WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

September 13, 2007

VIA E-MAIL **EX PARTE**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: WC Dkt. No. 07-22

Dear Ms. Dortch:

On September 12, 2007, Greg Kennan of One Communications and Karen Reidy of CompTel as well as the undersigned met separately with (1) Adam Kirschenbaum and Bill Dever of the Wireline Competition Bureau; (2) Ian Dillner, legal advisor to Chairman Kevin Martin; and (3) Chris Moore, legal advisor to Commissioner Deborah Tate. On September 13, 2007, Mr. Kennan, Ms. Reidy and the undersigned met separately with John Hunter, legal advisor to Commissioner Robert McDowell and with Scott Bergmann, legal advisor to Commissioner Jonathan Adelstein. In each meeting, Mr. Kennan, Ms. Reidy and the undersigned made the points set forth in the attached presentation document.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), a copy of this notice is being filed electronically in the above-referenced proceeding. Please contact me if you have any questions.

Respectfully submitted,

_______/s/__________

Thomas Jones
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006
202-303-1111

Enclosure

cc: Ian Dillner
Chris Moore
Scott Bergmann
John Hunter
Adam Kirschenbaum
Bill Dever

ONE COMMUNICATIONS EX PARTE PRESENTATION REGARDING THE PROPOSED ACQUISITION OF VERIZON ILEC ASSETS BY FAIRPOINT

WC Docket No. 07-22
(September 12 & 13, 2007)

- **TRANSFER OF THE VERIZON ILECS AT ISSUE TO FAIRPOINT WOULD RENDER THE MERGED FIRM A BOC IN THE AREAS SERVED BY THE TRANSFERRED ILECS**
  - There is no question that the ILECs subject to the proposed transfer are part of a BOC - New England Telephone and Telegraph Company (now known as Verizon New England Inc.); those ILECs must continue to be classified as BOCs if the Merged Firm qualifies as a "successor or assign" under Section 3(4)(B)
  - The Commission should clarify *in this proceeding* that the Merged Firm would qualify as successor or assign for these purposes
    - FairPoint's assertion that its non-binding promises to provide wholesale inputs to competitors obviate the need to assess whether the Merged Firm qualifies as a successor/assign is absurd; if voluntary commitments were sufficient to address the risk of BOC abuse of market power, Congress would never have enacted Sections 271 and 272 and it would have never required continued compliance with these requirements after a BOC receives Section 271 approval in a state; even the extensive legal compulsions in Section 251(c) were insufficient to address the problem of BOC market power;
    - FairPoint has apparently no intention of complying with the requirements of Section 271 and 272: it has stated that it will offer Section 271 UNEs "provided that reasonable terms [defined by FairPoint!] can be reached" (FairPoint June 18^{th} Ex Parte at 3) and it has stated that it believes it should not be "subject . . . to the nondiscrimination provisions of Section 272(e)" (*id.* at 11).
  - The Merged Firm would meet the definition of "successor or assign;" as FairPoint has emphasized over and over again, there will be "substantial continuity" between Verizon and the Merged Firm in virtually every aspect of the retail and wholesale businesses of the ILECs subject to the proposed transfer; Fairpoint has stated that it will
    - ensure that "[n]o existing Verizon retail service will be discontinued or interrupted as a result of the proposed transaction"
    - 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"
    - adopt Verizon's interconnection agreements

  - continue to provide wholesale services in the same manner as Verizon, including offering an "OSS similar in functionality to what is offered by Verizon"
  - honor Verizon's existing wholesale contractual arrangements
  - maintain Verizon's performance assurance plans[1]

- Nor is there any question that the pro-competition goals of the Act would be served by treating the Merged Firm as a successor or assign
  - eliminating BOC status would remove the requirement that the Merged Firm continue to comply with the market-opening requirements of the competitive checklist just at the time when (as discussed below) the transfer of ownership to FairPoint most jeopardizes continued compliance with these requirements
  - eliminating BOC status is flatly inconsistent with the intent of Congress to ensure that BOCs continue to comply with their market-opening obligations after receiving Section 271 approval in a state; it cannot be that Congress expected that a BOC could shed this obligation by transferring its ILECs to another owner

