BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.	)	WC Docket No. 07-22

PETITION TO DENY OF ONE COMMUNICATIONS CORP.

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One Communications Corp. ("One Communications"), by its attorneys, hereby files this petition to deny the application of Verizon New England Inc., et al. ("Verizon") and FairPoint Communications, Inc. ("FairPoint") (collectively, the "Applicants") for approval of the proposed transfer of control in the above-captioned proceeding.[1]

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[1] *See* Application of Verizon New England Inc., NYNEX Long Distance Company, Bell Atlantic Communications, Inc., Verizon Select Services Inc., Verizon Communications Inc., and Northern New England Spinco Inc., Transferors, and FairPoint Communications, Inc., Transferee, For Consent to Transfer Certain Assets and Long-Distance Customer Relationships in the States of Maine, New Hampshire, and Vermont, WC Docket No. 07-22 (filed Jan. 31, 2007) ("Application").

I. INTRODUCTION AND SUMMARY

Section 214 of the Communications Act (the "Act") requires the Commission to determine whether the proposed transfer of control will serve the public interest.[2] In making such a determination, the FCC weighs any potential public interest harms—harms which would "substantially frustrat[e] or impair[] the objectives or implementation of the Act"—against any potential public interest benefits.[3] The Applicants bear the burden of proving by a preponderance of the evidence that the proposed merger, on balance, serves the public interest. In other words, the Commission may only approve the proposed transfer of control if the Applicants demonstrate that the benefits yielded by the transfer outweigh the harms.

The Applicants have failed to meet this burden. The instant application poses significant public interest harms that, if unresolved, would result in a net loss in competition and consumer welfare in Maine, New Hampshire, and Vermont. For example, FairPoint has already stated that "it does not concede" that the transferred Verizon incumbent LECs will qualify as a Bell Operating Company ("BOC") and be subject to the requirements of Sections 271 and 272(e) (which have not sunset) after the proposed transaction is consummated. Similarly, the proposed merger poses a risk that the Merged Firm will exploit the so-called rural exemption and other protections of Section 251(f) of the Act to circumvent the market-opening requirements applicable to all incumbent local exchange carriers and their successor companies.

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[2] 47 U.S.C. § 214(a).

[3] *See, e.g., In re Verizon Communications, Inc., Transferor, and America Movil, S.A. de C.V., Transferee, Application for Authority to Transfer Control of Telecomunicaciones de Puerto Rico, Inc.*, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd. 6195 ¶ 17 (2007) ("*Verizon/America Movil Merger Order*"); *In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶ 16 (2005) ("*Verizon/MCI Merger Order*").

In addition, there is a substantial risk that the Merged Firm, which for the first time must develop the capability to support extensive wholesale operations, including building its own wholesale operations support systems ("OSS") and developing its own employee expertise in meeting ILEC wholesale obligations, will fail to meet its most basic obligations under Section 251(b) and (c) as well as Sections 271 and 272. The Merged Firm will have powerful incentives to divert resources away from wholesale obligations and toward meeting its commitments to shareholders, unions and end users.

Moreover, the proposed transaction threatens to deprive competitors of the benefits of their existing special access volume-term service arrangements and even possibly existing interconnection agreements. For example, the sale of the Verizon incumbent LEC facilities covering three states will substantially reduce the volume of special access that companies like One Communications purchase from Verizon. This will give Verizon the opportunity to assert that, after the transaction, One Communications no longer purchases sufficient volumes of special access to qualify for the price discount (and must therefore pay higher prices going forward) and other terms and conditions available under One Communications' current volume-term plan. The Merged Firm might also assert that, after the transaction, One Communications must pay higher special access rates and no longer benefit from other terms and conditions that apply today under the Verizon special access volume-term plan. Verizon and the Merged Firm could seek to make these arguments, even though One Communications continues to purchase *exactly the same volume of special access from Verizon and Merged Firm together that it purchased from Verizon prior to the transaction*. The Merged Firm may also be able to raise rivals' costs by breaking existing interconnection agreements between Verizon and its competitors.

The instant application does nothing to alleviate these concerns. In fact, the Applicants offer few, if any, details on how the proposed transaction can be consummated without running afoul of the market-opening provisions of the 1996 Act, let alone any specifics on how the proposed merger will yield net benefits for competition and consumer welfare. In short, Applicants have not met the public interest standard. Accordingly, the Commission must deny the instant application, or at the very least condition its approval on the Applicants' compliance with requirements that address the public interest harms posed by the transaction.

II. THE PROPOSED TRANSFER OF CONTROL SHOULD NOT CAUSE THE MERGED FIRM TO BE EXEMPT FROM LEGAL OBLIGATIONS THAT APPLY TO VERIZON.

The proposed transfer of local exchange carrier ("LEC") assets from Verizon to FairPoint offers the Merged Firm the opportunity to argue in the future that the LEC assets in question are, by virtue of the transfer of control to the Merged Firm, no longer subject to some or all of the wholesale obligations to which they are subject today. While the Applicants ignore these concerns, they are serious and cannot be dismissed. The Commission must rule in this proceeding that the transferred LECs will be subject to the full panoply of requirements applicable to BOCs and incumbent LECs after the transaction and that the Merged Firm is ineligible to request relief from these requirements as applied to the transferred LEC assets under Section 251(f).

A. The Local Exchange Networks Subject To The Proposed Transfer Of Control Must Continue To Be Classified As Bell Operating Company Facilities.

FairPoint has stated that it "does not concede that it will become a 'BOC' as a result of [the] transaction and, thus, become generally subject to Section 271 of the Act."[4] But the law is clear that the Verizon incumbent LECs that the Applicants propose to transfer to the Merged Firm would, if transferred to the Merged Firm, continue to be BOCs and would continue to be subject to the full panoply of legal requirements applicable to BOCs. The Commission should clarify this issue in this proceeding to eliminate the very real possibility that the Merged Firm will refuse to comply with the bedrock legal requirements of Section 271 and the nondiscrimination requirements of Section 272(e) (which have not sunset) after the proposed transaction.

The LEC networks that Verizon New England proposes to transfer to the Merged Firm are classified as BOC facilities today. Under Section 3(4)(A) of the Act, the term BOC "means any of the following companies" including "New England Telephone and Telegraph Company."[5] New England Telephone and Telegraph is known today as Verizon New England Inc., Transferor in the instant proceeding.[6] Thus, Verizon New England is a BOC.

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[4] Response of FairPoint Communications, Inc. to One Communications' First Set of Discovery Requests, *In re Joint Petition of Verizon New England Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof, and FairPoint Communications, Inc. For Approval Of An Asset Transfer, Acquisition of Control by Merger And Associated Transactions*, Vermont PSB Docket No. 7270, ONE:FP.1-39 (dated Apr. 19, 2007) ("FairPoint Vermont Discovery Response") (Peter G. Nixon, COO, FairPoint, person responsible for response).

[5] 47 U.S.C. § 153(4)(A).

