

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Applications Filed for the Transfer of Certain
Spectrum Licenses and Section 214
Authorizations in the States of Maine, New
Hampshire, and Vermont from Verizon
Communications Inc. and its Subsidiaries to
FairPoint Communications, Inc.

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WC Docket No. 07-22

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MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2007

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By the Commission: Commissioners Copps and Adelstein dissenting and issuing separate statements.

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I. INTRODUCTION

1. Verizon Communications Inc. (Verizon Communications) and its subsidiaries<sup>1</sup> (collectively, Verizon) and FairPoint Communications, Inc. (FairPoint) (together with Verizon, the Applicants) filed a

<sup>1</sup> The Verizon Communications Inc. subsidiaries are Verizon New England Inc. (Verizon New England), NYNEX Long Distance Company (NYNEX Long Distance), Bell Atlantic Communications, Inc. (BACI), Verizon Select (continued....)

series of applications<sup>2</sup> pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended (Communications Act or Act).<sup>3</sup> Grant of these applications will result in the transfer of domestic section 214 authority and the assignment of certain spectrum licenses and international section 214 authorizations.

2. In accordance with the terms of sections 214(a) and 310(d), we must determine whether the Applicants have demonstrated that the proposed transactions would serve the public interest, convenience, and necessity.<sup>4</sup> Based on the record before us, we find that the transaction meets this standard.<sup>5</sup> We

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Services Inc. (VSSI), Northern New England Spinco Inc. (Spinco), and Northern New England Telephone Operations Inc. (Telco).

<sup>2</sup> See *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, Public Notice, 22 FCC Rcd 5035 (2007) (*Public Notice*); see also 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, Consolidated Application for Consent to Transfer Assets, WC Docket No. 07-22 at 7 (filed Jan. 31, 2007) (FairPoint/Verizon Application); ITC-ASG-20070206-00059; ITC-ASG-20070206-00060; ITC-ASG-20070206-00061; ITC-ASG-20070206-00062; ULS File Nos. 0002921062, 0002921107, 50005CFTC07. The *Public Notice* set due dates of April 13, 2007 for the filing of Comments and Petitions to Deny; April 23, 2007 for Responses and Oppositions; and April 30, 2007 for Replies. *Public Notice*, 22 FCC Rcd at 2035. On April 11, 2007, the Wireline Competition Bureau (Bureau) extended the pleading cycle deadlines by two weeks in response to a petition by the Communications Workers of America and International Brotherhood of Electrical Workers. See *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, Order, 22 FCC Rcd 6897 (WCB 2007). Appendix A lists the parties that filed formal pleadings in this proceeding. In addition to those formal pleadings, we have received *ex parte* submissions. All pleadings and comments are available on the Commission's Electronic Comment Filing System (ECFS) website at [www.fcc.gov/cgb/ecfs/](http://www.fcc.gov/cgb/ecfs/). *Public Notice*, 22 FCC Rcd at 5039.

<sup>3</sup> See 47 U.S.C. §§ 214, 310(d). Pursuant to section 214 of the Communications Act, the Applicants filed applications seeking Commission approval to transfer domestic and assign international section 214 authorizations held by Verizon and its subsidiaries to FairPoint. 47 U.S.C. § 214. Pursuant to section 310(d) of the Communications Act, the Applicants filed applications seeking Commission approval of (1) the *pro forma* assignment of Part 101 Common Carrier Fixed Point-to-Point Microwave and Industrial/Business Pool licenses from Verizon New England to Telco, as controlled by Spinco and ultimately the Verizon shareholders, as part of a multi-step *pro forma* reorganization, see discussion *infra* Part II.B, and (2) an application seeking Commission approval of the transfer of control of the licenses held by Telco from Spinco to FairPoint. 47 U.S.C. § 310(d); see also Appendix B (listing the applications for assignment and transfer of control of wireless licenses filed by the Applicants). In the *pro forma* assignment applications, Verizon New England is partially assigning six of its wireless licenses and fully assigning 24 others. The authority provided by these licenses for all other areas will remain with Verizon New England. Due to limitations in the ability of the Universal Licensing System (ULS) to accommodate five of the six partial assignment applications, the Applicants request that five licenses be partitioned such that the portions of the licenses providing authority to operate in Maine, New Hampshire, and Vermont are assigned to Telco. Applicants request that Verizon New England retain the currently issued call signs for these five licenses and requests that new call signs be issued to the portions of the licenses assigned to Telco. See ULS File No. 0002921065 at Attachment 3 (amended Mar. 2, 2007).

<sup>4</sup> See, e.g., *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5664, 5664, para. 2 (2007) (*AT&T/BellSouth Order*); *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18292, para. 2 (2005) (*SBC/AT&T Order*); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75,

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conclude that it is unlikely the merger will result in any anticompetitive effects or other public interest harms. Specifically, the Applicants do not compete in any of the relevant local exchanges. Moreover, after consummation of the transaction, the Applicants will compete for large business and long distance customers. The transaction also is likely to produce public interest benefits, including the accelerated deployment of broadband throughout the region.

## II. BACKGROUND

### A. Description of the Applicants

#### 1. The Transferor

3. Verizon Communications, a publicly traded Delaware corporation, owns operating subsidiaries that provide a range of communications services in the United States and throughout the world.<sup>6</sup> The company's operating subsidiaries offer local telephone service, as well as broadband, nationwide long distance, high-capacity connections, video, international, wireless, and other services.<sup>7</sup>

4. Verizon Communications, through Verizon New England, provides local exchange service and exchange access service to approximately 1.5 million access lines in 352 exchanges in Maine, New Hampshire, and Vermont.<sup>8</sup> Verizon Communications also provides long distance services in Maine, New Hampshire, and Vermont, as well as other areas of the United States, through its subsidiaries, NYNEX Long Distance, BACI, and VSSI.<sup>9</sup>

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Memorandum Opinion and Order, 20 FCC Rcd 18433, 18435, para. 2 (2005) (*Verizon/MCI Order*); *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, File Nos. 0002031766, et al., Memorandum Opinion and Order, 20 FCC Rcd 13967, 13976, para. 20 (2005) (*Sprint/Nextel Order*); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987, para. 2 (1997) (*Bell Atlantic/NYNEX Order*); *Merger of MCI Communications Corp. and British Telecommunications PLC*, GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15353, para. 2 (1997) (*BT/MCI Order*).

<sup>5</sup> We decline to address FairPoint's "all-or-nothing" waiver petition in this Order because it is the subject matter of a pending Commission proceeding. See *Petition of FairPoint Communications, Inc. for a Waiver of the All-or-Nothing Rule in Connection with its Acquisition of Certain Verizon Properties in Maine, New Hampshire and Vermont*, WC Docket No. 07-66, Public Notice, 22 FCC Rcd 6723 (2007).

<sup>6</sup> See FairPoint/Verizon Application at 6-8; see also ITC-ASG-20070206-00059; ITC-ASG-20070206-00060; ITC-ASG-20070206-00061; ITC-ASG-20070206-00062; ULS File Nos. 0002921062, 0002921107, 50005CFTC07.

<sup>7</sup> See FairPoint/Verizon Application at 7. Further, Verizon Communications is a majority owner of Celco Partnership d/b/a Verizon Wireless (Verizon Wireless), which services approximately 56 million wireless voice and data subscribers in the United States. See *id.* at 8. The transaction does not involve any of the wireless assets, section 214 authorizations, or Title III licenses that are held by Verizon Wireless. See *id.* at 2 n.1.

<sup>8</sup> See *id.* at 11. Verizon New England is a direct, wholly owned subsidiary of NYNEX Corporation, a Delaware corporation, which in turn is a direct, wholly owned subsidiary of Verizon Communications, a Delaware corporation. See *id.* at 6.

<sup>9</sup> See *id.* at 7. NYNEX Long Distance, a Delaware corporation, is a direct, wholly owned subsidiary of Bell Atlantic Worldwide Services Group, Inc. (Bell Atlantic Worldwide), a Delaware corporation, which in turn is a direct, wholly owned subsidiary of NYNEX Corporation. See *id.* at 6. BACI, a Delaware corporation, is a direct, wholly owned subsidiary of Verizon Communications. See *id.* at 7. VSSI, a Delaware corporation, is a wholly owned subsidiary of GTE Corporation, a New York corporation, which in turn is a wholly owned subsidiary of Verizon

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5. Three additional Verizon entities – Spinco, Telco, and Enhanced Communications of Northern New England Inc. (Newco) – have been formed in order to effectuate the proposed transaction.<sup>10</sup> Spinco, a Delaware corporation, is a direct, wholly owned subsidiary of Verizon New England. Newco, a Delaware corporation, is a direct, wholly owned subsidiary of Spinco.<sup>11</sup> Telco, a Delaware limited liability company, is a direct, wholly owned subsidiary of Verizon New England.<sup>12</sup>

## 2. The Transferee

6. FairPoint, a publicly traded Delaware corporation, provides wireline local exchange service and exchange access service through its local exchange carrier (LEC) operating subsidiaries in 18 states, including Maine, New Hampshire, and Vermont.<sup>13</sup> FairPoint does not provide any local exchange service in the exchanges in which Verizon currently operates in these three states.<sup>14</sup> FairPoint's interexchange carrier subsidiaries provide domestic and international long distance toll services in 18 states, including Maine, New Hampshire, and Vermont.<sup>15</sup>

## B. Description of the Transaction

7. On January 15, 2007, FairPoint entered into an Agreement and Plan of Merger with Spinco and Verizon Communications (Merger Agreement).<sup>16</sup> The Applicants state that the proposed transaction “consists of two distinct but immediately sequential parts.”<sup>17</sup> First, Verizon will undertake an internal reorganization consisting of the following sequential *pro forma* transactions: (1) Verizon New England will transfer certain assets, liabilities, and customer relationships relating to its local exchange and long distance operations in Maine, New Hampshire, and Vermont to Telco; (2) Verizon New England will transfer 100 percent of its interest in Telco directly to Spinco; (3) Verizon New England will transfer the stock of Spinco to Verizon Communications; and (4) Verizon Communications will distribute the stock of Spinco directly to the shareholders of Verizon Communications, such that Spinco (and therefore Telco and Newco, each a direct subsidiary of Spinco) no longer will be subsidiaries of Verizon Communications.<sup>18</sup>

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Communications. *See id.* Verizon Communications directly owns more than 92% of the equity of GTE Corporation and indirectly owns the remainder. *Id.*

<sup>10</sup> *See id.* at 9-10; Letter from Joseph Jackson, Associate Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 1 (filed Oct. 29, 2007) (Verizon Oct. 29 *Ex Parte* Letter).

<sup>11</sup> *See id.* at 8.

<sup>12</sup> *See id.* at 9.

<sup>13</sup> *See id.* at 8, 11. FairPoint also owns and operates companies that provide telecommunications services in Alabama, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Massachusetts, Missouri, New York, Ohio, Oklahoma, Pennsylvania, Virginia, and Washington. *Id.* at 11 n.9.

<sup>14</sup> *See* FairPoint/Verizon Application at 11-12.

<sup>15</sup> *See id.*

<sup>16</sup> *See id.* at 9.

<sup>17</sup> *Id.*

<sup>18</sup> *See* Verizon October 29 *Ex Parte* Letter (identifying the Applicants' selected transaction structure); *see also* Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Dec. 12, 2007) (Verizon Dec. 12 *Ex Parte* Letter) (stating that per the alternate description of the transaction provided in the application, Telco had been converted into a limited liability company); FairPoint/Verizon Application at 10, n.6.

