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	)	WC Docket No. 09-95
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	)	

PETITION TO DENY OF TW TELECOM INC., ONE COMMUNICATIONS CORP., INTEGRA TELECOM, INC., AND CBEYOND, INC.

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PETITION TO DENY OF CBEYOND, INC., INTEGRA TELECOM, INC., ONE COMMUNICATIONS CORP., AND TW TELECOM INC.

Cbeyond, Inc. ("Cbeyond"), Integra Telecom, Inc. ("Integra"), One Communications Corp. ("One Communications"), and tw telecom inc. ("tw telecom") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit this petition to deny the application of Verizon Communications Inc. ("Verizon") and Frontier Communications Corporation ("Frontier") for approval of the proposed assignment and transfer of control in the above-captioned proceeding.[1]

[1] Consolidated Application for Transfer of Control and Assignment of International and Domestic Section 214 Authority, Exhibit 1, Description of the Transaction and Public Interest Statement (filed May 29, 2009) ("Application"); *see also Applications Filed By Frontier Communications Corporation And Verizon Communications Inc. For Assignment Or Transfer Of Control*, Public Notice, DA 09-1793, WC Dkt. No. 09-95 (rel. Aug. 11, 2009).

I. INTRODUCTION AND SUMMARY.

The Commission has described the standard of review for determining whether a proposed transfer of control will serve the public interest pursuant to Section 214 of the Act[2] as follows:

> [W]e must 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 potential public interest benefits. The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[3]

Thus, the Commission's public interest inquiry must include an assessment of whether the proposed transaction will result in the Merged Firm's failure to comply with the provisions of the Act needed to sustain local competition. More generally, in "weighing any potential public interest harms against any potential public interest benefits," the Commission must determine that the benefits outweigh the harms "by a preponderance of the evidence." When evaluating applications for the previous two Verizon spin-off transactions, those involving incumbent LEC assets in Hawaii and in Maine, New Hampshire, and Vermont, the FCC failed to undertake this analysis in a meaningful way. Instead, it accepted the applicants' unsupported assurances that the transactions would result in net benefits, and it ignored warnings by competitors of the potential risks—including the risk that the Merged Firm would fail to comply with its wholesale obligations under Section 251—associated with each transaction.

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[2] 47 U.S.C. § 214.

[3] *In re AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, ¶ 19 (rel. Mar. 26, 2007).

Unfortunately, the two prior spin-off transactions have had disastrous consequences for consumer welfare. In both cases, it quickly became clear that the acquiring firm had insufficient resources and experience to manage the transferred LEC assets. As a result, in both cases, the acquiring firm was unable to handle the cutover from Verizon's operations support system ("OSS"), thus resulting in severely degraded service for both residential and wholesale customers and insufficient investment in broadband services. Moreover, in both cases, the local exchange assets in question have been starved of investment, with the Hawaii assets landing in bankruptcy and the Maine, New Hampshire, and Vermont assets brought to the brink of bankruptcy.

There is a very significant risk that the instant transaction will lead to the same consequences. Just as with the two previous Verizon spin-off transactions, the transfer of the Verizon incumbent LEC assets will be triple the size of pre-transaction Frontier. Frontier has no experience in managing a company the size of the Merged Firm. Moreover, it is taking on $3 billion in debt and making extravagant commitments to shareholders and other stakeholders, leaving in serious doubt the Merged Firm's ability to live up to its commitment to comply with its obligations to provide wholesale services or to deploy broadband services.

The Joint Commenters are particularly concerned about the implications of this transaction for wholesale services. Post-transaction, the Merged Firm will face an enormous increase in demand for wholesale inputs such as unbundled network elements ("UNEs") and interconnection. But legacy Frontier has no significant experience in serving wholesale customers. With all of its other commitments, it is hard to imagine that the Merged Firm will have sufficient financial and personnel resources to devote to developing the systems and expertise needed to serve wholesale customers. Moreover, the Merged Firm will have no incentive to meet its legal obligations to wholesale customers because doing so will only deprive it of market share and revenue—revenue it desperately needs to service its huge debt.

Furthermore, there are also material risks that the Merged Firm will increase wholesale rates, attempt to avoid Verizon's obligations as a Bell Operating Company ("BOC") in West Virginia, or even attempt to avoid its obligations as an incumbent LEC in the affected states by seeking to exploit the rural exemption under Section 251(f). Finally, there is a material risk that the proposed transaction will hinder the deployment of broadband to businesses and to rural and sparsely populated areas.

In light of these risks and the disastrous consequences of prior Verizon spin-off transactions, it is simply not enough for the Commission to accept the Applicants' unsupported assurances that this transaction will benefit consumers. Rather, the Commission must undertake a comprehensive review of the Merged Firm's ability to operate the assets in question and to live up to its legal obligations to provide wholesale service. Thus far, the Applicants have offered no basis for concluding that the Merged Firm can do so successfully.