[6] Verizon New England is a wholly owned subsidiary of NYNEX Corporation, which is in turn a wholly owned subsidiary of Verizon Communications Inc. *See* Verizon New England Inc., Financial Statements As of December 31, 2005 and 2004 and for the years then ended, Notes to Financial Statements, at 8 (February 23, 2006), *available at* http://investor.verizon.com/

If that BOC transfers any LEC facilities, including those in Maine, New Hampshire, and Vermont, to FairPoint, the transferred LEC facilities must continue to be classified as BOC facilities. Section 3(4)(B) of the Act explicitly states that "any successor or assign" of a BOC listed in Section 3(4)(A), including New England Telephone and Telegraph Company, which provides "wireline telephone exchange service" is a BOC.[7] The Commission must clarify that this is the case in this proceeding. Moreover, as discussed more fully below, it must ensure that the Merged Firm complies with all of the market-opening requirements of the Act applicable to BOCs, namely Sections 251, 271, and 272.[8]

B. The Local Exchange Networks Subject To The Proposed Transfer Of Control Must Not Become Eligible For The Exemption, Suspension, Or Modification Provisions Of Section 251(f).

The proposed transfer of Verizon's LEC assets in Maine, New Hampshire, and Vermont also creates the risk that the Merged Firm will attempt to argue in the future that the transferred

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(continued)

income/subsidiaries/ne/pdf/4q05_ne.pdf.

[7] 47 U.S.C. § 153(4)(B); *see also In re Sacred Wind Communications, Inc. and Qwest Corp. et al.,* Order, 21 FCC Rcd. 9227 (2006) (Chief, Wireline Competition Bureau) ("*Sacred Wind Order*"). When the Wireline Competition Bureau approved Qwest's sale of rural exchanges in New Mexico to Sacred Wind Communications, it rejected Sacred Wind's argument that because Sacred Wind was "merely acquiring 2,300 copper lines from Qwest, it [wa]s not acquiring an 'exchange' *per se*." *Sacred Wind Order* ¶ 20. The Bureau held that Sacred Wind was in fact acquiring exchange assets, facilities, and customers from Qwest in order to provide "telephone exchange service" and therefore, "Sacred Wind, as a successor to Qwest, meets the definition of an incumbent LEC pursuant to Section 251(h)(1) of the Act." *Id.* ¶ 25. The Bureau did not specifically address whether the successor entity can be classified as a BOC as opposed to merely an ILEC. However, the logical inference from the Bureau's analysis is that, as a successor to Qwest, an ILEC which is also a BOC, Sacred Wind meets the statutory definition of a BOC. Likewise, with respect to the instant transaction, the Merged Firm will acquire facilities from—and thus become a successor to—Verizon New England, an ILEC which is also a BOC. Accordingly, the Merged Firm will satisfy the statutory definition of a BOC under Section 3(4)(B) and be subject to all provisions of the Act applicable to BOCs.

[8] 47 U.S.C. §§ 251, 271-72.

LEC assets are eligible for the protections in Section 251(f)(1) or 251(f)(2).[9] Even the possibility that the Merged Firm could claim eligibility for these rural protections will have a chilling effect on competition. Moreover, a request for such relief would embroil the Merged Firm and competitors in multi-jurisdictional (involving both state and federal regulators) disputes that could take months or years to resolve. It is therefore necessary that the Commission clarify in this proceeding that the LEC assets that are the subject of the proposed transfer will be ineligible for the protections of either Section 251(f)(1) or Section 251(f)(2) after being transferred to the Merged Firm.[10]

Section 251(f)(1) states that Section 251(c) "shall not apply to a rural telephone company" until the following conditions are met:

> (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with [the universal service requirements of] [S]ection 254.

47 U.S.C. § 251(f)(1)(A).

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[9] *Id.* § 251(f)(1)-(2).

[10] The Applicants have stated in their testimony before the relevant state regulatory authorities that the Merged Firm will not seek the protections of either subsection of Section 251(f). *See, e.g., In re Joint Application for Approvals Related to Verizon's Transfer of Property and Customer Relations to Company to be Merged with and into FairPoint Communications, Inc.*, Direct Testimony of Peter G. Nixon, COO, FairPoint Communications, Inc. Regarding Topic Group III, ME PUC Docket No. 2007-67, at 3 (lines 10-14) (Mar. 23, 2007) ("Nixon ME Testimony III"). Notably, the Applicants have made no such representations in their FCC application; they have not stated that the Merged Firm does not *qualify* for the protections of Section 251(f); and they have not specified whether the Merged Firm might change its position in the future. Indeed, the Merged Firm might argue that its statements do not constitute formal waivers of the Merged Firm's rights to seek an exemption, suspension, or modification of the Act's market-opening requirements, especially if market conditions change in the future. It is therefore critical that the FCC clarify that the Merged Firm does not qualify for the protections of Section 251(f).

Thus, if a state commission decides that a rural incumbent LEC's fulfillment of a CLEC's request for UNEs, for example, would result in financial hardship or is technically infeasible, that "rural telephone company" would be exempt from fulfilling the request. If the Merged Firm qualifies as a "rural telephone company," an open question since the Applicants have failed to provide the information needed to make this assessment, it could attempt to argue that, in areas where it has not yet received a request for interconnection, services or network elements, it should be free of the requirements of Section 251(c).[11]

Section 251(f)(2) differs in several important respects from Section 251(f)(1). While Section 251(f)(1), "applies only to *rural* LECs and offers an *exemption* only from the requirements of Section 251*(c)*,"[12] Section 251(f)(2) establishes a procedure for all incumbent LECs "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" to request *suspension or modification* of the requirements of *either* Sections 251(b) *or* 251(c).[13] Under Section 251(f)(2), a state commission must grant the suspension or modification petition of any incumbent LEC with less than 2 percent of subscriber lines

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[11] Section 3(37) of the Act defines "rural telephone company" as a LEC that (A) provides common carrier service to any study area that does not include (i) any incorporated areas with at least 10,000 residents, based on the most recent population statistics or Census; or (ii) any "urbanized area" as defined by the 1993 Census; (B) provides telephone exchange service, including exchange access, to less than 50,000 access lines; (C) provides telephone exchange service to any study area with less than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities with at least 50,000 residents on the date of enactment of the 1996 Act. 47 U.S.C. § 153(37). A "study area" corresponds to an ILEC's entire service territory within a state. "Thus, an incumbent LEC operating in more than one state typically has one study area for each state." *In re Sioux Valley Tel. Co. and Hills Tel. Co., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix Glossary of the Commission's Rules et al.*, Order, 20 FCC Rcd. 8071, ¶ 2 (2005).

[12] *In re Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, ¶ 117 (1997), *subsequent history omitted* (emphasis added).