- FairPoint's assertions to the contrary are without merit
  - FairPoint's reliance on the *ALLTEL* case is misplaced: (1) in that case, ALLTEL purchased divested wireless assets from AT&T-Cingular in areas where the merged AT&T-Cingular continued to operate as a mobile wireless provider offering the same services as it did prior to the divestiture; ALLTEL, therefore, did not "step[] into Cingular's shoes" or continue "Cingular's business"; in this case, *Verizon is exiting the markets served by its ILECs* and retaining its wireless and legacy MCI assets that the FCC has held compete in different markets from the legacy BOC ILECs; and (2) the underlying policy objectives were served by not treating ALLTEL as a successor or assign for purposes of Cingular's E911 consent decrees since ALLTEL was subject to the E911 legal requirements and of course Cingular was still subject to the consent decree requirements in the relevant areas; in the instant case, failure to treat the Merged Firm as a successor or assign would mean that *the Section 271 obligations would disappear entirely in the three states at issue*
  - Nor is it true, as FairPoint asserts, that the size of the Merged Firm is not comparable to a BOC; several BOCs listed in Section 3(4)(a) are smaller than the Merged Firm would be, including Nevada Bell, C&P of West Virginia (now Verizon West Virginia) and Wisconsin Telephone Company (now Wisconsin Bell); nor is the exemption of GTE from treatment as a BOC relevant since the concentration of ILEC assets in a limited geographic area served by the Merged Firm fundamentally distinguishes it from GTE's diffuse ILEC presence;

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[1] *See* One Communications July 27, 2007 *Ex Parte* at 2-3 for cites to these promises.

  - FairPoint's reliance on the absence of FCC determinations in prior transactions as to whether BOC assets qualified as successors or assigns is beside the point; the issue was not raised in prior proceedings; it has been here

- **THE MERGED FIRM SHOULD NOT BE ELIGIBLE TO TAKE ADVANTAGE OF THE SECTION 251(f) EXEMPTIONS**

  - The Commission must clarify in this proceeding that the Merged Firm is ineligible for the Section 251(f) exemptions

  - FairPoint's non-binding expressions of intent to forego reliance on these exemptions in the future does not, as FairPoint contends, render this a "non-issue:" FairPoint has left itself the flexibility to go back on its promises, for example claiming that "circumstances have changed;" indeed, FairPoint has never stated that it does not *qualify* for the Section 251(f) exemptions and it has never stated that it waives its right to seek the protections of Section 251(f); the Merged Firm may well therefore attempt to take advantage of Section 251(f) in the future

  - Permitting the Merged Firm to do so would be inconsistent with the terms of the Act and sound public policy:

    - preventing enforcement of Section 251(c) is contrary to the continued classification of the Merged Firm as a BOC since the most important obligation of a BOC is the duty to comply with the market-opening requirements of the Act; notably, this determination would be left to the states under Section 251(f), thus effectively eliminating FCC jurisdiction over enforcement of Section 271/272

    - such an outcome would be terrible public policy since it would essentially increase the value of the ILEC assets at issue when owned by a smaller ILEC based entirely on an artifact of regulation; the FCC has adopted USF regulations (e.g., Section 54.305(b) which prevents increased USF payments due to change in ILEC ownership) to prevent this kind of outcome.

- **APPLICANTS HAVE FAILED TO DEMONSTRATE THAT THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST IN LIGHT OF THE THREAT IT POSES TO WHOLESALE SERVICES**

  - The Merged Firm has limited financial resources and managerial expertise and it has little or no experience as a provider of wholesale UNEs to CLECs; of the 64,000 lines FairPoint currently serves in northern New England, not a single one is sold to a wholesale purchaser; indeed FairPoint has essentially no wholesale operations support systems in place right now; nevertheless, FairPoint has taken on the task of designing an entirely new wholesale OSS from scratch for the ILECs subject to the proposed transfer

  - FairPoint has made ever-more extravagant commitments to shareholders (e.g., no reduction in annual dividend for VT, ME and NH while at the same time not increasing local rates), consumers (e.g., increased broadband deployment and the introduction of video service), and unions (e.g., job retention)

- As the dominant firm controlling the only connection to the vast majority of business customers in the relevant territory, the Merged Firm will have powerful incentives to deny, delay and degrade wholesale services offered to competitors

