BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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

**REPLY OF ONE COMMUNICATIONS CORP. AND GREAT WORKS INTERNET TO THE APPLICANTS' OPPOSITION TO PETITIONS TO DENY**

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One Communications Corp. ("One Communications") and Biddeford Internet Corporation d/b/a Great Works Internet, by their attorneys, hereby submit this Reply to the Opposition to Petitions to Deny filed by Verizon New England Inc., et al. ("Verizon") and FairPoint Communications, Inc. ("FairPoint") (collectively, the "Applicants") in the above-captioned proceeding.[1] As One Communications explained in its Petition to Deny,[2] the Applicants have failed to demonstrate that the proposed transaction will result in net public interest benefits as required by Section 214 of the Communications Act (the

[1] *See* Opposition to Petitions to Deny, 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 May 7, 2007) ("Opposition").

[2] *See* Petition to Deny of One Communications Corp., 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 (filed Apr. 27, 2007) ("Petition" or "Petition to Deny").

"Act"). 47 U.S.C. § 214(a). Moreover, Applicants' Opposition does nothing to remedy this deficiency. Accordingly, the Commission must deny the Application. At a minimum, the Commission must impose conditions on the Merged Firm that will remedy the specific harms posed by the transaction.

## I. INTRODUCTION AND SUMMARY

In their opposition to One Communications' Petition to Deny, the Applicants essentially argue that the Commission need not worry about this transaction. There is no need, they say, to address the Merged Firm's obligation under existing laws and agreements or its ability or incentive provide wholesale services. But there is no basis in law, policy or market experience for the Commission to abdicate its responsibility to review the consequences for competition and consumer welfare of the proposed transaction in this manner.

Section 214 grants the Commission full authority to determine whether the transfer of the wireline assets at issue here is in the public interest. In this context, the public interest inquiry must include an assessment of whether the proposed transaction will result in the elimination or failure to comply with the core Section 251, 271 and 272 legal requirements needed to sustain local competition. The Applicants' argument that the Commission should not exercise this authority is without merit.

The Applicants argue that the Verizon incumbent LECs would not qualify as a Bell Operating Company ("BOC") once they are part of the Merged Firm. This argument of course demonstrates precisely why the Commission must clarify this issue, and other similar issues, in this proceeding. Moreover, the analysis is straightforward. The Merged Firm would be a "successor or assign" of a BOC and thereby remain subject to the full panoply of Section 271 and 272 obligations. The fact that the Merged Firm would be "smaller" than Verizon, the sole basis for Applicants' argument to the contrary, is irrelevant to the analysis. The Commission must so state affirmatively here.

It must also clarify that the Merged Firm will be ineligible to seek the protections of either Section 251(f)(1) or (2). The Applicants do not even attempt to argue that they would be eligible for such protections; they merely assure the Commission that they will not exercise any rights they may have in this regard and that this should be enough. But it is assuredly not. The Applicants' statements of their present intention are not legally binding, and there is far too much at stake for the Commission to credit them here. The Commission must clarify that, for the reasons set forth in One Communications' Petition to Deny, the Merged Firm is legally ineligible to seek the protections of Section 251(f) in the areas served by the Verizon incumbent LECs subject to this transaction.

But as the history of local competition since the passage of the 1996 Act has demonstrated, the mere fact that statutory obligations apply does not ensure that incumbent LECs will fully comply with them. That is of course a particularly relevant concern here since, as One Communications explained in its Petition to Deny, the Merged Firm will lack the resources, expertise or incentive to comply with its wholesale obligations. The Applicants have offered nothing in their Opposition to assuage this concern. All available evidence in fact confirms that the Applicants have no idea how they will go about meeting the Merged Firm's wholesale obligations. In all events, it is clear that the Merged Firm will have a powerful incentive to fail in these responsibilities.

It is therefore clear that the instant transaction cannot be deemed to be in the public interest absent binding legal conditions on Commission approval requiring (1) the Merged Firm to comply with the Verizon-MCI merger conditions for a substantially extended time period; (2) the Merged Firm to comply with comprehensive performance requirements designed to ensure compliance with the Section 271 checklist, including automatic financial penalties for failure to meet those requirements; (3) the Merged Firm and Verizon to continue to honor all contracts and interconnection agreements; and (4) the Merged Firm and Verizon to charge no more for special access than they do today under existing volume and term agreements today.

## II. APPLICANTS MISCONSTRUE THE PUBLIC INTEREST STANDARD OF SECTION 214 OF THE ACT.

The Applicants make a number of different arguments to support their general claim that the Commission need not or may not review the true consequences for consumer welfare of the proposed transaction. These arguments range from those that are obviously incorrect to those that are overstated or simply irrelevant. All of them should be rejected.

