Before the
GOVERNMENT OF THE VIRGIN ISLANDS
OF THE UNITED STATES

PUBLIC SERVICES COMMISSION

In re Petition for Forbearance of the Virgin Islands Telephone Corp. d/b/a Viya	PSC Docket No. ___________

PETITION FOR FORBEARANCE OF THE VIRGIN ISLANDS TELEPHONE CORP. DBA VIYA

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PETITION FOR FORBEARANCE OF
THE VIRGIN ISLANDS TELEPHONE CORP. DBA VIYA

TABLE OF CONTENTS

**PETITION FOR FORBEARANCE OF
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EXECUTIVE SUMMARY

The Virgin Islands Telephone Corporation dba Viya ("Viya") respectfully requests the U.S. Virgin Islands Public Services Commission ("Commission") to forbear from continuing to apply to Viya various regulatory obligations that currently are imposed on the company and not imposed on any other telecommunications service provider in the U.S. Virgin Islands ("USVI"). Unlike in years past, when Viya was the dominant provider of telecommunications services in the USVI, the current degree of regulatory supervision of Viya by the Commission is unwarranted given the competitive realities of the USVI's telecommunications marketplace.

Today, Viya provides landline voice service to only a small minority of the USVI's voice customers. It faces intense competition from many mobile and fixed voice and broadband providers—competition that is more than adequate to ensure that Viya prioritizes the best interests of its customers. As an initial matter, the USVI has become predominantly a mobile, rather than fixed, telecommunications marketplace since the hurricanes of 2017. Indeed, Viya's landline customer base has decreased by approximately 50 percent since then, and there are now many times more mobile customers served by wireless carriers in the USVI than landline subscribers. In addition, Viya's fixed service competition is newly invigorated. As the winner of the Connect USVI Fund reverse auction, Broadband Virgin Islands dba Liberty effectively is taking over Viya's prior role as the USVI's federally subsidized provider with a legal obligation to provide voice service and high-speed broadband to every location in the USVI. Basic concepts of fairness require that Viya be treated substantially similarly to these many USVI competitors, and the Commission currently does not apply most telecommunications regulatory requirements to them.

Moreover, if the Commission relies on the competitive marketplace, rather than exhaustive regulatory oversight, to ensure that Viya's operations are pro-consumer, this will enable Viya to redirect the substantial resources that Viya currently devotes to complying with its Commission-imposed regulatory obligations. Viya instead can direct these funds to improving its customer service offerings and efficiently maintaining and improving its network, rather than on regulatory compliance. In addition, once Viya no longer receives USF support, it is not clear that the Commission will have adequate jurisdiction to maintain its current regulatory oversight of Viya. Viya provides voice service using interconnected voice over internet protocol ("VoIP") technology, and Congress and the Federal Communications Commission have preempted state and territorial regulation of interconnected VoIP.

For these reasons, there is no public policy justification for continuing to apply much more onerous regulations to Viya than the Commission applies to every other telecommunications service provider in the USVI. Therefore, the Commission should promptly adopt an order that:

- releases Viya from its unique contractual obligations set forth in the 2016 Transfer of Control Agreement that the Commission required Viya and its affiliates to execute as a condition to their acquisition by ATN International, Inc.;
- commits to working with the USVI government to discontinue Viya's outdated 60-year-old franchise;
- forebears from continuing to uniquely impose regulatory oversight over Viya's service quality and network investment and maintenance activities in exchange for Viya committing to maintain its current network footprint through the end of 2027; and
- in exchange for Viya's commitment not to modify its current rates for regulated services through the end of 2027, forebears from continuing to uniquely apply to Viya tariffing, rate regulation, associated accounting and financial reporting requirements, and other regulations that the Commission generally does not apply to other providers.

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PETITION FOR FORBEARANCE OF
THE VIRGIN ISLANDS TELEPHONE CORP. DBA VIYA

The Virgin Islands Telephone Corporation dba Viya (also known as Vitelco and formerly known as Innovative Telephone Company ("Innovative")) ("Viya") respectfully requests for the U.S. Virgin Islands Public Services Commission ("Commission") to forbear from continuing to apply to Viya various regulatory obligations that currently are imposed on the company and not imposed on any other telecommunications service provider in the U.S. Virgin Islands ("USVI" or "Territory"). Unlike in years past, when Innovative was the dominant provider of telecommunications services in the Territory, the current degree of regulatory supervision of Viya by the Commission is unwarranted given the competitive realities of the USVI's telecommunications marketplace.

Innovative once had a dominant market position in the USVI, but Viya does not today. Also, as the USVI's incumbent local exchange carrier ("ILEC"), Viya was the primary recipient of the federal universal service fund ("USF") support allocated to the Territory, but that also is no longer the case. Today, Viya faces intense competition from many mobile and fixed voice and broadband providers—competition that is more than adequate to ensure that Viya prioritizes the best interests of its customers. As an initial matter, mobile providers collectively dominate the USVI market relative to fixed providers. In addition, Viya's fixed competitors include the Territory-wide voice and broadband provider Broadband Virgin Islands dba Liberty ("Liberty"),[1] a subsidiary of a leading telecommunications company in Latin America and the Caribbean region, Liberty Latin America. Liberty effectively is taking over Viya's role as the USVI's federally subsidized provider with a legal obligation to provide voice service and high-speed broadband to every location in the USVI. Liberty committed to accomplish this by the end of 2027 in exchange for nearly $85 million of federal fixed-service high-cost USF support—support that Viya historically had received but will no longer receive.

Moreover, if the Commission treats Viya like other USVI telecommunications providers by primarily relying on the competitive marketplace, rather than on exhaustive regulatory oversight, to ensure that Viya's operations are pro-consumer, this will enable Viya to redirect the substantial resources that Viya currently devotes to complying with its Commission-imposed regulatory obligations. Viya instead can expend these funds on improving its customer service offerings and efficiently maintaining and improving its network. This also will enable Viya to focus its business planning primarily on serving its customers, rather than on regulatory compliance.

In addition, once Viya no longer receives USF support, it is not clear that the Commission will have adequate jurisdiction to maintain its current regulatory oversight of Viya. Viya provides voice service using interconnected voice over internet protocol ("VoIP")

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[1] Since being acquired by Liberty Latin America, Broadband Virgin Islands has rebranded as Liberty. *See* LIBERTY, www.broadband.vi (last visited Nov. 30, 2022) (in which the company almost exclusively identifies itself as Liberty rather than Broadband VI).

technology, and Congress and the Federal Communications Commission ("FCC") have preempted state and territorial regulation of interconnected VoIP.[2]

For these reasons, there is no public policy justification for continuing to apply much more onerous regulations to Viya than the Commission applies to Viya's competitors. Therefore, the Commission should promptly adopt an order expressly forbearing from their application to Viya.[3] Specifically:

- The Commission should release Viya from its unique contractual obligations set forth in the 2016 Transfer of Control Agreement[4] that the Commission required Viya and its affiliates to execute as a condition to their acquisition in 2016 by ATN International, Inc. ("ATN").[5]

- The Commission should work with the USVI government to discontinue Viya's outdated 60-year-old franchise.

- In exchange for Viya's commitment to maintain its current network footprint through the end of 2027, the Commission should forebear from continuing to uniquely impose

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[2] The Commission does not significantly regulate the provision of broadband services in the USVI, including by Viya. Therefore, this Petition focuses on Commission's regulation of Viya's landline voice service.

[3] According to the Commission's longstanding consultant Georgetown Consulting Group, Inc. ("GCG"): "Like other state regulatory agencies, the PSC has broad discretion on forbearance from enforcing the provisions of Title 30." *See* Letter from Jamshed K. Madan, GCG, to Johann Clendenin, Chairman, Commission, (April 27, 2016), 1, 6 ("GCG 2016 Letter") (recommending that the Commission grant Level 3 Communications St. Croix Inc. ("Level 3") authority to provide telecommunications services in the USVI but forbear from applying almost all USVI telecommunications statutes and regulations to Level 3). The Commission approved Level 3's application. *See Level 3 Communications St. Croix, Inc. Application to Provide Telecommunications Services in the USVI*, Order, Docket No. 656, Order No. 70/2016 (USVI PSC Sept. 15, 2016) ("Level 3 Order"); *see also* Letter from Jamshed K. Madan, GCG, to Andrew Rutnik, Chairman, Commission, (Jan. 27, 2017), 1-2 ("GCG 2017 Letter") (acknowledging that the Commission forbore from applying telecommunications statutes to Level 3 when it granted Level 3 authority to provide telecommunications in the USVI).