II. PREVIOUS VERIZON SPIN-OFF TRANSACTIONS HAVE RESULTED IN SUBSTANTIAL PUBLIC INTEREST HARMS.

The spin-off transaction proposed by the Applicants in this proceeding is the third time in the last six years in which Verizon has sought Commission approval to transfer local exchange facilities in relatively high cost areas to smaller carriers. In the previous two transactions, one of which involved Verizon's local exchange facilities in Hawaii and one of which involved Verizon's local exchange facilities in Maine, Vermont, and New Hampshire, the FCC relied on the Applicants' unsupported assurances that the acquiring company would be able to continue to operate the Verizon wholesale and retail businesses without harm to consumer welfare. Unfortunately, that has not happened. Instead, a combination of inexperience and inadequate resources have caused the acquiring firm in both transactions to fail to provide wholesale and retail services on just, reasonable, and nondiscriminatory terms and conditions. Consumers have experienced, and continue to experience, significant net harms in all four states. This experience is highly relevant to the instant transaction since it resembles so closely the prior two Verizon spin-off transactions.

A. Verizon's Spin-off To HawTel Resulted In Substantial Public Interest Harms.

1. The Wireline Competition Bureau Rubber Stamped Verizon's Spin-off To HawTel.

In 2004, in a five-paragraph Public Notice, the Wireline Competition Bureau approved the transfer of Verizon Hawaii to the Carlyle Group.[4] The Bureau found that it was not "necessary to impose any conditions on the terms of the transfer."[5] In particular, the Bureau expressly rejected the argument of one competitive LEC that "the proposed transaction threatens to . . . diminish the efficiency of Hawaii's only incumbent network's operation support system[s]."[6] The Bureau held, "We rely on the Applicants' representation that they have a reasonable plan for developing and transitioning to independent back-office systems without 'reduction, impairment, or discontinuance of service to any customer.'"[7]

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[4] *See Streamline Domestic Section 214 Application Granted*, Public Notice, DA 04-2541, 19 FCC Rcd. 15604 (rel. Aug. 17, 2004), *recon. denied*, 19 FCC Rcd. 24110 (Wireline Competition Bureau) (rel. Dec. 15, 2004).

[5] *Id.* at 3.

[6] *Id.* at 2.

[7] *Id.* at 3.

2. The Spin-off To HawTel Resulted In Harm To Retail And Wholesale Customers in Hawaii.

Although the parties to the HawTel transaction had a detailed plan to cutover from Verizon's legacy OSS to HawTel's OSS in place,[8] the new company's critical back-office systems still lacked sufficient functionality after cutover.[9] The result has been significant harm to both retail and wholesale customers in Hawaii. For instance, consumers have experienced substantial service delays, outages, and billing problems.[10] Wholesale customers, such as tw telecom, have also experienced numerous problems, including HawTel's (1) failure to complete special access circuit orders on time; (2) failure to successfully port customers' phone numbers on time; (3) failure to provide a graphic user interface repair portal for wholesale customers to submit and monitor the status of trouble tickets; (4) directory listing problems; and (5) caller identification data deficiencies.[11] These problems compelled tw telecom to file a complaint with the Hawaii Public Utilities Commission ("PUC") in which tw telecom requested, among other things, an investigation into the persistent service issues and an independent audit of the

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[8] For example, the plan included various testing protocols to ensure that HawTel's systems would function properly following cutover. *See Joint Petition of Verizon New England Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof and FairPoint Communications, Inc. for approval of asset transfer, acquisition of control by merger and associated transactions,* State of Vermont Public Service Board, Dkt. No. 7270, Prefiled Direct Testimony of Michael D. Pelcovits on Behalf of NECTA, Inc. and Comcast Phone of Vermont, LCC, at 19 (filed May 24, 2007) ("Pelcovits Testimony").

[9] *See id.* at 19-20.

[10] *See id.* at 19-21.

[11] *See In the Matter of the Public Utilities Commission Instituting a Proceeding Regarding Hawaiian Telcom, Inc.'s Service Quality and Performance Levels and Standards in Relation to Its Retail and Wholesale Customers*, Public Utilities Commission of the State of Hawaii, Dkt. No. 2006-0400, Time Warner Telecom of Hawaii, L.P., dba Oceanic Communications' Post-Hearing Brief at 23 (filed Nov. 9, 2007) ("tw telecom Post-Hearing Brief").

HawTel's OSS.[12] As tw telecom explained to the Hawaii PUC, HawTel's systems deficiencies have "had a significant negative impact" on tw telecom, resulting in damage to its reputation in Hawaii, problems for its retail business customers, delayed and lost revenue, and increased costs.[13]

The Hawaii PUC subsequently opened an investigation "to examine [Hawaiian Telcom's] service quality and performance levels and standards in relation to its retail and wholesale customers," including tw telecom.[14] In the course of that proceeding, the Hawaii Consumer Advocate stated:

> In view of the large magnitude of the resultant system related problems that occurred after the April 1, 2006 cutover . . . one may question whether Hawaiian Telcom's initial efforts involved the right people and systems integrating vendor(s), whether [HawTel's] financial interest may have had a higher priority than the immediate impact to customers in decisions made, and whether [HawTel] actually knew or knows how to fix the resultant problems.[15]

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[12] *See In the Matter of the Application of Paradise Mergersub, Inc., GTE Corporation, Verizon Hawaii Inc., Bell Atlantic Communications, Inc., and Verizon Select Services Inc. For approval of a merger transaction and related matters,* Public Utilities Commission of the State of Hawaii, Dkt. No. 04-0140, Time Warner Telecom of Hawaii, L.P., dba Oceanic Communications' Request for Investigation and Independent Audit and for Extension of Stipulation (filed June 21, 2006).

