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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Applications 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 Dkt. No. 07-22

Dear Ms. Dortch:

One Communications Corp. ("One Communications"), through its undersigned attorneys, hereby responds to the June 18, 2007 *ex parte* letter ("*Ex parte*") filed by FairPoint Communications, Inc. ("FairPoint") in the above-captioned proceeding. In that letter, FairPoint asserts that, following its proposed transaction with Verizon Communications Inc. ("Verizon"), it will not be a successor or assign of Verizon's incumbent LEC business, and therefore, will not be subject to the obligations of a Bell Operating Company ("BOC"), including compliance with Sections 271 and 272 of the Communications Act of 1934, as amended ("the Act").[1] As explained below, FairPoint's arguments are meritless.

There is no dispute that FairPoint should be considered a "successor or assign" of Verizon if, pursuant to the relevant common law test applied by the FCC, there is "substantial continuity" between FairPoint and Verizon in the relevant geographic and product markets. Nor is there any dispute that the Commission should apply this test in light of the pro-competition goals of the Act. A fair application of this standard yields the undeniable conclusion that FairPoint will be Verizon's successor and assign as the incumbent LEC in Maine, New Hampshire, and Vermont following the proposed transaction.

[1] 47 U.S.C. §§ 271-72.

FairPoint and Verizon (the "Applicants") have themselves made the point abundantly clear that the Merged Firm plans to continue "without interruption or substantial change" Verizon's incumbent LEC operations in these three states. As FairPoint has explained,

> In terms of the current regulatory environment -- tariffs, rates, whatever contracts are in effect today, the answer is we do expect to step into [Verizon's] shoes and, from the customer's perspective, provide the same rates under the same terms and conditions as Verizon did prior to the merger.[2]

This is true of retail services and wholesale services. In particular, the Applicants have asserted that FairPoint plans to: (1) ensure that "[n]o existing Verizon retail service will be discontinued or interrupted as a result of the proposed transaction";[3] (2) concur with or adopt "Verizon's interstate and intrastate tariffs, and, as appropriate, file new tariffs replicating as closely as possible Verizon's current tariffs";[4] (3) adopt Verizon's interconnection agreements ("ICAs");[5] (4) continue to provide wholesale services in the same manner as Verizon,[6] including offering an "OSS similar in functionality to what is offered by Verizon";[7] (5) honor Verizon's existing wholesale contractual arrangements (*see Ex parte* at

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[2] *Verizon New England Inc. et al., 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.*, Maine PUC Dkt. No. 2007-67, Technical Session, June 12, 2007, at 104, *available at* http://mpuc.informe.org/easyfile/easyweb.php?func=easyweb_docview &docid=55967&img_rng=191083&vol_id=1 (quoting Walter Leach, Executive VP of Corporate Development, FairPoint).

[3] Joint Application for Approval of the Transfer of Certain Assets by Verizon New England Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Co. and Verizon Select Services Inc. and Associated Transactions, NH PUC Dkt. No. 07-011, at 12 (filed Jan. 31, 2007) ("Verizon New Hampshire App.").

[4] *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 Dkt. No. 2007-67, at 17 (Mar. 23, 2007) ("Nixon ME III Testimony").

[5] *See Ex parte* at 3. When assignment of an ICA is not feasible, FairPoint has stated that it will "contact each carrier and offer a 'mirror' agreement to the one currently in place with Verizon if it is unable to have the contract assigned to it by Verizon." FairPoint Response to Group II, One Communications to FairPoint, Set I, Due Diligence, Technical Capabilities, ME PUC Dkt. No. 2007-67, at II-1-31 (Apr. 27, 2007) ("FairPoint ME Interrogatory Response II").

[6] *See* FairPoint Response to Group III, One Communications to FairPoint, Set 1, Wholesale, Back Office Systems and Broadband, ME PUC Dkt. No. 2007-67, at III-1-29 (Apr. 27, 2007) ("FairPoint ME Interrogatory Response III").

[7] *See id.* at III-1-33.