8. Second, immediately following the *pro forma* transactions, Applicants state that Spinco will be merged with and into FairPoint, resulting in the transfer of control of Telco and Newco and the transfer of assets.<sup>19</sup> FairPoint will be the surviving company (under its existing name), and will own all of the stock of Telco and Newco.<sup>20</sup>

9. The Applicants contend that the merger will serve the public interest. Specifically, they assert that the merger will produce numerous public interest benefits, including enhanced service quality, increased capital expenditures that will result in a variety of high-quality services,<sup>21</sup> accelerated broadband deployment, and the creation of over 700 new jobs and three new local service centers in the region.<sup>22</sup> The Applicants also assert that the merger will not reduce competition because FairPoint and Verizon do not currently compete for local exchange customers in any of the affected exchanges.<sup>23</sup> The Applicants contend that the merger will promote competition because Verizon will continue to provide large business and long distance services in the region and compete with FairPoint for the provision of these services.<sup>24</sup> Further, FairPoint proposes to “assume all of the rights and obligations of Verizon” in

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<sup>19</sup> See FairPoint/Verizon Application at 10. Verizon New England will assign its international section 214 authorization, ITC-214-20030516-00243, to Telco. This international section 214 authorization provides authority to provide facilities-based services between the Lubec exchange, located in Maine, and the Campobello Island exchange of New Brunswick Telecommunications, located in New Brunswick, Canada. See *International Authorizations Granted*, Report No. TEL-00718, Public Notice, 18 FCC Rcd 19808 (IB 2003). Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and VSSI will each assign certain accounts receivable, liabilities and customer relationships related to their provision of international service to Enhanced Communications of Northern New England Inc. BACI will continue to provide international service to its remaining customers pursuant to its existing international section 214 authorizations, ITC-214-20020213-00082, ITC-214-20020402-00170, and ITC-214-20020705-00327. NYNEX Long Distance Company will continue to provide international service to its remaining customers pursuant to its existing international section 214 authorizations, ITC-214-20020213-00081, ITC-214-20020402-00168, and ITC-20020705-00326. VSSI will continue to provide international service to its remaining customers pursuant to its existing international section 214 authorizations, ITC-214-20020213-00083, ITC-214-20020213-00084, ITC-21420020402-00167, ITC-214-20020402-00169, ITC-214-20020705-00324, and ITC-214-20020705-00325. Enhanced Communications of Northern New England Inc. will provide international service to its new customers pursuant to international section 214 authorization, ITC-214-20070206-00437 (to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission’s rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission’s rules, 47 C.F.R. § 63.18(e)(1), (2)). For the purposes of our review in this Order, the primary subject of our concern is the merger of Spinco with and into FairPoint. We therefore hereinafter refer to the transaction as a “merger.”

<sup>20</sup> See FairPoint/Verizon Application at 10. Upon closing of the transactions, the shareholders of Verizon Communications will own approximately 60% of FairPoint, and the pre-merger shareholders of FairPoint will own approximately 40% of post-merger FairPoint. See *id.* at 3, n.2. Applicants state that current FairPoint management will manage and control the day-to-day operations of FairPoint following consummation of the proposed transaction. See *id.* at 3. Further, the Applicants have amended their application to note that Verizon will have the right to nominate only four of the nine members of the FairPoint board of directors prior to the closing. See Letter from Karen Brinkmann, Counsel to FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Nov. 16, 2007).

<sup>21</sup> FairPoint identifies these services as local and long distance phone services, dial-up and digital subscriber line (DSL) Internet access to residential and business customers, Web hosting, domain name registration, and hosted e-mail services. See *id.* at 18.

<sup>22</sup> See *id.* at 16-19; Letter from Karen Brinkmann, Counsel for FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22, Attach. (filed July 10, 2007)-(FairPoint July 10 *Ex Parte* Letter); Letter from Karen Brinkmann, Counsel for FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 1 (filed Nov. 16, 2007).

<sup>23</sup> See FairPoint/Verizon Application at 19-20.

<sup>24</sup> See Letter from Karen Brinkmann, Counsel for FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 6 (filed June 18, 2007) (FairPoint June 18 *Ex Parte* Letter). Verizon states that it has not, nor does it intend to, sign any non-compete agreements. *Id.*

Maine, New Hampshire and Vermont.<sup>25</sup> For example, FairPoint anticipates that existing wholesale agreements will remain largely the same and that Telco will assume those interconnection agreements between Verizon New England and other carriers that relate to service wholly within Maine, New Hampshire, and Vermont.<sup>26</sup>

### C. Applications and Review Process

10. On January 31, 2007, Verizon and FairPoint jointly filed a series of applications seeking Commission approval of the multi-step transaction that will ultimately result in the transfer of control to FairPoint of domestic 214 authorizations and assignment of licenses and international 214 authorizations held directly and indirectly by Verizon through its various subsidiaries.<sup>27</sup>

## III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

11. Pursuant to sections 214(a) and 310(d) of the Act,<sup>28</sup> the Commission must determine whether the proposed transfer of control to FairPoint of certain licenses and authorizations held and controlled by Verizon will serve the public interest, convenience, and necessity.<sup>29</sup> In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the proposed public interest benefits.<sup>30</sup> The Applicants

<sup>25</sup> See FairPoint/Verizon Application at 20.

<sup>26</sup> See *id.* Applicants state that Verizon New England interconnection agreements that relate, in part, to service outside Maine, New Hampshire, and Vermont, will be modified to apply to Telco and the other party in Maine, New Hampshire, and/or Vermont only. *Id.* In the alternative, Telco will enter into new agreements on substantially the same terms and conditions following discussion with and required notice to the affected parties and state commissions, as appropriate. *Id.*

<sup>27</sup> See discussion *supra* n.3 (discussing the assignment applications filed by the Applicants to reflect this internal reorganization).

<sup>28</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>29</sup> Section 310(d) of the Act, 47 U.S.C. § 310(d), requires that we consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under section 308 of the Act, 47 U.S.C. § 308. See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5672, para. 19; *SBC/AT&T Order*, 20 FCC Rcd at 18300 n.60; *Verizon/MCI Order*, 20 FCC Rcd at 18443 n.59; *Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-50, Memorandum Opinion and Order, 20 FCC Rcd 13053, 13063-63, para. 17 (2005) (*Alltel/Western Wireless Order*); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket 04-70, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21542, para. 40 (2004) (*Cingular/AT&T Wireless Order*); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 485, para. 18 (2004) (*News Corp./Hughes Order*). Thus, we must examine the Applicants' qualifications to hold licenses. See discussion *infra* at Part IV.C (FairPoint's Qualifications to Acquire Control of Verizon's Licenses).

<sup>30</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5672, para. 19; *SBC/AT&T Order*, 20 FCC Rcd at 18300, para. 16; *Verizon/MCI Order*, 20 FCC Rcd at 18443, para. 16; *Sprint/Nextel Order*, 20 FCC Rcd at 13976, para. 20; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-43, para. 40; *News Corp./Hughes Order*, 19 FCC Rcd at 483, para. 15; *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14046, paras. 20, 22 (2002) (*Bell Atlantic/GTE Order*); *Applications of VoiceStream Wireless Corporation and Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee*, IB Docket No. 00-187, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789, para. 17 (2001)

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bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.<sup>31</sup> If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we may designate the application for hearing.<sup>32</sup>

12. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,”<sup>33</sup> which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.<sup>34</sup> Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.<sup>35</sup>

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(*Deutsche Telekom/VoiceStream Order*); *Applications of Ameritech Corp. and SBC Communications Inc.*, WC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14737-38, para. 48 (1999) (*SBC/Ameritech Order*); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

<sup>31</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5672, para. 19; *SBC/AT&T Order*, 20 FCC Rcd at 18300, para. 16; *Verizon/MCI Order*, 20 FCC Rcd at 18443, para. 16; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40 (citing, e.g., *News Corp./Hughes Order*, 19 FCC Rcd at 483, para. 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23255, para. 26 (2002) (*AT&T/Comcast Order*); *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)(Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002) (*EchoStar/DirecTV Order*)).

<sup>32</sup> We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that granting the applications would serve the public interest. See *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979). We may do so, however, if we find that a hearing would be in the public interest. With respect to the applications to transfer licenses subject to Title III of the Communications Act, however, if we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, section 309(e) of the Communications Act requires that we designate the application for hearing. 47 U.S.C. § 309(e); see *EchoStar/DirecTV Order*, 17 FCC Rcd at 20574, para. 25; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40.

<sup>33</sup> *AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 20; *SBC/AT&T Order*, 20 FCC Rcd at 18301, para. 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443, para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41 (citing, e.g., *News Corp./Hughes Order*, 19 FCC Rcd at 483-84, para. 16; *AT&T/Comcast Order*, 17 FCC Rcd at 23255, para. 27; *EchoStar/DirecTV Order*, 17 FCC Rcd at 20575, para. 26).

<sup>34</sup> See 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act), 254, 332(c)(7)); 1996 Act, Preamble; *SBC/AT&T Order*, 20 FCC Rcd at 18301, para. 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443-44, para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41; see also *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom Inc.*, WC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030-31, para. 9 (1998) (*WorldCom/MCI Order*); *2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WC Docket No. 01-14, Report and Order, 16 FCC Rcd 22668, 22696, para. 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)); cf. 47 U.S.C. §§ 521(4), 532(a).

<sup>35</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 20; *SBC/AT&T Order*, 20 FCC Rcd at 18301, para. 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443-44, para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41 (citing, e.g., *AT&T/Comcast Order*, 17 FCC Rcd at 23255, para. 27; *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9).

In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.<sup>36</sup>

13. In determining the competitive effects of the merger, our analysis is informed by, but not limited to, traditional antitrust principles.<sup>37</sup> The Commission is charged with determining whether the transfer of control serves the broader public interest.<sup>38</sup> In the communications industry, competition is shaped not only by antitrust principles, but also by the regulatory policies that govern the interaction of industry players.<sup>39</sup> In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition.<sup>40</sup> We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another.<sup>41</sup> For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create or enhance market power, increase barriers to entry by potential competitors, and/or create opportunities to disadvantage rivals in anticompetitive ways.<sup>42</sup>

14. The Commission has the authority to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the transaction serves the public interest.<sup>43</sup> Indeed, our public interest authority enables us to impose and enforce conditions based upon our extensive regulatory and enforcement experience to ensure that the merger, overall, will serve the public interest.<sup>44</sup> Despite broad

<sup>36</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 20; *SBC/AT&T Order*, 20 FCC Rcd at 18301-02, para. 17; *Verizon/MCI Order*, 20 FCC Rcd at 18444, para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41.

<sup>37</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 21; *Verizon/MCI Order*, 20 FCC Rcd at 18444, para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *News Corp./Hughes Order*, 19 FCC Rcd at 484, para. 17; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14046, para. 23; *WorldCom/MCI Order*, 13 FCC Rcd at 18033, para. 13.

<sup>38</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 21.

<sup>39</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 21; *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 118444, para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *AT&T/Comcast Order*, 17 FCC Rcd at 23256, para. 28.

<sup>40</sup> See generally *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 21; *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 118444, para. 18; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42.

<sup>41</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 21.

<sup>42</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 21; *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 118445, para. 18; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6550, 6553, paras. 5, 15 (2001) (*AOL/Time Warner Order*); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42.