[4] Transfer of Control Agreement between ATN International, Inc.; ATN VI Holdings, LLC; Caribbean Asset Holdings, LLC; DTR Holdings, LLC; Virgin Islands Telephone Corp.; Caribbean Communications Corp.; St. Croix Cable TV, Inc.; and United States Virgin Islands Public Services Commission, dated July 1, 2016 ("TOCA").

[5] In 2016, the Commission approved the acquisition of Viya by its current parent company, publicly traded ATN International, Inc. (Nasdaq Ticker: ATNI), which operates telecommunications companies that serve rural and insular markets in the mainland United States and Caribbean.

regulatory oversight over Viya's service quality and network investment and maintenance activities.

- In exchange for Viya's commitment not to modify its current rates for regulated services through the end of 2027, the Commission should forebear from continuing to uniquely apply to Viya tariffing, rate regulation, associated accounting and financial reporting requirements, and other regulations that the Commission generally does not apply to other providers.

I. THE COMPETITIVE NATURE OF THE USVI TELECOMMUNICATIONS MARKET ALLEVIATES ANY NEED TO IMPOSE REGULATORY REQUIREMENTS UNIQUELY ON VIYA.

When Innovative received its telecommunications franchise in 1959—over 60 years ago, it was the sole provider of local telephone service in the USVI.[6] Today, the USVI's telecommunications marketplace is marked by robust competition, which only will increase in the future. This competition exerts price discipline on every USVI provider, including Viya. It also requires each provider to offer a high level of service quality and ample network coverage.[7] Consequently, because Viya no longer holds market power in the USVI and because there is ample competition in the USVI telecommunications market, there is no current justification for imposing unique and comprehensive regulatory requirements on Viya, while only minimally regulating Viya's competitors, including Liberty.

Viya is a USVI corporation headquartered on St. Thomas, with major offices and retail/technical properties on St. Croix and St. John. It is operated by a local management team of USVI residents that serve Virgin Islanders and employs nearly 200 people throughout the Territory. Viya, directly and through its USVI affiliates, offers broadband, VoIP, and wireless

[6] Franchise for the Virgin Islands Telephone Corp. (Oct. 31, 1959); Act No. 504 of the Third Legislature of the Virgin Islands, Authorizing the Sale of the Virgin Islands Telephone System, the Granting of a Franchise, and for Other Related Purposes (approved Oct. 9, 1959), 1959 V.I. Sess. Laws pp. 193-202 (approving sale of Viya to International Telephone and Telegraph Corporation) ("Franchise").

[7] According to the Commission's longstanding consultant, GCG: "In a competitive environment, the acceptable level of service quality will be determined by the customer. Customers would have a choice of whether to subscribe or to obtain service from another service provider." GCG 2016 Letter at 5.

services,[8] including Ethernet-based fixed broadband services with download speeds ranging from 60 Mbps to 1 Gbps, to residential and enterprise customers.[9] Viya's fixed voice and broadband hybrid coaxial fiber network reaches 99 percent of locations in St. Thomas and St. John and 98 percent of locations in St. Croix.

As further discussed below, Viya's landline telephone business represents only a small fraction of the total USVI telecommunications market. Viya estimates that it provides residential voice service to less than 15 percent of all housing units in the USVI.[10] In addition, Viya competes directly with the mobile wireless providers that collectively dominate the USVI telecommunications market. The USVI's dominant voice and broadband mobile wireless provider, Liberty Mobile (a sister company of Liberty), alone serves many times more customers in the USVI than Viya. Viya also faces substantial fixed competition from Liberty, which is assuming Viya's historical role as the USVI's federally subsidized voice and broadband providers required to provide service to all locations throughout the Territory. Viya also competes with many local USVI internet service providers ("ISPs"), many of which offer VoIP and all of which provide their customers with access to over-the-top VoIP service providers that compete with Viya's voice service. Further, Liberty and many of these local ISPs benefit from access to a government-subsidized, wholesale middle-mile fiber network operated by Virgin Islands Next Generation Network ("viNGN").

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[8] Viya's commonly controlled sister company, wireless carrier Vitelcom Cellular, Inc. ("Vitelcom"), provides mobile broadband and voice services to USVI residents and many of the over 2 million annual USVI visitors over Vitelcom's 4G LTE wireless network that covers 100 percent of the population of the USVI and over its rapidly expanding 5G network.

[9] *See* VIYA, https://viya.vi/our-company/ (last visited Nov. 30, 2022) (providing a listing of Viya's current telecommunications offerings).

[10] According to the U.S. Census Bureau, in 2020 there were 87,146 USVI residents and 57,257 housing units in the USVI. *See* U.S. Census Bureau, *2020 Island Areas Censuses: U.S. Virgin Islands*, (Oct. 20, 2022), https://www.census.gov/data/tables/2020/dec/2020-us-virgin-islands.html.

USVI Wireless Carriers. Viya's landline business competes directly with the broadband and voice offerings of the USVI's wireless carriers, and this competitive landscape increasingly and strongly has been tilting towards the mobile providers. Following the devastation to the USVI's fixed telecommunications infrastructure wrought by back-to-back Category 5 Hurricanes Irma and Maria in 2017, the USVI has predominantly been a mobile, rather than fixed, telecommunications marketplace. Since 2017, Viya's landline customer base has decreased by approximately 50 percent, and there are now many times more mobile customers served by wireless carriers in the USVI than landline subscribers. Viya estimates that the USVI's dominant wireless provider, Liberty Mobile[11] (formerly AT&T Mobile[12]), alone has many times more mobile customers than Viya has landline customers. And Liberty Mobile is not the only mobile provider that serves the USVI market. In addition to Viya's wireless affiliate Vitelcom, T-

[11] Liberty Mobile receives federal USF support for mobile service in the USVI and, as a result, must maintain supported service in the areas for which it is an eligible telecommunications carrier, and must devote its federal support to enhance its network's resiliency and to deploy 5G infrastructure. *See Wireline Competition Bureau Authorizes Stage 2 Mobile Support for Certain Providers Participating in the Uniendo a Puerto Rico Fund and the Connect USVI Fund*, Public Notice, 35 FCC Rcd 6321, 6324, Attach. A (WCB 2020) (*BBVI Authorization*).

[12] Liberty Mobile, a division of Liberty Latin America, which is the parent company of BBVI, acquired AT&T's market-dominant wireless and wireline operations in the USVI in October 2020. *See Liberty Latin America Complete Acquisition of AT&T's Wireless and Wireline Operations in Puerto Rico and the U.S. Virgin Islands*, LIBERTY LATIN AMERICA (Nov. 2, 2020), https://lla.com/blog/liberty-latin-america-completes-acquisition-atts-wireless-and-wireline-operations-puerto-rico.

Mobile,[13] Boost Mobile,[14] H2O Wireless,[15] Red Pocket Mobile,[16] Cricket Wireless,[17] Tracfone Wireless,[18] and Claro Puerto Rico[19] each offer a wide variety of mobile voice, text, and data plans to USVI consumers that compare in speed and quality with many of Viya's most popular offerings. Moreover, Liberty Mobile and T-Mobile are in the process of deploying 5G facilities throughout the USVI, which will increasingly enable them to offer lower latency, higher bandwidth mobile services, as well as high-speed wireless fixed services.[20]

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[13] In April 2022, T-Mobile announced that it provides 5G in 100% of its USVI sites and plans to expand. *See T-Mobile Officially Arrives in USVI, Boasts 100 Percent 5G Network Coverage*, THE VIRGIN ISLANDS CONSORTIUM (April 22, 2022, 5:53 AM), https://viconsortium.com/vi-technology/virgin-islands-t-mobile-officially-arrives-in-usvi-boasts-100-percent-5g-network-coverage.

[14] *See* BOOST MOBILE, https://www.boostmobile.com/coveragemap_xp.html?INTNAV=UtilNav:ExpandedCoverageMap (last visited Dec. 06, 2022) (map shows coverage of the U.S. Virgin Islands); Boost Mobile recently was acquired from T-Mobile by DISH and is now operated independently of T-Mobile. *See* Eli Blumenthal, *Dish Completes Purchase of Boost Mobile from T-Mobile*, CNET (July 1, 2020, 8:56 AM), https://www.cnet.com/tech/mobile/dish-completes-purchase-of-boost-mobile-from-t-mobile/.