[13] tw telecom Post-Hearing Brief at 22-23.

[14] *See In the Matter of the Public Utilities Commission Instituting a Proceeding Regarding Hawaiian Telcom, Inc.'s Service Quality and Performance Levels and Standards in Relation To Its Retail and Wholesale Customers*, Public Utilities Commission of the State of Hawaii, Docket No. 2006-0400, Order No. 22928, at 1 (rel. Oct. 6, 2006).

[15] *In the Matter of the Public Utilities Commission Instituting a Proceeding Regarding Hawaiian Telcom, Inc.'s Service Quality and Performance Levels and Standards in Relation To Its Retail and Wholesale Customers*, Division of Consumer Advocacy's Statement of Position at 12, Public Utilities Commission of the State of Hawaii, Dkt. No. 2006-0400 (filed June 21, 2007).

The Hawaii PUC's investigation is ongoing, and today, more than three years after cutover, HawTel is still required to file biweekly reports "detailing its progress . . . [in] resolv[ing] the remaining backoffice cutover issues."[16]

3. The Spin-off Left HawTel Bankrupt.

Even if HawTel successfully resolves its remaining post-merger integration issues, the company's financial problems threaten continuity of retail and wholesale service. As a result of the $1.65 billion transaction, HawTel became a highly leveraged company with a capital structure consisting of 82.5 percent debt and 17.5 percent equity.[17] This capital structure left HawTel ill-equipped to handle the service problems that have plagued it since the cutover. As one analyst noted, "'When you have a lot of leverage, you have little room [for] variances.'"[18] Indeed, since the consummation of the spin-off in 2005, HawTel has lost more than $425 million, which has led to, among other things, the termination of a significant number of employees and the outsourcing of services.[19] HawTel has struggled under its heavy debt load,

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[16] *In the Matter of the Public Utilities Commission Instituting a Proceeding Regarding Hawaiian Telcom, Inc.'s Service Quality and Performance Levels and Standards in Relation To Its Retail and Wholesale Customers*, Public Utilities Commission of the State of Hawaii, Docket No. 2006-0400, Order No. 23550, at 4 (rel. July 18, 2007). The latest such report was filed on September 9, 2009. *See* Letter from Steven P. Golden, Vice President, External Affairs, Hawaiian Telcom, to Public Utilities Commission of the State of Hawaii, Dkt. No. 2006-0400 (filed Sept. 9, 2009).

[17] *See In the Matter of the Application of Paradise Mergersub, Inc., GTE Corporation, Verizon Hawaii Inc., Bell Atlantic Communications, Inc., and Verizon Select Services Inc. For approval of a merger transaction and related matters*, Public Utilities Commission of the State of Hawaii, Dkt. No. 04-0140, Decision and Order No. 21696, at 21-22 (rel. Mar. 16, 2005).

[18] Rick Daysog, "Value of HawTel Bonds Pluges 65%," *Honolulu Advertiser* (Apr. 27, 2008), *available at* http://the.honoluluadvertiser.com/article/2008/Apr/27/bz/hawaii804270321.html.

[19] *See, e.g.*, "Hawaiian Telcom Gets Turnaround Extension," *Pacific Business News* (Mar. 13, 2009), *available at* http://www.bizjournals.com/pacific/stories/2009/03/09/daily60.html; Nanea Kalani, "Hawaiian Telcom Replaces CEO Ruley," *Pacific Business News* (Feb. 5, 2008), *available at* http://www.bizjournals.com/pacific/stories/2008/02/04/daily12.html.

was unable to make interest payments to its creditors and ultimately filed for bankruptcy in December 2008.[20] Recently, Sandwich Isles Communications offered to buy HawTel out of bankruptcy for $400 million,[21] but it appears that this company—which relies on huge universal service subsidies to serve customers living on sparsely populated state-developed land—is also ill-equipped to become the state's incumbent LEC.[22] As these continuing financial problems demonstrate, HawTel was simply unqualified and unprepared to acquire Verizon's access lines in Hawaii.

B. Verizon's Spin-off To FairPoint Resulted In Substantial Public Interest Harms.

1. The FCC Rubber Stamped Verizon's Spin-off To FairPoint.

In 2008, the Commission approved Verizon's spin-off of its wireline assets in New England to FairPoint Communications in a 3-2 vote.[23] While the Commission ruled that FairPoint would be classified as a BOC post-transaction, it failed to impose any conditions on the

[20] *See* Jennifer Sudick, "HawTel Seeks Bankruptcy Protection," *Honolulu Star-Bulletin* (Dec. 2, 2008), *available at* http://www.starbulletin.com/news/hawaiinews/20081202_HawTel_seeks_bankruptcy_protection.html#fullstory.