<sup>43</sup> See 47 U.S.C. § 303(r); 47 U.S.C. § 214(c). See generally *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22; *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 19; *Verizon/MCI Order*, 20 FCC Rcd at 118445, para. 19; *Alltel/Western Wireless Order*, 20 FCC Rcd at 13065-66, para. 21 (conditioning approval on the divestiture of operating units in specified markets); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43 (same); *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 (conditioning approval on the divestiture of MCI's Internet assets).

<sup>44</sup> 47 U.S.C. § 303(r); see, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5674, para. 22; *SBC/AT&T Order*, 20 FCC Rcd at 18303, para. 19; *Verizon/MCI Order*, 20 FCC Rcd at 18445, para. 19; *Alltel/Western Wireless Order*, 20 FCC Rcd at 13065-66, para. 21; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43; *Bell Atlantic/GTE*

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authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)<sup>45</sup> and that are related to the Commission's responsibilities under the Communications Act and related statutes.<sup>46</sup>

#### IV. POTENTIAL PUBLIC INTEREST HARMS

15. In this section, we consider the potential public interest harms, including potential harms to competition, arising from this proposed transaction. Consistent with Commission precedent, in addition to considering whether the transfer of control will reduce existing competition, we also must focus on its likely effect on future competition.<sup>47</sup> In doing so, we recognize that FairPoint will assume local exchange facilities needed by other providers,<sup>48</sup> but find, on the record before us, that the proposed transaction is not likely to have an anticompetitive effect in Maine, New Hampshire, or Vermont.

##### A. Market Concentration

16. Based on evidence in the record, we find that the proposed transaction is not likely to increase market concentration. The record evidence indicates that the proposed transaction is not likely to adversely affect competition because Verizon and FairPoint do not compete for local exchange customers in the affected exchanges.<sup>49</sup> This finding is consistent with our view that the sale of rural exchanges from large incumbent LECs to smaller incumbent LECs that specialize in providing service in rural areas is unlikely to raise the potential of competitive harm.<sup>50</sup> In addition, the Applicants contend that after the transaction, Verizon affiliates will continue to provide "large business and long distance services" in

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*Order*, 15 FCC Rcd at 14047, para. 24; *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10; *FCC v. Nat'l Comm. for Broad.*, 436 U.S. 775 (1978); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989).

<sup>45</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5675, para. 22; *SBC/AT&T Order*, 20 FCC Rcd at 18303, para. 19; *Verizon/MCI Order*, 20 FCC Rcd at 18445, para. 19; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 43.

<sup>46</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5675, para. 22; *SBC/AT&T Order*, 20 FCC Rcd at 18303, para. 19; *Verizon/MCI Order*, 20 FCC Rcd at 18445, para. 19; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 43; *News Corp./Hughes Order*, 19 FCC Rcd at 534, para. 131.

<sup>47</sup> See, e.g., *Verizon Communications, Inc. and América Móvil, S.A. de C.V. Application for Authority to Transfer Control of Telecomunicaciones de Puerto Rico, Inc.*, WC Docket No. 06-113, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd 6195, 6205, para. 22 (*Verizon/América Móvil Order*); *Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc.* WT Docket No. 06-96, 21 FCC Rcd 13580, 13591, para. 16 (2006) (*DoCoMo-Guam Cellular Order*); *Midwest Wireless Holdings, L.L.C. and AllTel Communications, Inc.*, WC Docket No. 05-339, 21 FCC Rcd at 11526, 11538, para. 19 (2006) (*ALLTEL/Midwest Wireless Order*); *SBC/AT&T Order*, 20 FCC Rcd at 18302, para. 18; *Verizon/MCI Order*, 20 FCC Rcd at 18444, para. 18; *Sprint/Nextel Order*, 20 FCC Rcd at 13978, para. 22; *ALLTEL/Western Wireless Order*, 20 FCC Rcd at 13065, para. 20; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545, para. 44.

<sup>48</sup> FairPoint will assume certain accounts receivable, liabilities, and customer relationships related to the provision of international services and not any international facilities, except for the cross-border local exchange services in Lubec, Maine, which has authority for facilities-based international services with the Campobello Island exchange of New Brunswick Telecommunications, located in New Brunswick, Canada (see ITC-ASG-20070206-00062, ITC-214-20030516-00243).

<sup>49</sup> See FairPoint/Verizon Opposition at 32 (acknowledging that FairPoint already has a presence in the region, but that none of its current exchanges overlap with the Verizon exchanges).

<sup>50</sup> See *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, WC Docket No. 02-78, Report and Order, 17 FCC Rcd 5517, para. 33 (2002).

Maine, New Hampshire, and Vermont in competition with FairPoint.<sup>51</sup> Accordingly, we find no potential public interest harms related to market concentration.

## B. Access to Wholesale Inputs

17. We disagree with comments alleging that the transaction will harm competition by disrupting the ability of competing carriers to obtain wholesale services.<sup>52</sup> We find nothing in the record to suggest that FairPoint will have either greater incentive or ability to discriminate in the provision of wholesale inputs than Verizon. To the contrary, we find that, because FairPoint has a much smaller footprint than Verizon, it will have a smaller incentive to discriminate.<sup>53</sup> Further, FairPoint states that it will retain all obligations under Verizon's current interconnection agreements, tariffs, SGATs, and other existing arrangements, in addition to the statutory obligations applicable to all incumbent LECs under sections 251 and 252.<sup>54</sup> Moreover, FairPoint asserts that it is devoting significant resources to providing wholesale services, and that competitive LECs will not be charged for the training, job aids, or reference materials necessary to interact with FairPoint's updates to its existing wholesale systems.<sup>55</sup> Accordingly, we find that the transaction is not likely to result in potential public interest harms related to access to wholesale inputs.<sup>56</sup>

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<sup>51</sup> FairPoint June 18 *Ex Parte* Letter at 6. Verizon states that it has not, nor does it intend to, sign any non-compete agreements. *Id.*

<sup>52</sup> See, e.g., One Communications Petition at 13-28.

<sup>53</sup> Cf. *AT&T/BellSouth Order*, 22 FCC Rcd at 5697, paras. 183-184 (discussing the "big footprint" theory).

<sup>54</sup> See FairPoint/Verizon Opposition at 33; FairPoint June 18 *Ex Parte* Letter at 3-4; see also Letter from Karen Brinkmann, Counsel for FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Sept. 10, 2007) (stating that PAETEC Communications, Inc. and USLEC Communications Inc. had filed a joint motion to withdraw as intervenors in the New Hampshire proceeding following successful negotiations with FairPoint for access to wholesale services in New Hampshire after the transaction); Letter from Shirley J. Linn and Robin E. Tuttle, FairPoint and Michael E. Glover, Karen Zacharia, and Leslie V. Owsley, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 5 (filed Oct. 11, 2007) (FairPoint/Verizon Oct. 11 *Ex Parte* Letter) (stating that DSCI Corporation recently moved to withdraw its motion to intervene in the New Hampshire proceeding, and a group of eight independent LECs in Vermont, which includes all such carriers in the state, filed a letter with the Vermont Public Service Board, and 22 independent LECs in Maine filed a letter with the Maine Public Utilities Commission, after the parties resolved their concerns regarding wholesale services).

<sup>55</sup> See FairPoint/Verizon Opposition at 33. Further, FairPoint states that it has already contacted all of the competitive LECs in the region to discuss any concerns. See *id.*

<sup>56</sup> We decline to impose a number of proposed conditions relating to wholesale special access service. See, e.g., One Communications/Great Works Reply at 23-25 (arguing that the Commission should impose conditions similar to those imposed in the *Verizon/MCI Order*). As we have found previously, "[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors" using special access inputs, "such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing." *AT&T/BellSouth Order*, 22 FCC Rcd at 5695, para. 60. Commenters submitted to the Commission a voluminous record on industry-wide special access pricing issues in one of these proceedings. See *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005). By addressing these issues in the context of a rulemaking, we would be able to develop a comprehensive approach based on a full record that applies to all similarly situated incumbent LECs. See *AT&T/BellSouth Order*, 22 FCC Rcd at 5695, para. 60. We note that we address specific allegations of competitive harms relating to wholesale inputs in the discussion below.

### C. FairPoint's Qualifications to Acquire Control of Verizon's Licenses

18. Section 310(d) of the Communications Act provides that no station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience and necessity will be served thereby."<sup>57</sup> Among the factors that the Commission considers in its public interest inquiry is whether the applicant for a license or license transfer has the requisite "citizenship, character, financial, technical, and other qualifications."<sup>58</sup> Therefore, as a threshold matter, the Commission must determine whether the parties meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission's rules.<sup>59</sup>

19. We recognize that the standard for evaluating the qualifications of the transferor is less stringent than that applied to the transferee.<sup>60</sup> Section 310(d) requires the Commission to consider whether FairPoint, the proposed transferee, is qualified to hold a Commission license.<sup>61</sup> The Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.<sup>62</sup> With respect to Commission-related conduct, the Commission has stated that it would treat any violation of any provision of the Act, or of the Commission's rules, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications.<sup>63</sup> In prior merger orders, the Commission has used the Commission's character policy in the broadcast area as guidance in resolving similar questions in transfer of licenses proceedings.<sup>64</sup> For expositional simplicity when commenters

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<sup>57</sup> 47 U.S.C. § 310(d).

<sup>58</sup> See *AT&T/BellSouth*, 22 FCC Rcd at 5756, para. 190; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations From Southern New England Telecommunications Corporation, Transferor to SBC Communications Inc., Transferee*, CC Docket No. 98-25, 13 FCC Rcd 21292, 21305, para. 26 (1998) (*SBC/SNET Order*).

<sup>59</sup> See 47 U.S.C. § 310(d); 47 C.F.R. §§ 1.948, 25.119.

<sup>60</sup> The Commission does not, as a general rule, reevaluate the qualifications of the transferors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing. See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18379, para. 171.

<sup>61</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5756, para. 191; *SBC Communications Inc. and BellSouth Corporation for Consent to Transfer Control or Assignment of Licenses and Authorizations*, File Nos. 0000117778, et al., WT Docket No. 00-81, Memorandum Opinion and Order, 15 FCC Rcd 25459, 25465, para. 14 (2000) (*SBC/BellSouth Order*).

<sup>62</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5756, para. 191; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20092-93, para. 236.

<sup>63</sup> *Policy Regarding Character Qualifications in Broadcast Licensing; Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, Gen. Docket No. 81-500, Docket No. 78-108, Report, Order and Policy Statement, 102 FCC 2d 1179, 1209-10, para. 57 (1986) (*Character Qualifications*), modified, 5 FCC Rcd 3252 (1990) (*Character Qualifications Modification*), recon. granted in part, 6 FCC Rcd 3448 (1991), modified in part, 7 FCC Rcd 6564 (1992) (*Further Character Qualifications Modification*); *MCI Telecommunications Corp. Petition for Revocation of Operating Authority*, Order and Notice of Apparent Liability, 3 FCC Rcd 509 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context). The Commission has also determined that allegations that an applicant has engaged in unreasonable or anticompetitive conduct are relevant to the Commission's public interest analysis. *SBC/SNET Order*, 13 FCC Rcd at 21306-07, paras. 28-30.

<sup>64</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5756, para. 191; *SBC/AT&T Order*, 20 FCC Rcd at 18739, para. 172; *SBC/SNET Order*, 13 FCC Rcd at 21305, para. 26; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20092-93, para.