At the most basic level, the proposed transaction would cause Fairpoint to "acquire" and "operate" a "line," in fact well over a million "lines." 47 U.S.C. § 214(a). Pursuant to Section 214 of the Communications Act, such an acquisition and operation is impermissible "unless and until" the Applicants obtain from the Commission "a certificate that the present or future public convenience and necessity require or will require" the acquisition and operation of the wireline assets in question by FairPoint. *Id.* The Communications Act expressly empowers the Commission to "refuse to issue" such a certificate entirely or issue such a certificate (*i.e.*, approve the transaction) but to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." *Id.* § 214(c). As the Commission has explained,

> [O]ur public interest evaluation necessarily encompasses the "broad aims of the Communications Act." These broad aims include, among other things, the implementation of Congress's pro-competitive, deregulatory national policy framework designed to open all telecommunications markets to competition, the preservation and advancement of universal service, and the acceleration of private sector deployment of advanced services. Our public interest analysis may also entail assessing whether the merger will affect the quality of telecommunications services or will result in the provision of new or additional services to consumers. In making these assessments, the Commission considers the trends within, and needs of, the telecommunications industry, as well as the factors that influenced Congress to enact specific provisions of the Communications Act.[3]

There is no question, therefore, that the Commission has the full authority to rule on all aspects of the proposed transaction that bear on whether it is consistent with the public interest and necessity. The Applicants' arguments that the Commission should not do so are meritless.[4] For example, the Applicants rely on FCC statements that, where "potential harms appear to be less likely or less substantial, . . . the Commission will accept a lesser showing to approval the transaction." Opposition at 6 (internal citations omitted). But as One Communications explained at length in its Petition to Deny, the proposed transaction poses harms that are both likely and substantial. There is therefore

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[3] *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, ¶ 50 (1999), subsequent history omitted ("*SBC/Ameritech Merger Order*").

[4] In addition to the arguments discussed herein, the Applicants assert that the transaction implicates no public interest issues because "'the sale of rural exchanges from larger incumbent LECs to smaller incumbent LECs'" does not pose public interest concerns. Opposition at 4 (citing *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Report and Order, 17 FCC Rcd 5517 ¶ 33 (2002) ("*Streamlining Order*")). But the Commission has already decided that this transaction does require an extensive public interest review. *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.*, Public Notice, 22 FCC Rcd 5035 at 2 (2007).

no basis for the Commission to accept a "lesser showing" of public interest benefits here than would otherwise be the case.

The Applicants also try to rely on the *Sprint/Nextel Order* for the proposition that transactions like this one that do not increase concentration should always be approved. But the cited passage simply stands for the proposition that a horizontal merger of CMRS carriers does not yield public interest harms where it does not result in *wireless* market concentration.[5] This has no relevance here. This transaction is not "horizontal" (and it does not involve wireless carriers). The public interest harm here is instead that the divestiture of all of Verizon's incumbent LEC assets covering three states will, if not properly analyzed and conditioned, result in widespread wholesale operations failures. The resulting harm to consumer welfare is clearly a cognizable public interest harm. In fact, the Commission held in the *Verizon/America Movil Order*, upon which Applicants place great reliance, that the sale of BOC incumbent LEC assets can raise substantial public interest concerns even though no increased concentration will result.[6]

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[5] *See Applications of Nextel Communications, Inc. and Sprint Corporation et al.*, Memorandum Opinion and Order, 20 FCC Rcd 13967, ¶ 31 (2005) ("*Sprint/Nextel Order*") ("A horizontal transaction is unlikely to create or enhance market power or facilitate its exercise unless it significantly increases concentration and results in a concentrated market properly defined and measured. Transactions that do not significantly increase concentration or result in a concentrated market ordinarily require no further competitive analysis.").

[6] *See Verizon Communications, Inc., Transferor, and America Movil, S.A. de C.V., Transferee, Application for Authority to Transfer Control of Telecommunicaciones de Puerto Rico, Inc.*, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd 6195 ¶ 21 (2007) ("*Verizon/America Movil Order*") (noting that while the transaction will not result in any increase in concentration "notwithstanding the lack of wireline overlap, commenters raise a variety of issues related to competition in Puerto Rico which are discussed below").

The Applicants argue further that, under the *Verizon/America Movil Order*, the appropriate comparison is between ownership of the incumbent LECs by FairPoint and the spin-off of the LECs to a stand-alone "Spinco," and that the Commission should not compare the *status quo* ownership by Verizon with ownership by Fairpoint.[7] This argument fails on multiple fronts. *First*, the FCC has in fact scrutinized spin-off transactions by examining whether the spun-off firm will be able to provide a similar level of service as its former parent.[8] The Commission undertook an extensive review under Section 214 of the divestiture of the BOCs from AT&T as part of the MFJ consent

[7] *See* Opposition at 11 (arguing that in the *Verizon/America Movil Order*, the FCC "stated that because 'Verizon has made the corporate decision to divest itself' of the assets at issue, the proper question was whether the transaction 'would result in efficiencies and other public interest benefits that are greater than [Puerto Rico Telephone Company's direct parent] would enjoy in its own.' The same reasoning applies here. Verizon has made the decision to divest its exchanges in Maine, New Hampshire, and Vermont. . . . Thus, whether FairPoint's resources are equivalent to [the parent] Verizon is not the appropriate question.").