3); and (6) maintain Verizon's performance assurance plans (*see id.*). Moreover, FairPoint will continue to operate other aspects of its business by seamlessly adopting Verizon's practices. For example, FairPoint will (1) largely retain Verizon's employees,[8] who will "continue in their same or similar functions and in their current work locations";[9] and (2) maintain Verizon's existing collective bargaining agreement and continue to provide benefits for retired Verizon employees.[10] Thus, Verizon is transferring all of its local exchange assets and much of its workforce to FairPoint while FairPoint plans to offer the exact same products and services as Verizon's incumbent LECs on the same terms and conditions to the same customers.[11] The Supreme Court has twice found that the substantial continuity test is met in similar circumstances.[12] FairPoint has failed to offer any basis for departing from that precedent here.

First, FairPoint argues that its promise to comply with Verizon's obligation to provide wholesale inputs to local competitors obviates the need to assess whether the Merged Firm is Verizon's successor or assign. *Ex parte* at 3-4. This is fatuous. Congress established the legal requirements applicable to BOCs because mere voluntary commitments would have been insufficient to compel them to open local markets to competition. In fact, Congress placed special obligations on BOCs, on a state-by-state basis, to remain in compliance with the competitive checklist of Section 271

[8] *See* Joint Petition of Verizon New England, Inc., Certain Affiliates Thereof and FairPoint Communications, Inc. For Approval of Asset Transfer, Acquisition of Control By Merger and Associated Transactions, Pursuant to 30 V.S.A. §§ 107, 109, 231, and 311, VT PSB Dkt. No. 7920, at 2 (filed Jan. 31, 2007) ("Verizon Vermont App.").

[9] Nixon ME Testimony at 30.

[10] *See* Verizon New Hampshire App. at 10.

[11] *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, 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 Dkt. No. 07-22, at 20 (filed Jan. 31, 2007) ("As discussed, FairPoint will continue to provide local exchange and domestic interexchange services after closing of the transaction without reduction, impairment, or discontinuance of a service to any customer. In fact, the proposed transaction will be largely transparent to Verizon's customers in these states.").

[12] *See, e.g., Howard Johnson Co. v. Detroit Local Joint Ex. Bd.*, 417 U.S. 249, 263 (1974) (holding that "continuity of identity in the business enterprise necessarily includes, we think, a substantial continuity in the identity of the workforce across the change in ownership."); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) (holding that in determining whether substantial continuity exists, courts will look to "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.").

and with Section 272 *because even the extensive legal requirements applicable to incumbent LECs under Section 251(c)* were insufficient to ensure BOCs' continued cooperation in the provision of inputs to CLECs. This is, of course, sensible in light of a BOC's powerful incentives to deny access to needed inputs throughout each state in which it operates.[13] Adopting FairPoint's approach would gut the BOC-specific provisions of the Act. It would allow Verizon, AT&T and Qwest to be relieved of their obligations to comply with Sections 271 and 272 if they merely promise to abide by those requirements in the future without any penalty for failing to do so. This is obviously contrary to the intent of Congress and plain common sense.

It is also worth emphasizing that FairPoint qualifies its promises to comply with BOC regulation to such a degree that they are rendered meaningless. It states that it "has committed to negotiate new agreements for so-called section 271 elements, *provided that reasonable terms can be reached*." *Ex parte* at 3 (emphasis added). Of course, this non-binding "commitment" leaves wide-open the possibility that the Merged Firm will be unable to reach terms that it (and only it!) deems "reasonable" during negotiations with former Verizon New England wholesale customers.[14] When this is the case, the purported promise to comply with Section 271 would be just that: a promise with no penalty for failure to comply. Accordingly, all of Applicants' "*bona fides*," "public[] commit[ments]," and "repeated assurances" that the Merged Firm "will not disrupt existing wholesale arrangements" (*id.* at 3), ring hollow.[15]

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[13] *See generally 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 Authorizations to Provide In-Region, InterLATA Services in Maine*, Memorandum Opinion and Order, 17 FCC Rcd 11659 (2002); *see also 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 (2002); *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 (2002).

[14] In any event, FairPoint has explicitly argued that it will *not comply* with many crucial aspects of these sections of the Act. For example, FairPoint goes as far as to assert that the Merged Firm should not be "subject . . . to the nondiscrimination provisions of Section 272(e)." *Ex parte* at 11.