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raise issues of character qualification in the record, we will apply the higher standard applicable to both transferors and transferees.

20. *Character Qualifications.* No commenter has raised issues of character qualification in the record, nor is there any evidence that any of the Applicants are guilty of adjudicated, non-FCC related misconduct relevant to this inquiry.

21. *Financial Qualifications.* We reject the commenters' claims that FairPoint lacks the financial qualifications to handle acquiring Verizon's operations in Maine, New Hampshire, and Vermont.<sup>65</sup> While FairPoint would assume a higher level of debt than either of the companies absent the merger, FairPoint represents that it will have adequate cash flows to support its investment plans and service debt.<sup>66</sup> With respect to concerns that FairPoint may issue dividend payments that will drain its financial resources,

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236; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21548-51, paras. 47-56; *Sprint/Nextel Order*, 20 FCC Rcd at 13979-80, paras. 24-25.

<sup>65</sup> See, e.g., CWA/IBEW Petition at 11 (arguing that post-merger FairPoint would have a worse leverage ratio, resulting in less financial stability); *id.* at 14 (arguing that FairPoint's dividend policy is a drain on financial resources); CWA/IBEW Reply at 7 (arguing that FairPoint would not have the additional financial resources needed to maintain quality of service because of its financial situation); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-22 at 2 (filed May 31, 2007) (CWA May 31 *Ex Parte* Letter) (discussing alleged financial risks associated with the transaction, including high debt, questionable savings projections, dividend policy, reduction in shareholder value, and revenue risks); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-22 at 2-3 (filed June 25, 2007) (CWA June 25 *Ex Parte* Letter) (same); *id.*, Attach. (providing a Morgan Stanley June 5, 2007 Report expressing concern that FairPoint would not be able to generate enough cash to pay its current dividend absent the proposed merger and indicating FairPoint is in a vulnerable financial position); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-22, Attach. at 1 (filed June 27, 2007) (CWA June 27 *Ex Parte* Letter) (arguing that the proposed merger poses significant concerns and risks because of FairPoint's "shaky finances"); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Sept. 5, 2007) (CWA Sept. 5 *Ex Parte* Letter) (same); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Oct. 26, 2007) (CWA Oct. 26 *Ex Parte* Letter) (arguing that state proceedings have demonstrated FairPoint is financially incapable of maintaining or improving the network infrastructure it would acquire); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Nov. 9, 2007) (CWA Nov. 9 *Ex Parte* Letter) (arguing that FairPoint is financially unqualified to run the network); Letter from Thomas Jones and Nirali Patel, Counsel for One Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 2-4 (filed Dec. 17, 2007) (One Communications Dec. 7 *Ex Parte* Letter) (arguing that FairPoint lacks the financial qualifications to operate the merged firm). *But see* Letter from Shirley J. Linn and Robert E. Tuttle, FairPoint & Michael E. Glover, Karen Zacharia, and Leslie V. Owsley, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 9 (filed Aug. 20, 2007) (FairPoint/Verizon Aug. 20 *Ex Parte* Letter) (arguing that the June 5, 2007 Morgan Stanley Report is irrelevant to the merger analysis because it does not discuss the merged company's finances, but rather opines on potential financials if the merger were not approved); Letter from Robert C. Rowe, Balhoff, Rowe & Williams, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Nov. 17, 2007) (asserting that FairPoint will have the financial capability to run the exchanges).

<sup>66</sup> See, e.g., FairPoint/Verizon Opposition at 16 (arguing that a company's total debt can only be understood in relation to its overall capitalization and cash flow, and FairPoint's post-merger cash flow would be more than adequate to maintain financial health); *id.*, Declaration of Walter Leach (Leach Decl.) at 4 (stating that FairPoint expects to generate solid cash flows that support its investment plans, debt servicing, and dividends as appropriate); *id.* at 5 (arguing that one credit rating agency has indicated that FairPoint's credit rating would likely improve post-merger based on its projected capital structure); FairPoint/Verizon Aug. 20 *Ex Parte* Letter at 2-3 (arguing that the post-merger debt-to-equity ratio would be reasonable and that cash flows would be sufficient to operate the company).

FairPoint clarifies that its issuance of dividends is discretionary.<sup>67</sup> We find nothing in the record indicating that FairPoint will be unable to reduce dividend payments if necessary.<sup>68</sup> Moreover, FairPoint states that it intends to spend more per line than Verizon has in recent years.<sup>69</sup> Specifically, FairPoint represents that it anticipates making a capital expenditure of at least \$100 per access line per year in the three states for the five years following the merger closing date.<sup>70</sup> Therefore, we are persuaded that FairPoint is likely to be financially capable of investing at appropriate levels in the acquired service territory.<sup>71</sup> While it is difficult to calculate the exact amount per access line that will be required to maintain and improve service quality and broadband availability, we take comfort in FairPoint's representation that this level of investment will serve as a significant step in reaching those goals.<sup>72</sup> Based on the record before us, we find that the commenters' contention that the transaction will result in financial instability for FairPoint and reduce its ability to invest in network infrastructure is speculative, and conclude that FairPoint is likely to have the financial resources necessary to maintain and improve its network in the relevant service territories.<sup>73</sup>

22. We also reject commenter arguments that the Applicants' decision to utilize a Reverse Morris Trust (RMT) will result in harm to the public interest.<sup>74</sup> There is no evidence in the record that the use of

<sup>67</sup> See, e.g., FairPoint/Verizon Opposition at 15 (arguing that FairPoint's issuance of dividends is discretionary and dividend payments would not divert resources); Leach Decl. at 4 (stating that FairPoint can opt not to pay dividends under its current dividend policy); FairPoint/Verizon Aug. 20 *Ex Parte* Letter at 4 (noting that it is not FairPoint's intention to under-invest in order to pay dividends); *id.* at 7 (arguing that FairPoint's dividend payments are within a range required by the equities markets). *But see* Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA to Marlene Dortch, Secretary, FCC, WC Docket No. 07-22, Attach. at 1 (filed June 28, 2007) (comparing FairPoint dividends to those of other telecommunications companies).

<sup>68</sup> See Letter from Karen Zacharia, Vice President & Associate General Counsel, Verizon, Shirley J. Linn, Executive Vice President & General Counsel, and Robin E. Tuttle, Director of Federal Affairs & Assistant General Counsel, Regulatory Affairs, FairPoint, and Karen Brinkmann, Brian Murray, and Kelley M. Marsden, Counsel to FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22, Attach. (filed Dec. 14, 2007) (FairPoint/Verizon Dec. 14 *Ex Parte* Letter) (attaching a stipulation in Maine by which FairPoint proposes to cut its dividend level by 35%).

<sup>69</sup> See FairPoint/Verizon Opposition at 13, Leach Decl. at 14.

<sup>70</sup> See Letter from Karen Brinkmann, Counsel for FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22, Attach. (filed May 3, 2007) (FairPoint May 3 *Ex Parte* Letter) (anticipating that FairPoint would make capital expenditures of approximately \$100 per access line per year in the three states in addition to its investments in network upgrades to generate revenues, strengthen the company's competitive position and increase high-speed data addressability).

<sup>71</sup> See, e.g., FairPoint/Verizon Dec. 14 *Ex Parte* Letter, Attach. (agreeing to certain investment levels in Maine).

<sup>72</sup> See *id.*

<sup>73</sup> We note that at the time of releasing this Order, there are separate, ongoing proceedings in Maine, New Hampshire and Vermont reviewing the merits of the proposed transaction. See CWA May 31 *Ex Parte* Letter at 1-2 (summarizing CWA's contention that FairPoint does not have the financial qualifications to run the Verizon territories before the State of Vermont Public Service Board); CWA Sept. 5 *Ex Parte* Letter at 1 (summarizing CWA's contention that FairPoint does not have the financial qualifications to run the Verizon territories before the New Hampshire Public Utility Commission); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 1 (filed Sept. 5, 2007) (CWA Sept. 5 Maine *Ex Parte* Letter) (summarizing CWA's contention that FairPoint does not have the financial qualifications to run the Verizon territories before the Maine Public Utility Commission).

<sup>74</sup> See, e.g., Letter from Representative Dennis J. Kucinich to Kevin J. Martin, Chairman, FCC, WC Docket No. 07-22 (filed May 25, 2007); CWA/IBEW Reply at 15-16 (arguing that the RMT mechanism has harmed the public interest, and resulted in Verizon not considering other companies for the transaction); CWA June 27 *Ex Parte* Letter, Attach. at 4 (arguing that Verizon may have chosen FairPoint for tax avoidance purposes rather than its financial and operational capacity to succeed); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 1 (filed Sept. 26, 2007) (arguing that Verizon chose to avoid taxes

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an RMT will result in public interest harm in light of our finding that FairPoint has the requisite financial qualifications.<sup>75</sup> In fact, the Applicants assert that, because the transaction is tax free, it will result in a lower transaction price, which will facilitate FairPoint's intended investments in the affected exchanges.<sup>76</sup>

23. *Technical Qualifications.* We find that FairPoint has extensive experience in providing telecommunications services and maintaining and investing in facilities in rural and small urban areas.<sup>77</sup> We disagree that FairPoint's lack of experience with operating a company as large as that which will result from the proposed transaction, or its alleged lack of experience with wholesale customers, demonstrates that FairPoint lacks the requisite technical qualifications.<sup>78</sup> The Transition Services Agreement (TSA) entered into by FairPoint and Verizon is likely to ensure that the transaction is

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rather than consider larger companies that would have the capital and operational resources to run the operations in Maine, New Hampshire, and Vermont); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-22 at 1-2 (filed Dec. 6, 2007) (arguing that the transaction was structured to avoid paying federal taxes). *But see* FairPoint/Verizon Aug. 20 *Ex Parte* Letter at 10 (stating that the tax advantages of the proposed transaction was not the primary factor in choosing FairPoint).

<sup>75</sup> *See, e.g.*, CWA/IBEW Reply at 15-16 (arguing that the transaction "appears" to be guided by tax avoidance).

<sup>76</sup> *See* FairPoint/Verizon Opposition at 12; Leach Decl. at 4. Accordingly, we reject assertions that Applicants should be required to forfeit the tax benefits from the use of an RMT. *See, e.g.*, CWA Nov. 9 *Ex Parte* Letter at 3 (arguing that FairPoint should create a special "Broadband Infrastructure Fund" funded by the \$600 million resulting from the RMT tax savings associated with the transaction to mitigate potential public interest harms); CWA Dec. 6 *Ex Parte* Letter at 1-2 (suggesting that the \$600 million fund could be used to build out fiber and DSL services in northern New England). *But see* Letter from Karen Zacharia, Vice President & Associate General Counsel, Verizon, Shirley J. Linn, Executive Vice President & General Counsel, FairPoint Communications, Inc., and Karen Brinkmann, Brian Murray, and Kelley M. Marsden, Counsel for FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 7-8 (filed Dec. 12, 2007) (FairPoint/Verizon Dec. 12 *Ex Parte* Letter) (arguing that CWA presents no evidence that supports the creation of the fund or why this amount is needed to create the fund); FairPoint/Verizon Dec. 14 *Ex Parte* Letter (attaching a stipulation by which Verizon agrees to increase FairPoint's working capital by \$235.5 million).