[15] *See* H2O WIRELESS IN VIRGIN ISLANDS, https://www.h2owireless.com/international-rates (last visited Dec. 06, 2022) (explaining that calls can be made and received in the USVI). H2O Wireless is a mobile virtual network operator owned by Telrite Holdings, Inc.

[16] *See* RED POCKET, https://www.redpocket.com/about-us (last visited Nov. 30, 2022).

[17] *See* CRICKET WIRELESS, https://www.cricketwireless.com/ (last visited Nov. 30, 2022) (noting that *"[a]*ll Cricket plans already include unlimited calls, texts, and picture messages across the US. and from the U.S. to Puerto Rico and the US Virgin Islands"). Cricket Wireless is owned and operated by AT&T Mobile.

[18] *See* Tracfone, https://www.tracfone.com/home (last visited Nov. 30, 2022). Tracfone is owned and operated by Verizon Communications.

[19] *See* CLARO, https://www.claro.com/ (last visited Nov. 30, 2022). Claro is owned and operated by Mexican telecom group America Movil.

[20] In addition, multiple satellite communications providers serve the USVI, including Viasat, Starlink, and OneWeb. *See* Annamarie Nyirady, *Viasat, Expedition Communications Expand Satellite Internet Across Puerto Rico, US Virgin Islands*, SATELLITE TODAY, (April 4, 2019) https://www.satellitetoday.com/broadband/2019/04/04/viasat-expedition-communications-expand-satellite-internet-across-puerto-rico-us-virgin-islands/; *see also Starlink on St. John in the US Virgin Islands!*, GREAT EXPECTATIONS ST. JOHN, US VIRGIN ISLANDS (Sept. 6, 2022) https://greatexpectationsstj.com/st-john-news/starlink-on-st-john-in-the-us-virgin-islands; *see also OneWeb Non-Geostationary Satellite System (LEO) Phase 2: Amended Modification to Auth. System Attachment B: Technical Info. To Supplement Schedule S*, FCC REPORT, 1, 12 (2021), https://fcc.report/IBFS/SAT-MPL-20210112-00007/3493913.pdf . These providers are ideally suited to

Liberty. In addition to intense competition from wireless providers, Viya also faces competition from Liberty, which Viya expects to further increase significantly over the next several years. As the USVI's historic ILEC, Viya previously received the federal high-cost USF support allocated to the USVI by the FCC in exchange for Viya's commitment to provide service to all requesting customers as an eligible telecommunications carrier ("ETC").[21] However, Liberty is in the process of taking over this role from Viya in the USVI.[22] In 2019, following the Hurricanes Irma and Maria, the FCC decided to conduct a reverse auction to assign federal high-cost USF support in the USVI and Puerto Rico going forward. In the USVI, this funding is referred to as the Connect USVI Fund. As the winner of the Connect USVI Fund reverse auction, Liberty is required to offer standalone voice service and broadband service with a minimum speed of 1 Gbps download and 500 Mbps upload (with latency no greater than 100 ms) to every location in the USVI in exchange for $84.5 million of Connect USVI Fund support over ten years.[23] Specifically, Liberty is required to serve 40 percent of all USVI locations by the end of 2024; 60 percent by the end of 2025; 80 percent by the end of 2026; and all locations by the end

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provide service to rural and remote areas in the USVI, and each provides broadband that can also support VoIP applications.

[21] A carrier that receives high-cost USF support is required to operate as an ETC, and, as interpreted by the FCC, Section 214(e)(1) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 214(e)(1), requires an ETC to offer voice telephony service throughout its designated service area, which for Viya is the entire USVI. *See, e.g., Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 20 FCC Rcd 6371, ¶ 21 (rel. March 17, 2005).

[22] As the prior recipient of federal high-cost support in the USVI, Viya has continued to receive a reduced level of "transition" support. Specifically, Viya received two-thirds of its historic USF support level through June 2022 and one-third through June 2023. However, the FCC is considering in a pending proceeding whether to extend the transition support period. *See The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, Further Notice of Proposed Rulemaking, WC Docket Nos. 18-143, 10-90, FCC 22-79 (rel. Oct. 28, 2022).

[23] *See Bringing Puerto Rico Together and Connect USVI Fund Stage 2*, FCC, https://www.fcc.gov/bringing-puerto-rico-together-and-connect-usvi-fund-stage-2 (last visited Nov. 30, 2022).

of 2027.[24] Liberty currently offers broadband and VoIP services to residential and business users across most of the USVI,[25] and it is a participant in the FCC's Affordable Connectivity Program ("ACP") and Lifeline Program, which enable Liberty to offer discounted services to qualifying customers.

Thus, Viya is relinquishing its role as the federally subsidized voice and broadband provider in the USVI to Liberty because Liberty won the USVI Connect Fund reverse auction. As a result, Viya will no longer be significantly federally subsidized, and Viya will be required to directly compete with a subsidized voice and broadband provider, Liberty,[26] that is required to provide service to every USVI location. Under these circumstances, it makes little sense for the Commission to continue to exclusively and comprehensively regulate Viya rather than Liberty. Although Viya does not believe that extensive telecommunications regulation is needed in the USVI due to the competitive nature of the market, as between Viya and Liberty, it is Liberty, rather than Viya, that warrants Commission oversight going forward.

Virgin Islands Next Generation Network. In addition to Liberty, the USVI is served by viNGN, which is wholly owned by the Virgin Islands Public Finance Authority.[27] viNGN

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[24] *See Connect USVI Fund Stage 2 Support Authorized for Broadband VI*, Public Notice, WC Docket Nos. 18-143, 10-90, 1, 3 (rel. June 8, 2021)..

[25] *See* LIBERTY, www.broadband.vi (last visited Nov. 30, 2022); *see also Voice Services*, LIBERTY, https://broadband.vi/voice/ (last visited Nov. 30, 2022).

[26] In addition to being assigned the USVI's high-cost USF support that historically was received by Viya, Liberty is owned by the publicly traded telecommunications company Liberty Latin America (Nasdaq Ticker: LILA), which offers service throughout Latin America and the Caribbean and has a market capitalization of over $1.7 billion. Thus, Liberty has access to considerable financial and operational resources through its parent company. (By contrast, Viya's parent company, ATN, with a market capitalization of $750 million, is less than half the size of Liberty Latin America.)

[27] *See* VIRGIN ISLANDS NEXT GENERATION NETWORK, https://vingn.com/ (last visited Nov. 30, 2022); *see also* Bill No. 29-0039, Act. No. 7257 of the Twenty-Ninth Legislature of the Virgin Islands Regular Session (2011) (establishing and providing telecommunications service objective for viNGN). ViNGN primarily initially was funded by Broadband Technology Opportunity Program grants issued by the

operates a wholesale middle-mile fiber network in the USVI. According to viNGN, its network infrastructure deployment has turned the USVI into the "only fully interconnected jurisdiction of all 50 states and 6 territories."[28] viNGN's charter requires it "to provide wholesale broadband middle mile service to providers and to promote local economic growth, innovation and global competitiveness."[29] Consistent with this mission, viNGN provides "open access, high speed, all-fiber optic broadband connectivity" to other USVI telecommunications companies (including Viya) at speeds up to 10 Gbps.[30] Indeed, Liberty relies in part on viNGN middle-mile network infrastructure to serve the USVI.[31]

viNGN also has operated free public Wi-Fi hotspots across the USVI since 2017,[32] and it plans to deploy a sufficient number of additional WiFi hotspots using federal funding to cover the entire Territory.[33] Consequently, viNGN offers a free alternative broadband option to USVI

National Telecommunications and Information Administration ("NTIA") of the Department of Commerce.

[28] *About Us*, VIRGIN ISLANDS NEXT GENERATION NETWORK, https://vingn.com/about-us/ (last visited Nov. 30, 2022).