[13] 47 U.S.C. § 251(f)(2).

nationwide where suspension or modification is (A) needed to avoid (i) "adverse economic impact on users of telecommunications services generally," (ii) undue economic burden; or (iii) technical infeasibility; and (B) is consistent with the public interest.[14] The Merged Firm will own far less than 2 percent of the nation's approximately 175 million switched access lines nationwide.[15] Thus, even if the Merged Firm does not qualify as a rural telephone company, it would nevertheless have a basis for trying to argue in the future that it is eligible for a suspension or modification of any of the resale, number portability, dialing parity, rights-of-way, and reciprocal compensation requirements of Section 251(b) in addition to the interconnection, unbundling, collocation and other requirements of Section 251(c).

The Commission must clarify that the Merged Firm would be legally precluded from exploiting the provisions of Sections 251(f)(1) and 251(f)(2). *First*, permitting the Merged Firm to become eligible for Section 251(f) protections would be flatly inconsistent with the requirement that a "successor or assign" of a BOC continue to be classified as a BOC. The most important statutory requirement uniquely applicable to a BOC is that it comply with the competitive checklist of Section 271, and the Section 251(b) and (c) obligations listed therein, as a precondition for entering the in-region long distance market and retaining its authorization to provide such service on a going-forward basis.[16] If transferring BOC local exchange networks to

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[14] *Id.*

[15] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, "Trends in Telephone Service," at 7-3, Table 7.1 & n.1 (rel. Feb. 9, 2007) (indicating approximately 175 million end-user switched access lines for CLECs and ILECs in the United States as of December 31, 2005); *see also* FairPoint Communications, Inc., Analyst Presentation, at 15 (Jan. 16, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=122010&p=irol-reportsAnnual (last visited Apr. 11, 2007) ("FairPoint Analyst Presentation") (estimating that FairPoint will have 2,022,109 access line equivalents post-merger).

[16] *See* 47 U.S.C. § 271; *see also infra* Part III.A.

another firm could free the BOC incumbent LECs from the core market-opening provisions of Sections 251 and 271, the incumbent LECs would cease functioning as BOCs in the process. The "successor or assign" provision of Section 3(4)(B) would thereby be rendered meaningless.

Second, because Section 251(f) gives state commissions the authority to determine whether compliance with Sections 251(b) or (c) is overly burdensome or technically infeasible, the determination as to whether transferred BOC local exchange facilities could qualify for exemption, suspension, or modification would be left to individual states. This would be an absurd result given that Congress granted the Commission the authority to determine whether a BOC has met the requirements for Section 271 approval (in the process "consulting" with a state as part of its inquiry into whether a BOC has met the requirements of Section 251(c)[17]). Granting BOC LEC assets eligibility to seek the protections of Section 251(f) would give the states the power to undo the Section 271 approval process by eliminating the BOC's obligation to comply with Section 251(c). The states' "consultation" role would be replaced with a nullification power that Congress cannot have intended.

Third, such power on the part of the state would not cover all of the unbundling obligations applicable to BOC LECs, thus creating an incoherent patchwork of legal requirements. This is because the Section 271 checklist imposes unbundling obligations that are independent of those established by Section 251(c).[18] If Congress had intended to give BOC LECs the right to seek the protections of Section 251(f), it would presumably have made the Section 271 unbundling requirements subject to those protections. But it did not. Thus, even if a

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[17] 47 U.S.C. § 271(d)(2)(B).

[18] *See* 47 U.S.C. § 271(c)(iv)-(vi).

BOC were to obtain the benefits of Section 251(f), it would still be subject to unbundling obligations. There is no evidence that Congress intended this strange and inconsistent outcome.

Fourth, permitting the Merged Firm to seek the protections of Section 251(f) would be terrible public policy. If the Commission were to adopt this approach, BOCs and other large ILECs with rural assets would have a powerful incentive to divide their service territories into separate operating companies and to sell off rural exchanges to smaller ILECs that, post-transaction, would be eligible for the protections of Section 251(f). Such eligibility would make the transferred LEC assets more valuable in the hands of smaller ILECs than in the hands of larger ILECs that do not qualify for the protections of Section 251(f). The differential treatment of the same LEC assets serving the same customers solely by virtue of a change in ownership is utterly incoherent. It would also be wasteful, because it would give carriers the incentive to engage in large-scale ownership transfers as a means of evading regulation rather than because of inherent efficiencies or other consumer welfare benefits.

Moreover, the Commission has already determined, in the context of universal service, that local exchanges should not arbitrarily receive favorable regulatory treatment as a result of a transfer to new owners. This concept is implicit in the Commission's study area boundary freeze policy.[19] In 1985, the Commission froze all study area boundaries in existence on November 15, 1984 to prevent carriers from manipulating study area borders to create high-cost exchanges within their existing service territories, thereby maximizing their high-cost universal support.[20]

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[19] *See* 47 C.F.R. Part 36, Subpart G, App. ("Study area boundaries shall be frozen as they are on November 15, 1984.").

[20] *See In re MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 50 F.R. 939, ¶ 1 (1985) ("*Part 67 Order*"), adopting Recommended Decision and Order, 49 F.R. 48325, ¶¶ 64-66 (1984). For example, a carrier seeking to acquire local exchange facilities could structure the transaction so

Similarly, when the Commission promulgated Section 54.305(b) of its rules,[21] it sought to discourage rural carriers from allowing potential universal service support to unduly influence their decisions to purchase a high-cost exchange.[22] Section 54.305 of the Commission's rules provides in relevant part that "a carrier that acquires telephone exchanges from an unaffiliated carrier shall receive universal service support for the acquired exchanges at the same per-line support levels for which those exchanges were eligible prior to the transfer of the exchanges."[23] In other words, an acquiring carrier will only receive as much universal service support for its acquired exchanges as the previous owner received. The FCC's rationale for creating this rule was that regulation should not cause exchange assets to be more or less valuable in the hands of one class of carrier versus another. Indeed, in making its recommendation to retain Section 54.305, the Joint Board Rural Task Force stated that "[a] mere transfer of ownership should not result in an increase in support associated with the acquired lines."[24]

In all events, allowing the Verizon local exchange networks at issue here to become eligible for the rural exemption of Section 251(f)(1) or the suspension or modification provisions

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that the high-cost exchanges are isolated into a separate study area, allowing it to obtain more universal service support than it would otherwise. *See also In re Federal-State Joint Board on Universal Service et al.*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, And Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd. 11244, ¶ 111 (rel. May 23, 2001) ("*Universal Service Fourteenth Report and Order*").

[21] 47 C.F.R. § 54.305(b).

[22] *See In re Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 308 (1997), *subsequent history omitted* ("*Universal Service First Report and Order*").

[23] 47 C.F.R. § 54.305(b).

[24] *In re Federal-State Joint Board on Universal Service*, Rural Task Force Recommended Decision, 16 FCC Rcd. 6153, 6192 ¶ 3 (2000).

of Section 251(f)(2) would be bad policy because it would reduce competition and harm consumer welfare. Even the risk that the Merged Firm could obtain the protections of Section 251(f) from a state commission would chill investment in further entry in the relevant region. Moreover, if a state were to grant the Merged Firm's request for exemption from ILEC obligations, competition would be halted in its tracks. Such an outcome is not possible while the LEC assets remain under Verizon's ownership. Permitting this outcome solely because of a transfer to the Merged Firm would yield net public interest harms in violation of the Section 214 standard.