<sup>77</sup> *See, e.g.*, FairPoint/Verizon Application at 17; FairPoint/Verizon Opposition at 7. We disagree with commenters that suggest that the Hawaiian Telcom/Verizon transaction should provide caution when reviewing this transaction because the Hawaiian Telcom/Verizon transaction did not involve the same parties or the same facts. *See, e.g.*, CWA/IBEW Petition at 27-28 (arguing that the Commission should review this transaction in light of the Hawaiian Telcom transaction); One Communications/Great Works Reply at 18-19 (arguing that in the Hawaiian Telcom transaction there were also assertions made that consultants had extensive telecommunications experience). *But see* FairPoint/Verizon Opposition at 30 (arguing that the Hawaiian Telcom transaction is not indicative of this transaction because it involved a different local exchange property and a different purchaser). Further, the Hawaiian Telcom/Verizon deal involved a purchaser, the Carlyle Group, whose focus is on a variety of investment industries, while FairPoint is an established and experienced carrier with extensive experience in serving rural markets. *See, e.g., id.* at 30. Additionally, FairPoint began working with Capgemini, which has 30 years of telecommunications experience, prior to the deal's announcement to speed the transition. *See id.* at 27, 30.

<sup>78</sup> *See, e.g.*, One Communications Petition at 18 (arguing that there is no basis for concluding that the existing FairPoint management has the expertise or ability to manage such a large company); *id.* at 18-19 (stating that FairPoint has no wholesale systems in place and no experience with meeting the wholesale requirements of sections 251, 271, or providing wholesale special access); One Communications/Great Works Reply at 17 (arguing that FairPoint has no track record or experience in providing wholesale services); CWA/IBEW Reply at 4-5 (arguing that FairPoint lacks the managerial experience to step into the shoes of Verizon, and that FairPoint management has never been responsible for a network of hundreds of thousands of poles, wire centers, or dozens of central offices); CWA June 27 *Ex Parte* Letter, Attach. at 2 (arguing that FairPoint management will be unprepared to handle taking over Verizon's large operations in these states). *But see* FairPoint/Verizon Oct. 11 *Ex Parte* Letter at 6 (arguing that FairPoint has implemented internal processes and procedures that will ensure that the wholesale systems will be ready).

completed without undue disruption to service.<sup>79</sup> Under the TSA, Verizon will continue to offer support services to FairPoint after the close of the transaction.<sup>80</sup> Notably, the TSA has no set terms for its termination, and FairPoint has stated that the TSA will remain in place until the company is confident that it can achieve a cutover without disruption to existing customers or ongoing operations.<sup>81</sup> Further, FairPoint has agreed to adhere to the Verizon Section 271 Performance Assurance Plan in each of the three states in order to avoid disrupting the provision of wholesale services.<sup>82</sup> FairPoint has also contacted all of the competitive LECs in the region to discuss their operational concerns.<sup>83</sup> Moreover, we disagree with commenters that FairPoint's previous operational experiences illustrate that FairPoint lacks the requisite technical qualifications.<sup>84</sup> The evidence in the record demonstrates that FairPoint's issues with FairPoint Solutions and billing in Maine were isolated incidents, and we believe that such problems are not indicators of FairPoint's ability to conduct its business operations in the future.<sup>85</sup> Based on these findings, we conclude that FairPoint is likely to have the technical resources necessary to maintain and improve its network in the relevant service territories.

24. *Other Qualifications.* We are not persuaded by allegations that the transaction will exacerbate previous service quality problems.<sup>86</sup> First, we note that FairPoint asserts that it is in compliance with state service quality requirements, and we believe that it is inappropriate to accord too much significance to prior performance issues of either Verizon or FairPoint that have been corrected.<sup>87</sup>

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<sup>79</sup> See FairPoint, SEC Form S-4/A, Exh.2.6 (filed May 25, 2007), available at [http://www.sec.gov/Archives/edgar/data/1062613/000104746907004640/a2177254zex-2\\_6.htm](http://www.sec.gov/Archives/edgar/data/1062613/000104746907004640/a2177254zex-2_6.htm); FairPoint/Verizon Opposition at 27.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See FairPoint/Verizon Oct. 11 *Ex Parte* Letter at 7.

<sup>83</sup> See *id.*, Declaration of Michael Haga (Haga Decl.) at 4.

<sup>84</sup> See, e.g., CWA/IBEW Petition at 24 (arguing that when FairPoint attempted to develop new billing systems and integrate its operations in Maine it failed); CWA/IBEW Reply at 5-6 (arguing that a failed FairPoint competitive LEC venture and prior FairPoint billing operations transitions are relevant to determine whether FairPoint can operate a large company); One Communications Petition at 19 (stating that the service quality issues that arose in Maine for FairPoint could occur in Maine, New Hampshire, and Vermont given the experience with Hawaiian Telcom); CWA/IBEW Reply at 6 (arguing that FairPoint was responsible for the Maine billing issues because FairPoint chose the vendor, wrote the contract, failed to properly oversee the work, and approved the cutover to an unready system).

<sup>85</sup> See, e.g., FairPoint/Verizon Opposition at 27 (noting that FairPoint hired Capgemini as a consultant to design processes, implement systems, and staff the organization to operate exchanges); Haga Decl. at 2 (arguing that Capgemini is one of the most qualified consultants in the telecommunications industry); Leach Decl. at 6 (asserting that FairPoint has been working with Capgemini since the fourth quarter of 2006 to prepare for this transaction).

<sup>86</sup> See, e.g., CWA/IBEW Petition at 29-31; One Communications Petition at 15-16; see also CWA May 31 *Ex Parte* Letter at 3 (alleging that FairPoint has had service quality problems in Vermont and New Hampshire); CWA June 25 *Ex Parte* Letter at 4 (alleging Verizon has had significant service quality problems in the three states); CWA June 27 *Ex Parte* Letter Attach. at 3 (stating that FairPoint has had the highest rate of complaints in six of the last seven years in Vermont, and the highest complaint rate in Maine in 2005 and 2006); Letter from David P. Sloane, Senior Managing Director, AARP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 1 (advocating imposing detailed and enforceable conditions on service quality as a merger condition) (AARP July 3 *Ex Parte* Letter); CWA Sept. 5 *Ex Parte* Letter (alleging that FairPoint has one of the highest rates of customer complaints in New Hampshire); CWA Nov. 9 *Ex Parte* Letter at 3 (arguing that the Commission should impose service repair interval benchmarks).

<sup>87</sup> See FairPoint/Verizon Opposition at 22 (stating that FairPoint has met the Maine Public Service Commission's performance benchmarks); *id.*, Declaration of Peter G. Nixon (Nixon Decl.) at 4 (asserting that FairPoint is not aware of any investigation of the company's retail service quality by any state); FairPoint May 3 *Ex Parte*, Attach.

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Second, we agree with the Applicants that FairPoint will have an incentive to maintain a commitment to customer service given continued state oversight of customer service issues.<sup>88</sup> Third, FairPoint's commitment to invest in its network infrastructure and the availability of support services under the TSA should help to mitigate potential service quality issues.

## V. POTENTIAL PUBLIC INTEREST BENEFITS

### A. Introduction

25. We next consider whether the transaction is likely to generate verifiable, merger-specific public interest benefits.<sup>89</sup> In doing so, we ask whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination.<sup>90</sup> As discussed below, we find that the proposed transaction is likely to generate significant merger-specific public interest benefits, although it is difficult to quantify the magnitude of some of these benefits.

### B. Analytical Framework

26. The Commission has recognized that “[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm’s ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products.”<sup>91</sup> Under Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms.<sup>92</sup>

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(stating in a January 16, 2007 FairPoint/Verizon news release that FairPoint has demonstrated its ability to provide high-quality operations in rural and small urban markets and that FairPoint’s commitment to quality customer service was key to Verizon’s decision to enter into the transaction with FairPoint); FairPoint/Verizon Aug. 20 *Ex Parte* Letter at 11 (attaching a letter from the Maine Public Service Commission commending FairPoint for its service quality improvements).

<sup>88</sup> See, e.g., FairPoint/Verizon Aug. 20 *Ex Parte* Letter, Attach. (stating that the Maine Public Service Commission will continue to monitor FairPoint’s service quality through filed consumer complaints).

<sup>89</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5760, para. 200; *SBC/AT&T Order*, 20 FCC Rcd at 18384, para. 182; *Verizon/MCI Order*, 20 FCC Rcd 18530, para. 193; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14130, para. 209; *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 255; *WorldCom/MCI Order*, 13 FCC Rcd at 18134-35, para. 194.

<sup>90</sup> See, e.g., *Verizon/América Móvil Order*, 22 FCC Rcd at 6210, para. 34; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14130, para. 209; *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 255; *WorldCom/MCI Order*, 13 FCC Rcd at 18134-34, para. 194.

<sup>91</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5760, para. 201; *SBC/AT&T Order*, 20 FCC Rcd at 18384, para. 183; *Verizon/MCI Order*, 20 FCC Rcd 18530, para. 194; *Echostar/DirecTV Order*, 17 FCC Rcd at 20630, para. 188; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 158; see also Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission (Apr. 2, 1992, revised Apr. 8, 1997) § 4 (*DOJ/FTC Guidelines*).

<sup>92</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 201; *SBC/AT&T Order*, 20 FCC Rcd at 18384, para. 183; *Verizon/MCI Order*, 20 FCC Rcd 18530, para. 194; *Echostar/DirecTV Order*, 17 FCC Rcd at 20630, para. 188; *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 256; see also *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

27. The Commission applies several criteria in deciding whether a claimed benefit is cognizable. First, the claimed benefit must be transaction or merger specific.<sup>93</sup> This means that the claimed benefit “must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.”<sup>94</sup> Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each benefit claim so that the Commission can verify the likelihood and magnitude of the claimed benefit.<sup>95</sup> In addition, as the Commission has noted, “the magnitude of benefits must be calculated net of the cost of achieving them.”<sup>96</sup> Furthermore, the Commission will discount or dismiss speculative benefits that it cannot verify. Thus, as the Commission explained in the *EchoStar/DirectTV Order*, “benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present.”<sup>97</sup> Third, the Commission has stated that it “will more likely find marginal cost reductions to be cognizable than reductions in fixed cost.”<sup>98</sup> “The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.”<sup>99</sup>

28. Finally, the Commission applies a “sliding scale approach” to evaluating benefit claims.<sup>100</sup> Under this sliding scale approach, where potential harms appear “both substantial and likely, the Applicants’ demonstration of claimed benefits also must reveal a higher degree of magnitude and

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<sup>93</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202.

<sup>94</sup> *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20630, para. 189; see also *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063-64 para. 158 (“Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger.”) (footnote omitted); *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 255 (“Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger. . . .”); *AT&T/Comcast Order*, 17 FCC Rcd at 23313, para. 173 (explaining that the Commission considers whether benefits are “merger-specific”); *cf. DOJ/FTC Guidelines* § 4.

<sup>95</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20630, para. 190; see also *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157 (“These pro-competitive benefits include any efficiencies arising from the transaction if such efficiencies . . . are sufficiently likely and verifiable . . . .”); *BellSouth/Comcast Order*, 17 FCC Rcd at 23313, para. 173 (explaining that the Commission considers whether benefits are verifiable . . . .”); *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 255; *DOJ/FTC Guidelines* § 4 (“[T]he merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm’s ability to compete . . . .”).

<sup>96</sup> *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 190.

<sup>97</sup> *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 190.

<sup>98</sup> *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 190.

<sup>99</sup> *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 191; see also *DOJ/FTC Guidelines* § 4.