[29] *See id.* (citing NTIA, *State Broadband Data Development* (2010), https://www2.ntia.doc.gov/grantee/virgin-islands-public-finance-authority-0; NTIA, *viNGN Comprehensive Community Infrastructure Program* (2010), https://www2.ntia.doc.gov/grantee/virgin-islands-public-finance-authority; NTIA, *viNGN Public Computer Centers Program* (2010), https://www2.ntia.doc.gov/grantee/virgin-islands-public-finance-authority-1; NTIA, *viNGN Sustainable Broadband Adoption Program* (2010), https://www2.ntia.doc.gov/grantee/virgin-islands-public-finance-authority-sba.

[30] *About Us*, VIRGIN ISLANDS NEXT GENERATION NETWORK, https://vingn.com/about-us/ (last visited Nov. 30, 2022).

[31] *See Fiber*, LIBERTY, www.broadband.vi (last visited Nov. 30, 2022).

[32] *Free USVI Public Wi-Fi Hot Spots*, VIRGIN ISLANDS NEXT GENERATION NETWORK, https://vingn.com/wi-fi-locator/ (last visited Nov. 30, 2022) (providing a search bar for free WiFi).

[33] NTIA's Broadband, Equity, Access, and Deployment ("BEAD") funding program has set aside $24 million in funding to be used in the USVI. During an August 18, 2022 Q&A session, Stephan Adams, President and CEO of viNGN, stated that viNGN intends to use this BEAD funding to deploy ubiquitous free WiFi throughout the Territory, as well as fiber to all multi-dwelling housing units. *See* Stephan Adams, President and CEO, viNGN, Q&A Statements (Aug. 18, 2022).

residents and visitors. In addition, viNGN intends to connect all low-income multi-dwelling housing in the USVI to its fiber network.[34]

Local USVI ISPs and National VoIP Providers. By offering government-subsidized wholesale middle-mile and multi-dwelling housing connectivity to all USVI telecommunications companies, viNGN lowers the entry and operating costs of all other ISPs in the USVI, thereby supercharging last-mile competition.[35] According to viNGN, in addition to Viya and BBVI, viNGN provides services to more than a dozen different local ISPs in the USVI. These ISPs offer competitive broadband alternatives to USVI residents and many also offer VoIP. Even those ISPs that do not directly offer voice services nevertheless provide competition to Viya's voice service by enabling the ISPs' customers to access national over-the-top ("OTT") VoIP providers, such as Vonage, RingCentral, Zoom, Ooma, 1-VoIP, Voiply, AXvoice, CallCentric, etc.

National Carriers. The USVI is also served by several national carriers, including AT&T, Lumen, and Verizon. AT&T and Lumen operate cable landing stations and have limited facilities in the USVI, while Verizon operates wholly on a resale basis. All three national carriers compete for the business of large enterprise and federal government customers and serve them through national accounts.

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[34] *See id.*

[35] For example, Sm@rtnet Limitless VI ("Sm@rtnet") provides high-speed fixed broadband in the USVI over copper and fiber optic cabling, as well as VoIP services. It offers speeds from 1 Mbps to 1 Gbps to USVI businesses and residents. *See* SM@RTNET LIMITLESS, https://www.smartnet.vi/broadband-services/ (last visited Nov. 30, 2022). Other local and national ISPs serving residential and business customers in the USVI include 1 Stop, Aeronet, Lumen/Level 3, ADM Technologies, OmniSystems, Hightide Solutions, and Astraqom. *See* 1 Stop Wireless VI, https://www.1stopwirelessvi.com/ (last visited Nov. 30, 2022); *see also* AERONET https://aeronetpr.com/ (last visited Nov. 30, 2022); *see also* LUMEN, https://www.lumen.com/en-hk/home.html (last visited Nov. 30, 2022); *see also* ADM TECHNOLOGIES, https://www.admtechinc.com/about-us.html (last visited Nov. 30, 2022); *see also* OMNISYSTEMS https://www.omnisystems.com/about-omnisystems (last visited Nov. 30, 2022); *see also* HIGHTIDE SOLUTIONS, https://www.htsvi.net/ (last visited Nov. 30, 2022), and ASTRAQOM, https://astraqom.com/vi/ (last visited Nov. 30, 2022).

In sum, USVI residents and business have access to numerous broadband and voice options, including mobile carriers, which collectively provide voice and data services to more customers in the USVI than fixed providers; Liberty's highly subsidized Territory-wide services; broadband and VoIP services offered by local ISPs, many of which benefit from access to viNGN's subsidized middle-mile wholesale fiber services; and broadband satellite companies. As a result of the development of this vigorous competition over the past decade, Viya no longer possesses market power in the Territory, much less a monopoly. Therefore, the market conditions that historically drove the uniquely pervasive regulation of Viya by the Commission simply no longer exist. There is no longer a compelling policy objective served by the regulatory structure applied to Viya. Consequently, as further set forth below, the Commission should forbear from applying its regulatory framework to Viya. Today, there is no reason to treat Viya differently than its many competitors.

II. THE COMMISSION SHOULD FORBEAR FROM APPLYING REGULATORY REQUIREMENTS TO VIYA THAT ARE NOT APPLICABLE TO VIYA'S COMPETITORS.

As the USVI's federally subsidized incumbent local exchange carrier ("ILEC") (and, prior to that, the USVI's sole, dominant telecommunications company),[36] Viya's operations historically have been subject to extensive Commission regulation to ensure that Virgin Islanders were able to obtain telephone service from the sole likely source of such service. This regulation is intrusive, administratively burdensome, and unique to Viya; it imposes substantial costs exclusively on Viya; and it provides Viya with a competitive disadvantage that distorts the

[36] Because Viya will remain an ILEC irrespective of any Commission forbearance in response to this Petition, Viya will continue to have interconnection, nondiscrimination, and other federal regulatory obligations under the Communications Act of 1934, as amended ("Communications Act"). *See e.g.,* 47 U.S.C. §§ 201, 251. In addition, although the Commission has deregulated directory services, Viya will continue to provide such services following any grant of this Petition by the Commission.

USVI's telecommunications market. This regulation is no longer justified because of significant recent changes to the USVI telecommunications landscape—changes that mirror the developments that have caused the majority of U.S. states to largely deregulate their ILECs.[37]

Due to increased competition, including the recent ascendance of wireless providers in the USVI and Liberty's replacement of Viya as USVI's federally subsidized carrier with a Territory-wide service obligation, Viya no longer has market power and USVI consumers now have many competitive options. For these reasons, the public interest no longer justifies maintaining Viya's unique TOCA and 1959 franchise obligations or continuing to exclusively apply to Viya service quality, network management, tariffing and rate regulation, accounting and financial reporting, transfer of control, and other requirements. Accordingly, Viya requests the Commission to forbear from continuing to apply these outdated and today unwarranted requirements exclusively to Viya.

A. *THE COMMISSION SHOULD RELEASE VIYA FROM THE 2016 TRANSFER OF CONTROL AGREEMENT.*

When ATN acquired Viya in 2016, the Commission required Viya to execute the TOCA as a condition to the Commission's approval of the transaction. The TOCA imposes a host of unique regulatory requirements that are applicable exclusively to Viya. These requirements, many of which are perpetual, are not warranted today—six years later—in light of the current competitive landscape in the USVI. They serve only to increase Viya's cost of doing business without any concomitant public interest benefit. The Commission therefore should promptly terminate the TOCA in this proceeding.

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[37] *See, e.g.,* Sherry Lichtenberg, Ph.D., *Examining the Role of State Regulators as Telecommunications Oversight is Reduced*, Nat'l Regulatory Research Inst., iv (Aug. 2015), https://pubs.naruc.org/pub/FA86912A-F509-F0A4-EB7D-6E938FA6CA06 (stating that, as of 2015, 36 states had deregulated telecommunications in whole or in part).

The administratively burdensome regulatory requirements contractually imposed on Viya by the TOCA include:

- A prohibition against Viya transferring "property, plant, or equipment ("PPE') without due consideration" or transferring, conveying, or selling more than 10% of its PPE under any circumstance, in each case without prior Commission approval.[38]

- Limitations on Viya's ability to serve as a co-guarantor of ATN indebtedness as an ATN subsidiary,[39] as well as limitations on the total amount of dividends Viya issues, the percentage of its earnings that it distributes in dividends,[40] and the amount of any management fee paid by Viya to its parent company.[41]

- At the Commission's request, an obligation to grant special Commission access to Viya's financial books and records, operational data, tax returns, and any other information related to the regulated activities of Viya and certain of its affiliates.[42]

- A requirement that Viya file the following notices or reports with the Commission:

    - notice prior to transferring more than five percent of its PPE;[43]

    - notice prior to Viya guaranteeing parent company loans;

    - notice promptly upon the issuance of any dividends;[44]

    - unaudited quarterly balance sheets and income statements prepared in conformance with FCC regulatory accounting rules;[45]

    - annual reports on Viya's revenue requirements and rate base prepared in conformance with FCC regulatory accounting rules;[46]

[38] TOCA § 3(a).

