

9 September 2009

**BY ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

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

Dear Ms. Dortch:

Through their respective counsel, National Rural Utilities Cooperative Finance Corporation (“CFC”) and Stan Springel, as Chapter 11 Trustee for the Bankruptcy Estate of Innovative Communication Corporation (“Chapter 11 Trustee”) (together, “Applicants”) urge the Commission to reject the efforts of Atlantic Tele-Network, Inc. (“ATN”) to slow-roll the Commission with untimely, repetitive, and still-meritless pleadings and instead speedily grant consent for the Proposed Transaction to permit rehabilitation of the telephony and cable television businesses of Innovative Communication Corporation (“New ICC”) in the U.S. Virgin Islands.<sup>1</sup> ATN is both a failed bidder for New ICC’s assets and a competitor of New ICC’s

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<sup>1</sup> Letter from Robert J. Aamoth and Joan Griffin, Kelley Drye & Warren LLP, Counsel for ATN, to FCC Secretary Marlene H. Dortch, WC Docket No. 09-82 (filed Aug. 28, 2009) (“ATN Letter”). While the Commission’s *ex parte* rules permit the filing of written presentations in permit-but-disclose proceedings until the proceeding is no longer subject to administrative reconsideration or review or to judicial review, ATN has waited 37 days after the end of the formal pleading cycle to file this *ex parte* letter. Because this letter merely regurgitates the arguments previously raised in its Petition to Deny, the only purpose of the letter is to attempt to delay Commission consideration of the applications before it. ATN should not be permitted to continue engaging in this gamesmanship. Further, consideration of repetitious arguments merely serves to consume the resources of the parties and the Commission while not materially assisting the Commission in evaluating the applications before it.

broadband business.<sup>2</sup> It seeks to either acquire New ICC assets at depressed prices or to delay its competitor's emergence from bankruptcy, or both.<sup>3</sup>

As for substance, the ATN Letter recycles arguments that have already long since been addressed:

- ATN halfheartedly claims that the alleged harms from the combination of New ICC's telephone and cable businesses are "transaction specific."<sup>4</sup> In fact, Applicants have already pointed out that there can be no transaction-specific harm arising from the sale of combined assets when those assets were combined more than a decade before the sale.<sup>5</sup> ATN now suggests that, "alternatively," the Commission can ignore transaction specificity altogether.<sup>6</sup> Nowhere does it explain how the Commission can do so consistent with its limited authority under the Communications Act of 1934, as amended, and longstanding approach to transaction reviews thereunder.<sup>7</sup>
- ATN now admits that "the instant transaction is not a 'buyout' subject to Section 652" of the Act.<sup>8</sup> Nevertheless, it argues inexplicably that inapplicability of the buyout prohibition warrants denial of the application rather than grant of it.<sup>9</sup> As the Applicants have previously indicated, if Congress found that telco-cable buyouts in small, non-urban markets raise no competitive issues, then, by definition, pre-existing telco-cable combinations in such markets raise no competitive issues.<sup>10</sup>
- ATN misrepresents that the Applicants have urged the Commission to "rubber stamp" the decisions of the U.S. District Court of the U.S. Virgin Islands, Division of St. Thomas

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<sup>2</sup> Joint Opposition to Petition to Deny, WC Docket No. 09-82, at 2-4 (filed July 22, 2009) ("Joint Opposition"); Opposition of the Chapter 11 Trustee, WC Docket No. 09-82, at 3, 6 (filed July 22, 2009) ("Trustee Opposition").

<sup>3</sup> Joint Opposition at ii.

<sup>4</sup> ATN Letter at 12.

<sup>5</sup> Joint Opposition at 5-6; Trustee Opposition at 5.

<sup>6</sup> ATN Letter at 12.

<sup>7</sup> See 47 U.S.C. §§ 214(a), 310(d); 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 at 5-6 (filed May 19, 2009) ("Public Interest Statement").

<sup>8</sup> ATN Letter at 10.