<sup>100</sup> See, *e.g.*, *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 203.

likelihood than we would otherwise demand.”<sup>101</sup> On the other hand, where potential harms appear less likely and less substantial, as in this case, we will accept a lesser showing to approve the merger.<sup>102</sup>

### C. Analysis

29. We find that the Applicants have met their burden of demonstrating that the proposed transaction will result in public interest benefits.<sup>103</sup> As the Applicants argue, Verizon’s strategic opportunities have required it to prioritize demands on its capital, and it has chosen to divest the exchanges in order to address competing needs.<sup>104</sup> In contrast, FairPoint presents a plan that is likely to result in accelerated broadband deployment in the three-state region.

30. We are persuaded that FairPoint’s proposed plan for broadband deployment is likely to provide greater benefits to consumers than they would receive absent the transaction.<sup>105</sup> Verizon stopped its capital-intensive New Hampshire FiOS project in June of 2006.<sup>106</sup> FairPoint initially proposed to spend \$52.55 million on broadband expansion in the three-state region by 2010, including \$18.55 million in Vermont, \$16.45 million in New Hampshire, and \$17.55 million in Maine.<sup>107</sup> FairPoint anticipated that

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<sup>101</sup> *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 192 (quoting *SBC/Ameritech Order*, 14 FCC Rcd at 14825); cf. *DOJ/FTC Guidelines* § 4 (“The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinary great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

<sup>102</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5762, para. 203.

<sup>103</sup> We do not rely on FairPoint’s assertion that the transaction will result in FairPoint achieving a net cost savings because the record does not definitively support this claim. Compare FairPoint/Verizon Opposition at 14 (stating that there will be a resulting cost savings from reduced overhead when FairPoint internalizes functions currently provided by Verizon); Leach Decl. at 5 (alleging that the reduction in allocated expenses post-closing is expected to result in operating efficiencies of \$ 60 million to \$ 75 million); *id.* at 5 (asserting that FairPoint expects to be able to reduce expenses from the levels of Verizon’s internal corporate allocations related but not limited to network monitoring, customer care, and back office support); *id.* at 5 (discussing that FairPoint expects that in-region costs to run operations will be less than Verizon’s internal allocations for services provided from outside the region); FairPoint May 3 *Ex Parte* Letter, Attach. (arguing in a January 16, 2007 press release that operating efficiencies will occur based on reduced expenses for network monitoring, customer care, and back office support), with CWA/IBEW Petition at 17 (arguing that FairPoint did not account for the potential risks associated with delays in closing the transaction and other transition and operational costs); CWA/IBEW Reply at 12-14 (alleging that it will be difficult for FairPoint to execute its plan should an unforeseen event occur); CWA May 31 *Ex Parte* Letter at 2 (arguing that the projected expense savings are in doubt because, CWA asserts, FairPoint’s unit operating expenses are higher than Northern New England’s); *id.*, Peres Testimony Attach. at 3 (alleging that there is a significant risk posed by FairPoint’s creation and implementation of 600 new operational, support, and administrative systems).

<sup>104</sup> See, e.g., FairPoint/Verizon Opposition at 3 (arguing that the transaction suits the companies’ business strategies because FairPoint’s strategy is to serve rural and small urban markets and Verizon has sought to divest such exchanges).

<sup>105</sup> See Section 706 of the 1996 Act directs the Commission to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis through, among other things, removing barriers to infrastructure investment. See 47 U.S.C. § 157 nt.

<sup>106</sup> See, e.g., CWA Petition at 18 n.25. Further, Verizon only provides access to broadband to 62% of its current customers in the three-state region, while FairPoint provides 92% of its customers access to a broadband product. See FairPoint May 3 *Ex Parte* Letter, Attach.

<sup>107</sup> See FairPoint/Verizon Dec. 12 *Ex Parte* Letter at 2-4. In Vermont, FairPoint expects to offer broadband DSL to 10 communities for the first time, and to 200 additional neighborhoods where Verizon does not offer broadband. See *id.* at 3-4. FairPoint has also committed to meet Verizon’s obligation to achieve 80 percent addressability in

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over 128,000 customers in the three states that do not currently have broadband access would benefit from these investments.<sup>108</sup> FairPoint stated that such expenditures will allow it to make broadband addressable to 88 percent of lines in Vermont within 34 months of the completed transaction, and 83 percent of lines in New Hampshire and 83 percent of lines in Maine within 24 months of the completed transaction.<sup>109</sup> Further, FairPoint stated its plans to increase broadband addressability eventually to at least the same level (92 percent) it has achieved in its existing service territory in these three states.<sup>110</sup>

31. The Commission now understands that FairPoint has agreed, before the Maine commission, “to substantially increase its proposed broadband investment to reach 90% addressability in Maine, and to maintain certain price levels and service offerings.”<sup>111</sup> To do so, during the five years following the closing of the transaction, Verizon and FairPoint collectively agreed to spend \$69.55 million in implementing this broadband commitment.<sup>112</sup> The Commission further understands that, in the stipulation before the Maine commission, FairPoint committed “to reduce its dividend level by 35% and . . . us[e] the higher of 90% of annual Free Cash Flow or \$35 million per year to further reduce its debt over time.”<sup>113</sup> In addition, prior to the closing of the transaction, Verizon agreed to increase the working

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Vermont by 2010, in addition to FairPoint’s commitment to increase broadband addressability to 88% of lines in Vermont within 34 months of closing. *Id.* at 4. In New Hampshire, FairPoint expects to bring broadband DSL to approximately 22 communities for the first time, and to 105 additional neighborhoods where Verizon does not currently offer broadband. *See id.* In Maine, FairPoint expects to bring broadband DSL service to 7 communities for the first time, and to 105 neighborhoods where Verizon does not currently offer broadband. *See id.* at 3.

<sup>108</sup> *See id.* at 2.

<sup>109</sup> *See* Letter from Brian Murray, Counsel for FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 1-2 (filed Oct. 12, 2007) (FairPoint Oct. 12 *Ex Parte* Letter); FairPoint July 10 *Ex Parte* Letter at 1 (discussing proposed broadband deployment in Vermont); Letter from Karen Brinkmann, Counsel for FairPoint Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 1 (filed July 30, 2007) (FairPoint July 30 *Ex Parte* Letter) (discussing proposed broadband deployment in New Hampshire); Letter from Karen Zacharia, Vice President & Associate General Counsel, Verizon, Shirley J. Linn, Executive Vice President & General Counsel, FairPoint, and Robin E. Tuttle, Director of Federal Affairs & Assistant General Counsel, Regulatory Affairs, FairPoint Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 1 (filed Aug. 31, 2007) (FairPoint/Verizon Aug. 31 *Ex Parte* Letter) (discussing proposed broadband deployment in Maine); FairPoint/Verizon Dec. 12 *Ex Parte* Letter at 2.

<sup>110</sup> *See* FairPoint/Verizon Dec. 12 *Ex Parte* Letter at 2.

<sup>111</sup> FairPoint/Verizon Dec. 14 *Ex Parte* Letter, Attach. Letter from Joseph G. Donahue, Counsel for FairPoint Maine Telephone Companies, to Karen Geraghty, Administrative Director, Maine Public Utilities Commission, at 2 (FairPoint Maine Stipulation Letter); FairPoint/Verizon Dec. 14 *Ex Parte* Letter, Attach. Stipulation to the Maine Public Utilities Commission at 10-11 (Maine Stipulation) (FairPoint shall expand DSL availability to reach 83% addressability in Maine within two years of the closing of the transaction, and 90% DSL availability by the end of five years); Maine Stipulation at 12 (at the time of closing, FairPoint will maintain all prices and speeds offered by Verizon for broadband Internet access service, including standalone DSL, which will remain available for two years at a monthly rate not to exceed \$37 per month); *see also* Letter from Leslie V. Owsley, Assistant General Counsel, Verizon, and Karen Brinkmann *et al.*, Counsel for FairPoint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 2 (filed Dec. 21, 2007). During the five year period following the closing of the transaction, FairPoint shall file quarterly reports to the Maine commission regarding its broadband deployment activities. Maine Stipulation at 11.

<sup>112</sup> Maine Stipulation at 10-11 (FairPoint shall invest in broadband deployment not less than \$40 million over the five years following the transaction closing date, in addition to the \$12 million investment previously committed by Verizon and \$17.55 million investment previously committed by FairPoint over the two years following the closing of the transaction).

<sup>113</sup> FairPoint Maine Stipulation Letter at 2; Maine Stipulation at 7-9; *see also supra* note 68 and accompanying text (discussing this commitment in the context of the analysis of FairPoint’s financial qualifications).

capital of the divested company by \$235.5 million, enabling FairPoint to incur less debt and facilitate investment.<sup>114</sup>

32. Accordingly, we believe that FairPoint's plan for broadband deployment is likely to accelerate availability of broadband Internet access service to customers in the three states, and we reject commenters' arguments that the transaction will produce no public benefits.<sup>115</sup>

## VI. OTHER ISSUES

33. *Regulatory Status of FairPoint.* We find that FairPoint will be a Bell Operating Company (BOC) following this transaction. Section 3(4) of the Act defines a BOC as either one of a group of specifically listed companies – one of which is New England Telephone and Telegraph Company – or as “any successor or assign of any such company that provides wireline telephone exchange service.”<sup>116</sup> The Act, however, does not define “successor or assign.” The Commission has stated that “a successor or assign analysis is ultimately fact-based” and that those terms “take their meaning from the particular legal context in which they were used.”<sup>117</sup> Sections 252 and 271-76 of the Act define BOC obligations.<sup>118</sup> The purpose of the sections specifically applicable to the BOCs is to address Congressional concerns regarding the BOCs opening their markets to competition.<sup>119</sup> Based on this, we interpret the terms

<sup>114</sup> FairPoint Maine Stipulation Letter at 1; Maine Stipulation at 10; *see also supra* note 76 (discussing this commitment in the context of the analysis of FairPoint's financial qualifications). We also note that it is likely that these and/or similar commitments will be required by the Vermont Public Service Board, which recently denied FairPoint's initial petition to acquire Verizon's operations in that state, noting that “it was open to FairPoint submitting revisions” that addressed its concerns, and that its decision “did not consider a recent settlement in Maine,” which was not officially in the record before the Board, and thus could not be considered. Vermont Public Service Board Denies Fairpoint Petition To Acquire Verizon; Invites Revised Request, Press Release (Dec. 21, 2007) available at <http://www.state.vt.us/psb/document/7270pressrelease.pdf>; *see also Joint Petition of Verizon New England Inc., d/b/a Verizon Vermont, certain affiliates thereof, and FairPoint Communications, Inc. for approval of an asset transfer, acquisition of control by merger and associated transactions*, Docket No. 7270, Order (VT. Pub. Serv. Bd. Dec. 21, 2007).

<sup>115</sup> *See, e.g.*, CWA Oct. 26 *Ex Parte* Letter at 8-9 (quoting Vermont Department of Public Services Staff conclusions that the transaction will not result in improved services). We also reject arguments that we need to go further, and impose additional requirements on FairPoint in this respect. *See, e.g.*, CWA Nov. 9 *Ex Parte* Letter at 2-3 (arguing that the Commission should impose broadband, fiber and video service rollout, investment requirements, and performance measurement merger conditions on FairPoint); Letter from Larry Cohen, President, CWA, to Kevin Martin, Chairman, FCC, WC Docket No. 07-22 at 3 (filed Nov. 28, 2007) (CWA Nov. 28 *Ex Parte* Letter) (suggesting that FairPoint be required to increase its broadband investment commitment in Maine to \$28 million). *But see* FairPoint Dec. 12 *Ex Parte* Letter (arguing that imposing further broadband, fiber or video service rollout conditions would be cost prohibitive and unnecessary since FairPoint has already committed to expanding broadband availability, and that performance measurement conditions are similarly inappropriate).