[15] In a similar vein, FairPoint contends that One Communications should take it at its word that it has "disavowed any intent[] to evade its obligations" by invoking the protections of the rural exemption of Section 251(f)(1) or the suspension or modification provisions of Section 251(f)(2). *Id.* at 4. Contrary to FairPoint's claims, however, the potential for circumvention of these statutory requirements is not a "non-issue." *Id.* at n.8. Indeed, as discussed in One Communications' Petition to Deny (at 7 & n.10), the Applicants have never argued that the Merged Firm does not *qualify* for the protections of Section 251(f) and FairPoint's mere promises that it will not seek such protections in no way constitute a formal waiver of the Merged Firm's right to do so in the future. The Commission must therefore prohibit the Merged Firm from invoking the provisions of Section 251(f)(1) or (2).

Second, FairPoint argues, unconvincingly, that the instant transaction resembles the *ALLTEL* case.[16] There, the FCC concluded that ALLTEL was not a successor or assign of Cingular when ALLTEL purchased wireless assets in the region in which Cingular offered service. ALLTEL purchased licenses and selected assets (but not subscribers in most cases) divested by AT&T Wireless in 18 markets as a condition of the Commission's approval of AT&T Wireless' merger with Cingular. *See ALLTEL Order* ¶ 3. The FCC required this divestiture because Cingular was already competing in these markets pre-merger and, absent divestiture, competition in these markets would have been reduced post-merger.[17] The FCC determined that there was no "substantial continuity" between Cingular and ALLTEL because, post-divestiture, ALLTEL would compete against the merged firm in the CMRS market using the AT&T Wireless divested assets, while the merged firm would compete against ALLTEL using legacy Cingular assets. *See id.* ¶ 5. The FCC concluded that, following ALLTEL's purchase, "Cingular and ALLTEL will both continue to operate as competing, independent going concerns in all of the subject markets, each with their own wireless assets and customers." For this reason, the Commission held that ALLTEL was not "'substantially continuing' Cingular's business operations." *Id.*

By contrast, here, Verizon and FairPoint will not operate "as competing, independent going concerns in all of the subject markets" in Maine, New Hampshire, and Vermont. As FairPoint admits, Verizon's incumbent local exchange operations, assets and customer base are being sold to FairPoint, leaving Verizon to only compete in the provision of wireless services, services demanded by very large business customers and long distance services. FairPoint implicitly concedes that Verizon's retention of its wireless assets (such as its pre-paid calling cards and CPE businesses) is irrelevant to the successor and assign analysis. This is because: (1) Verizon uses those assets to compete in different product markets from those in which the legacy incumbent LEC competes; and (2) wireless assets are distinct from the bottleneck local exchange assets that are the source of a BOC's market power and the reason why Congress enacted BOC-specific statutory obligations. FairPoint does rely on Verizon's retention of its wireline long distance and Enterprise service assets, but the case here is no stronger than Verizon's retention of wireless assets. As the Commission has concluded, MCI does not, except in rare cases not relevant here, compete in the same product markets as the Verizon incumbent LECs that are the subject of the instant transfer.[18] Accordingly, Verizon's retention of MCI and similar long

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

[17] *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorization*s, Memorandum Opinion and Order, 19 FCC Rcd 21522 ¶ 254 (2004) ("In [this Order], we [have] found that the transaction, as proposed, would be likely to cause significant competitive harm in certain geographic markets. Specifically, our analysis indicate[s] that, in certain markets, there will not be enough competing carriers remaining, post-merger, with sufficient network and spectrum assets, to deter anticompetitive behavior by the merged entity. We therefore condition this grant of authority to transfer control of licenses from AT&T Wireless to Cingular on the divestiture of AT&T Wireless operating units (including spectrum associated with such operating units) in the following markets[.]").