<sup>9</sup> *Id.*

<sup>10</sup> Joint Opposition at 9; Trustee Opposition at 5.

and St. John, Bankruptcy Division (the “Bankruptcy Court”).<sup>11</sup> The Applicants have said no such thing. To the contrary, they have maintained only that “a telecommunications service provider’s successful emergence from bankruptcy” is itself a powerful public interest benefit, which the Commission should consider along with other public interest aspects of a transaction, and which the Commission has long considered with other public-interest aspects of other transactions.<sup>12</sup> The Applicants have said that this public-interest benefit is particularly relevant here because the Proposed Transaction represents the only viable path out of bankruptcy for New ICC, and thus by far the best option for its operating businesses.<sup>13</sup> As the USVI Delegate in the U.S. Congress stated, “the prospect of the continued bankruptcy of New ICC would cast a shadow of uncertainty over the Operating Subsidiaries and distract them from their primary mission—the provision of telecommunications services to my constituents.”<sup>14</sup>

- In speculating that other qualified bidders might now appear to purchase the New ICC businesses, ATN maintains its collateral attack on the Bankruptcy Court process.<sup>15</sup> Had

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<sup>11</sup> ATN Letter at 5.

<sup>12</sup> Joint Opposition at 10 (citing *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)).

<sup>13</sup> Joint Opposition at 10-11.

<sup>14</sup> Letter from Delegate Donna M. Christensen, Member of Congress, to FCC Secretary Marlene H. Dortch, WC Docket No. 09-82, at 2 (filed Jul. 6, 2009) (“Delegate Christensen Letter”).

<sup>15</sup> ATN Letter at 14. The Commission should deny ATN’s request for divestiture, consistent with its longstanding policy of avoiding conflict between federal statutory schemes—in particular, the Communications Act and the Bankruptcy Code—where the statutes in question may be accommodated without conflict. Such accommodation is possible in this case. See *Applications of Arlie L. Davidson and Associates, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 15382, 15388-89 ¶17 (1996) (stating that “[t]he Commission has consistently declined to consider what, in essence, is a collateral attack on a bankruptcy court determination...”); *Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 6232, 6241 ¶ 22 (WTB 2004) (stating that “[t]he Commission will not revisit the terms of the transactions already reviewed and approved by the Bankruptcy Court in the absence of a showing that Petitioners will be harmed by approval of the license assignments under consideration”); *Applications of TV Active, LLC*, Order on Reconsideration, 16 FCC Rcd 18938, 18944 ¶16 (Pub. Safety and Private Wireless Div. 2001) (stating that “[i]f TV Active believes that the Bankruptcy Court erred, it must seek a remedy through the judicial process rather than at the Commission”); *Applications of D.H. Overmyer*, Memorandum Opinion and Order, 94 FCC 2d 117, 122-24 ¶¶ 8-9 (1983) (refusing to hear allegations of

ATN wanted to argue that other bids could better serve the interests of New ICC's estate and its creditors, it could have raised these issues before the Bankruptcy Court, where they should have been raised. It did not. Unsurprisingly, the Bankruptcy Court found that "[a] reasonable opportunity to object or to be heard regarding the relief requested in the Motion has been afforded to all creditors and parties in interest" and that the Trustee and his financial advisors have marketed the Group 1 Assets and conducted the sale process in compliance with the Sale Procedures Order and have conducted a fair, full and complete marketing process."<sup>16</sup> Consequently, the Bankruptcy Court concluded that the Proposed Transaction is "in the best interests of the Debtor's estate and its creditors."<sup>17</sup> The Commission should therefore find that ATN is estopped from arguing before the Commission what it failed to argue in the Bankruptcy Court.

- In bemoaning the state of New ICC's USVI infrastructure to support its own self-serving divestiture proposal,<sup>18</sup> ATN continues to ignore both the stabilizing efforts of the Chapter 11 Trustee and the significant public interest benefits of the Proposed Transaction, facilitated by CFC's expertise and access to capital.<sup>19</sup> In particular, the Proposed Transaction represents the best prospect for greater broadband deployment in the USVI.
- In arguing that CFC should be barred from bidding for New ICC's assets<sup>20</sup> and that the bankruptcy process should discount the interests of the principal secured creditor,<sup>21</sup> ATN again asks the Commission to rewrite the U.S. Bankruptcy Code and second-guess the Bankruptcy Court.<sup>22</sup> In fact, the U.S. Bankruptcy Code expressly permits a secured

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"mistakes, illegalities, and irregularities" in a bankruptcy court's decision as "such disputes should be left to those tribunals which are specifically charged with reviewing such matters on appeal").

<sup>16</sup> *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, at 3-4 (Bankr. D.V.I. April 9, 2009) ("Interim Sale Order").

<sup>17</sup> *Id.* at 4.

<sup>18</sup> ATN Letter at 3, 9.

