

Before the
GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES
Public Services Commission

In the Matter of)	
)	Docket No. 571
Change of Control Proceeding for Innovative)	
Telephone Company)	Order No. <u>13/2007</u>
)	

ORDER

The parent companies of the Virgin Islands Telephone Corp., doing business as Innovative Telephone (“Innovative Telephone”), have filed for voluntary bankruptcy under Chapter 11 of the U.S. bankruptcy code in order to reorganize the finances of those parent companies. Current management of those parent companies, classified as debtors-in-possession under the bankruptcy code, continue to run the operations of those parent companies and through various subsidiaries, vote the stock and influence the operations of Innovative Telephone.¹ The reorganization is represented as necessary in order to eliminate more than \$600 million in debt owed by the parent companies to creditors of the company. These creditors include the Rural Telephone Finance Cooperative Corp. (“RTFC”) and certain minority shareholders of the parent companies (called the “Greenlight plaintiffs”). RTFC and the Greenlight plaintiffs entered into settlement agreements with Innovative Telephone’s parent entities to resolve numerous, lengthy, and fractious litigations.

¹ The present controlling interests of Innovative Telephone were approved by the Commission previously.

Despite these agreements, RTFC and Greenlight plaintiffs have requested that the bankruptcy court appoint an independent trustee to manage the affairs of the parent companies in the stated belief that current management cannot be relied upon to satisfactorily complete the reorganization process under the bankruptcy laws. PSC counsel participated in hearings before the bankruptcy court, during which he expressed the opinion that appointing an independent trustee for one or more of Innovative Telephone's parent companies constitutes an indirect transfer of control of Innovative Telephone – an act that requires the expressed approval of the Public Services Commission (“PSC”). Without such pre-approval, the appointment is void under the terms of the statute.

On February 13, 2007, the bankruptcy court issued an order mandating the appointment of a trustee, requiring only that the trustee “confer” with the PSC, citing Section 43a of Title 30 of the V.I. Code.² In the accompanying order to said motion, the court indicated its belief that Section 43a does not require pre-approval by the PSC, citing other state and federal decisions to support its determination.³ A large part of the court's decision rested on the fact that there was no written order of the PSC, making such an interpretation of Section 43a.⁴

Section 43a provides in pertinent part:

(a) No person or corporation, whether or not organized under the laws of the Territory, shall sell, acquire or transfer

² Order of Court Granting Appointment of Trustee, Bankruptcy No. 30007, *et al.*, (D.V.I., Feb. 13, 2007).

³ Memorandum Opinion, Bankruptcy No. 30007, *et al.*, at 19 (D.V.I., Feb. 13, 2007).

⁴ *Id.*

control, either directly, or indirectly of any public utility organized and doing business in this Territory, without first securing authorization from the Commission. Any such acquisition or control without prior authorization shall be void and of no effect.⁵

This section makes clear that any transfer of control, directly or indirectly, of a public utility incorporated in the Virgin Islands, which includes Innovative Telephone, requires approval by the PSC prior to the appointment. A bankruptcy trustee has the power to hire and fire boards of directors and officers of any of the companies controlled by the bankrupt companies, as well as the power to direct significant operations of the subsidiaries, such as Innovative Telephone. As such, it is the opinion of this Commission that this act is a clear transfer of control that Section 43a declares to be void if not first approved by the Commission. The fact that the statute is clear on its face and does not make any exception for how such a transfer comes about, convinces us that the prohibition is absolute and that the Virgin Islands legislature meant to require all transfers receive the prior approval of this body.⁶ The Commission cannot simply waive this statute, but is duty bound to follow it.⁷

The potential transfer of control of Vitelco – a regulated public utility -- is of particular concern to the Commission and the people it represents. Although the Commission has avoided embroiling itself in the litigation among RTFC, the Greenlight

⁵ Tit. 30, §43a(a) (V.I. Code).