[8] *See Sprint/Nextel Order* ¶ 183 ("Furthermore, Mr. Forsee and Mr. Donahue state that, as part of the state commission approval process for this spin-off and resulting change of control of its local telephone operations, Sprint Nextel will demonstrate that the New Local Company will possess the requisite financial strength, in addition to managerial and technical capability, to fully perform its public service obligations. We find that these statements represent commitments by Sprint Nextel that the new local wireline company, LTD Holding Company, will receive an equitable debt and asset allocation at the time of its proposed spin-off so that the company will be a financially secure, Fortune 500 company, and that Sprint Nextel will demonstrate that the new local company will possess the requisite financial strength, in addition to managerial and technical capability, to fully perform its public service obligations.") (internal citations omitted). Both Commissioners Copps and Adelstein noted this commitment in their approval of the merger. *See id.*, Separate Statement of Commissioner Adelstein and Separate Statement of Commissioner Copps. Commissioner Copps argued that the applicants would be held to these commitments once they filed for approval of the spin-off. *Id.*, Separate Statement of Commissioner Copps. Commissioner Adelstein argued that it was important that the spin-off would continue to offer the same level of service as Sprint as a whole: "This positive step will protect Sprint's wireline employees and ensure millions of primarily rural wireline customers continue to see a high level of service and investment in advanced services." *Id.*, Separate Statement of Commissioner Adelstein.

decree. In so doing, it compared ownership by AT&T with ownership by shareholders of the divested, stand-alone BOCs.[9] In any event, as explained, the Commission has ample authority under Section 214 to address this transaction in the manner it deems appropriate.

*Second*, the FCC's reasoning in the *Verizon/America Movil Order* is inapplicable to review of the instant transaction. There, the FCC's conclusion that the attributes of parent company Verizon may not be considered in the public interest analysis was based upon Section 310(d) of the Act, which only applies to the transfer of wireless licenses.[10] In other words, any restriction on comparing the attributes of Verizon as a whole to America Movil only applied to that portion of the transaction related to the transfer of wireless licenses. It has no bearing on the transfer of wireline assets under Section 214, the central issue implicated by the instant transaction.

*Third*, even if the appropriate comparison is between the "stand-alone" operations in New Hampshire, Vermont and Maine and operation by FairPoint, the Applicants have not shown that the transaction should be approved on this basis. FairPoint has not provided any evidence that, compared to Verizon's operations in the three states, it is less

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[9] *See The Consolidated Application of American Telephone and Telegraph Company and Specified Bell System Companies for Authorization Under Sections 214, and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Transaction*, Memorandum Opinion, Order and Authorization, 96 F.C.C. 2d 18 (1983).

[10] *See Verizon/America Movil Order*, n.108 (citing 47 U.S.C. § 310(d)) ("Any such application shall be disposed of as if the proposed transaction or assignee were marking duplication under section 308 for the permit or license in question; but in acting thereon, the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.") (emphasis added).

leveraged, has more experience serving wholesale customers, plans on investing more heavily in wholesale infrastructure or has developed a more advanced wholesale OSS. Indeed, the evidence in the record demonstrates that the incumbent LECs are far worse as part of the Merged Firm than either part of Verizon *or* on their own.[11]

*Fourth*, the Applicants do not follow the purported *Verizon/America Movil* standard when it does not suit their purposes to do so. The Applicants assert that FairPoint's small size and "local experience," compared to that of Verizon (not the stand-alone incumbent LECs), are cognizable public interest benefits. Opposition at 11. The Applicants cannot have it both ways. But the real lesson, as the Applicants implicitly concede, is that the Commission should, and unquestionably may, consider both the benefits and harms associated with the *status quo* ownership by Verizon as compared to ownership by Fairpoint of the incumbent LECs at issue.

## III. THE MERGED FIRM MUST COMPLY WITH THE LEGAL OBLIGATIONS THAT APPLY TO VERIZON.

In addressing the application of core local competition provisions of the Communications Act to the Merged Firm, the Applicants do little more than wave off the issue as irrelevant and not properly addressed in this proceeding. But the question of whether the incumbent LEC assets subject to the proposed transaction will continue to be

[11] *See, e.g.*, Petition to Deny of Communications Workers of America, et al., *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, at 14 (filed Apr. 27, 2007) (comparing the debt to EBITDA ratios of VZ ME-NH-VT with that of FairPoint); *id.* at 17 (arguing that "Fairpoint will spend less in the [Northern New England] area that it has expended in its current operations nationwide or that Verizon has spent in this same region"); *id.* at 19 ("[A]nnual maintenance and capital expenditures for NNE will continue to be significantly below Verizon's historic levels of investment" in the NNE); *id.* at 20 ("Verizon spent 45 percent more than FairPoint plans to spend in 2008 per line in the NNE region.").

bound by the requirements of Sections 251, 271, and 272 is central to any determination of whether the proposed transfer of control is in the public interest. Moreover, there should be no doubt that all of these provisions would apply to the Merged Firm.

### A. The Commission Must Clarify That The Merged Firm Will Be Classified As A Bell Operating Company.

In their Opposition (at 36-38), the Applicants assert that the Merged Firm should not be classified as a BOC subject to the market-opening requirements of the Act applicable to all BOCs, namely Sections 251, 271, and 272. 47 U.S.C. §§ 251(c), 271-72. In particular, Applicants argue that the Merged Firm should not be subject to these requirements because it will be smaller than, and thus, "will not resemble the BOCs." Opposition at 37. This argument is easily rejected.