[21] *See* Randi Petrello, "Sandwich Isles Bids $400M for Hawaiian Telcom," *Pacific Business News* (June 16, 2009).

[22] *See, e.g.,* Opening Statement of Rep. Henry A. Waxman, Hearing, "Universal Service: Reforming the High-Cost Fund," U.S. House of Representatives Committee on Energy and Commerce (Mar. 12, 2009), *available at* http://energycommerce.house.gov/Press_111/20090312/haw_open_ti.pdf (noting that Sandwich Isles receives $13,000 of high-cost support annually per line).

[23] *See generally 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.*, Memorandum Opinion and Order, 23 FCC Rcd. 514 (2008) ("*FairPoint-Verizon Merger Order*").

transaction.[24] The Commission held that "it is unlikely the merger will result in any anticompetitive effects or other public interest harms."[25] The Commission ignored warnings by One Communications and other parties that FairPoint would have a diminished incentive to provide access to wholesale inputs post-transaction,[26] that it lacked experience in serving wholesale customers and/or in operating a company the size of the merged firm,[27] and that it lacked sufficient financial resources.[28] Instead, the Commission relied heavily on FairPoint's unsupported assurances that all would be well and concluded, among other things, that "FairPoint is likely to have the technical resources necessary to maintain and improve its network in the relevant service territories."[29] As Commissioner Copps summarized in his dissent, "[T]oday's Order relies almost entirely on the assertions of the applicants and makes no endeavor to get under the hood to confirm that these promises are realistic."[30]

2. The Spin-off To FairPoint Resulted In Harm To Retail And Wholesale Customers in New England.

In his dissent in the *FairPoint-Verizon Merger Order*, Commissioner Copps also predicted that "[a]s a result of this particular transaction, FairPoint may be unable to meet its broadband promises, have less reliable service, . . . and [may be unable to] meet its other

[24] *Id.* ¶¶ 33-36.

[25] *See id.* ¶ 2.

[26] *See id.* ¶ 17 & n.52.

[27] *See id.* ¶ 23 & n.78

[28] *See id.* ¶¶ 21-22 & nn.65 & 74.

[29] *Id.* ¶ 23.

[30] *See id.*, Statement of Commission Michael J. Copps, Dissenting.

commitments due to its heavy debt load and historically high dividends."[31] This is exactly what has happened.

Since the cutover from Verizon's legacy OSS to FairPoint's OSS on February 1, 2009, many of FairPoint's critical back-office systems have not worked. As recently as last month, FairPoint admitted that "a number of the key back-office systems, such as order entry, order management, and billing, experience certain functionality issues."[32] As a result, consumers have faced billing delays, problems re-starting service, e-mail service outages, and long customer service wait times.[33] The Maine PUC has concluded that the ongoing FairPoint service problems have produced "the highest level of calls involving a single utility that [the Maine PUC's] consumer assistance division has seen."[34]

Wholesale customers have also experienced numerous problems, including the following: (1) difficulties in creating orders; (2) inconsistencies in processing orders; (3) failures of many pre-ordering transactions, such as requests for customer service records and loop qualifications; (4) unreliable and inaccurate notification messages about order status; (5) problems with format

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[31] *Id.*

[32] FairPoint Communications, Inc., Quarterly Report for the Period Ending June 30, 2009 (Form 10-Q), at 40 (filed Aug. 5, 2009) ("FairPoint Aug. 5, 2009 10-Q").

[33] *See* Tux Turkel, "FairPoint Besieged by Complaints," *Kennebec Journal Morning Sentinel* (Mar. 22, 2009), *available at* http://morningsentinel.mainetoday.com/news/local/6099988.html; *see also* FairPoint Aug. 5, 2009 10-Q at 40 ("As a result of these systems functionality issues, as well as work force inexperience on the new systems, we experienced increased handle time by customer service representatives for new orders, reduced levels of order flow-through across the systems, which caused delays in provisioning and installation, and delays in the processing of bill cycles and collection treatment efforts.").

[34] *See* Turkel, *supra*.

and content of Daily Usage Feed files; (6) slow response times after notification of transaction problems; (7) poor customer service; and (8) billing errors.[35]

As a result of these problems, several wholesale customers have filed formal requests for investigations with the regulatory commissions in the affected states. For instance, BayRing Communications has filed a complaint against FairPoint with the New Hampshire PUC ("NH PUC") alleging that FairPoint has "fail[ed], following the cutover, to provide BayRing with Operating Support Systems that are adequate, operationally ready, just and reasonable, and nondiscriminatory."[36] In its complaint, BayRing asks the NH PUC to open an investigation into the sufficiency of FairPoint's operations and to order that FairPoint provide wholesale customers with, among other things, fully operational OSS.[37] The NH PUC has determined that "further investigation is merited,"[38] and the complaint remains pending. In addition, Mid Maine Communications and CRC Communications of Maine have also requested that the Maine PUC

