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

In the Matter of	)	
	)	
Verizon Communications Inc. and Frontier Communications Corporation Application for Consent to Assign and Transfer Control of Authority to Provide Global Facilities-Based and Global Resale International Telecommunications Services and to Assign and Transfer Control of Domestic Common Carrier Transmission Lines, Pursuant to Section 214 of the Communications Act of 1934, as Amended	)	WC Docket No. 09-95 DA 09-1793

COMMENTS OF KENTUCKY DATA LINK

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Authority to Provide Global Facilities-Based and	)	
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Domestic Common Carrier Transmission Lines,	)	
Pursuant to Section 214 of the Communications	)	
Act of 1934, as Amended		

COMMENTS OF
KENTUCKY DATA LINK

Kentucky Data Link ("KDL"), through its undersigned counsel, submits these comments regarding the application of Verizon Communications Inc. ("Verizon") and Frontier Communications Corporation ("Frontier") (collectively, the "Merged Firm") for approval of the proposed assignment and transfer of control in the above captioned proceeding.

I. SUMMARY AND INTRODUCTION

KDL has provided choice, innovative services and low prices for the past ten years to customers throughout significant parts of the territory served by the Verizon incumbent local exchange carriers (collectively, the "Spin-Off ILECs") that the Applicants seek to transfer to the Merged Firm.[1] KDL's business plan and market success in these areas remain dependant upon

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[1] *See* Application of Contel of the South Inc. d/b/a Verizon Mid-States, Verizon Communications Inc. and Frontier Communications Corporation for Consent to Transfer Control of Domestic Section 214 Authority, *Consolidated Application for Transfer of Control and Assignment of International and Domestic 214 Authority*, WC Dkt. No. 09-95 at n.2 (filed May 29, 2009) ("*Application*") ("The Verizon subsidiaries who hold Section 214 authorizations that will be included in this transaction are: Contel of the South, Inc. d/b/a Verizon Mid-States,

Verizon's obligation to comply with the duties imposed by Sections 251, 271 and 272 of the Act, including the duty to offer collocation and access to unbundled network elements. KDL is concerned that the Merged Firm will be less cooperative in providing access to necessary inputs from the Spin-Off ILECs than has been the case while those ILECs were owned by Verizon. To prevent this merger-specific harm, the Commission must rule in this proceeding that the Spin-Off ILECs will be subject to the full panoply of requirements applicable to Bell Operating Companies ("BOCs") and incumbent LECs after the transaction. Specifically, the Commission should clarify that (1) consistent with the Commission's holding in the *FairPoint - Verizon Merger Order*,[2] the Spin-Off ILECs are a "successor or assign" to Verizon and, therefore, the Merged Firm must continue to comply with the obligations of a BOC with respect to the Spin-Off ILECs in West Virginia; and (2) the Merged Firm is ineligible to request relief under Section 251(f)(1) from the requirements of Section 251(c) in any area served by the Spin-Off ILECs.[3]

Verizon California Inc., Verizon North Inc., Verizon Northwest Inc., Verizon South Inc., Verizon West Coast Inc. Verizon West Virginia Inc., Verizon Long Distance LLC, and Verizon Enterprise Solutions LLC.").

[2] *See In re 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.*, Memorandum Opinion and Order, 23 FCC Rcd. 514, ¶¶ 33-36 (2008) ("*FairPoint - Verizon Merger Order*").

[3] The Merged Firm would not qualify under Section 251(f)(2) for a suspension or modification of any of the obligations of Sections 251(b) or (c) because it will not have fewer than 2 percent of the nation's subscriber lines at the *holding company level* post-merger. *See In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1264 (1996) ("We find that Congress intended Section 251(f)(2) only to apply to companies that, at the holding company level, have fewer than two percent of subscriber lines nationwide."); *see also Local Telephone Competition: Status as Of June 30, 2008*, at Table 1 (WCB July 2009) (showing 154,654,847 total end-user switched access lines nationwide); Frontier Communications Investor Relations Presentation, *Welcome to the New Frontier*, at 9 (May 13, 2009) (showing that the Merged Firm will have 7,045,000 access lines), *available* at http://phx.corporate-

II. THE SPIN-OFF ILECS SHOULD CONTINUE TO BE CLASSIFIED AS BELL OPERATING COMPANY FACILITIES IN WEST VIRGINIA.

The FCC should hold that if the Verizon West Virginia assets are transferred to the Merged Firm, the operator of those assets post-merger would be considered a "successor or assign" to the Verizon BOC and would therefore continue to be subject to the full range of legal requirements applicable to BOCs. Such a determination is necessary to eliminate the very real possibility that the Merged Firm will refuse to comply with the bedrock legal requirements of Section 271 and the nondiscrimination requirements of Section 272(e) (which have not sunset) after the proposed transaction.