<sup>116</sup> 47 U.S.C. § 153(4). New England Telephone and Telegraph Company is now part of Verizon, and the exchanges at issue in this proceeding were part of the New England Telephone and Telegraph Company. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd 19985 (merging Bell Atlantic and NYNEX, formerly the AT&T subsidiaries New York Telephone and New England Telephone and Telegraph Company); *Bell Atlantic/GTE Order*, 15 FCC Rcd 14032 (merging Bell Atlantic and GTE, which thereafter conducted business in these states as Verizon New England, Inc.).

<sup>117</sup> *See SBC/Ameritech Order*, 14 FCC Rcd at 14897, para. 454 (citing *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 264 n. 9 (1974)), *rev'd on other grounds, Ass'n. of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

<sup>118</sup> *See* 47 U.S.C. §§ 252, 271-76.

<sup>119</sup> *See, e.g.*, 47 U.S.C. § 271 (requiring a BOC to meet a 14-point checklist prior to providing interLATA services originating in any of its in-region states). Further, a fundamental goal of the Act is to promote competition for all services. *See* 1996 Act, Preamble.

“successor or assign” as used in section 3(4) in a manner that promotes competition in the markets that were the focus of the Act’s BOC-specific requirements. This counsels in favor of treating FairPoint as a BOC. The potential loss of the market-opening benefits of section 271 is an independent public interest reason for rejecting FairPoint’s argument that it will not be a successor or assign of a BOC for the three-state operations it is acquiring from Verizon.<sup>120</sup>

34. Support for this interpretation also comes from case law on how federal courts have interpreted these terms. As in similar inquiries, we find that the courts have generally applied a “substantial continuity” test to determine whether one entity replaces another.<sup>121</sup> In particular, in *Fall River Dyeing & Finishing Corp. v. NLRB*, the Supreme Court, in determining whether substantial continuity existed between two companies, focused on whether the company had “acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations.”<sup>122</sup> Applying the “substantial continuity” test here, we find that FairPoint would be a successor or assign of Verizon, and thus FairPoint is a BOC in the three-state region.<sup>123</sup> Specifically, we find that the transaction will result in FairPoint acquiring substantial assets that are necessary to continue the incumbent’s traditional business operation from Verizon for the entire three-state region, resulting in no interruption or substantial change to Verizon’s business operation.<sup>124</sup> Therefore, we find that because this transaction involves a large portion – three of five states – of the former New England Telephone and Telegraph Company, and there is substantial continuity between Verizon and FairPoint in the provision of wireline telephone exchange service in these states, FairPoint will be a successor or assign of Verizon.<sup>125</sup>

35. We are not persuaded by FairPoint’s argument that we need not address whether FairPoint is a BOC in this Order, nor by its arguments that it would not be appropriate to classify FairPoint as a BOC upon conclusion of the proposed transaction.<sup>126</sup> While FairPoint correctly states that the Commission has

<sup>120</sup> See, e.g., Letter from Thomas Jones, Counsel for One Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 10 (filed July 27, 2007) (One Communications July 27 *Ex Parte* Letter) (arguing that the section 271 safeguards are still necessary from a policy perspective); One Communications Dec. 7 *Ex Parte* Letter at 8-12 (arguing that the merged firm is a successor or assign of Verizon).

<sup>121</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14897, para. 454 (analyzing the terms “successor or assign” in the context of section 251(h)(1)); *Alltel Communications, Inc.*, File No. EB-05-SE-084, Order, 20 FCC Rcd 8112 (2005) (analyzing the terms “successor or assign” in the context of Enhanced 911 Consent Decrees).

<sup>122</sup> *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

<sup>123</sup> See, e.g., One Communications July 27 *Ex Parte* Letter at 1-3.

<sup>124</sup> The Applicants have structured the merger to eliminate any disruptions in business operations that may occur as a result of the change in ownership. See, e.g., FairPoint/Verizon Opposition at 26 (arguing that the transition plan will ensure that the transaction is completed without disruptions in service or operations); Leach Decl. at 7 (declaring that wholesale customers will receive the same services under the same rates, terms, and conditions as provided by Verizon).

<sup>125</sup> See, e.g., One Communications Petition at 5-6 (arguing that the New England Telephone and Telegraph Company is now Verizon New England, meaning Verizon New England qualifies as a BOC, and thus FairPoint should also be considered a BOC under section 3(4)); One Communications/Great Works Reply at 10 (asserting that FairPoint is a “successor or assign” of a BOC after the transaction); *id.* at 10-11 (arguing that the “substantial continuity” test is appropriate for determining whether a firm is a “successor or assign” of a BOC).

<sup>126</sup> See, e.g., FairPoint/Verizon Opposition at 38 (explaining that in prior merger proceedings involving the transfer of BOC-owned lines to non-BOC incumbent LECs, the Commission has declined to deem the non-BOC acquirer a BOC as a result of the transaction); see also *id.* at 37 (arguing that post-merger FairPoint will resemble GTE, not a BOC, because FairPoint’s post-merger operations will not be large and geographically concentrated); *id.* at 34 (arguing that BOC status is a classification Congress singled out for uniquely large and concentrated operations). But see One Communications July 27 *Ex Parte* Letter at 9-10 (noting that the Commission has never addressed the issue relating to BOC status because it has never been raised before).

not previously held a non-BOC purchasing BOC exchanges to be a successor or assign of a BOC, FairPoint's argument fails to account for the difference in scale between those previous transactions and this proposed transaction.<sup>127</sup> This transaction involves the transfer of the local exchange lines for an entire three-state region, rather than a small number of exchanges within a state.<sup>128</sup> Previously, the Commission examined Verizon's statewide compliance for each one of these three states by applying the quintessential BOC provision of the 1996 Act, section 271. This transaction will involve those same lines. FairPoint's argument that it will not be large and geographically concentrated is unavailing here, where it proposes to own BOC operations in three contiguous states, where the average percentage of incumbent local exchange lines held in the three states approximates 80 percent.<sup>129</sup> Accordingly, we find that the proposed transaction is factually distinguishable from the transactions cited by FairPoint.

36. Since FairPoint will be a BOC in the three-state region following the transaction, it will be responsible for complying, for example, with the provisions of sections 271, 272, 273, 274, 275, and 276 of the Act that have not sunset,<sup>130</sup> and the applicable *Computer Inquiry* requirements.<sup>131</sup> Having already

<sup>127</sup> Past transactions where the Commission (or Bureau on delegated authority) has permitted a transfer of BOC local exchanges, without finding that the transferee would thereby become a BOC, have involved a significantly smaller number of exchanges and customers than the instant transaction, and in no event has resulted in the sale of all of a BOC's assets in a given state. *Compare Comments Invited on Qwest Section 214 Application to Discontinue Operation of Facilities within 38 Arizona Exchanges*, Public Notice, 16 FCC Rcd 6972 (NSD 2001) (application by Qwest for authorization to discontinue service to 38 exchanges in Arizona in connection with an acquisition of assets by Citizens Utilities Rural Company, Inc.); *Citizens Telecommunications Company of Iowa and Qwest Corporation Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, CC Docket No. 96-45, Order, 15 FCC Rcd 19362 (APD 2000) (granting a study area waiver in connection with the acquisition of 32 Qwest Corporation exchanges in Iowa by Citizens Utilities Rural Company, Inc.); *U S West Communications, Inc. and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, and Eagle Telecommunications, Inc. Petition for Waiver of Section 61.41(c) of the Commission's Rules*, Memorandum Opinion and Order, 10 FCC Rcd 1771 (1995) (granting study area and price cap waivers in connection with sale of 43 exchanges in Colorado from U S West to Eagle Telecommunications, Inc.) with FairPoint/Verizon Application Attach. B (identifying the 352 exchanges affected by the FairPoint/Verizon transaction, including 135 Maine exchanges, 118 New Hampshire exchanges, and 99 Vermont exchanges). See FairPoint June 18 *Ex Parte* Letter at App. A.

<sup>128</sup> See FairPoint June 18 *Ex Parte* Letter at App. A; see also FairPoint/Verizon Application at 11.

<sup>129</sup> See FCC, *Local Telephone Competition: Status as of June 30, 2006* at Table 7 (WCB rel. Jan. 2007); FCC, *Selected June 30, 2006 Data Filed for the Incumbent Local Exchange Carrier Operations of the Region Bell Operating Companies* (visited Aug. 21, 2007), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/RBOC\\_Local\\_Telephone\\_June\\_2006.xls](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/RBOC_Local_Telephone_June_2006.xls); see also One Communications July 27 *Ex Parte* Letter at 9 (arguing that several BOCs listed in section 3(4) of the Act are smaller than the exchanges FairPoint plans to purchase, and that unlike GTE, FairPoint's lines are concentrated in an area of three contiguous states).

<sup>130</sup> See 47 U.S.C. §§ 271-75.

<sup>131</sup> Under the *Computer Inquiry* requirements, a BOC that provides enhanced services must unbundle its enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed rates, terms, and conditions under which it provides services to its own enhanced service operations, and further must provide its enhanced services only through a *Computer II* affiliate. See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), recon., 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order*), further recon., 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), cert. denied, 461 U.S. 938 (1983) (collectively referred to as *Computer II*). We note that the *Computer II* "unbundling" of basic services requirement is separate and distinct from the obligation in section 251(c)(3) of the Act to provide access to unbundled network elements (UNEs). See 47 U.S.C. § 251(c)(3). Alternatively, FairPoint may provide enhanced services on an integrated basis (*i.e.*, through the traditional telephone

(continued...)

approved Verizon's section 271 applications in Maine, New Hampshire, and Vermont, we find that FairPoint does not need to file for section 271 authority, but rather will step into the shoes of Verizon's authority in those states.<sup>132</sup> Further, FairPoint will step into Verizon's shoes for any regulatory relief that

(...continued from previous page)

operating company or through separate affiliates not considered *Computer II* affiliates) pursuant to the *Computer III* nonstructural safeguards (*i.e.*, open network architecture and comparably efficient interconnection processes). See *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), *recon.*, 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*); see also *Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Dockets Nos. 95-20 & 98-10, Public Notice, 16 FCC Rcd 5363 (2001) (asking whether, under the open network architecture (ONA) framework, information service providers can obtain the telecommunications inputs, including digital subscriber line (DSL) service, they require) (collectively referred to as *Computer III*).

