to deny transfer and assignment applications filed by bankruptcy trustees.<sup>22</sup> More importantly, the FCC has not hesitated to condition the grant of such applications on changes in corporate structure or compliance with requirements intended to preserve or promote competition,<sup>23</sup> or to take other actions in granting such applications that impose costs on the entity emerging from bankruptcy.<sup>24</sup> As such, the Commission's determination to grant the Consolidated Applications subject to the condition that the parties divest the cable television business post-close is entirely consistent with the Commission's authority under the Act and with prior precedent.

At bottom, the applicants are arguing that there is no venue in which these critical telecommunications policy issues may be considered and addressed. The Trustee did not, and could not, consider the impact of packaging these assets for sale upon the development of broadband infrastructure in the U.S. Virgin Islands. Further, the Bankruptcy Court would not have considered these issues given the limited scope of its interim order, nor is the Bankruptcy Court an appropriate decision-maker with respect to the telecommunications and broadband policies of the U.S. Government. Only the Commission is capable of articulating and applying those critical national policies in the U.S. Virgin Islands. If, as the applicants suggest, the

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<sup>22</sup> See, e.g., *American Colonial Broadcasting Corp.*, 758 F.2d 794, 799 (1<sup>st</sup> Cir. 1985); *Two If By Sea Broadcasting Corp.*, 12 FCC Rcd 2254 (1997).

<sup>23</sup> See *Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corp. (Debtor-in-Possession), Assignors, and Intelsat North America, LLC, Assignee, Applications for Consent to Assignments of Space Station Authorizations and Petition for Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934, as Amended, Order and Authorization*, 19 FCC Rcd 2404 (2004) (grant of authority to assign space station licenses of debtors-in-possession conditioned on assignee's compliance with Orbit Act's requirements regarding IPO, exclusivity arrangements, and limitations on expansion into additional services) [hereinafter "*Loral Satellite*"]; *Applications of Space Station System Licensee, Inc., Assignor, and Iridium Constellation LLC, Assignee, Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 2271 (2002) (grant of authority to assign satellite system licenses and authorizations to Bankruptcy Court-approved assignee conditioned on assignee's compliance with change in ownership structure, national security agreement with Executive Branch agencies, and requirement to provide advance notification of de-orbiting of system or individual satellites) [hereinafter "*Iridium*"].

<sup>24</sup> See *Winstar LMDS (Chapter 7 Debtor), Request for Waiver of 1.211(d) and 101.1107(e) of the Commission's Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction 17; Application for Assignment of Licenses and Authorizations from Winstar LMDS, LLC (Chapter 7 Debtor) to Winstar Spectrum, LLC, Order*, 17 FCC Rcd 7084, ¶ 10 (2002) (FCC refuses to waive spectrum auction unjust enrichment rules and requires debtor to repay approximately \$8.5 million in small business bidding credits and interest despite debtor's assertion that failure to grant waiver will limit funds available to assignee for future infrastructure development).

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Commission declines to review the impact of these national policies on the proposed transaction, then these policies will have effectively been silenced without ever being considered.

***IV. The Public Interest Requires A Divestiture Requirement.***

***A. Divestiture Is Required To Promote Broadband Deployment.***

The key question in this proceeding is whether it would promote the deployment of broadband infrastructure and services in the U.S. Virgin Islands to have independent ownership of Vitelco and Innovative Cable.<sup>25</sup> In the specific circumstances of these Consolidated Applications, the answer to that question is not in doubt. ICC has operated Vitelco and Innovative Cable so that they do not compete with each other (a state of affairs that CFC would continue), thereby depriving Virgin Islanders of the benefits of intermodal competition and preventing them from entering the Broadband Era. Vitelco's own expert consultant concluded that the availability of advanced services in the U.S. Virgin Islands is woefully deficient compared to the U.S. Mainland, and that prices for the few available services are excessive.<sup>26</sup> The list of broadband or similar services *not* available to Virgin Islanders seems almost endless — all IP-based services, PRI services, Ethernet services, optical ring services, packet switching services, video services, conferencing services, virtual private network services, and remote access services.<sup>27</sup> Further, the lack of competitive market conditions for fixed services in the U.S. Virgin Islands has resulted, as Vitelco's own witnesses have confirmed, in the near total disintegration of Vitelco's wireline network.<sup>28</sup> In the absence of competitive entry, separate ownership of Vitelco and Innovative Cable is the only viable option for promoting the competitive deployment of broadband infrastructure in the U.S. Virgin Islands. As the Trustee's investment adviser testified before the Bankruptcy Court, Vitelco and Innovative Cable are