Accordingly, the Commission should rule that the local exchange facilities that are the subject of the instant transfer of control application are ineligible for the exemption, suspension, and modification provisions of Section 251(f). Even if the Act could somehow be read to permit BOC local exchanges to become eligible for Section 251(f) protection, the Commission must clarify that a state's grant of such an exemption, suspension, or modification would render the BOC noncompliant with its obligations under the competitive checklist of Section 271(c). If this were the case, the Commission would be obligated, pursuant to Section 271(d)(6), to revoke the Merged Firm's authorization to provide in-region interLATA service throughout the state in question.

III. THE APPLICANTS MUST DEMONSTRATE THAT THE MERGED FIRM WILL PROVIDE WHOLESALE INPUTS IN A MANNER THAT IS AT LEAST EQUAL TO THE PRICES, TERMS, AND CONDITIONS OFFERED BY VERIZON.

Even if, as it must, the Commission clarifies that the Merged Firm will be subject to the full panoply of BOC and ILEC obligations without any right to seek an exemption under Section 251(f), the proposed transaction poses a grave risk that the Merged Firm will fail to comply with its legal obligations as a wholesale supplier to competitors. The Applicants fail to provide any proof that the Merged Firm will be able or willing to meet these obligations, thus making it impossible for the Commission to conclude that the transaction is in the public interest.

A. Absent Adequate Proof That The Merged Firm Will Have The Resources And Incentives To Comply With Its Wholesale Obligations Under Sections 251, 271 And 272, The Commission Must Deny The Application.

The proposed transaction poses a major threat to the provision of ILEC wholesale input services by the Verizon LECs in Maine, New Hampshire, and Vermont after they become part of the Merged Firm. The Merged Firm will be highly leveraged, and it will have no incentive to expend its limited resources on developing the systems and expertise necessary for the transferred incumbent LECs to continue to comply with their obligations under Sections 251, 271 and 272 of the Act even at the level they achieved as part of Verizon.

1. Absent Adequate Regulatory Requirements, It Is Likely That The Quality Of Wholesale Services Offered By The Transferred ILECs Will Deteriorate Dramatically After They Are Transferred To The Merged Firm.

The Merged Firm is likely to fail to meet its obligations to provide competitors with wholesale inputs under Sections 251, 271 and 272. This is true for two basic reasons.

First, the Merged Firm will have few financial or managerial resources, far fewer in fact than Verizon has. Even now, before the proposed transaction, FairPoint is a highly leveraged company with \$614 million in long-term liabilities and only \$885 million in total assets.[25] FairPoint's long term liabilities thus represent fully 69.9 percent of its total assets. Moreover, 56 percent of FairPoint's assets consist of goodwill,[26] indicating that the company has an excessively negative tangible net worth. By contrast, at the end of 2006, Verizon's long-term

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[25] FairPoint Communications, Inc., Annual Report (Form 10-K), at 56 (filed Mar. 13, 2007) (for the period ending Dec. 31, 2006) ("FairPoint 2006 Annual Report").

[26] *Id.*

liabilities represented less than 20 percent, and its goodwill and other intangible assets represented less than 6 percent, of its total assets.[27] After the transaction, the Merged Firm will also be financially weak. In the transaction, FairPoint will assume approximately $1.7 billion in new debt,[28] and it will have approximately $2.35 billion in outstanding debt at closing.[29]

Notwithstanding its assumption of immense debt in the proposed transaction, FairPoint has made numerous costly commitments to various stakeholders. It has publicly promised FairPoint shareholders that the Merged Firm will maintain the same dividend post-merger,[30] it has promised all active employees that the Merged Firm will assume their pension liabilities,[31] and it has promised union employees that the Merged Firm will honor union labor contracts in

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[27] *See* Verizon Communications Inc., Annual Report (Form 10-K), at 43 (filed Mar. 1, 2007) (for the period ending Dec. 31, 2006) ("Verizon 2006 Annual Report").

[28] Press Release, FairPoint Communications, Inc., FairPoint To Grow Through Merger With New England Wireline Operations Of Verizon Communications, at 2 (Jan. 16, 2007) ("FairPoint Press Release").

[29] *In re Joint Application for Approvals Related to Verizon's Transfer of Property and Customer Relations to Company to be Merged with and into FairPoint Communications, Inc.*, Direct Testimony of Stephen E. Smith on Behalf of Verizon New England Inc. et al., Addressing Topic Group I, ME PUC Docket No. 2007-67, at 15 (lines 5-6) (Mar. 23, 2007) ("Smith ME Testimony I").

[30] *See* FairPoint Analyst Presentation at 5; Press Release, *FairPoint Communications, Inc. and Verizon Communications Inc., Verizon and FairPoint Agree To Merge Verizon's Wireline Businesses in Maine, New Hampshire and Vermont With Current Operations of FairPoint*, at 5 (Jan. 16, 2007) ("Joint Press Release").

[31] Smith ME Testimony I at 17 (lines 8-20). *See also In re Joint Petition by Verizon New England Inc. et al., and FairPoint Communications, Inc. Transfer of New Hampshire Assets of Verizon New England Inc. et al.*, Direct Testimony of Peter G. Nixon On Behalf of FairPoint Communications, Inc., at 14 (lines 9-18) (Mar. 23, 2007) (stating that FairPoint plans to add approximately 600 new employees, with all of the expenses, including pensions and insurance, that go with such employees) ("Nixon NH Testimony"); *id.* at 16 (lines 3-5, 15-23) (stating that the Merged Firm will assume the pension liabilities for "[t]he approximately 3,000 Verizon company employees who will continue with FairPoint following the merger").

the three affected states.[32] The Applicants have also publicly pledged to consumers that the Merged Firm will "significantly expand DSL and other broadband availability from the current level provided over the Verizon network in the three-state region."[33] Indeed, a FairPoint executive recently promised that the Merged Firm will also roll out video services to customers of the transferred LECs.[34] These predictions are remarkable since Verizon is selling the LEC exchanges in question to FairPoint precisely because of the inefficiencies of deploying broadband and video more extensively to the customers served by those exchanges.[35]

As widely documented in the local media, the Merged Firm will also be under tremendous pressure to reverse FairPoint's poor history of providing basic voice and data services to consumers. One recent news report in Maine, for example, indicates that FairPoint's China Telephone Co. had the highest number of complaints per thousand customers of all carriers statewide and three other FairPoint-owned carriers ranked in the top ten for volume of customer complaints.[36] A local New Hampshire newspaper editorialized that the "Verizon-

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[32] Joint Press Release at 3.

[33] FairPoint Press Release at 4.

[34] *See* "A FairPoint Official Told Local Business Owners in Rutland . . . ," Communications Daily, Apr. 11, 2007, at 8.