<sup>132</sup> See *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Vermont*, CC Docket No. 02-7, Memorandum Opinion and Order, 17 FCC Rcd 7625 (2002); *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maine*, CC Docket No. 02-61, Memorandum Opinion and Order, 17 FCC Rcd 11659 (2002); *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket No. 02-157, Memorandum Opinion and Order, 17 FCC Rcd 18660 (2002). FairPoint represents that it will honor all of Verizon's existing interconnection arrangements and commercial agreements post-transaction to the extent that the section 271(c)(2) checklist requirements duplicate provisions in those agreements. See FairPoint/Verizon Opposition at 39. Therefore, we disagree with commenters that suggest that FairPoint should be required to file for its own section 271 authorizations or that it will be otherwise unable to comply with ongoing section 271 obligations. See One Communications Petition at 5 (arguing that the Commission should eliminate the possibility that the merged firm will refuse to comply with the requirements of section 271); *id.* at 14 (arguing that because FairPoint will be highly leveraged, it will not have an incentive to expend the resources necessary to comply with section 271); *id.* at 18-19 (arguing that FairPoint has no experience with meeting the wholesale requirements of section 271); *id.* at 25 (arguing that a BOC's desire to enter the in-region long distance market should be conditioned on compliance with the section 271 checklist); One Communications Reply at 17 (arguing that the Commission should impose conditions governing the price and non-price terms and conditions for the offer of all inputs, including special access and interconnection from the section 271 checklist); *id.* at 24 (arguing that as a condition of regulatory approval, FairPoint must show it will comply with the obligations of section 271); *id.* at 24 (arguing that without section 271 requirements, the transaction will give FairPoint an incentive to backslide in terms of performance).

the Commission has granted Verizon in the service area that pertains to the facilities and service operations that FairPoint is acquiring.<sup>133</sup>

37. We find it unnecessary to condition our approval of this transaction subject to FairPoint not seeking an exemption under section 251(f)(1) and (f)(2).<sup>134</sup> FairPoint already has agreed to honor all existing Verizon obligations under section 251, including inter-carrier agreements entered into pursuant to section 251 for interconnection, transport and termination of local telecommunications, traffic exchange, resale, access to unbundled network elements, and collocation.<sup>135</sup>

38. *Employment.* We reject arguments that the transaction is likely to result in the loss of experienced employees.<sup>136</sup> We note that FairPoint states that it plans to retain all current employees and add another 700 positions when it moves out-of-state back office functions into the region and opens three new service centers.<sup>137</sup> Additionally, FairPoint states that it will assume pension and other post-employment benefits obligations for current Verizon employees.<sup>138</sup> Commenters do not contradict FairPoint's assertions, offering only speculative concerns,<sup>139</sup> which we find are not supported by the record.

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<sup>133</sup> See, e.g., Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services, WC Docket Nos. 02-112, 06-120; CC Docket No. 00-175, Report and Order and Memorandum Opinion and Order, FCC 07-159 (rel. Aug. 31, 2007) (establishing a new framework to govern the provision of in-region, long distance services by AT&T, Qwest, and Verizon, and their independent incumbent LEC affiliates). FairPoint does not seek, and thus we need not reach, a determination in this Order as to whether or not FairPoint may qualify for relief from any of the obligations applicable to BOCs. We note that other procedural avenues are available to FairPoint if it seeks regulatory relief in the future.

<sup>134</sup> See, e.g., One Communications Petition at 8 (arguing that the merged firm could attempt to argue it should be free of the requirements of section 251(c) under section 251(f)(1) in areas where it has not yet received a request for interconnection, services or network elements); *id.* at 9 (asserting that the merged firm will own less than 2% of the Nation's subscriber lines and therefore it will have a basis to argue for suspension or modification of the requirements of section 251(b) or section 251(c) under section 251(f)(2)); One Communications Sept. 13 *Ex Parte* Letter at 3 (arguing that the Commission should clarify that the merged firm is ineligible for the section 251(f) exemptions); One Communications Dec. 7 *Ex Parte* Letter at 15 (asserting that the Commission should condition any approval on FairPoint refraining from seeking section 251(f) protections).

<sup>135</sup> See, e.g., Nixon Decl. at 4; see also FairPoint/Verizon Opposition at 34 (stating that following the transaction, FairPoint's operating companies will be incumbent LECs).

<sup>136</sup> See, e.g., CWA/IBEW Petition at 28 (alleging the possibility that if the transaction is approved that FairPoint will lose experienced workers and access to experienced workers in nearby states); *id.* (claiming that employees "are seriously thinking of retiring before the merger becomes official"); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Sept. 7, 2007) (asserting based on a survey of current Verizon employees that more than half are seriously considering leaving the company if the sale is approved). *But see* FairPoint/Verizon Oct. 11 *Ex Parte* Letter at 2-4 (arguing that some Verizon workers are electing to join the Northern New England team despite knowing of the pending merger).

<sup>137</sup> See, e.g., FairPoint/Verizon Application at 19 (stating that FairPoint will maintain jobs, work with the unions, and honor existing collective bargaining agreements); FairPoint July 10 *Ex Parte* Letter, Attach. (stating that FairPoint plans to create 145 new positions in Vermont, 280 in Maine, and 250 in New Hampshire); FairPoint/Verizon Nov. 16, 2007 *Ex Parte* Letter.

<sup>138</sup> See, e.g., Leach Decl. at 8 (asserting that FairPoint will assume pension and other post-employment benefits obligations for all active, continuing employees of Verizon that become part of FairPoint).

<sup>139</sup> See CWA October 26 *Ex Parte* Letter at 11-14 (arguing that experienced employees will leave if the transaction is consummated, resulting in service degradation).

39. *Miscellaneous Proposed Conditions.* Several commenters in this proceeding allege that grant of the proposed transaction is inconsistent with the public interest and request that the Commission deny the applications. In the alternative, commenters urge us to impose conditions on any approval of the proposed transaction in order to address other alleged public interest harms.<sup>140</sup> We deny those requests because they do not address merger-specific harms. For example, we reject One Communications' request to condition merger approval on FairPoint's compliance with the provisions of the *Verizon/MCI Order* freezing special access rates and prohibiting FairPoint from requesting a rate increase for any UNE.<sup>141</sup> We agree with FairPoint that the dissimilar posture of the current transaction eliminates the need for such conditions.<sup>142</sup> As noted above, we do not believe that this transaction will disrupt the ability of competing carriers to obtain wholesale services, nor are we concerned that FairPoint's financial commitments to various stakeholders will create incentives for FairPoint management to recover costs through increases in UNE or special access prices.<sup>143</sup> Accordingly, we find it inappropriate to apply the voluntary conditions present in the *Verizon/MCI Order* to the present transaction.

40. One Communications argues that Verizon and FairPoint must be required to make appropriate adjustments in their volume/term commitment requirements for special access agreements so that wholesale customers can continue to qualify for discounts.<sup>144</sup> Specifically, One Communications argues that if a competitive LEC has received a certain percent discount under a special access volume commitment plan from Verizon, post-consummation that entity should continue to receive the same

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<sup>140</sup> See, e.g., CWA/IBEW Petition at 32 (urging the Commission to require service quality improvements based on performance as measured by the Commission in its ARMIS reports); CWA/IBEW Petition at 32 (asserting that the Commission should require that operating, administrative, and support systems functions operate efficiently for two years before cutover from Verizon to FairPoint); One Communications Petition at 27-28 (arguing that the Commission must require FairPoint to continue to comply with the provisions of the *Verizon/MCI Merger Order* freezing special access rates and prohibiting FairPoint from requesting a rate increase for any UNE); One Communications/Great Works Reply at 17 (asserting that the special access reporting requirements established in the *Verizon/MCI Merger Order* are necessary to address a possible breakdown of the wholesale system); One Communications Petition at 28 (asserting that FairPoint's systems must interface with wholesale customers in exactly the same manner as Verizon's); One Communications/Great Works Reply at 25 (arguing that there should be a binding merger condition that the merged firm will stand in place of Verizon for all existing interconnection agreements); Rivard Comment at 1 (arguing for Verizon to continue its FiOS rollout in Maine, New Hampshire and Vermont); Letter from Kenneth R. Peres, Ph.D., Research Economist, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 (filed Dec. 5, 2007) (attaching the Maine Hearing Examiner's recommended 47 conditions to the merger); One Communications Dec. 7 *Ex Parte* Letter at 15 (arguing for conditions on interconnection agreements and rates); *id.*, Attach. (attaching a list of proposed merger conditions to the New Hampshire Public Utility Commission).

<sup>141</sup> See, e.g., One Communications Petition at 27-28 (asserting that the Commission must require One Communications to continue to comply with the provisions of the *Verizon/MCI Order* conditions freezing special access rates and prohibiting the merged firm from requesting a rate increase for any UNE); One Communications Reply at 23 (arguing that the proposed transaction poses an even more serious threat, albeit from a different cause, than was the case with Verizon/MCI).

<sup>142</sup> See, e.g., FairPoint/Verizon Opposition at 39 (arguing that the transactions are distinguishable because the Verizon/MCI merger involved the vertical integration of an incumbent LEC with one of its largest wholesale competitors and this transaction would sever that relationship).

<sup>143</sup> See, e.g., One Communications Petition at 14 (arguing that without sufficient regulatory requirements, it is probable the quality of wholesale services offered by the incumbent LECs will deteriorate after they are transferred to FairPoint); One Communications Reply at 24 (arguing that the UNE and special access rate freeze requirements established in the Verizon/MCI transaction should apply to prevent FairPoint from recovering costs by raising prices).

<sup>144</sup> See Letter from Thomas Jones, Counsel for One Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-22 at 5 (filed Sept. 13, 2007) (One Communications Sept. 13 *Ex Parte* Letter).

discount from FairPoint, on the condition that the competitive LEC satisfies its volume commitment that is proportionately adjusted to reflect the reduction in the size of the relevant geographic territory to include only Maine, New Hampshire and Vermont.<sup>145</sup> One Communications argues, respectively, that a competitive LEC should also continue to receive the same percentage discount from Verizon that is appropriately adjusted to reflect the size of the relevant geographic area excluding those states.<sup>146</sup> We agree that the transaction should not adversely affect the Applicants' commercial partners and customers by requiring them to meet higher standards for discount rates during the term of existing contracts, and note that Applicants have agreed to adjust their contracts and tariffs on a *pro rata* basis to account for the changes in the Applicants' service territories resulting from the transaction, for the duration of existing contracts.<sup>147</sup> We note that the Applicants' plan to adjust their contracts and tariffs in this manner will ensure that the Applicants' wholesale customers are not adversely affected due to the loss of previously negotiated discount rates. Accordingly, we do not anticipate that the transaction is likely to result in public interest harms that would necessitate imposing a condition regarding special access discount rates.

## VII. CONCLUSION

41. We find that no significant public interest harms are likely to result from the merger, and that public interest benefits are likely to occur. We therefore conclude that Applicants have met their burden under sections 214 and 310(d) of the Act.<sup>148</sup>

## VIII. ORDERING CLAUSES

42. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and (j) and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 214, the applications for the transfer of control of certain spectrum licenses and domestic section 214 authorizations from Verizon to FairPoint as discussed herein and set forth in Appendix B ARE GRANTED.

43. IT IS FURTHER ORDERED that, pursuant to section 4(i) and (j), 214, 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 214, 309, 310(d), the applications for the assignment of international section 214 authorizations from Verizon to FairPoint as discussed herein and set forth in Appendix B ARE GRANTED.

44. IT IS FURTHER ORDERED that, pursuant to section 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the applications for the *pro forma* assignment of certain spectrum licenses from Verizon New England to Telco and the transfer of control of spectrum licenses held by Telco from Verizon to FairPoint as discussed herein and set forth in Appendix B ARE GRANTED.

45. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the Petitions to Deny the transfer of control and licenses and authorizations from Verizon to FairPoint filed by the Communications Workers of America and the International Brotherhood of Electrical Workers, and One Communications Corp. ARE DENIED for the reasons stated herein.

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<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See FairPoint Oct. 29 *Ex Parte* Letter at 1-2.

<sup>148</sup> 47 U.S.C. §§ 214(a), 310(d). The actions taken in this Order are without prejudice to ongoing state proceedings.