[39] *Id.* § 3(b)(2).

[40] *Id.* § 5(c).

[41] *Id.* § 8(a).

[42] *Id.* § 11.

[43] *Id.* § 3(a)(1).

[44] *Id.* § 5(c).

[45] *Id.* § 10(b)(1).

[46] *Id.* § 10(b)(2).

- quarterly and annual reports regarding Viya's "access lines, employee headcount, plant additions and plant retirements;"[47]
- an "annual summary of payments, income, and receipts" from or to affiliates;[48]
- annual audited financial statements;[49] and
- an annual report showing "revenues, expenses, and assets" booked to Viya and how these were allocated between Viya and nonregulated affiliates and between Viya's regulated and unregulated services.[50]

Although certain other requirements set forth in the TOCA have sunset, the foregoing extensive requirements do not have an expiration date, and the TOCA does not have a termination date. Consequently, absent Commission action in response to this Petition, these requirements will remain in effect in perpetuity.

As explained above, Viya faces robust competition in the USVI from the wireless carriers that collectively serve more USVI customers than all of the USVI's fixed providers combined; Liberty; viNGN and the local ISPs that use viNGN's subsidized middle-mile fiber network; and national OTT VoIP providers accessible via broadband connections. This competition is sufficient to ensure that Viya and the other USVI telecommunications providers operate in a pro-consumer manner and thereby render Viya's TOCA obligations superfluous. In addition, it is inappropriate and unfair for only Viya to be subject to a TOCA and for the perpetual obligations applicable to Viya under the TOCA not to be imposed on any of Viya's USVI competitors, including Liberty. Unlike when Viya was acquired by ATN in 2016, the Commission did not require Liberty to obtain prior Commission approval to be acquired by Liberty Latin America in

[47] *Id.* §§ 10(b)(3), 10(c)(2).

[48] *Id.* § 10(b)(4).

[49] *Id.* § 10(c)(1).

[50] *Id.* § 10(c)(3).

2021. Therefore, the Commission did not impose any regulatory requirements on Liberty in connection with that transaction.

Further, the TOCA requirements materially increase Viya's operational costs to the detriment of Viya's customers. Viya spends substantial sums preparing and presenting to the Commission the reports required by the TOCA and then Viya funds the Commission's evaluation of those reports through Commission assessments. Viya must push these material costs through to its customers. In addition, the ability and flexibility of Viya and its parent company ATN to operate and respond to market forces in the USVI with maximum efficiency is limited by Viya's TOCA obligations. ATN is less likely to commit resources to Viya and the USVI market if ATN's ability to earn a return on such investments is tightly regulated by the Commission, rather than being subject to the same market forces applicable to other providers.

It is questionable whether the TOCA commitments applicable to Viya were needed in 2016, but they are not warranted today—six years later—in light of the competition to which Viya is now subject, including from Liberty. Moreover, it is unfair to continue to apply these administratively burdensome requirements exclusively to Viya, while not applying equivalent requirements to Liberty and other USVI telecommunications providers. In addition, the costs of Viya's compliance with the obligations ultimately flows through to Viya's customers to their detriment.[51] For these reasons, Viya requests the Commission to promptly terminate the TOCA in this proceeding.

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[51] If the Commission determines not to terminate the TOCA, then, to avoid any discriminatory effect, the Commission should impose each surviving requirement on Liberty, which has a similar role to Viya in the USVI market.

B. *THE COMMISSION SHOULD WORK TO RELEASE VIYA FROM ITS 60-YEAR-OLD FRANCHISE.*

As the USVI's initial ILEC, Innovative was granted telecommunications authority in the USVI via a franchise issued over 60 years ago by the USVI government. No other telecommunications provider operating in the USVI today is subject to a similar franchise, and the terms and existence of Viya's franchise are outdated. The Commission therefore should work with the Governor and Legislature to terminate Viya's anachronistic franchise.[52] In lieu of a franchise, the Commission should permit Viya to operate without a telecommunications license, as Liberty does today, or instead issue Viya a more contemporary telecommunications provider license consistent with the licenses that the Commission recently has issued to other USVI providers.

Viya's franchise includes several outdated, unenforced, and likely unenforceable conditions, such as:

- A vague and ambiguous obligation that Viya continually "expand and modernize its service and facilities;"[53]
- a limitation on Viya's rates such that Viya does not earn a return on the "fair value of its property devoted to public use" in excess of eight percent (subject to certain exceptions);[54] and
- a requirement that the USVI government "expropriate the entire business, plant, and facilities of Viya" if the USVI government terminates or deems not to renew the franchise.[55]

[52] Because Viya's franchise was enacted into law by the Virgin Islands Legislature and Governor rather than the Commission, it is doubtful that the Commission can unilaterally release Viya from the franchise. Assuming that this is the case, the Commission should work with the USVI government to terminate the franchise.

[53] Franchise § 3.

[54] Franchise § 6(e).

[55] Franchise § 8. Any action by the USVI government to release Viya from its franchise should, of course, expressly repeal this unjust and archaic term.

Relieving Viya of these decades-old franchise obligations is long overdue. They no longer make sense in light of the structure of today's USVI telecommunications market. In addition, it is unfair to impose these requirements uniquely on Viya. The Commission has not required Viya's strongest competitor, Liberty, to obtain a similar franchise, or even apply for a competitive local exchange carrier ("CLEC") certificate or some other telecommunications license. Other than Liberty's status as an ETC (a status shared by Viya), Liberty operates in the USVI without any such certificate or license from the Commission. There is no justification for this disparate treatment of the two competing providers. Moreover, in those instances in which the Commission has issued telecom licenses to USVI providers, the Commission has not used the certificates to impose significant administrative requirements on the providers.[56]

For these reasons, Viya requests the Commission to work with the USVI government to terminate Viya's franchise and permit Viya, like Liberty, to operate without a formal telecommunications license. If, in the alternative, the Commission feels it is necessary for Viya to be licensed, Viya requests the Commission issue Viya generic authority to operate as a telecommunications service provider in substantially the same form as the Commission recently has used for other applicants and to require Liberty to obtain an equivalent license.

C. *THE COMMISSION SHOULD FOREBEAR FROM APPLYING SERVICE QUALITY AND NETWORK MAINTENANCE REQUIREMENTS TO VIYA.*

Viya requests forbearance from all applicable service quality, network maintenance, and similar operational requirements arising under the TOCA, Viya's franchise, USVI statute, and

[56] *See, e.g., Onvoy, LLC Petition for Authorization to Operate as a Telecommunications Service Provider in the U.S. Virgin Islands*, Order, Docket No. 681, Order No. 2/2021 (USVI PSC Dec. 1, 2020) (merely requiring the licensee to operate as a common carrier and provide 911 service); *see also Level 3 Communications St. Croix, Inc. Application to Provide Telecommunications Services in the* USVI, Order, Docket No. 656, Order No. 70/2016 (USVI PSC Sept. 15, 2016) (authorizing Level 3 to operate as a telecommunications provider without applying any telephone service statutes or regulations to Level 3).

the Commission's rules and orders.[57] The competitive pressures exerted on each other by the USVI's many voice and broadband providers ensure that all such providers have a strong incentive to provide high-quality service to their customers over well-maintained networks. Detailed regulatory oversight of providers' service quality and network maintenance by the Commission is an unnecessary and wasteful use of the scarce resources of both the Commission and providers. The Commission's general agreement with this proposition is demonstrated by the fact that it has not imposed material service quality and network maintenance obligations on other USVI providers, including Liberty. Viya should not be singled out for such obligations.