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[35] *See FairPoint Post-Cutover Status Report* at 5-7, Liberty Consulting Group (Apr. 1, 2009), *available at* http://www.puc.state.nh.us/Telecom/Filings/FairPoint/Monthly%20Monitoring%20Reports/FairPoint%20Cutover%20Monitoring%20Monthly%20Report%2001-14-09.pdf. This Report was filed pursuant to the request of regulators in Maine, New Hampshire, and Vermont. *See* Letter from Paula W. Foley, One Communications, to Karen Geraghty, Administrative Director, Maine PUC, Dkt. Nos. 2007-67 & 2008-108 (filed July 31, 2009) at 1 ("CLECs revenues and operations continue to suffer from FairPoint's inability to return to the levels of service provided by Verizon's systems pre-cutover.").

[36] *See In re CLEC OSS and Access to Wholesale Services,Petition of Freedom Ring Communication, LLC d/b/a BayRing Communications v. Northern New England Telephone Operations LLC, d/b/a FairPoint Communications-NNE*, New Hampshire Public Utilities Commission, Dkt. No. 09-039 (filed Mar. 2, 2009). BayRing has explained that "[i]n all material respects, FairPoint's CLEC OSS has failed" for the functions of preordering, ordering, provisioning, maintenance and repair, and billing. *See id.* at 4.

[37] *Id.* at 9-10.

[38] Letter from Debra A. Howland, Executive Director, New Hampshire PUC, to Kevin Shea, VP Government Relations, FairPoint, New Hampshire PUC Dkt. 09-039 (filed Apr. 20, 2009).

open an investigation into the sufficiency of FairPoint's OSS.[39] In their request, Mid Maine and CRC argue that "FairPoint has shown itself incapable of performing even the most basic of wholesale functions, such as porting numbers without causing service interruption for customers," and that "FairPoint's failures effectively prevent customers from choosing a competitive telecommunications provider for their service, thereby stifling competition and limiting consumer choice."[40]

Perhaps most egregiously, at the same time that FairPoint has failed to provide adequate wholesale service, it has sought to avoid financial penalties for not doing so. Under the Performance Assurance Plans ("PAPs") and Carrier-to-Carrier Guidelines ("C2C Guidelines") in the affected states, FairPoint is obligated to pay wholesale customers for its failure to provide wholesale service pursuant to specific quality standards.[41] These penalties are designed to give

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[39] *See Request of Mid Maine Communications and CRC Communications of Maine, Inc. for Investigation of FairPoint Communications, NNE,* State of Maine PUC, Dkt. No. 2009-106 (filed Mar. 20, 2009).

[40] *Id.* at 1-2.

[41] In Vermont, for example, the PAP sets forth "specific compensation that must be paid to CLECs in the event that Verizon [now FairPoint] does not adhere to specified service quality standards." *In re 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*, State of Vermont Public Service Board, Order, Dkt. No. 7270 (rel. Dec. 21, 2007) (denying the proposed transaction) ("*December 2007 VT PSB Order*"); *see also In re 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*, State of Vermont Public Service Board, Order, Dkt. No. 7270 at 6 (rel. Feb. 15, 2008) (approving the revised FairPoint-Verizon transaction and holding that "[a]ll of the rulings and rationale in the December 21 Order . . . still apply"). The Vermont PSB found it so "critical for CLECs that the PAP apply during the period around the cut over of systems from Verizon to FairPoint," that it explicitly required that FairPoint abide by the PAP and C2C Guidelines. *December 2007 VT PSB Order* at 219-20. *See also In re Joint Application for Approvals Related to Verizon's Transfer of Property and Customer Relations to Company to be Merged with and into FairPoint Communications, Inc.* Maine Public Utilities Commission, Order, Dkt. No. 2007-67, at 34 (rel. Feb. 1, 2008) (requiring that FairPoint be subject to the PAP in Maine); *Settlement Agreement between Joint Petitioners*

the incumbent LEC the incentive to provide wholesale customers with sufficient service quality. But rather than pay the applicable fines for its failure to provide wholesale service on just, reasonable, and nondiscriminatory terms and conditions, FairPoint has filed petitions for waiver of these penalties in the affected states.[42] This is unsurprising given FairPoint's financial instability.[43] The petitions in Maine and New Hampshire are still pending, but the Vermont Public Service Board ("Vermont PSB") did not allow FairPoint to escape the consequences of its actions. Instead, it rejected FairPoint's petition for waiver on the following grounds:

> FairPoint has failed to show any basis on which we could conclude that the waiver is due to circumstances outside of its control. To the contrary, the design of its new systems, and their ability to produce the reports necessary to comply with the PAP and C2C standards, was FairPoint's responsibility and FairPoint had a duty to ensure that those systems enable it to meet regulatory mandates.[44]

Wholesale customers are not the only parties that have raised concerns about the complete failure of the FairPoint's OSS. Consumer advocates in all three states have made their own calls for investigations into FairPoint's ability to provide service. On July 15, 2009, more than five months after cutover to the FairPoint OSS, the Vermont Department of Public Service

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and Staff of the Public Utilities Commission, New Hampshire Public Utilities Commission, Dkt. No. 07-011 Ex. 2, at 5 (filed Jan. 24, 2008), Ex. 2 at 5 (requiring FairPoint to be subject to the PAP in New Hampshire).