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<sup>25</sup> The applicants assert that ATN's proposal to condition grant of the transfer applications on divestiture of TCC's cable television operations is motivated by ATN's desire to acquire Innovative Cable and re-enter the video business in the USVI. Joint Opposition at 4. Since ATN has stated that conditioning approval of the transfer applications upon divestiture of Vitelco is equally acceptable, there is no basis for the applicants' claim.

<sup>26</sup> See ATN Petition at 18 (reciting testimony of Dr. Jeffrey Eisenach for Vitelco).

<sup>27</sup> See ATN Petition at 18 (reciting testimony of Mr. Keith Milner for Vitelco).

<sup>28</sup> The Trustee argues that rates for wireline services in the USVI are comparable to rates in the continental U.S. and other countries in the Caribbean basin in support of his position that Virgin Islanders enjoy service comparable to services in mainland U.S. See Trustee Opposition at 9. Considering the minimal capital expenditures Vitelco has made in its wireline network and the considerable USF subsidies and tax breaks ICC has received, it stands to reason that Vitelco's prices for wireline service should be lower than the rates for comparable service in the U.S. mainland or other Caribbean countries.

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“natural competitors.”<sup>29</sup> If they are made to compete against each other, which cannot be achieved except through separate ownership, the beneficiaries will be the citizens of the U.S. Virgin Islands.

It should be noted that even a small increase in the take-up rate for broadband services in the U.S. Virgin Islands could have enormous economic benefits. The link between broadband subscribership and economic growth is well-documented. As Viteclo’s own expert consultant noted, even a 7% increase in broadband subscribership could deliver more than \$40 million in economic benefits.<sup>30</sup>

***B. The Section 652 Exemption Is A Red Herring.***

CFC contends that the Commission is precluded from adopting a divestiture condition because the common ownership of Vitelco and Innovative Cable falls within an exemption to the prohibition on cable-telco “buyouts” under section 652.<sup>31</sup> The problem with this argument, as CFC appears to acknowledge,<sup>32</sup> is that the instant transaction is not a “buyout” subject to section 652. That CFC claims to qualify for an exemption to an otherwise inapplicable prohibition is not grounds to reject ATN’s petition. Certainly, the buyout exemption does not equate to a general rule or policy that parties are entitled as a matter of law to implement common ownership of LECs and cable operators in every small, non-urban market in the United States. Indeed, given the strong policy concerns that common ownership of LEC and cable television operations will harm consumers, Congress’ decision not to transform this limited buy-out exemption into a rule of general applicability refutes CFC’s argument that it has an inchoate entitlement to undisturbed common ownership of Vitelco and Innovative Cable in perpetuity. The Commission’s authority to impose a divestiture condition on a case-by-case basis under the statutory “public interest” standard is not limited to situations where the condition is required to cure a statutory or regulatory violation. There are numerous cases where the Commission has imposed conditions to address problems on a case-by-case basis that do not reflect an independent violation of agency rules or the underlying statute.<sup>33</sup> The Commission should adhere to this precedent in this instance.

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<sup>29</sup> See Bankruptcy Hearing at 150 (testimony of Adam Dunayer, Managing Director, Houlihan Lokey).

<sup>30</sup> See ATN Petition at 18-19 (testimony of Dr. Jeffrey Eisenach for Vitelco).

<sup>31</sup> See Joint Opposition at 8-9.

<sup>32</sup> *Id.* at 9 (stating that “Section 652 simply does not apply to the Proposed Transaction”).