[35] *See* Dionne Searcey, "Verizon Considers FairPoint Bid For Landlines in New England," Wall St. J. Online, Aug. 19, 2006, *available at* http://online.wsj.com/article_print/SB115594001 889039819.html ("Verizon . . . is looking to shed land lines that are expensive to maintain as it upgrades its network with fiber and starts selling Internet-based services rather than focusing on traditional phone service."); *see also* Ken Belson, "Rural Areas Left in Slow Lane of High-Speed Data Highway," N.Y. Times, Sept. 28, 2006 ("The proceeds from any sale of [Verizon's] New England lines would help Verizon pay for the potentially more lucrative fiber optic network it is building in and around cities like New York and Boston.") (hereinafter "Rural Areas Left in Slow Lane").

[36] Lisa Arsenault, "New England Telecom Takeover?" Concord Monitor, Feb. 25, 2007.

FairPoint deal [is] bad for New Hampshire" because FairPoint lacks the capital, and consequently has no plans, to deploy a fiber network and provide much needed high speed Internet access to consumers.[37] Consumer advocates have intervened in the state transaction review proceedings and organized labor has launched an extensive campaign to ensure that the Merged Firm improves upon both FairPoint and Verizon's track records[38] on retail customer service and broadband deployment in the three-state region.[39]

In addition, the Merged Firm must take on numerous other substantial and costly management tasks after the proposed transaction is completed. Under the Transition Services Agreement between the Applicants, the Merged Firm is responsible for establishing "its own service solutions for environmental and safety management, risk management, investor relations, benefit design, compensation planning, diversity compliance, labor relations, staffing, workforce and leadership development, and credit and collections."[40] It must accomplish these undertakings for a vastly larger company than FairPoint is today. The Merged Firm will move

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[37] "Verizon-FairPoint Deal Bad for New Hampshire," Nashua Telegraph, Jan. 31, 2007.

[38] *See, e.g.,* "Rural Areas Left in Slow Lane" (noting that the Vermont PSB fined Verizon $8.1 million in 2005 for inadequate customer service).

[39] *See, e.g.,* Carolyn Y. Johnson, "Phone Deal Could Boost Rural Areas' Net Access But FairPoint's Debt Level An Issue For Some," Boston Globe, Mar. 26, 2007 (describing concerns of Communications Workers of America and consumer advocates in Maine and New Hampshire); Maine Office of the Public Advocate, "Public Advocate Intervenes in PUC Proceeding to Consider FairPoint's Acquisition of Verizon-Maine" (Apr. 3, 2007), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=meopa_news&id=35982&v=Default; Mike Spillane, "Verizon Sale Must Include Safeguards for Vermont," Burlington Free Press, Mar. 3, 2007 (editorial by International Brotherhood of Electrical Workers leader); "Multiple Sticking Points Possible in Verizon-FairPoint Deal," State Telephone Regulation Report, at 1-3 (Jan. 26, 2007) (citing concerns of Maine PUC, Vermont consumer advocate agency, and New Hampshire consumer advocate).

[40] Smith ME Testimony I at 25 (lines 21-23) and 26 (lines 1-2).

from the 17th largest[41] to the 8th largest[42] local telephone company in terms of access lines in the United States. Post-merger, FairPoint will have seven times as many access lines and four times as many employees as it has now.[43]

There is simply no basis for concluding that existing FairPoint management has the expertise or ability to manage all facets of such a large company efficiently. This is especially true for wholesale services. FairPoint has confirmed that, of the 64,000 access lines it now serves in Maine, New Hampshire, and Vermont, not a single one is sold to a wholesale purchaser.[44] It has also confirmed that it has virtually no wholesale access lines in the other states in which it operates as an incumbent LEC.[45] FairPoint therefore has no wholesale systems or processes in place[46] and no experience in meeting the wholesale requirements of Section 251,

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[41] *See* FairPoint Communications, Inc. Quarterly Report (Form 10-Q), at 19 (filed May 9, 2006) (for the period ending Mar. 31, 2006); *see also* FairPoint Analyst Presentation at 15 (estimating that FairPoint's total access line equivalents will increase from approximately 300,000 to approximately 2M).

[42] FairPoint Press Release at 1.

[43] Communications Workers of America, "The Proposed FairPoint Purchase of Verizon's Properties Would Place Consumers, Workers and Communities at Risk," at 9 (Jan. 23, 2007), *available at* http://www.stop-the-sale.org/files/Initial Analysis of Verizon Sale to FairPoint 1-23-07.doc (last visited Apr. 11, 2007) (comparing FairPoint Analyst Presentation with FairPoint Communications, Inc., Annual Report (Form 10-K) (filed Mar. 14, 2006) (for the period ending Dec. 31, 2005)).

[44] FairPoint Vermont Discovery Response, at ONE:FP.1-4 (Peter G. Nixon, COO, FairPoint, person responsible for response).

[45] *Id.* at ONE:FP.1-5 (same).

[46] FairPoint has stated that it "recently concluded thirty-one company conversions to a single operating environment. This included basic BSS/OSS functionality. *Wholesale services were not part of the service offering of the companies therefore there were no wholesale data to convert*." *Id.* at ONE:FP.1-47 (Michael Haga, Dir. of Billing and OSS, person responsible for response) (emphasis added).

271 or in providing wholesale special access. As it has explained, "there are aspects of this acquisition that obviously make this transition different from others we have done, namely the size of the transaction, the need to migrate from existing Verizon systems and the addition of a wholesale business serving CLECs and other wholesale customers."[47] The company is scrambling to "supplement" its "expertise with management experience from larger companies,"[48] but it is far from clear how it could accomplish this goal. It is in the process of "developing and implementing a staffing plan to meet the needs of the post-merger company," but "[n]o specific assignments have been made at this time."[49] In light of this "learning on the fly" approach, it is not surprising that the company has been forced to admit that it simply may not be able to maintain adequate service quality post-merger:

> The Merger [with Verizon New England] may present significant challenges to our management that could divert management's attention from day-to-day operations. . . . Prior to the closing of the Merger, our management team may be required to devote considerable amounts of time to this integration process, which will decrease the time they will have to . . . service existing customers. . . . Growth through acquisitions, including the Merger, entails numerous risks, including . . . difficulties in enhancing our customer support resources to adequately service our existing customers and the customers of the acquired businesses.[50]

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[47] *In re Joint Petition of Verizon New England Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof and FairPoint Communications, Inc. for Approval of Asset Transfer, Acquisition of Control by Merger and Associated Transactions*, Prefiled Testimony of Michael Haga On Behalf Of FairPoint Communications, Inc., VT Pub. Serv. Bd. Docket No. 7270, at 4 (lines 4-21) and 5 (lines 1-8) (Mar. 23, 2007) ("Haga VT Testimony").

[48] Nixon NH Testimony at 14 (lines 9-10).

[49] FairPoint Vermont Discovery Response, at ONE:FP.1-6 (Peter G. Nixon, COO, FairPoint, person responsible for response).

[50] FairPoint 2006 Annual Report at 23, 25.