*First*, and most fundamentally, the Applicants' argument clearly ignores the terms of the statute and relevant case law. The Applicants fail to account for the fact that the statutory definition of BOCs states that "any successor or assign" of "any" BOC that provides wireline telephone exchange service itself qualifies as a BOC. 47 U.S.C. § 153(5)(B). The incumbent LECs that are the subject of the proposed transaction are unquestionably BOCs today because they are part of the New England Telephone and Telegraph Company.[12]

Nor is there any question that the Merged Firm would be a "successor or assign" of New England Telephone and Telegraph. The Commission has consistently relied on the general common law "substantial continuity" test for determining whether company is a successor or assign of another company. Under that test, a firm is a successor or

[12] In approximately 2000, the New England Telephone and Telegraph Company changed its name to Verizon New England Inc.

assign if there is "substantial continuity between two companies such that one entity steps into the shoes, or replaces, another entity." As the Supreme Court has held, "substantial continuity" exists if "the company had 'acquired substantial assets of its predecessor and continue, without interruption or substantial change, the predecessor's business operations.'" *SBC/Ameritech Merger Order* ¶ 454 (citing *Fall River Dying & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)). The Commission has applied this test for the purpose determining whether an entity is a successor or assign of an incumbent LEC[13] and it has stated that it is appropriate for determining whether a firm is a successor or assign of a BOC. *See SBC/Ameritech Merger Order* ¶ 458.

The Merged Firm is clearly the successor or assign of Verizon to the incumbent LECs that are the subject of the proposed transaction. The entire thrust of the Applicants' public interest statement and subsequent filings is that the Merged Firm plans to continue, "without interruption or substantial change," Verizon's operations in these three states.[14] For example, FairPoint has stated that it "will retain the obligations applicable to all ILECs to provide wholesale services under Sections 251 and 252, as well as . . . current interconnection agreements, tariffs, SGATs, and other existing arrangements in the

[13] *See ALLTEL Communications, Inc., et al.*, Order, 20 FCC Rcd 8112 (2005) ("*ALLTEL*").

[14] *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. 07-233, at 20 (filed Jan. 31, 2007) ("Application") ("As discussed, FairPoint will continue to provide local exchange and domestic interstate interexchange services after the closing of the transaction without reduction, impairment, or discontinuance of service to any customer. In fact, the proposed transaction will be largely transparent to Verizon's customers in these states.").

acquired exchanges for the duration of the respective terms." Opposition at 33. FairPoint has engaged Verizon in a "Transition Services Agreement" and has hired Capgemini to overhaul its back-office systems in an attempt to ensure that Verizon's customers do not see any performance drop-off with the transaction. *See id.* at 26-27. FairPoint has also agreed to take over the pension and other obligations of the Verizon employees in the exchanges at issue. *See id.* at ii. Finally, following the transaction, Verizon will no longer have any local exchange assets in the areas served by the transferred incumbent LECs (except for a minimal amount of facilities originally acquired from MCI) and Verizon will cease competing in most product markets (e.g., residential and small business). For all of these reasons, FairPoint qualifies is a "successor or assign" to Verizon.[15]

*Second*, taken to its ultimate conclusion, Applicants' argument is an open invitation to all BOCs to split up their operating territories into smaller segments for the purpose of evading a regulatory regime designed to further competition.[16] It is simply implausible to assert, as Applicants do, that Congress intended that BOCs could evade their obligation to comply with Section 271 by transferring segments of their ILEC

[15] By contrast, in *ALLTEL*, the FCC found that the transfer of certain cellular licenses and assets from Cingular to Alltel did not meet the "substantial continuity" test because, "Following the transaction, Cingular and ALLTEL will both continue to operate as competing, independent, going concerns in all of the subject markets, each with their own assets and customers. Thus, ALLTEL will not simply be stepping into Cingular's shoes and 'substantially continuing Cingular's business operations." *ALLTEL* at 5. (emphasis added).

[16] *See* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (enacted Feb. 8, 1996) (an act "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

operations to other companies. The mere fact of the "successor or assign" language in the Act shows that Congress could not have intended such a result.

As a fallback, the Applicants claim that it would be inappropriate for the Commission to clarify that the Merged Firm will qualify as a BOC in the areas covered by the transferred ILEC operations in this proceeding. Opposition at 36. But the FCC has consistently ruled on threshold issues of law and even made actual declaratory rulings in its merger orders. For example, in the *Verizon/America Movil Order,* the FCC considered and ruled upon a petition for declaratory ruling filed by the applicants in that transaction regarding foreign ownership issues. *See Verizon/America Movil Order* ¶ 31. A similar petition was filed and declaratory ruling issued as part of the review proceeding for the sale of the assets of Guam Cellular to DoCoMo.[17] More to the point, the FCC first discussed the test for "successor or assign" in the *SBC/Ameritech Merger Order*.[18]

The Applicants also cite to a string of cases for the proposition that the "Commission has consistently *declined* to deem the non-BOC acquirer [of lines] to be a BOC as a result of the acquisition of the lines." Opposition at 38 (emphasis added); *id.* n.130. But none of the orders cited by the Applicants discussed, let alone mentioned, whether the buyer would be a successor or assign of the seller.[19] It is completely

[17] *See Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc.*, Memorandum Opinion and Order and Declaratory Ruling, 21 FCC Rcd 13580 (2006).