⁶ Although the court seemed to think that transfer to a debtor-in-possession would also be prohibited under this interpretation, we disagree. The debtor-in-possession is still the same management that ran the company prior to filing for bankruptcy and is therefore not a transfer at all. The transfer to a trustee, however, is placing control in an independent third party who has not previously been examined or approved by this Commission. Therefore, the two situations are completely different under the statute.

⁷ See *Hartford v. Glastonbury*, 561 F.2d 1032, 1041(2d Cir. 1976); see also *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

plaintiffs and the parent companies of Innovative Telephone, with the order of the bankruptcy court the Commission's involvement is unavoidable. A trustee has the unrestricted ability to manage the operations of the parent companies involved, which includes the affairs of its subsidiaries, and in particular, Innovative Telephone in a manner that may not comport with the public's interest in this matter. The control vested with a trustee is significantly broad and has great potential to affect the quality of service provided to the citizens of the U.S. Virgin Islands. An indirect change of control such as that of placing responsibility for these assets in the hands of a trustee seems to be precisely the issue that the statute seeks to address by first requiring approval from the Commission.

We are well aware that other jurisdictions which may have different laws that apply in a situation such as this. We find such precedent interesting -- but cannot control this body's interpretation of a Virgin Islands statute; a statute which has unique wording and provisions. We find, therefore, that such other precedent as presented to the court for consideration is not persuasive to this agency in interpreting the plain meaning of its own statutes.

Section 43a only permits the PSC to authorize a transfer of control to a party if that transfer is in the public interest. We are aware of significant violations of Commission Orders by one or more parties involved in the RTFC litigation that warrant some consideration in this matter -- and in this Commission's decisions. If a party involved in the ultimate transferee of Innovative Telephone were found to have committed a serious violation of a Commission Order and that violation had an adverse impact on ratepayers, those facts must weigh heavily in the PSC's public interest

analysis. Such determination could lead this Commission to void contracts previously approved or to deny parties' rights under those contracts, such as the power to pay monies that were originally generated by Innovative Telephone. Although it is up to the Hearing Examiner in this docket to find facts in the first instance, which facts would be presented to the Commission for deliberation, there is no doubt that resolution of such issues would – in our opinion -- be critical before authorizing any transfer.

We recognize that the bankruptcy court has unique powers that are designed to give it the ability to efficiently reorganize debts of the bankrupt company to the benefit of creditors. However, we do not believe it has any responsibility to ensure quality phone service to U.S. Virgin Islanders in the same way as does our statute. This Commission's interest in preserving quality service for the ratepayers is critical to the conclusion we reach here, and is a significant reason why Section 43a is interpreted by us as it is presented herein. We therefore Order that no trustee shall begin any work pursuant to any court appointment, nor should any other indirect transfer of control take place for that matter, except after filing an application for a transfer of control with this Commission and receiving approval for the same. In the context of any application, this Commission will decide what conditions, if any, should be applied to ensure that the public interest is served.

So Ordered.

Dated: February 26, 2007

By: Aileen M. Muller
Chairwoman

ATTACHMENT TO ORDER NO. 13-2007

“Change of control” as set forth in §§ 43a and 313 of Title 30 of the Virgin Islands Code shall be broadly construed to effectuate its clear purpose of insuring that any ownership and/or operational control over the Virgin Islands Telephone Company (VITELCO) and the Cable TV franchises granted to St. Croix Cable TV Inc. and Caribbean Communications Corporation is not transferred to any other party absent prior PSC approval. In this regard, “change of control” includes any action absent prior PSC approval that results in the direct and/or indirect change in the ownership and/or operation control of these public utilities or any of their direct or indirect parent companies no matter how remote, including any indicia of ownership such as, but not limited to, the right to appoint the board of directors or direct the day-to-day management of the companies. Any action that attempts to circumvent the express purpose of §§ 43a and 313 of Title 30 of the Virgin Islands Code shall be deemed void *ab initio* as far as the ownership and/or control of the utility or its parent companies are concerned.