[18] *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 104 (2005) ("*VZ/MCI Merger Order*"). In

distance assets does not in any way diminish the extent to which the Merged Firm will stand in the shoes of Verizon in the business of providing incumbent LEC voice and data services to residential and small and medium business customers.[19]

To classify the Merged Firm as anything other than a successor or assign of Verizon's incumbent LECs would also be contrary to the legislative intent of the BOC-specific requirements of the Act. Congress enacted Sections 271 and 272 to ensure that BOCs, who dominated (and continue to dominate) local exchange operations in their regions, would irreversibly open the local market to competition and could not use their control over bottleneck local transmission facilities to harm competition in either the local or long distance markets. For example, as the Applicants acknowledge, "Congress adopted [S]ection 271 to address concerns that BOCs might harm competition in the interexchange market by virtue of the BOCs' ability to leverage their historic dominant position in the local exchange market." *Ex parte* at 8. The bottleneck local exchange assets that characterize Verizon as a BOC will be transferred *in toto* to FairPoint. As discussed at length in One Communications' Petition to Deny and Reply, post-transaction, FairPoint will have the incentive and ability to discriminate against competitors through its newly dominant position in the local exchange markets in Maine, New Hampshire, and Vermont. The long distance assets and enterprise customer assets that Verizon will retain are irrelevant to the analysis because MCI was never able to deploy local loops to the vast majority of customer locations.[20] Verizon's ownership of those assets does not therefore diminish the Merged Firm's incentive and ability to leverage ILEC bottleneck facilities any more than MCI's ownership of those assets did at the time of the passage of the 1996 Act.[21] In fact, the

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fact, the FCC found that MCI was exiting the mass market long distance market. *Id. See also Request for Approval of Reorganization (Between Verizon Communications Inc. and MCI, Inc.)*, ME Dkt. No. 2005-154, Hearing Transcript, at 92 (Sept. 29, 2005)(describing MCI's declining long distance customer base) ("*VZ/MCI Hearing Transcript*"). *See id.* at 113 (stating the MCI had made the decision to exit the mass market long distance market prior to its decision to merge with Verizon).

[19] It is also significant that, when describing their merger, Verizon and MCI stated the companies were not merging the assets, operations or lines of the two businesses. *See Joint Petition of Verizon Communications, Inc. and MCI, Inc. for approval of an Agreement and Plan of Merger resulting in MCI becoming a wholly-owned subsidiary of Verizon*, Order, VT PSB Dkt. No. 7056, ¶ 21 (Nov. 29, 2005) ("*VT VZ/MCI Merger Order*"); *Verizon Communications Inc. and MCI, Inc. Request for Approval of Reorganization and Approval of Agreement of Verizon Communications and MCI, Inc.*, Order, Part II, ME PUC Dkt. No. 2005-154, at 2 (Dec. 22, 2005) (same). Accordingly, the companies appear to have kept the legacy Verizon BOC assets separate from the non-BOC MCI assets, making it all the clearer that Verizon's retention of the non-BOC assets should have no bearing on whether a purchaser of the BOC assets is itself a successor or assign of the Verizon BOC.

[20] *See VZ-MCI Hearing Transcript* at 107-08 (describing MCI's inability to deploy loops to end user customer locations).

[21] Not only does MCI compete in different product markets from the legacy Verizon BOCs, but its operations in the three states at issue are extremely limited. For example, the Vermont PSB concluded

Applicants' logic would yield absurd results. It would allow a BOC to purchase assets not related to its status as a BOC (such as the MCI assets), and then sell, or have a successor company sell, those assets to escape from BOC obligations. The FCC must reject FairPoint's regulatory jujitsu.[22]

In an attempt to salvage its argument, FairPoint offers several purported bases for concluding that the Merged Firm will not be a BOC successor or assign. None of these is persuasive. For example, FairPoint points out that Verizon is "free to expand" into the incumbent LECs' "core market" in the future. *Ex parte* at n.21. But of course any competitor is "free to expand" into a legacy BOC's "core market," but that does not support the conclusion that the incumbent BOC should no longer be classified as a BOC. In any event, there is no reason to believe that Verizon will (or is able to) utilize its remaining assets in these three states to compete in the local exchange market. On the contrary, Verizon's stated purpose for the transaction was to exit the local exchange business in these three states to "focus more intently on," and free up capital to further invest in, "operations in other markets," including its FiOS service and other non-core ventures.[23] FairPoint provides no analysis or rationale as to why Verizon would seek to re-enter those markets that it is now choosing to exit. Indeed, in the Verizon/MCI merger proceeding, MCI argued that without local exchange assets, it was unable to compete in the local exchange mass market and planned to exit that market.[24] In contrast, in