[18] *See id.* ¶ 446 (holding that "under the Act, a 'successor or assign' of an incumbent LEC, or in this case, a BOC, will be subject to the obligations imposed upon incumbent LECs in [S]ection 251(c)").

[19] One of the cases cited by the Applicants was decided in 1995. *US West Communications, Inc. and Eagle Telecommunications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 1771 (1995) (the order was released January 5, 2005). This case

inappropriate for the Applicants to argue that the absence of any mention of the issue in these cases means the FCC "held" that the acquirer was not a successor or assign of the BOC at issue. Indeed, whole volumes could be filled with the issues that were not discussed in these orders.

In any case, most of the orders cited by the Applicants did not involve review of a transaction *per se*, but rather involved waiver requests filed by the parties that were related to the transaction. Because the question of whether the acquiring company was a successor or assign to the BOC was not implicated by the waiver requests in these cases, it is unsurprising that the issue was not addressed. For example, in one case cited by the Applicants, the transferee and the transferor (Qwest) sought a waiver from the definition of a "study area" so that Qwest could, among other things, "remove from its Arizona study area part of the Phoenix exchange comprising approximately 2,700 access lines."[20] In addition, the parties sought permission for "Saddleback to establish a new study area comprising the Salt River Pima-Maricopa Indian Community, which will include Saddleback's existing facilities and the approximately 2,700 access lines it intends to acquire from Qwest," and sought waiver from other related rules. *Id.* Whether or not Saddleback was a successor or assign to Qwest was irrelevant to these waiver requests. By contrast, in *Sacred Wind*, Sacred Wind specifically argued that it was not a successor or assign of Qwest and therefore sought a waiver of [R]ule 69.2(hh) so that it could "become a member of NECA, participate in NECA pools and received federal universal

could not of course have analyzed a section of the 1996 Telecommunications Act because the Act had not yet been passed.

[20] *Saddleback Communications and Qwest Corporation*, Order, 16 FCC Rcd 21159, ¶ 1 (2001).

service support." *Sacred Wind* ¶ 24. In response, the FCC determined that, because Sacred Wind was a successor to Qwest, no such waiver was necessary. *See id.* ¶ 5.

Similarly, here, because the issue of whether FairPoint will be a successor or assign to Verizon has been squarely raised in this proceeding and will have substantial bearing on the duties of FairPoint post-transaction, it is proper under Section 214, and indeed necessary, for the FCC to rule on this issue in its transaction. Nor is there any question that the Commission has the authority to resolve particular questions of law implicated by a transaction as part of its Section 214 review.[21] It must exercise that authority here to clarify that the incumbent LECs subject to the proposed transfer of control are BOCs.

### B. The Merged Firm Must Be Prohibited From Invoking The Protections Of Section 251(f) Of The Act.

The Applicants state in their Opposition that FairPoint has publicly stated that the Merged Firm will not attempt to seek the protections of the rural exemption, modification and suspension provisions of Section 251(f) of the Act, and that the Commission therefore need not address this issue in the instant proceeding. 47 U.S.C. § 251(f)(1)-(2). There is no merit to this argument.

To begin with, in its 2006 annual report, FairPoint describes the rural exemption, modification, and suspension provisions of Section 251(f) and explicitly states that "[i]f a

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[21] *See, e.g., 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, ¶¶ 41-58 (2000) ("*Bell Atlantic/GTE Merger Order*") (addressing the novel question of whether a conditional conversion right constitutes an "equity interest (or the equivalent thereof)" under Section 3(1) of the Act in order to determine whether Genuity, following its proposed spin-off from GTE, would be an "affiliate" of the merged Bell Atlantic/GTE entity).

request for any of the[] additional interconnection services [required by Section 251(b)] is filed by a potential competitor . . . *we are likely to ask the relevant State regulatory commission to retain the exemption*," which "remains effective for all of our incumbent local exchange operations , except in Florida."[22] Simultaneously, in their Opposition (at 36), FairPoint and Verizon assert that the states, and not the FCC, have the authority to determine whether Section 251(f) applies to the Merged Firm, apparently to reserve the right to do exactly that at some point in the future. Indeed, if FairPoint has no intention of seeking a rural exemption (despite its preference for the exemption stated in the annual report), modification or suspension of the requirements of Section 251(b) and (c), there would be no reason for it to argue that the FCC cannot rule on this issue in the instant proceeding.

In any event, Applicants' stated intention to refrain from invoking Section 251(f) protections is merely that; it has no binding effect whatsoever. It should be noted in this regard that, although FairPoint has stated that it will continue to pay the same dividend as before,[23] it says in the Opposition(at 15) that it is not of course bound to do so, thus revealing the limited effect of its stated commitments.[24] In light of One

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[22] FairPoint Communications, Inc., Annual Report (Form 10-K), at 14-15 (filed Mar. 13, 2007) (emphasis added) (for the period ending Dec. 31, 2006) ("FairPoint 2006 Annual Report").