Second, the Commission has held that incumbent LECs have a powerful incentive to deny, delay and degrade wholesale services offered to their competitors.[51] In this case, the Merged Firm will most likely act on this incentive by allocating its limited resources to fixing problems with its retail service while allowing wholesale service to deteriorate.

According to Verizon New England, it will provide FairPoint "with major support services until such time as [FairPoint] develops its own support systems and groups to provide these services."[52] The Merged Firm will be required to pay substantial fees to Verizon to assist in performing wholesale functions, and those fees increase over time.[53] Therefore, the Merged Firm will have a strong incentive to discontinue reliance on Verizon as soon as possible. Premature discontinuance would be a "win win" for the Merged Firm since it would experience lower costs and its competitors would experience degraded service, thus harming their reputation for service quality and enhancing the Merged Firm's competitive position.

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[51] *See In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶¶ 214, 253 (1999), *subsequent history omitted* ("*SBC/Ameritech Merger Order*").

[52] Smith ME Testimony I at 23 (lines 6-7). This transition process will be *in addition to* FairPoint's current conversion of all of its subsidiaries "to a single outsourced billing platform" that is "expected to be completed by the middle of 2007." FairPoint 2006 Annual Report at 26.

[53] *See* Agreement And Plan Of Merger dated as of January 15, 2007 by and among Verizon Communications Inc., Northern New England Spinco Inc. and FairPoint Communications, Inc., Exhibit 5: Transition Services Agreement by and among Verizon Information Technologies LLC et al., and FairPoint Communications, Inc., Art. II, § 2.1(a)-(b) (Jan. 15, 2007) (providing that FairPoint will pay Verizon for so-called Schedule A services, including wholesale support services, at a fee of $14.2 million per month for the first eight months following closing; for each month beginning in the ninth month, $500,000 less than for the prior month until the 13th month; $14.7 million for the 13th month; and for each month following the 13th month until termination of the agreement, $500,000 more than the amount paid for the prior month"); *see id.* Schedule A, § VPS.SR.1 (delineating Verizon's obligations to FairPoint with respect to wholesale service requests during transition).

This is not simply a theoretical problem; wholesale customers' experience in Hawaii after Verizon sold Hawaiian Telcom ("HawTel") to Carlyle Group, a private equity firm, provides concrete evidence that spin-off transactions can result in serious wholesale service quality degradation. From the early stages of its review of the proposed sale of HawTel to Carlyle Group, it was clear that the spin-off entity was seriously undercapitalized. As a condition of its approval of the Verizon-Carlyle Group transfer, the Hawaii PUC therefore required that HawTel reduce its debt funding from approximately 83 percent of the purchase price to approximately 76 percent, a difference of $185 million.[54] As part of the merger review proceeding, Time Warner Telecom (the primary CLEC in Hawaii) also entered into a "stipulation" agreement with HawTel in which, among other things, HawTel committed to (1) participate in a collaborative process with Time Warner Telecom for purposes of ensuring a seamless transition to HawTel's wholesale systems; (2) file periodic reports with the Hawaii PUC regarding progress made toward establishing its own wholesale OSS; (3) participate in a dispute resolution process; (4) abide by performance standards for its wholesale operations; and (5) establish extensive wholesale operations capabilities, including electronic interfaces.[55]

Unfortunately, these measures, which did not include automatic financial penalties for HawTel's failure to meet the stipulation requirements, proved to be insufficient to prevent a major breakdown in HawTel's wholesale OSS after the consummation of the spin-off transaction. By all accounts, the highly leveraged company, which spent approximately $100

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[54] *See* "The Hawaii PUC Approved Verizon's Sale of its Landline . . . ," Communications Daily, Mar. 18, 2005.

[55] *See In the Matter of the Application of Paradise Mergersub, Inc., GTE Corporation et al. for Approval of a Merger Transaction and Related Matters*, Stipulation, Hawaii PUC Docket No. 04-0140, Decision and Order No. 21696 (filed Mar. 16, 2005).

million[56] to integrate more than 80 Verizon computer systems,[57] utterly failed in its systems integration efforts—including any contingency planning—following consummation of the transaction.[58] The effect of this failure on wholesale services caused Time Warner Telecom to file a request (which is still pending) for an investigation and independent audit of the operational readiness of HawTel's back-office systems in July 2006.[59] Little has changed since then. Indeed, in a report recently filed with the SEC, HawTel acknowledged that, more than 15 months following the original cutover to HawTel's OSS,[60] that "critical systems related to back-office functions such as customer care, order management, billing and financial reporting systems lacked, *and continue to lack*, significant functionality." This deficiency has "substantially impacted . . . customer satisfaction (as evidenced in part through a large increase in the customer call volume at our work centers)."[61] In April 2007, Standard & Poor's

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[56] *See* Stewart Yerton, "Billing Woes Overwhelm Hawaiian Telcom Systems," Honolulu Star Bulletin, June 21, 2006, *available at* http://www.starbulletin.com.

[57] *See* Howard Dicus, "Hawaiian Telcom Hopes It Has Turned A Corner," Pacific Business News, Sept. 1, 2006, *available at* http://pacific.bizjournals.com/pacific/stories/2006/08/28/daily64.html.

[58] Hawaiian Telcom Annual Report (Form 10-K) at 24 (filed Mar. 31, 2007) (for the period ending Dec. 31, 2006) ("Hawaiian Telcom 2006 Annual Report"); *see also* John E. Morris, "Carlyle Continues to Stumble with Hawaiian Telcom Acquisition," The Deal, Dec. 4, 2006 (citing Nov. 21, 2006 Moody's Investors Service report); Olga Kharif, "Trouble in Carlyle's Paradise," BusinessWeek Online, Aug. 17, 2006 (detailing the operational and financial losses of Hawaiian Telcom 15 months following the close of the transaction).

[59] *See In re Application of Paradise Mergersub, Inc., GTE Corporation, Verizon Hawaii Inc., Bell Atlantic Communications, Inc., and Verizon Select Services, Inc. For Approval of a Merger Transaction and Related Matters*, Time Warner Telecom of Hawaii, L.P. Request for Investigation and Independent Audit and for Extension of Stipulation, Hawaii PUC Docket No. 04-0140 (filed July 31, 2006).

[60] Hawaiian Telcom 2006 Annual Report at 24 (citing Feb. 1, 2006 as the original cutover date).

[61] *Id.* (emphasis added).

downgraded HawTel's corporate credit rating, "cit[ing] continuing delays on the carrier's part to upgrade back-office systems," and predicting negative future ratings changes.[62] The resulting financial pressure on the company will doubtless cause it to focus wherever possible on fixing its retail service problems at the expense of the wholesale service problems that have harmed Time Warner Telecom and other CLECs.