<sup>33</sup> See, e.g., *Loral Satellite; Global Crossing Ltd. (Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee, Applications for Consent to Transfer Control of Submarine Cable Landing Licenses, International and Domestic Section 214 Authorizations, and Common Carrier and Non-Common Carrier Radio Licenses, and*

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***C. The Benefits Of Divestiture Outweigh Implementation Costs.***

The Trustee and CFC argue that it will be difficult and expensive to implement the requested divestiture. Parties always trot out this argument when they oppose a divestiture which is required to promote the public interest. Yet the Commission has on many occasions required parties to divest companies or assets as a condition of approval – despite the implementation costs of doing so – because the benefits that divestiture will deliver to the public outweigh the private costs of divesting the company or assets. The divestiture costs identified by the Trustee and CFC are the same types of one-time costs that are normally incurred when a divestiture occurs. In this case, whatever one-time costs may be incurred to ensure separate ownership of Vitelco and Innovative Cable are outweighed by the efficiency gains that each company will achieve in a competitive environment, so there is no reason that such costs should result in higher rates for Virgin Islanders. In any event, these private implementation costs are necessary to ensure that the U.S. Virgin Islands will have a true broadband infrastructure for the first time.

Although ATN believes that the Trustee and CFC overstate the difficulty and expense of separate ownership, ATN would accept establishing a reasonable timetable of no more than one year for CFC to implement the divestiture in order to ensure that the transition occurs smoothly and without undue hardship to the parties. However, any delays beyond one year would serve only to harm the interests of Virgin Islanders, who have already waited too long for access to broadband services.

Ultimately, the Trustee's and CFC's argument that divestiture is too expensive boils down to their belief that the U.S. Virgin Islands cannot support competing LEC and cable television operations. As noted above, they believe that intermodal competition between LECs and cable operators in rural areas is inherently uneconomic and inefficient. ATN strongly disagrees, and would note that the applicants have offered no evidentiary support for their belief that separate ownership is infeasible. Particularly given that the transmission infrastructure has already been established and therefore represents "sunk costs," there is no basis for rejecting head-to-head competition between Vitelco and Innovative Cable. Further, there are many rural areas in the United States where the ILEC and the cable television operator are separately owned. By itself, this refutes the applicants' assertion that intermodal competition cannot work in rural areas such as the U.S. Virgin Islands.

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*Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization, 18 FCC Rcd 20301 (2003) (grant of authority to transfer control of debtor-in-possession conditioned upon transferee's compliance with national security agreement with Executive Branch agencies); Iridium.*

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***D. Divestiture Is A Transaction-Specific Condition.***

The applicants' contention that divestiture is improper because common ownership of Vitelco and Innovative Cable is "a done deal" may be briefly refuted. Upon ICC's bankruptcy, the Trustee was required to examine all ICC assets and package them for sale. The Trustee could have sold Vitelco and Innovative Cable separately, but admittedly chose not to do so in order to maximize the proceeds from the sale.<sup>34</sup> Yet the reason why Vitelco and Innovative Cable maximize proceeds when sold together -- the market power they collectively embody over services in the U.S. Virgin Islands -- is precisely why the Commission should require separate ownership. The transaction under review is not merely the Bankruptcy Court's interim selection of CFC as the winning bidder, but the Trustee's decision to package these assets in such a way as to maximize their market power to the detriment of broadband infrastructure in the U.S. Virgin Islands. Hence, the divestiture condition requested by ATN is fully consistent with the Commission's recent practice of imposing transaction-specific conditions.

Alternatively, the Commission is not required by statute to impose only transaction-specific conditions, and it may waive that practice where, as here, the public interest requires a condition in order to provide a broadband infrastructure to an underserved rural area for the first time.

***V. CFC Is Not A Qualified Transferee.***

The CFC's arguments that it has the requisite qualifications fall of their own weight.

*First*, CFC does not attempt to conceal its lack of experience operating telephone companies. As the Trustee candidly testified before the Bankruptcy Court, managing telephone companies is "not generally what they [RTFC] do."<sup>35</sup> In order to compensate for its own inexperience, CFC suggests somewhat opaquely that it may seek to hire "experienced and able management" to operate these companies. However, outsourcing the management of Vitelco and Innovative Cable to some unnamed third party hardly constitutes a ringing endorsement of CFC's own qualifications. Moreover, CFC's failure to provide any details on this outsourcing option only confirms ATN's concern that CFC plans to operate as a mere caretaker until the assets can be sold at a later date at a higher price in a different economic climate.<sup>36</sup>

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<sup>34</sup> See Trustee Opposition at 3 (Trustee packaged the ICC Group One assets "consistent with" his mandate to administer the estate in the best interest of the creditors); *id.* at 12 n.23 ("the Trustee never contemplated selling these operations as separate entities because it makes no business sense to do so").