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that "MCI owns very few facilities and leases a limited number of facilities in Vermont. MCI does not own any local loop facilities and owns or controls only a small amount of fiber transport facilities in Vermont." *See VT VZ/MCI Merger Order* ¶ 23. Similarly, MCI is authorized to provide facilities-based services (targeted to very large business customers) in only eight local exchange areas. *See MCI Metro Access Transmission Services, LLC Petition for Fining of Public Convenience and Necessity to Provide Facilities-Based Local Exchange Services and Interexchange Services*, Order Granting Authority to Provide Facilities-Based Local Exchange Service and Interexchange Service, ME PUC Docket No. 2004-531 (Sept. 22, 2004); *MCI Metro Access Transmission Services, LLC Request for Authorization to Provide Facility-Based Competitive Local Exchange Service in Additional Exchanges*, Order Approving Application to Amend Order Regarding Scope of Authority, ME PUC Docket No. 2004-672 (Oct. 15, 2004). In contrast, Conversent, one the operating companies of One Communications, has authority to operate as a facilities-based provider in 15 Verizon exchanges in Maine.

[22] As the Applicants acknowledge, similar "policy driven" concerns led the FCC to hold that GTE spin-off Genuity would not be a successor or assign to GTE because it did not control any "bottleneck facilities" and would have "the potential to leverage existing market power from one market to another" and thus would not "occupy a market position comparable to that of the incumbent LEC." *Ex parte* at n.19.

[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 2 (Jan. 16, 2007).

[24] *See* Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control, Public Interest Statement, WC Dkt. No. 05-75, at 33 (Mar. 11, 2005).

ALLTEL, Cingular retained the assets it had used to provide service prior to the divestiture of the AT&T Wireless assets to ALLTEL. The situation was not one in which Cingular was "free to expand" into the product market at issue, but rather one in which Cingular continued to own the assets it had used in the past to compete in that market.

FairPoint also argues that, because FairPoint will operate the exchanges under a "new business plan" and with "whole new systems," it should not be considered a successor or assign of Verizon. *See Ex parte* at 6. This is makeweight. FairPoint's "new business plan" appears to be little more than a pledge to speed broadband deployment or engage in other new initiatives within Verizon' existing lines of business. These plans in no way undermine the conclusion that the Merged Firm will be "substantially continuing" Verizon's business operations in these three states. Indeed, if Verizon had undertaken these initiatives on its own, it would still remain subject to the obligations of a BOC.

Furthermore, the "whole new systems" to which FairPoint refers are the system upgrades that it believes it must undertake to ensure that it provides Verizon's customers with the level of service that they have come to expect from Verizon. FairPoint acknowledges that its existing systems do not have sufficient scope or sophistication to serve its newly acquired customers. For example, it has engaged Capgemini to help it develop a wholesale provisioning system—a system which Verizon already operates but FairPoint lacks.[25] The purpose of FairPoint's back-office upgrades is so that it can step into Verizon's shoes once the transaction is complete.[26] FairPoint's Transition Services Agreement ("TSA") with Verizon is meant to ensure that Verizon's former customers continue to receive the same service they received from Verizon until FairPoint's systems are in place.[27]

FairPoint's assertion that "Verizon New England will remain in business and will continue to operate as a BOC in the *rest of its BOC territory*" is equally unpersuasive. *Ex parte* at 6 (emphasis added). Consumers in Maine, New Hampshire and Vermont will not be protected from discriminatory behavior if the requirements of Sections 271 and 272 continue to apply to Verizon's operations in

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[25] *See* Opposition to Petitions to Deny, *Applications for 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 33 (May 7, 2007) ("VZ/FP Opp.") ("FairPoint already is devoting significant resources to developing and improving the systems and mechanisms necessary to provide wholesale services"); FairPoint ME Interrogatory Response II, at II-1-22 ("FairPoint and Capgemini are working together, with assistance from Verizon, to ensure that current functionality supported by Verizon systems will continue to be supported in the new systems solution").