[23] *See* 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) (FairPoint "expects that its current annual dividend of $1.59 per share will continue unchanged following the closing").

[24] Similarly, Applicants contend that "even though FairPoint has stated that it plans to increase the availability of broadband and make other upgrades in the relevant areas, it is irrelevant whether FairPoint has a binding commitment to do so." Opposition at 6.

Communications' arguments on the merits of this issue in its Petition to Deny (at 14-16), the Commission should clarify that Section 251(f) does not apply to the Merged Firm.

## IV. THE PROPOSED TRANSACTION RAISES A SUBSTANTIAL LIKELIHOOD OF HARM TO THE QUALITY OF WHOLESALE INPUTS IN THE AFFECTED STATES.

The Applicants offer no basis for concluding that the Merged Firm could or would fulfill its wholesale obligations under Sections 251, 271, and 272 at the same level or in the same manner that Verizon has achieved. The only way that the Commission can increase the chances that the Merged Firm will fulfill its obligations is to establish specific merger conditions with substantial penalties for failure to comply. Such conditions must govern the price and non-price terms and conditions for the offer of all inputs, including Section 251(c) UNEs and interconnection, included in the Section 271 checklist, as well as special access.

### A. The Merged Firm Will Lack The Resources, Experience And Incentive To Comply With Its Wholesale Obligations.

The Applicants offer a number of meritless arguments in an attempt to show that the Merged Firm will fulfill its wholesale obligations to competitors under Sections 251, 271, and 272. The Applicants rely primarily on FairPoint's purported expertise in managing LECs serving rural and small urban markets and its experience in acquiring/integrating small ILECs. *See* Opposition at 6-10. In fact, Applicants imply that it is appropriate to judge the likelihood of public interest harms based on the acquiring firm's track record and experience. *See id.* at 8 (noting FairPoint's purported "[h]istory of [s]uccessful [a]cquisitions"). But of course FairPoint has no track record and no experience, let alone any special expertise, in providing *wholesale services*. As One Communications pointed out in its Petition to Deny, FairPoint has already conceded that "the addition of a wholesale business serving CLECs and other wholesale customers" makes the proposed transaction unlike any acquisition it has completed in the past.[25] Indeed, as noted in the Petition to Deny, FairPoint recently converted 31 company systems, including OSS functionality, to a single operating system, but "[w]holesale services were not part of the service offering of the companies [sic] therefore there was no wholesale data to convert." *Id.* at 18 n.46. Based on the Applicants' own standard, therefore, there is no basis for concluding that the Merged Firm will be able to meet its wholesale obligations to competitors.

The Applicants' attempt to differentiate the experience of the Carlyle Group in its acquisition of Verizon's local exchanges in Hawaii is also unconvincing. Opposition at 30. The Applicants assert that the Carlyle Group lacked the requisite experience to manage HawTel, but the Carlyle Group has an extensive portfolio of telecommunications companies and none other than William Kennard, former Chairman of the FCC, managed the HawTel transaction.[26] One of the three founders of the Carlyle Group is a former CFO of MCI and other partners of the firm include a former Executive Vice President of Verizon and a former CEO of Nextel.[27] It would be hard to find such a concentration of telecommunications expertise in any other firm.

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[25] Petition at 19 & n.47 (citing 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)).

[26] Alex Salkever, "Carlyle's Hawaiian Adventure," BusinessWeek Online (Nov. 2, 2004), available at http://www.businessweek.com/bwdaily/dnflash/nov2004/nf2004112_5368_db016.htm (last visited May 14, 2007).

[27] *See id.*; *see also* The Carlyle Group, News Release, "The Carlyle Group to Buy Verizon Hawaii for $1.65 Billion," May 21, 2004, *available at* http://www.thecarlylegroup.com/eng/news/l5-news2792.html (last visited May 14, 2007).

Applicants also assert that FairPoint will be using a different consulting firm, Capgemini, to assist in the creation and integration of back office systems than the firms retained by HawTel. But there is no basis for concluding that Capgemini will be any more successful here than BearingPoint or Accenture has been in Hawaii.[28] The Applicants' description of Capgemini's experience and expertise could equally apply to BearingPoint or any of the other myriad consulting firms[29] that provide systems integration and other solutions for merging telecommunications carriers. It should also be noted that FairPoint boasts that it only service quality incident arose in Maine in 2005 because it "was required to change vendors and restart the [billing and customer care systems integration] process midstream." Opposition at 22. As One Communications explained in its Petition, this is exactly the problem encountered by HawTel when it was forced to hire BearingPoint and fire Accenture. *See* Petition at 21-23; *see supra* note 27. It is entirely possible that this will occur in Vermont, New Hampshire and Maine after the proposed transaction. Furthermore, the Applicants fail to mention the one telling difference between HawTel and the Merged Firm at issue here: HawTel already had wholesale operations before its merger and still failed to successfully develop and integrate OSS in a timely manner.