The LEC networks that Verizon West Virginia proposes to transfer to the Merged Firm are classified as BOC facilities today. Under Section 3(4)(A) of the Act, the definition of the term BOC includes "The Chesapeake and Potomac Telephone Company of West Virginia."[4] The Chesapeake and Potomac Telephone Company of West Virginia is known today as Verizon West Virginia Inc. Thus, Verizon West Virginia is a BOC.

If a BOC transfers any LEC facilities, as Verizon West Virginia seeks to do in this proceeding, the facilities must continue to be classified as BOC facilities. Section 3(4)(B) of the Act explicitly states that "any successor or assign" of a BOC listed in Section 3(4)(A), including the Chesapeake and Potomac Telephone Company, which provides "wireline telephone exchange service" is a BOC.[5] The Commission merely need follow the *FairPoint - Verizon*

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[4] 47 U.S.C. § 153(4)(A).

[5] 47 U.S.C. § 153(4)(B); *see also In re Sacred Wind Communications, Inc. and Qwest Corp. et al.,* Order, 21 FCC Rcd. 9227 (2006) (Chief, Wireline Competition Bureau) ("*Sacred Wind Order*"). When the Wireline Competition Bureau approved Qwest's sale of rural exchanges in

Merger Order precedent to find that the operator of the transferred West Virginia LEC assets is a "successor or assign" to the Verizon BOC. In the *FairPoint - Verizon Merger Order* (which also involved a similar spin-off of Verizon BOC assets), the Commission found that such a designation was appropriate to "address Congressional concerns regarding the BOCs opening their markets to competition" and that "[t]he potential loss of the market-opening benefits of Section 271 is an independent public interest reason" for rejecting arguments to the contrary.[6] These reasons apply equally to the West Virginia Spin-Off ILECs, mandating an identical outcome.

Moreover, the "successor or assign" designation is appropriate in this case because the Merged Firm's operations in West Virginia would meet the "substantial continuity test" as applied in the *FairPoint - Verizon Merger Order*. Under that Federal "common law" test, courts focus on whether the successor company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations."[7] The FCC found that this test was met in the *FairPoint - Verizon Merger Order* because (1) "the

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New Mexico to Sacred Wind Communications, it rejected Sacred Wind's argument that because Sacred Wind was "merely acquiring 2,300 copper lines from Qwest, it [wa]s not acquiring an 'exchange' *per se*." *Sacred Wind Order* ¶ 20. The Bureau held that Sacred Wind was in fact acquiring exchange assets, facilities, and customers from Qwest in order to provide "telephone exchange service" and therefore, "Sacred Wind, as a successor to Qwest, meets the definition of an incumbent LEC pursuant to Section 251(h)(1) of the Act." *Id.* ¶ 25. The Bureau did not specifically address whether the successor entity can be classified as a BOC as opposed to merely an ILEC. However, the logical inference from the Bureau's analysis is that, as a successor to Qwest, an ILEC which is also a BOC, Sacred Wind meets the statutory definition of a BOC. Likewise, with respect to the instant transaction, the Merged Firm will acquire facilities from—and thus become a successor to—Verizon West Virginia, an ILEC which is also a BOC. Accordingly, the Merged Firm will satisfy the statutory definition of a BOC under Section 3(4)(B) and be subject to all provisions of the Act applicable to BOCs.

[6] *FairPoint - Verizon Merger Order* ¶ 33.

[7] *Id.* ¶ 34 (internal cites omitted).

transaction will result in FairPoint acquiring the substantial assets that are necessary to continue the incumbent's traditional business operation from Verizon . . . resulting in no interruption or substantial change to Verizon's business operation," and (2) the transfer involved the majority of the assets of the Verizon New England operating company.[8] In this instance, the first factor is met because the Merged Firm plans to operate these assets as before, without interruption or substantial change. The second factor is met because Verizon plans to transfer, in *toto*, all of its local exchange operations in of Verizon West Virginia.[9]