Under the Commission's current rules, Viya (but not other USVI telecommunications providers) must:

- permit Commission inspection of plant and equipment, at Commission discretion;[58]
- "make all necessary extensions and improvements in its physical plant," with "necessary" undefined;[59]
- obtain Commission approval for the extension or improvement of facilities where the cost exceeds $150,000;[60]
- meet specified equipment and line maintenance requirements;[61]
- stay under a cap on the number of subscribers per circuit;[62]
- maintain "sufficient" exchange facilities and staffing, and conduct and submit traffic studies;[63]

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[57] This request encompasses the service quality, network maintenance, and related requirements set forth in the text, as well as all other such requirements arising under any other USVI sources of law.

[58] 30 V.I.R.R. 001-002, Sec. 13-32.

[59] *Id.* Sec. 13-61.

[60] *Id.* Sec. 13-62 & -63.

[61] *Id.* Sec. 13-121.

[62] *Id.* Sec. 13-122.

[63] *Id.* Sec. 13-123.

- take specified steps to prevent service disruptions;[64]
- supervise the "phraseology and methods" of operators;[65]
- revise directories annually, include specified instructions, and provide directories to customers;[66]
- prevent and remediate service interruptions and keep specified records regarding such interruptions;[67]
- maintain specified records and maps of facilities;[68]
- prevent safety harms and avoid interference to other services, with the Commission able to order "any alteration" and extract costs;[69]

In addition, the TOCA and various Commission orders incorporated into the TOCA add further requirements that also are exclusively applicable to Viya.[70]

The Commission should forbear from applying all such service quality and network maintenance requirements to Viya for several reasons. *First*, forbearance will not put USVI customers at risk of poor service quality. Markets with adequate telecommunications competition, such as the USVI, do not require intrusive regulation to ensure that providers offer pro-consumer service quality and adequately maintain their networks. As set forth above, in addition to Viya and Liberty, the USVI is served by multiple wireless carriers that collectively serve many multiples of the number of USVI landline customers served by all USVI fixed providers combined; viNGN and the local ISPs that leverage viNGN's middle-mile fiber

[64] *Id.* Sec. 13-124

[65] *Id.* Sec. 13-125

[66] *Id.* Sec. 13-126

[67] *Id.* Sec. 13-127

[68] *Id.* Sec. 13-128

[69] *Id.* Sec. 13-129

[70] TOCA § 7(a)-(b) (incorporating various PSC orders most of which regulate Viya's service quality).

network; and the national OTT VoIP providers whose voice services can be obtained via any broadband connection. Consumers can simply select another provider if a particular competitor is not keeping pace. Indeed, all competitors must maintain their service quality and networks to, in turn, maintain their viability as ongoing concerns. This presumably is the reason that the Commission historically has not found it necessary to apply service quality and network management requirements to other USVI providers, including Liberty. It also is the reason that Viya is, and will remain, committed to providing high-quality service using a well-maintained network wherever it operates, irrespective of the Commission's regulatory mandates.

Second, basic concepts of fairness require that Viya be treated substantially similarly to its competitors, and the Commission does not apply service quality and network management requirements to other USVI providers. In particular, it makes little sense for Viya to be subject to service quality and network management obligations that the Commission does not apply to Liberty. Both companies currently provide residential and business voice and broadband services throughout the Territory. Further, as the winning applicant in the FCC's Connect USVI Fund reverse auction, Liberty will take on over the next several years the role that Viya historically has fulfilled in the USVI—i.e., the federally subsidized provider with a legally binding federal obligation to provide service to *all* fixed locations in the USVI that satisfies federally mandated minimum service obligations—and Viya will relinquish that role to Liberty.

Third, applying these regulations only to Viya, and not to its competitors, provides Viya's competitors with a potential commercial advantage. It places in jeopardy the highly proprietary competitive intelligence regarding Viya's current network and operations and future business plans that Viya regularly is required to file with the Commission. To the extent that Viya's competitors are able to obtain access to this information, they can react to it when developing their own deployment and operational plans. By contrast, Viya has no equivalent potential to commercially benefit from knowledge of its competitor's operations and plans. Extensive Commission regulation of Viya's service quality and network management practices also provides Viya's competitors with a forum to publicly criticize Viya before the Commission without concern about reciprocal Commission scrutiny in connection with the same regulatory requirements. In Viya's experience, these advantages distort the competitive playing field significantly.

Fourth, the Commission's quality of service and network maintenance requirements are not merely unnecessary; they also are highly burdensome and costly to Viya and ultimately to Viya's customers. Fundamentally, these requirements effectively substitute the Commission's views regarding how Viya should operate its networks in lieu of Viya's (and its parent company ATN's) decades of experience and expertise efficiently operating telecommunications networks. Further, many of the requirements are ambiguous or outdated. For example, it is not clear what constitutes "necessary" extensions and improvements or "sufficient" exchange facilities and staffing. Similarly, Viya's VoIP service does not rely on "circuits," and the role of live operators and print directories has been diminishing for decades. As a result, Viya too often expends substantial funds to conservatively manage its operations in line with ambiguous or outdated legacy service quality and network maintenance regulations. In the absence of such intrusive mandates, however, Viya could manage its network more efficiently, in the best interest of its customers, and using the latest technological advancements—without concern that such optimal management practices will run afoul of detailed Commission service quality and network maintenance obligations. Moreover, enforcing these requirements also consumes limited

Commission resources and imposes a further financial burden on Viya through the payment of assessments to the Commission to fund its oversight.

For these reasons, Viya requests the Commission to forbear from applying service quality and network maintenance obligations to Viya. In addition, Viya is prepared to commit, in exchange for such forbearance, to maintain its current network footprint (reaching more than 98 percent of all USVI locations) until such time as Liberty is required to offer voice and broadband service to every residence and business in the USVI.[71]

D. *THE COMMISSION SHOULD RELIEVE VIYA OF OTHER OUTDATED REQUIREMENTS.*

The Commission also should forbear from enforcing against Viya other legacy regulatory requirements that are premised on Viya being a subsidized incumbent with substantial market power. The application of these regulations only makes sense when imposed on a dominant carrier. Viya has not held that role in the USVI for many years, and, as discussed above, Liberty has assumed Viya's role as the USVI's federally subsidized carrier. Specifically, Viya requests forbearance from tariffing and rate regulation, accounting and financial reporting requirements, and transfer of control restrictions. These regulations generally are not imposed by the Commission on Viya's USVI competitors. In addition, compliance with these requirements is

[71] Viya makes this commitment despite there not being any source of USVI law that expressly subjects Viya to "carrier of last resort" obligations. No such requirement appears to be imposed in Innovative's original 1959 franchise, statutes enacted by the Virgin Islands legislature, or rules promulgated by the Commission. That said, Viya acknowledges that high-cost ETCs are required to provide service to all requesting locations throughout the USVI. Consequently, as a high-cost ETC and the sole recipient of Connect USVI Fund support, Liberty effectively has a standalone voice and broadband COLR obligation that progressively vests over time culminating with its December 31, 2027 deadline under the Connect USVI Fund rules to serve all locations in the USVI. Viya thus far also has maintained its ETC status in the USVI because Viya continues to receive high-cost USF transition support. However, Viya expects to relinquish this status once it no longer receives such transition support. Consequently, at that time, Viya believes that it will no longer have a legally binding obligation to provide services to all locations in the USVI and requests the Commission to confirm as much.

highly costly for Viya, consuming resources that Viya could better direct towards its customers. These regulations also consume valuable and limited Commission resources. Consequently, Viya requests for the Commission to promptly forbear from these outdated requirements.[72]

Tariffing and Rate Regulation. Viya requests the Commission to forbear from enforcing tariffing and rate regulation arising from statutory provisions, the TOCA, and the Commission's rules and orders.[73] As the FCC has explained,

> tariffs originally were required to protect consumers from unjust, unreasonable, and discriminatory rates in a virtually monopolistic market, and . . . they become unnecessary in a marketplace where the provider faces significant competitive pressures.[74]

In addition, in a competitive market such as the USVI, "it is very difficult for firms to set efficient prices when they must tariff,"[75] in part because selective application of tariff requirements leads to an uneven playing field. Tariffing also imposes significant administrative costs on both Viya and the Commission without concomitant pro-consumer benefits.[76] Similarly, rate regulation is unnecessary and can be distortive in a competitive marketplace. As the FCC has observed for decades, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably

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[72] Should the Commission determine to maintain some subset of these requirements, Viya requests that the requirements also be imposed on a nondiscriminatory basis to Liberty due to Liberty's assumption of Viya's historical role as the USVI's federally subsidized incumbent with a Territory-wide, price-capped service obligation.