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[28] *See* Hawaii Telcom, Press Release, "Hawaiian Telcom Contracts with Accenture to Complete Systems Transformation," Feb. 8, 2007, available at http://www.hawaiiantel.com/pdfs/HT_ACC_PR_020807.pdf; "BearingPoint pays Hawaiian Telcom $52M," Pacific Business News, Mar. 29, 2007, *available at* http://www.bizjournals.com/pacific/stories/2007/03/26/daily36.html (last visited May 14, 2007; *see also* Petition at 21-23.

[29] *E.g.*, Computer Associates Int'l Inc., PriceWaterhouseCoopers, SAP AG, SAS Institute Inc. *See* also Ray Le Maistre, "Who Makes What: OSS," Boardwatch (July 9, 2003) *available at* http://www.lightreading.com/document.asp?doc_id=36545 (last visited May 14, 2007).

In any event, the Applicants consistently cite their employment of Capgemini to divert attention from the fact that FairPoint lacks experienced in the provision of wholesale services. Opposition at ii, 27-28, 30. However, retaining a consulting firm to assist in systems integration is a common industry practice[30] and doing so is not a panacea for potential problems that will likely occur during integration. Capgemini's experience in telecom consulting is no substitute for FairPoint's complete lack of experience in the provision of wholesale services to competing carriers.

In their Opposition, the Applicants barely attempt to address the Merged Firm's incentive to "starve" its wholesale operations of resources. FairPoint and Verizon argue strongly that the Merged Firm will spend more per line than Verizon did, but this leaves even less money for wholesale functionalities. Applicants state that they have an incentive to keep the Transition Services Agreement ("TSA") between them in place because it is necessary to ensure retail service quality. But of course retail issues could well be addressed first, leaving wholesale issues unaddressed. In fact, given that FairPoint has much more experience in providing retail than wholesale service, there is good reason to expect that it will resolve retail issues more readily and quickly than wholesale issues. Once it has accomplished this, the Merged Firm would have a powerful incentive to discontinue the TSA. This incentive will become ever more powerful as the fees under the TSA increase sharply over time, as One Communications explained in its Petition to Deny. *See id.* at 20 n.53.

It is not surprising, therefore, that the Applicants provide only vague assurances that the Merged Firm will have the personnel and expertise in place to provide wholesale

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[30] *See* "Who Makes What: OSS," *supra* note 40.

services (while admitting that FairPoint is "currently finalizing its system design and architecture" (Opposition at 33)). Messrs. Haga and Nixon describe the work FairPoint has purportedly undertaken thus far to build wholesale operations support systems in only the most general terms. Based on these statements, it is simply impossible to determine exactly how much progress FairPoint has made thus far.

But evidence produced in state proceedings regarding the merger does provide a clearer picture, and it is not a good one from wholesale customers' perspective. In its responses to One Communications' discovery requests in the Maine PUC review proceeding,[31] FairPoint admits that none of its access lines in the three affected states is provided on a wholesale basis (e.g., resale, UNEs) to CLECs. *Id.* at One I-1-4. Indeed, FairPoint concedes that it "has an *immaterial number* of wholesale lines provided in states *outside* the three Northern New England states." *Id.* at One-I-1-5 (emphasis added).

In addition, FairPoint has neither developed the organizational structure it will have in place to ensure the provision of wholesale services by the Merged Firm nor identified the executives who will lead and manage such provision. *Id.* at One-I-1-6; One II-1-29, -30; One III-1-11 to -14. Nor is FairPoint even able to identify the senior contacts with whom CLECs such as One Communications will interact for the purposes of ordering, and ensuring the adequacy of, wholesale services. *Id.* at One-III-1-12.

[31] *See generally*, *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.*, FairPoint's Response to Group I One Communications to FairPoint Set 1 Transactional and Financial Issues, ME PUC Docket No. 2007-67 (dated Apr. 27, 2007) (*e.g.*, "One-I-1-1"); *id.* FairPoint's Response to Group II Set 1 Due Diligence, Technical Capabilities And Current Infrastructure (*e.g.*, "One-II-1-1"); *id.* FairPoint's Response to Group III Set 1 Wholesale Back Office Systems And Broadband (*e.g.*, "One-III-1-1").

Similarly, FairPoint does not know the locations from which it will provide services currently provided by Verizon's national market, regional customer care, New England carrier account team, or regional customer maintenance centers; it does not know the number of employees that will staff such centers; and it does not know the projected budgets for those centers. *Id.* at One-III-1-25, -29 to -32. FairPoint cannot even estimate the amount of money it will need to allocate to wholesale systems. *Id.* at One-II-1-23. As if this were not enough, FairPoint does not yet know how many interconnection agreements it plans to assume from Verizon. *Id*. at II-1-31. In addition, FairPoint has not even begun to review any of the interconnection agreements between Verizon and any of One Communications' operating entities. *Id*. at One-II-1-33. In light of this evidence (or rather lack thereof), it is fair to say that FairPoint has no plan for its post-merger wholesale operations.

Nor is Applicants' claim that "facilities-based" competition will give it the incentive to provide wholesale services credible. As of June 2006, competitors with their own loop facilities served only 5.7 percent of total switched access lines in Maine, 8.8 percent in New Hampshire and 3.6 percent in Vermont.[32] Given this extremely low level of competition, it is likely that the Merged Firm will have powerful incentives to deny, delay and degrade access to bottleneck local transmission facilities.