[26] In response to interrogatories filed in the Maine PUC proceeding, FairPoint has asserted that its wholesale operations "will be sufficient to perform wholesale operations as offered by Verizon today." FairPoint ME Interrogatory Response II, at II-1-21.

[27] *See* VZ/FP Opp. at 27 (stating that "FairPoint may continue to operate under the TSA until it is confident that the cutover can be achieved effectively and without disruption to existing customers or ongoing operations").

Massachusetts or Rhode Island. Congress designed the Section 271 review process to be a state-by-state review under which a BOC must show compliance with the competitive checklist and other requirements on an ongoing basis. Under this regime, Verizon's conduct in Massachusetts or Rhode Island is not determinative of whether the BOC in Maine, New Hampshire, or Vermont is continuing to comply with its obligations under Section 271 and 272. It follows that the instant analysis must be conducted on a state-by-state basis as well.

FairPoint further asserts that the size and scope of the Merged Firm are not comparable to a BOC and therefore BOC obligations should not apply. These arguments do not hold water. There are, for instance, several BOC listed in Section 3(4)(a) of the Act,[28] including Nevada Bell, The Chesapeake and Potomac Telephone Company of West Virginia (now Verizon West Virginia), and Wisconsin Telephone Company (now Wisconsin Bell), that are smaller than the exchanges FairPoint plans to purchase.[29] The Applicants, relying on *BellSouth v. FCC*, 144 F.3d 58, 67 (D.C. Cir. 1998), also argue that BOC requirements were not imposed on GTE during the Bell Atlantic/GTE merger because "BOCs' facilities are generally less dispersed than [those of] GTE," which spanned 27 states. The Applicants assert that the same principle should apply to FairPoint's operations. However, the 1.6 million access lines that FairPoint seeks to acquire are concentrated in three contiguous states, making its operations much more concentrated than those of GTE.[30] It is therefore more likely that, like the BOCs described in the *BellSouth* opinion, FairPoint can "exercise bottleneck control over both ends of a telephone call in a higher fraction of cases than can GTE."[31] Moreover, as the D.C. Circuit noted in *BellSouth*, GTE was "not the dominant provider of local exchange service in any state except [one]." *Id.* In contrast, here, FairPoint will be dominant in three adjacent states post-transaction. The Merged Firm will, therefore, have precisely the characteristics that justify its treatment as a BOC.

Third, FairPoint makes much of the fact that the FCC has never determined that a purchaser of multiple state operations of a BOC should be considered a successor or assign of that BOC. But this is because *the issue has never been raised before the Commission*. *See Ex parte* at 7; *id.* Appendix A. Nor is this surprising since, of the transactions listed by the Applicants in Appendix A, only two actually involved a determination on the merits of applications for consent to transfer exchanges from a BOC to a non-BOC. Nearly all of the transactions were considered *pro-forma* and, in most cases, the

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[28] 47 U.S.C. § 153(4)(A).

[29] *See* "FCC Report 43-01, the ARMIS Annual Summary Report, Table II. Demand Analysis," *available at* http://svartifoss2.fcc.gov/eafs7/adhoc/table_year_tab.cfm?reportType=4301 (data run on July 27, 2007) (customized report of total billable access lines for all ILECs for 2006).

[30] *See* FairPoint Merger Fact Sheet at 1 (attached to Notice of *Ex Parte* Presentation of Karen Brinkmann, Counsel to FairPoint Communications, *Applications for 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 Dkt. No. 07-22 (filed June 20, 2007)).

[31] *Ex parte* at 9 & n.33 (citing *BellSouth Corp.*, 144 F.3d at 67).