[73] The provisions for which Viya request forbearance include 30 VIC §§ 2, 13, 14, 15a, 15b, 15c, 15d, 20, 23-24, and 31; TOCA §§ 7(c)-(d), 8; and 30 V.V.I.R. 001-002, §§ 13-11, -41, -42, -43, and -51.

[74] *AT&T Forbearance Order*, 22 FCC Rcd at 18724, ¶ 30 n.124

[75] *See Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25, RM 10593, 32 FCC Rcd 3459 ¶ 127 (rel. April 28, 2017) ("BDS Order"); *see also id.* at ¶ 157.

[76] *See id.* at ¶ 163.

discriminatory."[77] Rate regulation discourages investment by imposing costs and by potentially mandating an artificially low price.[78] By forbearing from tariffing and rate regulation, the Commission can reduce Viya's costs, thereby freeing up resources that Viya can devote to improving its business, and promote an even playing field in the USVI marketplace.[79]

To eliminate any concern that the Commission may have regarding forbearing from applying tariffing and rate regulation obligations to Viya, Viya will agree, in exchange for such forbearance, to cap its regulated and tariffed rates at existing levels until December 31, 2027. As of that date, in exchange for its nearly $85 million in federal subsidies, Liberty is required to provide standalone voice and broadband service to all USVI locations at rates that are capped by the FCC's USVI Connect Fund rules.[80] Consequently, the price caps applicable to Liberty under the rules of the USVI Connect Fund program effectively will impose price discipline on all USVI providers.

Accounting and Financial Reporting Requirements. Viya also requests the Commission to forbear from enforcing accounting and financial reporting requirements arising from statutory

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[77] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8673, para. 97 (2010) (citing *Petition of US WEST Communications, Inc., for Declaratory Ruling Regarding the Provision of National Directory Assistance et al.*, CC Docket No. 97-172 et al., Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999)); *see also* 47 U.S.C. § 543(a)(2) (precluding cable rate regulation in areas with effective competition).

[78] *See BDS Order* ¶¶ 127-28.

[79] Viya currently has a rate case pending before the Commission and will be filing additional materials requested by the Commission and GCG that should enable the Commission to conclude there is no risk of Viya over-earning. Should the Commission grant the forbearance from rate regulation requested in this Petition, the Commission can close out the rate case and declare that Viya will not be subject to future rate proceedings.

[80] Liberty's USF-supported service must be offered at rates that are reasonably comparable to rates for comparable offerings in urban areas. 47 CFR § 54.1507(a).

provisions, the TOCA, and the Commission's rules and orders.[81] These accounting and reporting measures are not only expensive and time-consuming, but they will not serve any valid public policy purpose if the Commission forbears from applying tariffing and rate regulation requirements as Viya requests above. As a company in a marketplace facing growing competition, Viya has every incentive to invest its resources prudently; regulatory oversight is not needed to create this incentive. The FCC has, on multiple occasions, streamlined its legacy accounting requirements in response to competition and market changes to reduce regulatory burdens. The Commission should similarly modernize its approach in light of market conditions by not singling out Viya for the unnecessary and costly accounting and financial reporting regulations.[82]

Transfer of Control Restrictions. Viya requests the Commission forbear from enforcing any requirement that the Commission review or approve a transaction involving Viya or any of its affiliates, parents, subsidiaries, or assets. This request encompasses any such restrictions arising from statutory provisions, the TOCA, and the Commission's rules and orders.[83] The Commission's transaction review and approval process can be lengthy and administratively burdensome, which substantially hinders the ability of a telecommunications provider to nimbly respond to market changes. For example, it took the Commission nearly eight months to approve

[81] The provisions for which Viya request forbearance include 30 VIC §§ 5, 6, and 8; TOCA §§ 5, 10-11; and V.V.I.R. 30-001-002, §§ 13-11, -12, -13, -14, -31, -81, -82, -83, -84, and -85.

[82] Viya acknowledges that the Commission has an obligation under federal and USVI law to annually address the expenditure of federal high-cost USF support by telecommunications providers to which the Commission assigned ETC status. For so long as Viya retains its ETC designation in the USVI, Viya is not seeking forbearance from its reporting obligations in connection with this annual process.

[83] The provisions for which Viya request forbearance include 30 VIC §§ 43a; TOCA §§ 3(a), 6; and 30 V.V.I.R. 001-002, § 13.

ATN's acquisition of Viya.[84] Moreover, if the Commission ultimately adopts the forbearance requested in this Petition, and thereby applies the same deregulatory approach to Viya that it applies to Viya's competitors, it makes little sense to nevertheless require Viya to undergo a searching transaction review, while refraining from applying any regulatory process to its competitors. Indeed, as set forth above, the Commission did not meaningfully review Liberty Latin America's acquisition of Liberty. In addition, the Commission heeded GCG's advice that the transfer of control of Level 3 in 2017 did not require any Commission action.[85] As with all other telecommunications providers serving the USVI, Viya will remain subject to federal and USVI antitrust and consumer protection laws even if the Commission grants the forbearance requested in this Petition. This will ensure adequate governmental oversight to protect competition and consumers in the USVI telecommunications market.

III. COMMISSION REGULATION OF INTERCONNECTED VOIP IS PREEMPTED BY FEDERAL LAW.

Once Viya relinquishes its high-cost ETC status, the Commission does not have obvious regulatory authority over Viya's services, although this issue is moot if the Commission determines to grant the regulatory relief Viya requests in this Petition. Historically, as an ETC, Viya was required to provide voice service on a common carrier basis in exchange for its allocation of high-cost federal USF support. Thus, Viya's voice service has been subject to common carrier regulation irrespective of the technology used to provision the service—e.g., legacy circuit-switched telephone service or interconnected VoIP. Innovative historically

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[84] It took the Commission nearly eight months to approve ATN's acquisition of Viya. On November 4, 2015, ATN filed a transfer of control application with the Commission seeking Commission approval to acquire Viya. The Commission approved the application on June 28, 2016. *See Consolidated Application for Transfer of Control of Virgin Islands Telephone Corp. d/b/a Innovative Telephone et al.*, Consent Order, Docket No. 653, Order No. 59/2016 (USVI PSC June 28, 2016).

[85] GCG 2017 Letter at 1-2.

provided copper-based circuit-switched intrastate telephone service in the USVI but modified its network technology in the mid-2010s to transition entirely to interconnected VoIP service provided over a hybrid fiber-coaxial network.

Now that Liberty is the USVI's federally subsidized high-cost carrier under the Connect USVI Fund program, Viya will no longer need to maintain its high-cost ETC status once Viya's transition support ends. At that time, Viya will no longer be required to provide voice service on a common carrier basis. Although the Commission has clear authority over the circuit-switched intrastate telephone service that Innovative historically provided,[86] federal law preempts Commission regulation of the interconnected VoIP service that Viya today provides. Federal law preempts state and territorial regulation of VoIP.[87] Federal law renders Commission regulation of VoIP unlawful for two independent reasons: (1) USVI regulation conflicts with the federal

[86] "Telephone service" is the only form of telecommunications that the Commission is statutorily permitted to regulate. *See* 30 VIC § 1(a)(3). Although the Virgin Islands Code does not expressly define "telephone service," the Commission historically has not applied substantive "telephone service" regulations to voice providers other than Viya, all of which utilize VoIP technology. This approach by the Commission therefore is generally consistent with the proposition that VoIP providers should not be considered to be providers of "telephone service." Specifically, the Commission has not purported to apply substantive regulations to communications providers other than Viya, reflecting its correct recognition that it lacks authority to regulate parties that do not offer circuit-switched telephony. Similarly, references in the federal Communications Act to "telephone" similarly refer to legacy service and its providers. *See* 47 U.S.C. §§ 153(44) ("rural telephone company"), 54 ("telephone exchange service"), 55 ("telephone toll service"). Consistent with typical usage, the Communications Act employs distinct definitions for VoIP that do not use the term "telephone." 47 U.S.C. §§ 153(25), (36) (defining interconnected and non-interconnected VoIP).