III. THE SPIN-OFF ILECS SHOULD NOT BE ELIGIBLE FOR THE PROVISIONS OF SECTION 251(F)(1).

The proposed transfer of the Spin-Off ILECs to Frontier also creates the risk that the Merged Firm will, unlike Verizon, attempt to argue in the future that the Spin-Off ILECs are eligible for the protections in Section 251(f)(1).[10] Even the possibility that the Merged Firm would claim eligibility for these rural protections could have a chilling effect on competition. It is therefore necessary that the Commission clarify in this proceeding that the Spin-Off ILECs will be ineligible for the protections of Section 251(f)(1) after being transferred to the Merged Firm.[11]

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[8] *Id.*

[9] *See Application* at n.3 ("The transaction involves the transfer to Frontier of all of Verizon's local wireline operating territories in Arizona, Idaho, Illinois, Indiana, Michigan, Nevada, North Carolina, Ohio, Oregon, South Carolina, Washington, West Virginia and Wisconsin.").

[10] *Id.* § 251(f)(1).

[11] The Applicants have not made any claims in their application that they will not seek the protections of Section 251(f).

Section 251(f)(1) states that Section 251(c) "shall not apply to a rural telephone company"[12] until the following conditions are met:

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

47 U.S.C. § 251(f)(1)(A). Thus, if a state commission decides that a rural incumbent LEC's fulfillment of a CLEC's request for collocation or UNEs, for example, would result in financial hardship or is technically infeasible, that "rural telephone company" would be exempt from fulfilling the request. If any of the Spin-Off ILECs qualify as a "rural telephone company," that ILEC could attempt to argue that, in areas where it has not yet received a request for interconnection, services or network elements, it should be free of the requirements of Section 251(c).

Verizon has not sought the protections of Section 251(f)(1) in the territories served by the Spin-Off ILECs. If the Merged Firm were to do so, the level of competition would be reduced, thereby resulting in a merger-specific harm to consumer welfare. Accordingly, the Commission should prohibit the Merged Firm from exploiting the provisions of Section 251(f)(1) in the

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

territories served by the Spin-Off ILECs. The Commission has ample legal and policy justification for doing do.

First, Section 214 permits the Commission to condition its approval of a transfer of control of a Section 214 authorization, such as the authorizations at issue in this proceeding. *See* 47 U.S.C. § 214. The Commission is well within its rights to establish conditions that prevent the transaction from resulting in diminished harm to competition and consumer welfare. This could be the case here because there is reason to believe that the Merged Firm will, if left to its own devices, try to avail itself of the rural exemption, thereby reducing competition and harming consumer welfare. Indeed, Frontier has aggressively pursued the exemption in its own legacy territory. The mere risk that the Merged Firm could obtain the protections of Section 251(f) from a state commission would chill investment in further entry in the relevant region. For the same reason, the Commission should reject any non-binding promise that the Merged Firm might offer that it would not seek the rural exemption. Compliance with the market-opening provisions of Sections 251(c) has not and should not be subject to the discretion of incumbent LEC management. These provisions were and continue to be crucial to ensuring local exchange competition and cannot be preserved by a mere promise.

Second, permitting the Merged Firm to seek the protections of Section 251(f) would establish a harmful precedent. If the Commission were to adopt this approach, BOCs and other large ILECs with rural assets would have a powerful incentive to divide their service territories into separate operating companies and to sell off rural exchanges to smaller ILECs that, post-transaction, would be eligible for the protections of Section 251(f). Such eligibility would make the transferred ILECs more valuable in the hands of smaller ILECs than in the hands of larger ILECs that do not qualify for the protections of Section 251(f). The differential treatment of the

same LEC assets serving the same customers solely by virtue of a change in ownership is utterly incoherent. It would also be wasteful, because it would give carriers the incentive to engage in large-scale ownership transfers as a means of evading regulation rather than because of the inherent efficiencies or other consumer welfare benefits of the transactions. Moreover, KDL's customers count on it to deploy competitive services in the territories served by the Spin-Off ILECs. If the Merged Firm were allowed to backslide from its current Section 251(c) obligations, there will be little or no competitive alternative.