- Accordingly, the Merged Firm will have powerful incentives to target its resources toward to meeting its commitments to shareholders, consumers and union and to divert resources away from wholesale services; in addition, the Merged Firm will have powerful incentives to discontinue its reliance on Verizon's wholesale OSS because, under the Agreement and Plan of Merger, the Merged Firm pays huge monthly fees to Verizon for use of these services (beginning at $14.2 million per month) and these fees escalate each month by $500,000 beginning in the 14^{th} month

- In this regard, wholesale customers' experience in trying to obtain wholesale inputs from Hawaiian Telcom after it was purchased by the Carlyle Group provides a cautionary tale

- One Communications serves more than 100,000 switched access line equivalents in the Maine, New Hampshire and Vermont; the proposed transaction places One Communications' customers and other business customers in the region at serious risk of experiencing degraded services

- This is precisely the kind of "backsliding" that the Section 271 process and BOCs' continued obligation to comply with the competitive checklist are designed to prevent

- **THE THREAT TO WHOLESALE SERVICE POSED BY THE MERGER CAN ONLY BE ADDRESSED WITH SUFFICIENT CONDITIONS**

  - Conditions must limit the Merged Firm's opportunity to act on its powerful incentives to short-change wholesale provisioning and to increase the cost of wholesale services; to achieve this end, wholesale conditions must include the following:

  - Classification of the Merged Firm as a BOC in the areas served by the transferred ILECs and clarification that the Merged Firm is ineligible for the Section 251(f) exemptions in those areas

  - Independent Third Party Testing

    - The Merged Firm must retain an independent third party with expertise in ILEC wholesale OSS operations and must design and follow a plan for the third party expert's review of the all aspects of ordering, provisioning, maintenance and repair for UNEs, special access facilities, and interconnection in the region served by the transferred ILECs;

- The Merged Firm's selection of the independent third party and the plan for wholesale OSS testing must be subject to review and comment by interested parties and FCC approval;

- The Merged Firm must be prohibited from converting wholesale operations from Verizon's OSS to the Merged Firm's OSS until the independent third party has determined that (1) the Merged Firm's wholesale OSS operate at a level of service quality at least equal to Verizon's prior to the transaction and (2) the Merged Firm has established the processes and procedures and dedicated sufficient resources to its wholesale OSS operations to ensure that the Merged Firm's wholesale OSS will continue to operate at a level of service quality at least equal to Verizon's prior to the transaction; the independent third party tester's conclusions should be subject to notice and comment and approval by the Chief of the Wireline Competition Bureau prior to any cutover to the Merged Firm's wholesale OSS

- The Merged Firm must also be prohibited from having a "black out" period in which wholesale OSS does not function during the transition from Verizon's systems to the Merged Firm's systems and the Section 271 PAPs must apply during the transition period

➢ The Merged Firm should be prohibited from forcing wholesale customers to incur extra expenses as a result of the inefficiencies created by the proposed transfer

- the Merged Firm should be prohibited from increasing its wholesale customers' costs in any way as a result of its adoption of new wholesale OSS; for example, the Merged Firm should not be permitted to charge wholesale customers for training in its new OSS; wholesale customers should not be required to develop their own OSS interfaces or other OSS features in order to continue to operate as they have prior to the proposed transaction; and the Merged Firm should be prohibited from seeking to recover any of the costs associated with its adoption of new wholesale OSS in wholesale rates of any kind;

- the Merged Firm's special access and UNE prices should be frozen for a suitable period of time (e.g., four years)

➢ The Merged Firm *and Verizon* must be prohibited from Reneging on Special Access Discounts and the Merged Firm must honor all Interconnection Agreements;

- the Merged Firm must be required to step into Verizon's shoes for all special access offers (e.g., tariffs and agreements);

- the Merged Firm and Verizon must make appropriate adjustments in volume/term commitment requirements to account for the transfer of the ILECs at issue; for example, if a CLEC has been obtaining a 10 percent discount under a special access volume commitment plan from Verizon, post-transaction it should continue to receive the same discount (1) from the Merged Firm on the condition that the CLEC meets the volume commitment that is appropriately adjusted to reflect reduction in the size of the relevant geographic territory to include only

Maine, New Hampshire and Vermont; and (2) from Verizon on the condition that the CLEC meets the volume commitment that is appropriately adjusted to reflect the reduction in the size of the relevant geographic territory to exclude Maine, New Hampshire and Vermont

- prohibit the Merged Firm from exercising any right to cancel or renegotiate an interconnection agreement that might arise as a result of the proposed transaction