[87] Preemption may be express or implied based on a conflict between federal and state law or where federal law occupies the field of regulation. *See generally Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act*, CONGRESSIONAL RESEARCH SERVICE, 1, 3 (updated Sept. 20, 2021), https://crsreports.congress.gov/product/pdf/R/R46736 ("The Commission has preempted states' regulation of VoIP services—i.e., services that enable users to make voice calls via the Internet—when the services interface with the Public Switched Telephone Network."). Federal law may preempt USVI law in the same manner that it preempts state law. *See Gerald v. RJ Reynolds Tobacco Co.*, 68 V.I. 3, 22-35 (Super. Ct. of V.I. 2017).

policy of limited VoIP regulation; and (2) VoIP is inherently interstate and the federal Communications Act[88] reserves regulation of interstate service to the FCC.

USVI Regulation of VoIP Conflicts with Federal Law. Because VoIP is properly classified as an information service under federal law, Commission regulation of VoIP conflicts with, and therefore is preempted by, federal law directing a deregulatory approach to VoIP. The Communications Act draws a fundamental distinction between highly regulated "telecommunications service"[89] and very lightly regulated "information services."[90] Although the FCC has not yet formally classified any type of VoIP as either a telecommunications or information service, the Eighth Circuit, the only federal appellate court to reach the issue of VoIP classification, correctly concluded that VoIP is an information service.[91] Three district courts outside of the Eighth Circuit have also concluded that VoIP is an information service.[92]

Regulation of VoIP by states or territories conflicts with the federal policy of deregulation of information services established by Congress pursuant to the Communications Act. The Eighth Circuit has concluded on multiple occasions that "any state regulation of an

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[88] The Communications Act defines both "states" and the "United States" to include U.S. Territories. 47 U.S.C. § 153(47), (58).

[89] A telecommunications service is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications," in turn, means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50).

[90] In contrast to a telecommunications service, an information service is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24).

[91] *See Charter Advanced Servs. v. Lange,* 903 F.3d 715, 719 (8th Cir. 2018) (quoting *Charter Advanced Servs. LLC v. Lange*, 259 F. Supp. 3d 980, 987 (D. Minn. 2017)).

[92] *See FTC ex. rel. Yost v. Educare Ctr. Servs.*, 433 F. Supp. 3d 1008, 1018 (W.D. Tex. 2020); *see also PAETEC Commc'ns, Inc. v. CommPartners, LLC*, No. 08-Civ-0397 (JR), 2010 WL 1767193 at *3 (D.D.C. Feb. 18, 2010); *see also Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n*, No. 04 CIV. 4306 (DFE), 2004 WL 3398572 at *1 (S.D.N.Y. Jul. 16, 2004).

information service conflicts with the federal policy of nonregulation."[93] The FCC has upheld Congress's deregulatory choice by concluding that subjecting VoIP to traditional telephone company regulations "directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements."[94] Although the FCC has extended many regulatory obligations to VoIP providers on a case-by-case basis, relying on either direct or ancillary authority,[95] the FCC has not chosen to apply service quality, network maintenance, tariffing, rate regulation, accounting, financial reporting, or transfer of control obligations to VoIP providers, even though the Communications Act applies these sorts of obligations on traditional common carrier telephone companies.[96] Where a federal agency has authority to regulate but chooses not to use it in support of a federal policy of deregulation, state and territorial regulation conflicts with the federal deregulatory choice and is preempted.[97]

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[93] *Charter*, 903 F.3d at 719 (quoting *Minn. PUC v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007)).

[94] *Vonage Order*, 19 FCC Rcd at 22415, ¶ 20, *aff'd, Minnesota PUC*, 483 F.3d at 570.

[95] *See, e.g.*, 47 CFR § 1.47(h) (registration and designation of agent for service of process); 47 CFR § 1.1151 et seq. (regulatory fees); 47 CFR Part 1 subpart Z ("CALEA"); 47 CFR Part 4 (outage reporting); 47 CFR Part 6, 7, and 14 (accessibility for individuals with disabilities); 47 CFR Part 9 (911 obligations); 47 CFR Part 52 (number portability, number administration, 988); 47 CFR Part 54 (universal service contributions); 47 CFR Part 64 subpart F (TRS provision); 47 CFR Part 63 (discontinuance of service); 47 CFR § 64.604(c)(5)(iii)(A) (TRS Fund contribution); 47 CFR § 64.1200 (robocalls); 47 CFR Part 64, subpart U (CPNI); 47 CFR Part 64, subpart V (rural call completion); 47 CFR Part 64 Subpart HH (caller ID authentication).

[96] *See Vonage Order*, 19 FCC Rcd at 22415, ¶ 20 (concluding that subjecting VoIP to traditional telephone company regulations "directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements"); *see also Communications Marketplace Report*, 2020 Communications Marketplace Report, 36 FCC Rcd 2945, 3047, ¶ 149 (2020) ("The dynamic nature of this [over-the-top VoIP] subsector makes it difficult to quantify the number of users, though consumers benefit from the ever evolving choices available to meet their voice communication needs."); *see also Call Authentication Trust Anchor*, Second Report and Order, 36 FCC Rcd 1859, 1862, ¶ 5 (2020) ("As the telecommunications industry has advanced and expanded into IP-based telephony, costs have decreased as competition increased, benefitting consumers greatly.").

[97] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010); *see also FERC v. Mississippi*, 456 U.S. 742, 759 (1982).

VoIP is Inherently Interstate, and the USVI Cannot Regulate Interstate Service. Unlike legacy circuit-switched telephone service, VoIP cannot be divided into interstate and intrastate components, and as such it may only be regulated federally. Pursuant to Section 2(a) of the Communications Act, the FCC is the exclusive regulator of interstate communications, while states and territories only may regulate intrastate communications.[98] Thus, interstate communications services are "under federal control,"[99] to "the exclusion of state law."[100] Where it is impossible to segregate a form of communications into interstate and intrastate components, the courts have determined that form of communications must be treated as wholly interstate and it may be regulated solely by the FCC.[101] Courts sometimes refer to this as the "impossibility exception." Unlike traditional circuit-switched telephone service, interconnected VoIP cannot be broken into interstate and intrastate components because packet switching, unlike circuit switching, can involve sending packets of data for the same call in different directions through multiple jurisdictions.[102] Therefore, VoIP regulation is solely the province of the FCC, which has chosen only partially to regulate it.

Thus, the Commission is preempted from undermining the FCC policy of significant deregulation of interconnected VoIP. In addition, the Commission does not have authority to

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[98] *See Ivy Broad.*, 391 F.2d 486, 490-91; *see also Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 31 (1919); *see also Western Union Tel. Co. v. Boegli*, 251 U.S. 315, 316-17 (1920).

[99] *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 31 (1919); *see also Western Union Tel. Co. v. Boegli*, 251 U.S. 315, 316-17 (1920).

[100] *Ivy Broad.*, 391 F.2d at 490-91.

[101] *See Louisiana PSC*, 476 U.S. at 375 n.4 (citing *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), and *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977)); *see also Maryland PSC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990).

[102] *Vonage*, 19 FCC Rcd at ¶ 23 (stating that there is no "plausible approach to separating [VoIP services] into interstate and intrastate components for purposes of enabling dual federal and state regulations to coexist without 'negating' federal policy and rules"); *see id. at* ¶¶ 32, 46 (explaining that this "practical inseverability" exists for all VoIP services, including those offered by cable companies).

regulate interstate services, and VoIP is wholly interstate. Therefore, because Viya's voice service is exclusively provided as interconnected VoIP, Commission regulation of the voice service is preempted once Viya is no longer a high-cost ETC.

IV. CONCLUSION.

For the reasons set forth herein, the Commission should promptly forbear from applying to Viya the extensive, legacy regulatory obligations that were adopted to address the market power historically held by Innovative. Today, the USVI telecommunications marketplace is competitive and increasingly tilted in favor of mobile carriers; Viya does not possess market power; and Liberty is taking over Viya's role as the federally subsidized USVI fixed provider with a legally binding service obligation. In light of these changed circumstances, it is no longer warranted to maintain Viya's unique TOCA and 1959 franchise obligations or continue to exclusively apply to Viya service quality, network management, tariffing and rate regulation, accounting and financial reporting, and transfer of control requirements. In addition, once Viya relinquishes its high-cost ETC authority following the termination of Viya's USVI Connect Fund transition support, the Commission will not have jurisdiction to regulate Viya's provision of interconnected VoIP.

Respectfully submitted,

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