[42] *See, e.g., Petition of Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, for waiver of certain requirements under the Performance Assurance Plan and Carrier to Carrier Guidelines*, State of Vermont Public Service Board, Dkt. No. 7506 (filed Mar. 25, 2009) (requesting waiver of financial penalties under Vermont PAP); *see also FairPoint Communications Request to Waive Certain Data from PAP and C2C Reporting*, Maine Public Utilities Commission, Dkt. Nos. 2000-849 & 2007-67 (filed Mar. 25, 2009); *FairPoint Petition for Waiver of Certain Requirements under the Performance Assurance Plan and C2C Guidelines*, New Hampshire Public Utilities Commission, Dkt. No. 09-059 (filed Mar. 26, 2009).

[43] *See infra* Part II.B.3.

[44] *Order re: Waiver of Performance Assurance Plan and Carrier-to-Carrier Measures*, State of Vermont Public Service Board, Dkt. No. 7506 at 2 (rel. Aug. 6, 2009).

filed a "Show Cause" Petition with the Vermont PSB, requesting an investigation into whether FairPoint's Certificate of Public Good should be revoked.[45] Later that month, the Maine Public Advocate filed a proposal for independent evaluation of FairPoint's OSS because of the "ongoing and significant problems that continue to arise in Maine, New Hampshire and Vermont due to the lack of a fully functional FairPoint OSS."[46] Most recently, on September 3, 2009, the New Hampshire Consumer Advocate, citing concerns about the accuracy and completeness of the data FairPoint has reported to regulators and other parties, urged the state commissions in all three states to "immediately engage a truly independent third party to perform an objective assessment of FairPoint's current status."[47]

3. The Spin-off Has Helped Bring FairPoint To The Brink Of Bankruptcy.

The failure of the post-merger transition to FairPoint's OSS has made the company's already bad financial situation worse. Specifically, even before it assumed an additional $1.7M in debt through its transaction with Verizon,[48] FairPoint was already in substantial financial peril.[49] FairPoint's failure to successfully integrate the spun-off assets merely exacerbated the

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[45] *See* News Release, "Department Files 'Show Cause' Petition Against FairPoint," Vermont Department of Public Service (July 15, 2009), *available at* http://www.vermont.gov/portal/government/article.php?news=1167.

[46] *See Proposal for Independent Evaluation of FairPoint OSS*, Maine Public Advocate, Maine Public Utilities Commission, Dkt. Nos. 2008-108 & 2007-67, at 1 (filed July 24, 2009).

[47] "Don't Trust FairPoint Data, State Consumer Advocate Warns," *Comm. Daily*, at 9 (Sept. 10, 2009).

[48] The transaction left FairPoint with $2.2 billion of debt as of March 31, 2008. *See* FairPoint Communications, Inc., Quarterly Report for the Quarterly Period Ended Mar. 31, 2008, at 50 (Form 10-Q) (filed May 16, 2008).

[49] For example, the Vermont PSB initially rejected the FairPoint-Verizon merger application because it found that "the evidence raise[d] significant questions about FairPoint's financial soundness" and "[a]s presently structured, FairPoint could be in a situation where, either by choice or as a necessity to meet debt obligations, it would need to reduce operating expenses,

company's financial problems. Cutover issues forced FairPoint to incur $28 million of incremental operating expenses over a six-month period, and more importantly, to divert substantial financial and managerial resources away from running the company.[50] FairPoint is now on the verge of insolvency. The company recently summarized the situation to its investors as follows:

> We have a highly leveraged capital structure and have essentially fully drawn all borrowings available under our credit facility. In the future, we expect that our primary sources of liquidity will be cash flow from operations and cash flow on hand. Because of cutover issues that have prevented us from executing fully on our operation plan for 2009, our revenue has continued to decline. In addition, cash collections have remained below pre-cutover levels and we have incurred significant incremental costs to operate our Northern New England operations, causing further stress on our liquidity position.[51]

This tenuous financial position has led FairPoint to warn that it may be forced to file for bankruptcy if it is unable to restructure sufficient amounts of its debt.[52] Such a development would only compound the operational problems plaguing FairPoint in New England, as the company would be forced to divert resources away from managing day-to-day operations and correcting systems deficiencies and toward developing a restructuring plan. As FairPoint has explained, "A chapter 11 proceeding may result in a protracted process which could disrupt our

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slow expansion of broadband and other services, and reduce investment to enable it to continue transferring money from the Vermont operation to the parent company (and on to shareholders)." *See December 2007 VT PSB Order* at 5 & 8.

[50] *See* FairPoint Aug. 5, 2009 10-Q at 40.

[51] *Id.* at 54.