<sup>35</sup> See Bankruptcy Hearing at 115 (Testimony of Stan Springel).

<sup>36</sup> This concern appears to have been confirmed by the President of ICC. See note 5, *supra*.

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*Second*, while CFC protests that it “did not stand by idly while New ICC’s assets were ‘looted’ by its prior owner,”<sup>37</sup> CFC cannot identify even one action that RTFC took to monitor its investment in ICC, detect wrong-doing, or ensure that ICC’s assets were of sufficient value to protect RTFC’s \$500 million loan. Nor has CFC committed to undertake an investigation of the potential misuse of tens of millions of dollars in Federal subsidies, or to identify the personnel or structural changes within ICC that may be required to prevent further misconduct and ensure eligibility for or the appropriate use of Federal subsidies on a going-forward basis. Simply put, to the extent that there was a misappropriation of funds by ICC’s prior owner, such action occurred on RTFC’s watch, and RTFC failed to identify the malfeasance. While “RTFC had every reason to guard against the malfeasance by New ICC’s former owner,”<sup>38</sup> the fact remains that RTFC did not do so – but now wants to own ICC’s assets in the hope of recovering at least some of its losses.

*Third*, the parties recount in detail the changes the Trustee has implemented in the New ICC companies.<sup>39</sup> ATN agrees, and congratulates the Trustee on his actions to rehabilitate and stabilize the New ICC companies. However, the Trustee is not the proposed transferee. CFC is the proposed transferee, and this record documents ATN’s concerns that CFC intends to function as a mere caretaker until the assets can be readied for re-marketing. As noted above, the Trustee testified before the Bankruptcy Court that he asked RTFC to make funds available for capital investment in Vitelco, and RTFC refused. Similarly, CFC’s alleged access to capital is meaningless if it plans to operate the ICC properties as a caretaker until they can be re-marketed at a later time.

*Fourth*, CFC and the Trustee argue that the Consolidated Applications must be approved because there are no other potential buyers of these assets.<sup>40</sup> This argument, it should be noted, is flatly contrary to their arguments elsewhere that the Commission cannot evaluate CFC’s qualifications by reference to other potential transferees,<sup>41</sup> and that ATN’s ulterior motive is to purchase certain of these assets itself.<sup>42</sup>

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<sup>37</sup> Joint Opposition at 15.

<sup>38</sup> Joint Opposition at 15.

<sup>39</sup> Trustee Opposition at 14-15.

<sup>40</sup> Joint Opposition at 12-14.

<sup>41</sup> Trustee Opposition at 4.

<sup>42</sup> Joint Opposition at ii and 1.

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More significantly, this argument is simply wrong. The applicants assert many times that RTFC's credit bid was accepted because no other bids were "sufficient."<sup>43</sup> What they mean to say is that the market-based bids submitted by ATN and other bidders were too low for RTFC's liking in a recessionary economic climate, so RTFC effectively pulled the assets off the market with a dispositive credit bid. There is no doubt that there were, and are, other qualified entities willing to purchase these assets at their current market prices and invest in building broadband infrastructure in the U.S. Virgin Islands. RTFC has chosen to gamble that holding onto the ICC assets for a longer period ultimately will result in a higher price, thereby reducing its severe losses from this investment. RTFC's decision to trump other bidders with its credit bid should not be confused with an absence of other qualified bidders ready and willing to pay fair market value for the assets.

***V. Conclusion.***

For these reasons, the Commission should deny the Consolidated Applications or, alternatively, grant the Consolidated Applications subject to the condition that CFC fully divests all cable television operations in the U.S. Virgin Islands.

Sincerely,



Robert J. Aamo  
Joan M. Griffin

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cc: David Krech  
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<sup>43</sup> E.g., Joint Opposition at iii, v, 13.