Moreover, the Commission has already determined, in the context of universal service, that local exchanges should not arbitrarily receive favorable regulatory treatment as a result of a transfer to new owners. This concept is implicit in the Commission's study area boundary freeze policy.[13] In 1985, the Commission froze all study area boundaries in existence on November 15, 1984 to prevent carriers from manipulating study area borders to create high-cost exchanges within their existing service territories, thereby maximizing their high-cost universal support.[14]

Similarly, when the Commission promulgated Section 54.305(b) of its rules,[15] it sought to discourage rural carriers from allowing potential universal service support to unduly influence

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

[14] *See In re MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 50 F.R. 939, ¶ 1 (1985) ("*Part 67 Order*"), adopting Recommended Decision and Order, 49 F.R. 48325, ¶¶ 64-66 (1984). For example, a carrier seeking to acquire local exchange facilities could structure the transaction so that the high-cost exchanges are isolated into a separate study area, allowing it to obtain more universal service support than it would otherwise. *See also In re Federal-State Joint Board on Universal Service et al.*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, And Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd. 11244, ¶ 111 (rel. May 23, 2001) ("*Universal Service Fourteenth Report and Order*").

[15] 47 C.F.R. § 54.305(b).

their decisions to purchase a high-cost exchange.[16] Section 54.305 of the Commission's rules provides in relevant part that "a carrier that acquires telephone exchanges from an unaffiliated carrier shall receive universal service support for the acquired exchanges at the same per-line support levels for which those exchanges were eligible prior to the transfer of the exchanges."[17] In other words, an acquiring carrier will only receive as much universal service support for its acquired exchanges as the previous owner received. The FCC's rationale for creating this rule was that regulation should not cause exchange assets to be more or less valuable in the hands of one class of carrier versus another. Indeed, in making its recommendation to retain Section 54.305, the Joint Board Rural Task Force stated that "[a] mere transfer of ownership should not result in an increase in support associated with the acquired lines."[18]

Third, at least with regard to West Virginia, permitting Spin-Off ILECs to become eligible for Section 251(f) protections would be flatly inconsistent with the requirement that a "successor or assign" of a BOC continue to be classified as a BOC. The most important statutory requirement uniquely applicable to a BOC is that it comply with the competitive checklist of Section 271, and the Section 251(b) and (c) obligations listed therein, as a precondition for entering the in-region long distance market and retaining its authorization to provide such service on a going-forward basis.[19] If transferring BOC local exchange networks to another firm could free the BOC incumbent LECs from the core market-opening provisions of

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

[17] 47 C.F.R. § 54.305(b).

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

[19] *See* 47 U.S.C. § 271.

Sections 251 and 271, the incumbent LECs would cease functioning as BOCs in the process. The "successor or assign" provision of Section 3(4)(B) would thereby be rendered meaningless.

Furthermore, because Section 251(f)(1) gives state commissions the authority to determine whether compliance with Section 251(c) is overly burdensome or technically infeasible, the determination as to whether transferred BOC local exchange facilities could qualify for exemption would be left to individual states. This would be an absurd result given that Congress granted the Commission the authority to determine whether a BOC has met the requirements for Section 271 approval (in the process of "consulting" with a state as part of its inquiry into whether a BOC has met the requirements of Section 251(c)).[20] Granting BOC LEC assets eligibility to seek the protections of Section 251(f) would give the states the power to undo the Section 271 approval process by eliminating the BOC's obligation to comply with Section 251(c). The states' "consultation" role would be replaced with a nullification power that Congress could not have intended.

Finally, granting the states such power would not cover all of the unbundling obligations applicable to BOC LECs, thus creating an incoherent patchwork of legal requirements. This is because the Section 271 checklist imposes unbundling obligations that are independent of those established by Section 251(c).[21] If Congress had intended to give BOC LECs the right to seek the protections of Section 251(f), it would presumably have made the Section 271 unbundling requirements subject to those protections. But it did not. Thus, even if a BOC were to obtain the benefits of Section 251(f), it would still be subject to unbundling obligations. There is no evidence that Congress intended this strange and inconsistent outcome.

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[20] 47 U.S.C. § 271(d)(2)(B).

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

Accordingly, the Commission should rule that the Spin-Off ILECs that are the subject of the instant application are ineligible for the exemption provision of Section 251(f)(1). Even if the Act could somehow be read to permit BOC local exchanges to become eligible for Section 251(f) protection, the Commission must clarify that a state's grant of such an exemption would render the BOC noncompliant with its obligations under the competitive checklist of Section 271(c). If this were the case, the Commission would be obligated, pursuant to Section 271(d)(6), to revoke the Merged Firm's authorization to provide in-region interLATA service throughout the state in question.

IV. CONCLUSION.

For the foregoing reasons, the Commission should impose the legal requirements on the Merged Firm as discussed herein.

Respectfully submitted,

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