[52] *See, e.g., id.* at 63 ("If we are unable to consummate a successful restructuring of our notes, we will consider all other restructuring alternatives available to us, which may include a chapter 11 proceeding."). At a September 9, 2009 joint hearing before the Maine, New Hampshire, and Vermont state commissions, FairPoint CEO David Hauser also admitted that bankruptcy was a possibility. *See* "FairPoint CEO Stresses Commitment in Tri-state Talks," *Communications Daily*, at 10-11 (Sept. 11, 2009).

business, divert the attention of our management from the operation of our business and the implementation of our business plan and may ultimately be unsuccessful."[53] In short, it is clear that FairPoint's ongoing operational and financial difficulties have directly and negatively impacted consumers and wholesale customers in Maine, Vermont, and New Hampshire.

III. THE PROPOSED SPIN-OFF TRANSACTION WILL LIKELY RESULT IN SUBSTANTIAL HARM TO WHOLESALE CUSTOMERS.

The instant transaction bears a disturbing similarity to the HawTel and FairPoint transactions. As with those two previous transactions, Verizon is divesting local exchange facilities that serve high-cost areas where it is difficult to deploy high-margin FiOS broadband facilities efficiently. Rather than invest in the local exchange assets in question, Verizon has chosen to sell them off to a much smaller firm that has severely limited resources and that has little experience in operating as a wholesale provider to CLECs. It should be obvious that this transaction poses a serious threat to wholesale customers and to consumer welfare more generally. But the Applicants have failed to address this problem in any meaningful way. They have offered nothing but blithe assurances that everything will be fine. Given the history of the last two Verizon spin-off transactions, this approach is simply not good enough.

A. There Is A Material Risk That The Quality Of Wholesale Service Offered Via The Transferred Assets Will Deteriorate Post-Transaction.

As with previous Verizon spin-off transactions, it is likely that the quality of wholesale service provided via the transferred assets with deteriorate following the spin-off to Frontier.

1. The Merged Firm Will Lack The Experience And Resources To Provide Wholesale Inputs In Compliance With Its Statutory Obligations.

Section 251 of the Act requires incumbent LECs to provide competitors with, among other things, interconnection and access to unbundled network elements on rates, terms, and

[53] *Id.*

conditions that are just, reasonable, and nondiscriminatory.[54] As discussed herein, however, there is a material risk that the Merged Firm will fail to comply with its wholesale obligations under Section 251. This is true for three reasons.

First, the Applicants have not shown that Frontier has any experience in managing a company the size of the Merged Firm. Frontier currently serves approximately 2.25 million access lines in 24 states, and the Merged Firm will have approximately 7.05 million access lines in 27 states.[55] Thus, Frontier will triple in size as a result of the proposed transaction.[56] The Applicants claim that Frontier "has a strong record of successfully integrating acquisitions, including lines previously acquired from Verizon's predecessor, GTE," but Frontier integrated those 750,000 access lines over the course of seven years.[57] By contrast, here, Frontier will acquire *4.8 million access lines overnight*. Thus, there is a substantial risk that the Merged Firm will be unable to successfully integrate its operations, as well as its OSS, as was the case in the spin-offs to HawTel and FairPoint. Indeed, Frontier has acknowledged that, "The acquisition of the Spinco business is the largest and most significant acquisition Frontier has undertaken. . . . [T]he size and complexity of the Spinco business and the process of using Frontier's existing common support functions and systems to manage the Spinco business after the merger, if not managed successfully by Frontier management, may result in interruptions of the business

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[54] 47 U.S.C. § 251.

[55] *See* Frontier Communications Investor Relations Presentation, Frontier Communications: Welcome to the New Frontier, at 27 (May 13, 2009), http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzM3NTc4fENoaWxkSUQ9MzIyMTk3fFR5cGU9MQ==&t=1 ("Frontier May 13, 2009 Investor Relations Presentation").

[56] *See also* Frontier Communications Fact Sheet at 1 (stating that Frontier currently has 5,671 employees while the Merged Firm will have approximately 16,000 employees), http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzM3NTkzfENoaWxkSUQ9MzIyMjEyfFR5cGU9MQ==&t=1 (last visited Sept. 21, 2009).

[57] Application at 4; *see also id.* at 20.

activities of the combined company that could have a material adverse effect on the combined company's business, financial condition, and results of operations."[58] The Applicants provide no specifics as to how Frontier can avoid this outcome.

Second, the Applicants have failed to demonstrate that Frontier has any significant experience in serving wholesale customers. For example, Frontier does not provide any descriptions of the wholesale OSS that it operates or any sense of the scale or capacity of those systems (*i.e.*, the volume of order, repair, and maintenance transactions those OSS process). Frontier also fails to provide any comparison of the current volume of such transactions and the volume that would be expected post-transaction. Frontier does not even state how many wholesale access lines it currently serves in the affected states.