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[32] Local Telephone Competition; Status as of June 30, 2006, Industry Analysis and Technology Division, Wireline Competition Bureau, Tables 7 and 11 (rel. Jan 31, 2007). Indeed, the triggers established in the TRRO predict that there will be little facilities based competition in these markets. The FCC's triggers eliminate access to UNEs only in those wire centers where it believes there is or the potential for substantial facilities-based competition. There are well over 300 Verizon wire centers in these three states. *See* http://www.universalservice.org/hc/tools/clli/search.aspx?action=S. DS3 loops are unavailable in only one of those wire centers and DS1 loops are available in all of those wire centers. *See* http://www22.verizon.com/wholesale/attachments/verizonwirecentersexempt.xls.

It is therefore clear that the proposed transaction places wholesale services at terrible risk by transferring large ILECs to an inexperienced firm with relatively few resources and powerful incentives to degrade the services provided to competitors.

### B. The Commission Must Impose Conditions To Remedy The Harms To The Provision of Wholesale Services Posed By The Proposed Transaction.

Applicants' attempt to show that the remedies proposed by One Communications in its Petition to Deny should not be imposed as a binding condition on any Commission approval is unconvincing. *First*, FairPoint and Verizon assert that there is no need to apply and extend the Verizon/MCI merger conditions[33] because that merger, unlike the instant transaction, resulted in an increase in market concentration. But, for the reasons described above and in the Petition to Deny, the proposed transaction poses an even more serious threat, albeit from a different cause, than was the case with Verizon/MCI.

In its review of that transaction, the Commission concluded that Verizon's acquisition of MCI did not yield substantial increases in market concentration.[34] Critically, however, that transaction did not, unlike this one, involve the wholesale elimination and replacement of established wholesale expertise, systems and processes that had been forced to pass the relatively rigorous standards of performance required by the Section 271 review process. The complete breakdown of the wholesale system,

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[33] *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, App. G (2005) ("*Verizon/MCI Merger Order*") (setting forth conditions).

[34] *See id.* ¶ 219 ("[W]e recognize that there will be an increase in market concentration with respect to certain services, including special access services, retail enterprise services, mass market services, and Internet backbone services. Nonetheless, in each case we find that the possible harms identified by commenters do not justify designating the application for hearing.").

which has of course occurred in Hawaii as a result of a similar transaction, was not even a possibility in the Verizon/MCI transaction. In any event, the special access performance reporting requirements established in the Verizon/MCI merger conditions are necessary to address this problem.

Moreover, given its costly commitments to end users, shareholders and employees and the likely significant cost associated of creating a new wholesale operation from scratch, there is a significant risk that the Merged Firm will seek to recover these costs by increasing UNE and/or special access prices after the merger. There is therefore good reason to extend for a significant period of time the UNE and special access rate freeze established by the Commission in the Verizon-MCI conditions. In any event, if the Applicants are correct that the Merged Firm's costs will somehow be lower than is the case today for the Verizon LECs and that it is (contrary to all indications) subject to facilities-based competition, then the Merged Firm will suffer no harm if it subject to an extended rate freeze.

*Second*, the Applicants' claim that it would be inappropriate to require the Merged Firm to comply with Section 271 requirements is also meritless. In making this claim, the Applicants rely primarily on their incorrect assertion that the transferred incumbent LECs would no longer be classified as BOCs. As BOC LECs, the transferred LECs are subject to an ongoing obligation to comply with Sections 271 and 272. They must show that they will do so as a condition to regulatory approval of the proposed transaction. Otherwise, the proposed merger will represent an invitation to the Merged Firm to engage in widespread backsliding from the level of performance necessary to pass muster under Section 271, an outcome that cannot be squared with the public interest standard in Section 214 or the ongoing requirements of Section 271. Furthermore, given that the Merged Firm will attempt to create from scratch new wholesale systems and processes *after* the Vermont, New Hampshire and Maine BOC LECs at issue have entered into the in-region long distance market (and been subject to the rigorous scrutiny of their wholesale performance, including their OSS, associated with obtaining Section 271 approval), the Commission must replace the "carrot" of in-region entry with a different regulatory incentive to establish such systems and processes properly and in a timely manner. Automatic and substantial financial penalties for failure to meet comprehensive performance requirements are the only logical means of achieving this objective.

*Third*, the Applicants ignore One Communications' argument that the Commission must prohibit *both* Verizon and the Merged Firm from increasing prices for special access services purchased pursuant to volume-term agreements territories after the transaction. This is apparently because the Applicants have no basis for disputing the merits of such a condition.

*Finally*, Applicants state that they are willing to honor Verizon's interconnection agreements in the three states at issue. But such offers are not binding absent legal compulsion. The Applicants' willingness to make this commitment, however, should mean that they have no complaint with a binding merger condition that the Merged Firm stand in the shoes of Verizon for all existing interconnection agreements to which Verizon is a party in Maine, New Hampshire, and Vermont.

## V. CONCLUSION

For the foregoing reasons, the Commission should either deny FairPoint and Verizon's Application or condition its approval in the manner described herein.

Respectfully submitted,

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