FCC did not actually seek comment on whether the transaction itself should be approved or rejected. Instead, the FCC usually sought comment on and scrutinized waiver requests related to the transaction. Because the question of whether the new purchaser should be considered a "successor or assign" of the BOC was not relevant to the waiver requests or was not raised by parties in these proceedings, it is unsurprising that the FCC did not rule on the issue of whether these companies were successors or assigns of a BOC. When successorship has been raised by a party or is clearly relevant to the issues before the Commission, the FCC has ruled on the question at least in one case and has found that the acquirer was a successor or assign.[32] In any event, the issue of whether FairPoint will be a successor or assign to Verizon and subject to its obligations as a BOC has been squarely raised in this proceeding, and the resolution of the question will have a substantial bearing on the scope of FairPoint's duties post-transaction. The FCC must therefore consider and rule on that question here.

Fourth, the Applicants argue that, from a policy perspective, the protections of Sections 271 and 272 are no longer needed because the proposed transaction will purportedly increase local, long distance and wireless services competition to such an extent that the marketplace will curb any anticompetitive behavior. *See Ex parte* at 10. This is wrong for several reasons. As explained above, FairPoint will dominate bottleneck local exchange services in Maine, New Hampshire, and Vermont post-merger and, again, there is no reason to believe that Verizon will use the assets of former MCI to enter the local exchange market in these three states. Even if such entry occurred, competition from an out-of-state Verizon would be insufficient to eliminate the need for Section 271 and 272 safeguards.[33] In addition, it is difficult to see how the transaction will facilitate wireless competition when FairPoint has never stated any intention to enter the wireless market. In fact, the FCC has repeatedly held that mobile wireless service is not a widespread replacement for wireless service.[34] Moreover, as explained, the fact that FairPoint and Verizon will continue to compete in the long distance market in these three states has no bearing on whether section 271 requirements should remain in place. The long distance market is competitive and has remained so in large part because of the Section 271 and 272 safeguards. Absent such protections, FairPoint could act to leverage its market power over local exchange markets to prevent long distance entry.

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[32] *See Sacred Wind Communications, Inc. and Qwest Corp. et al.*, Order, 21 FCC Rcd 9227, ¶ 25 (2006) (finding that Sacred Wind, which had purchased exchanges from Qwest, was a successor to Qwest for purpose of being an ILEC, and therefore the waiver requested by Sacred Wind was unnecessary).

[33] As the FCC just recently reiterated, despite competition from Verizon out-of-region and other CLECs, Section 271 and 272 safeguards remain relevant in Qwest's region because Qwest likely retains bottleneck control over local exchange facilities in those markets. *See Petition of Qwest Communications Int'l Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd 5207, ¶ 47 (rel. Mar. 9, 2007).

[34] *See AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 96 (2007).

It is also critical to emphasize that, as One Communications has demonstrated in great detail, the Merged Firm will face intense financial pressure that will only contribute to its already powerful incentives to evade the market opening requirements of the Act.[35] Among the factors contributing to this risk are FairPoint's highly leveraged financial position, its assumption of tremendous debt in the proposed transaction, and a public promise to shareholders that the Merged Firm will maintain the same dividend post-merger. *Id.* at 14-15. A June 5, 2007 Morgan Stanley analyst report further underscores this point.[36] In the report, Morgan Stanley states that FairPoint's own amended S-4 filing with the SEC on May 25, 2007 contains "forecasts suggest[ing] the company will not generate enough cash to cover its current dividend in 2008, with an increasing deficit." *Id.* at 1. In this context, the Merged Firm will have a powerful incentive to cut back on its investment in wholesale support systems and services needed to provide inputs to CLECs. Such a result could only be addressed if the Merged Firm is subject to the legal compulsion to provide sufficient wholesale services to its competitors under Sections 251 and 271. Public policy therefore strongly supports continued application of those requirements to the assets that FairPoint seeks to acquire in the proposed transaction.

Respectfully submitted,

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[35] *See* Petition to Deny of One Communications Corp., *Applications for 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 14-23 (filed Apr. 27, 2007).

[36] *See* Morgan Stanley Research North America, "FairPoint Communications Lowering 2008 Estimates on New Company Forecasts" (June 5, 2007) ("Morgan Stanley Report") (attached to *Ex Parte* Notice of Communications Workers of American ("CWA"), *Applications for 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 June 20, 2007)).