The Applicants provide no reason to think that the situation in Maine, New Hampshire, or Vermont will be any different than it has been in Hawaii. In their FCC filing, the Applicants do not even attempt to show that the Merged Firm's wholesale operations will function properly. In state proceedings, FairPoint has claimed that it is qualified to perform as a wholesaler because it operates two CLEC subsidiaries.[63] This is like saying that a driver's license gives one the expertise to design, manufacture and sell cars. The unstated converse of FairPoint's claim is that it has no experience whatsoever provisioning UNEs or designing an OSS needed for wholesale operations, or otherwise performing the functions necessary to effectively serve multiple CLEC that rely on thousands of UNEs and resold loops today in the affected area.

2. The Applicants Must Prove That The Merged Firm Will Have The Resources And Incentives To Provide Wholesale Inputs In Compliance With Its Statutory Obligations.

In light of the major effort and resource expenditure required to establish efficient wholesale operations, the Merged Firm's strong incentive not to make such an expenditure, and evidence that past spin-offs of Verizon ILECs have resulted in the degradation of wholesale services, the Applicants bear a heavy burden to demonstrate that the instant transaction will not

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[62] "Business News," Telecommunications Reports, Apr. 15, 2007 (citing Standard & Poor's Ratings Services report).

[63] Haga VT Testimony at 3 (line 22) and 4 (lines 1-2).

harm competition. It is therefore striking that, as explained, the Applicants have only the vaguest notion as to how it would provision wholesale services in the future. This is simply not good enough, especially given the scope of the potential harm that a failure to adequately provision UNEs, interconnection, special access and other essential inputs could have on competition and consumer welfare. The consequences of such a failure would be substantial. One Communications alone serves more than 100,000 switched access line equivalents in Maine, New Hampshire, and Vermont. It does so almost exclusively via loops leased from the Verizon incumbent LECs that are the subject of this proposed transaction. Overall, as of June 20, 2006, incumbent LECs provisioned approximately 240,000 resold and unbundled network element access lines in the three states at issue.[64] The Merged Firm will assume responsibility for provisioning virtually all of these lines, and failure to perform this task efficiently will obviously diminish substantially the sustainability of competition.

The proposed transaction thus threatens to reverse the Section 271 process that Verizon completed in Maine, New Hampshire, and Vermont. Section 271 of the Act "ma[kes] the BOCs' authority to provide in-region, interLATA services contingent upon the BOC opening its local markets to competition by, for example, 'providing access and interconnection' to local competitors."[65] In other words, the Act withholds entry into the in-region long distance business until a BOC shows that it has met the so-called competitive checklist of Section 271, including

[64] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, "Local Telephone Competition: Status as of June 30, 2006," Table 11 (rel. Jan. 31, 2007) (entitled "CLEC-Reported End-User Switched Access Lines by State").

[65] *In re Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, n.118 (2000) ("*Bell Atlantic/GTE Merger Order*") (internal citation omitted); 47 U.S.C. § 271.

the 251 requirements reference therein,[66] and satisfied the separate affiliate requirements and structural and nondiscrimination safeguards of Section 272.[67]

The policy underlying Section 271 is that a BOC is far less likely to fully comply with the requirements of Sections 251, 271, or 272 absent an incentive to do so:

> By adding section 271, Congress . . . established a process for the BOCs to gain entry into the long distance market. Recognizing the continued and extensive market dominance of the BOCs in their regions, however, Congress chose to maintain the [Modified Final Judgment's] restriction on BOC provision of in-region, interLATA services until such time as the BOCs demonstrated that their local markets are open to competition. Section 271 therefore prohibits a BOC or its affiliate from entering the in-region, interLATA market until the BOC complies with certain market-opening criteria. In this manner, Congress struck a careful balance that sought to cultivate a competitive environment by giving the BOCs a powerful incentive to open up their local markets.

Non-Accounting Safeguards Remand Order, 16 FCC Rcd. 9751, ¶ 28 (2001).

Without Section 271, BOCs have no incentive to comply with the local market-opening requirements of Section 251 because an information asymmetry exists between ILECs and regulators. ILECs possess all of the information relevant to satisfying the market-opening requirements of the Act, and it is therefore extremely difficult for the FCC to dispute ILECs' claims that such compliance is technically infeasible or overly burdensome. As a result, the best way to ensure such compliance is by requiring it as a condition to obtaining desired regulatory relief—in the case of Section 271, BOCs' desire to enter the in-region long distance market.

In the three states at issue here, Verizon has demonstrated to the Commission and state commissions that, at the time of its applications to enter the long distance market in 2001-2002, it complied with Sections 251, 271 and 272. As discussed *supra*, however, the Merged Firm

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[66] 47 U.S.C. § 271(c)(2)(B).

[67] *Id.* §§ 272(b)-(c).

plans to replace most, if not all, of the systems and key employees used to accomplish that end. Thus, most, if not all, of the work that Verizon New England did to comply with Sections 251, 271 and 272 will apparently be lost.

Accordingly, the Merged Firm should undergo a process akin to the Section 271 application process whereby it demonstrates that it will comply with the requirements of Sections 271 (and in turn, Section 251) and 272 as a condition of regulatory approval. The Commission must therefore condition merger approval on a commitment by the Merged Firm to an enforceable incentive plan (including substantial penalties for failure to meet service quality targets) designed to ensure such compliance. Only then will the Merged Firm meet its *ongoing* obligation under Section 271(d) to satisfy the requirements of the competitive checklist.[68] As the Commission recognized in the *Maine 271 Order*, "cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Verizon's entry into the Maine long distance market."[69]

There is clear precedent for this approach. In the *SBC/Ameritech Merger Order*, for example, the FCC imposed numerous conditions, including a carrier-to-carrier performance plan in which the Merged Firm was required to file data measuring its performance in meeting obligations to CLECs in 20 different categories, including pre-ordering, ordering, provisioning,

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[68] 47 U.S.C. § 271(d)(6)(A).

[69] *See In re Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Maine*, Memorandum Opinion and Order, 17 FCC Rcd. 11659, ¶ 66 (2002) ("*Maine 271 Order*"); *see also In re Application by Verizon New England Inc. et al., for Authorization to Provide In-Region, InterLATA Services in Vermont*, Memorandum Opinion and Order, 17 FCC Rcd. 7625, ¶ 82 (2002); *In re Application by Verizon New England Inc. et al., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, Memorandum Opinion and Order, 17 FCC Rcd. 18660, ¶ 174 (2002).

maintenance, and repair associated with UNEs, interconnection, and resold services, along with significant "voluntary incentive payments" for failure to meet these performance goals.[70] Among the other conditions imposed upon SBC and Ameritech was the requirement that the Merged Firm provide effective, nondiscriminatory access to OSS,[71] training in the use of OSS for qualifying CLECs,[72] and collocation,[73] all with monetary penalties for lack of compliance. More recently, the Commission demonstrated through its approval of Verizon's spin off of an ILEC in Puerto Rico to a Mexican telecommunications carrier that the FCC has the authority to condition sale of an ILEC on the allocation of sufficient resources to ensure that the merged firm provides services at acceptable service quality levels.[74] Specifically, the Commission conditioned merger approval on transferee America Movil's investment of $1 billion over five years to improve the quality of voice and data services in Puerto Rico.[75]

It is also critical that the Merged Firm not force wholesale purchasers to pay for the inefficiencies created by the proposed transaction (*e.g.*, diminished scale and scope economies as compared to Verizon). There is both a price and non-price component to this issue. *First*, the Commission must require the Merged Firm to continue to comply with the provisions of the *Verizon/MCI Merger Order* conditions freezing special access rates and prohibiting the Merged

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[70] *SBC/Ameritech Merger Order*, ¶¶ 377-78.