<sup>19</sup> Joint Opposition at 6; Public Interest Statement at 15-20; Delegate Christensen Letter at 2 (noting that "the acquisition will facilitate the Operating Subsidiaries' access to capital thereby promoting new investment, which will allow them to grow and maintain their core businesses for the benefit of U.S. Virgin Islands consumers, businesses and visitors").

<sup>20</sup> ATN Letter at 13.

<sup>21</sup> *Id.* at 4-5.

<sup>22</sup> See Joint Opposition at 10-11; Trustee Opposition at 3-7.

creditor to make a credit bid, thereby ensuring that either the debt is paid in full or the creditor's collateral stands in its place,<sup>23</sup> as CFC's affiliate RTFC has done and as the Bankruptcy Court has permitted in this case.<sup>24</sup> Moreover, the U.S. Bankruptcy Code requires that the sale of a debtor's assets be in the best interests of the estate *and the creditors*,<sup>25</sup> as the Bankruptcy Court has found in this case.<sup>26</sup> CFC, for its part, can only recover its investment by rehabilitating New ICC's USVI telecommunications and cable businesses, thereby serving its own interests and those of U.S. Virgin Islanders.<sup>27</sup>

- ATN continues to make *ad hominem* attacks on CFC and its qualifications, ignoring the record and only confirming ATN's gross self-interest in this proceeding.<sup>28</sup> ATN pays no heed to CFC's latest submission describing CFC's intention to retain both existing management of New ICC's operating companies, which are not in bankruptcy, and senior management with substantial telecommunications management experience.<sup>29</sup> As the USVI Delegate noted, "The acquisition by CFC represents a unique opportunity to

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<sup>23</sup> 11 U.S.C. § 363(k) (stating that "[a]t a [Section 363 sale] of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.").

<sup>24</sup> See Supplemental Motion to Sell Property Free and Clear of Liens Supplemental Motion for Order (A) Approving Sale of the Debtors Primary Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Granting Related Relief, Filed by the Chapter 11 Trustee, Bankruptcy No. 07-30012JKF, Docket Nos. 360, 1159, at 3-4 (Bankr. D.V.I., filed Mar. 13, 2009) (noting that "[o]n January 30, 2009, the Trustee received a purchase offer in the form of a credit bid of not less than \$250,000,000 from RTFC for certain of the Group 1 Assets"); Interim Sale Order at 3-4.

<sup>25</sup> See, e.g., 11 U.S.C. § 323(a) (stating that the trustee "is the representative of the estate"); *In re WHET, Inc.*, 750 F.2d 149 (1st Cir. 1984) (per curiam) (finding that a trustee "owes a fiduciary duty to debtor and creditors alike to act fairly and protect their interests" (citation omitted)); *In re Obie Elie Wrecking Co.*, 35 B.R. 114, 115 (Bankr. N.D. Ohio 1983) (stating that the trustee "acts as representative of the estate, managing the estate's funds for the benefit of creditors of the estate").

<sup>26</sup> Interim Sale Order at 4 (stating that "[t]he Trustee has demonstrated both (i) good, sufficient, and sound business purpose and justification for the sale of the Assets; and (ii) compelling circumstances for interim approval of the sale transaction contemplated in the Agreement").

<sup>27</sup> Joint Opposition at 14.

<sup>28</sup> ATN Letter at 3, 12.

<sup>29</sup> Letter from Kent Bressie, Wiltshire & Grannis LLP, Counsel to CFC, to FCC Secretary Marlene H. Dortch, WC Docket No. 09-82, at 2 (filed Aug. 14, 2009).

facilitate resolution of New ICC's bankruptcy by providing the Operating Subsidiaries with a solvent and stable owner that has broad expertise with rural utilities."<sup>30</sup>

CFC and the Chapter 11 Trustee agree with ATN on one thing—"the people of the U.S. Virgin Islands deserve better" than the *status quo*.<sup>31</sup> The best way to achieve this goal, however, is to allow the Chapter 11 Trustee and New ICC's creditors to spend less time and resources addressing bankruptcy-related matters and dilatory pleadings filed with the Commission and more time and resources revamping New ICC's businesses and providing service to USVI customers. The meritless objections of a former potential purchaser and current competitor should not be allowed to stand in the way.

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<sup>30</sup> Delegate Christensen Letter at 2.

<sup>31</sup> ATN Letter at 3.

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Respectfully submitted,



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