[71] *See id.* ¶¶ 381-82.

[72] *See id.* ¶ 385.

[73] *See id.* ¶ 386.

[74] *See Verizon/American Movil Merger Order*, App. D.

[75] *Id.*; *see also* FCC News Release, FCC Grants Application For Transfer Of Control Of Telecomunicaciones De Puerto Rico, Inc. (TELPRI) From Verizon Communications, Inc. To America Movil, S.A. de C.V. (Mar. 26, 2007).

Firm from requesting a rate increase for any UNE. The prohibition against rate increase requests should also be extended to all Section 251 obligations. In addition, competitors must not be required to pay for the Merged Firm's development of new OSS by incurring new charges or increased charges of any kind.

Second, competitors must not be forced to incur costs to interface with the Merged Firm's new OSS. For example, competitors must not be required to develop their own electronic interfaces for the purpose of establishing electronic wholesale connections with the Merged Firm. Nor should competitors be required to incur the expense associated with or allocate resources to training employees to use the Merged Firm's newly-deployed OSS.[76] Such systems must interface with wholesale customers in exactly the same way that Verizon's do today. Moreover, both these price and non-price requirements must remain in effect for a suitable time period (*e.g.*, four years) to prevent backsliding.

B. The Merged Firm Must Not Be Permitted To Renege On Its Commitments Under Verizon's Existing Interconnection Agreements And Special Access Tariffs.

Just as the Applicants have powerful incentives to deny, delay and degrade wholesale inputs required under the Act, they also have the incentive to avoid complying with portions of existing interconnection agreements and special access service arrangements that benefit competitors. There is no sound basis in policy for allowing the Merged Firm to take advantage of any provision in an existing interconnection agreement or special access arrangement (*i.e.,* a tariff offer or negotiated volume-term agreement) that arguably grants the Merged Firm the right

[76] FairPoint has stated that it would provide (as it must under Section 251(c)(5)) notice of changes to its operations support systems and free "job aids and reference materials on the new systems," but that it will not reimburse CLECs for expenses incurred in adapting to the new systems. *See* FairPoint Vermont Discovery Response at ONE:FP.1-22 (Michael Haga, Dir. of Billing and OSS, person responsible for response).

to renege on any commitment solely because of the transfer of the incumbent LECs in question to the Merged Firm. Any such provisions were not the result of normal commercial negotiations, but instead were dictated by the dominant firm that controls bottleneck inputs. Allowing the Merged Firm to take advantage of these provisions would merely allow the Merged Firm to further entrench its position as the dominant firm in the market for serving business customers, thus resulting in net harm to consumer welfare.

Yet the Applicants have offered only the vaguest of statements regarding the continued viability of their existing contracts and tariffs. They speculate, for example, that "FairPoint anticipates that existing wholesale arrangements will remain largely the same as a result of th[e] transaction."[77] Such statements in no way constrain the Merged Firm, since aspects of the wholesale arrangements that remain "largely the same" could well be the ones that favor the ILEC while the ILEC may refuse (where possible) to honor unfavorable terms and conditions. Further, FairPoint's "anticipation" is hardly a binding commitment. With regard to potential changes to special access offers, particularly discounts based on volume commitments,[78] the Applicants are silent. In testimony before the Maine Public Utilities Commission, however, one Verizon executive stated that "Verizon and [FairPoint] will re-negotiate and *amend volume commitments to reflect the change in the scope of service post-closing*."[79] This suggests the

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[77] Application at 20.

[78] *See, e.g.,* Verizon Tel. Cos., Tariff FCC No. 11, § 25 (effective date: Apr. 25, 2006) (offering Commitment Discount Plans for switched and special access services).

[79] Smith ME Testimony I, at 22 (lines 13-14) (emphasis added). Verizon has elsewhere stated that, "For Special Access DS3 and below services offered pursuant to federal tariff that have a commitment component, volume commitments would be adjusted to exclude the amount for Vermont, New Hampshire, and Maine." Response of Verizon New England Inc. d/b/a Verizon Vermont to One Communications' First Set of Discovery Requests, *In re Joint Petition of Verizon New England Inc., d/b/a Verizon Vermont et al. for Approval of an Asset Transfer,*

possibility that the Merged Firm will reduce special access volume discounts as a result of lower volume purchased in the three-state region.

To prevent the proposed transaction from resulting in a net harm to competition and consumer welfare, the Commission must preclude the Merged Firm from exploiting any opportunities created by the proposed transaction to raise rivals' costs under existing interconnection agreements or special access wholesale arrangements. For example, there is no basis for enforcing any provision allowing the Merged Firm to cancel or renegotiate an interconnection agreement because of a transfer of the incumbent LECs to the Merged Firm.

Nor should either the Merged Firm or Verizon be permitted to charge higher special access rates to purchasers under volume-term arrangements because they no longer meet the minimum volume required for a particular discount. Thus, the Merged Firm and Verizon should continue to honor all provisions of existing special access tariffs *except* to the extent that they could exploit diminished economies of scale or scope caused by the transaction. Under this exception, the Commission would require that, after the transaction, the Merged Firm and Verizon offer the same special access discounts as those offered by Verizon today but conditioned on proportionate volume levels for the three states and for the remaining Verizon service areas. For example, if a CLEC has been obtaining a ten percent discount under a special access volume commitment plan from Verizon, it should continue to receive the same discount (1) from the Merged Firm on the condition that the CLEC meets a volume commitment that is

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Acquisition of Control by Merger and Associated Transactions, Vermont PSB Docket No. 7270, One Comm: 1-7 (dated Apr. 5, 2007) ("Verizon Vermont Discovery Response") (Stephen E. Smith, VP-Business Development, Verizon, respondent). This statement also leaves open the possibility (indeed the probability) that Verizon and the Merged Firm will attempt to reduce special access discounts after the transaction.

appropriately adjusted to reflect the reduction in the size of relevant geographic territory to include only Maine, New Hampshire, and Vermont; and (2) from Verizon on the condition that the CLEC meets a volume commitment that is appropriately adjusted to reflect the reduction in the size of relevant geographic territory to exclude Maine, New Hampshire, and Vermont. In this manner, the Commission can diminish the harms to consumer welfare posed by the transfer of the Verizon incumbent LECs to the Merged Firm.

IV. CONCLUSION

For the foregoing reasons, One Communications Corp. urges the Commission to deny the instant application, or alternatively, to impose conditions on its approval that are consistent with the arguments made herein.

Respectfully submitted,

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