The Applicants attempt to differentiate the proposed transaction from the HawTel and FairPoint spin-offs on the basis that "Frontier will not need to convert billing and other operational systems in thirteen of the fourteen states" at issue.[59] This does not mean, however, as the Applicants claim, that "retail and wholesale customers alike have no reason to fear disruption to the services they are receiving."[60] Based on the Application, it appears that Verizon will create "separate instances of [its] current systems for both retail and wholesale" and that those systems "will be transferred to Frontier at close."[61] In other words, Verizon will

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[58] Frontier Communications Corp. SEC Form S-4 Registration Statement, at 24 (filed July 24, 2009) ("Frontier Form S-4").

[59] Application at 4.

[60] *Id.*

[61] *Id.* at 21.

duplicate its systems and transfer those systems to Frontier at closing.[62] According to the Applicants, "Verizon will continue to provide system support for not less than a year after close" and the Applicants will "test data transfer and integration prior to close."[63] This approach raises several questions. For example, what is Verizon's incentive to duplicate its systems properly and to provide ongoing system support for at least one year following closing? What happens if Verizon has not duplicated the systems in time for closing? In addition, what if testing immediately prior to closing reveals that the systems have not been properly duplicated? The Applicants have failed to answer any of these obvious questions.

Furthermore, elsewhere in their Application, the Applicants state that "Frontier will *initially* use separate instances of Verizon's OSS for 13 of the 14 states involved" and that "*over time Frontier expects to migrate customers from those systems onto a single integrated platform*."[64] Thus, the Applicants are merely postponing any OSS integration issues that would otherwise occur at closing until sometime after closing. While the Applicants claim that they "have in place a plan for smooth transition of OSS systems and operations," they fail to provide any details about their plan.[65] For example, the Applicants do not provide any specific timeline for the transition or any information on the staffing of the transition, including whether the employees working on the transition have the requisite technical qualifications.

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[62] *See* Ed Gubbins, "Frontier COO on integrating Verizon assets," *Telephony* (May 13, 2009) ("[Verizon is] copying all the systems, all the software, all the platforms used to support the business.").

[63] Application at 21 & 4.

[64] *Id.* at 17 (emphasis added).

[65] *Id.* at 20.

The Applicants also attempt to differentiate the instant transaction from previous Verizon spin-off transactions on the ground that, while the Merged Firm will cutover from Verizon's OSS to Frontier's systems in West Virginia at closing, "these are existing, operational systems and do not need to be built from scratch."[66] Nevertheless, the Applicants have failed to provide any information about how this cutover will occur. The Applicants state that "customer accounts [and] billing information" will be transferred to Frontier at closing,[67] but it is entirely unclear whether Frontier's systems have the capacity to handle all of this data. This is especially troubling because the Merged Firm will have *five times* as many access lines in West Virginia than Frontier has today.[68] Moreover, as mentioned, while Frontier repeatedly points to the fact that it has consolidated billing systems over the course of five years that "encompass[ed] more customers than are to be transitioned in West Virginia," the Merged Firm will have to perform the cutover in West Virginia *in one day*.[69] Thus, contrary to the Applicants' representations to the Commission, the OSS transition in West Virginia involves substantial risk. As Frontier has told its investors, "[t]he size, complexity and timing of th[e] migration [in West Virginia], if not managed successfully by Frontier management, may result in interruptions of Frontier's business activities."[70]

In light of the serious OSS integration problems that arose after previous Verizon spin-off transactions, the Commission simply cannot take the Applicants at their word that "neither retail

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[66] *Id.* at 4.

[67] *Id.* at 21.

[68] *See* Frontier May 13, 2009 Investor Relations Presentation at 27.

[69] Application at 4-5; *see also id.* at 21.

[70] Frontier Form S-4 at 25.

nor wholesale customers will experience disruptions in service, ordering, or billing."[71] Indeed, while Frontier clings to its allegedly strong track record in integrating acquisitions, FairPoint made the exact same claims in the FairPoint-Verizon review proceeding.[72] Therefore, the Applicants here should be required to explain in detail specifically how they will avoid the myriad problems that have plagued retail and wholesale customers in the HawTel and FairPoint spin-off transactions and to state what consequences they are willing to face (e.g., financial penalties) in the event that similar problems occur and persist following the spin-off to Frontier.

Third, like FairPoint and HawTel, the Merged Firm will have few financial resources to devote to developing the systems and expertise necessary to serve wholesale customers. To begin with, the Merged Firm will take on *more than $3 billion in new debt*.[73] At the same time, Frontier has made additional commitments to various stakeholders that will divert resources from broadband deployment and other network investment, let alone investment in wholesale OSS. For example, the Applicants have stated that "Frontier will honor the union labor agreements in the 14 states" at issue.[74] In West Virginia, "Frontier has agreed not to fire represented technicians and installers for a period of 18 months."[75] In addition, even though Frontier plans to

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[71] Application at 20.

[72] *See, e.g.,* FairPoint-Verizon Opposition to Petitions to Deny, WC Dkt. No. 07-22, at 8 (filed May 7, 2007) (describing FairPoint's "[h]istory of [s]uccessful [a]cquisitions"); *see also id.* at 29 ("FairPoint's Past Acquisition History Supports the Finding That FairPoint Will Responsibly Manage This Acquisition.").

[73] *See* Frontier May 13, 2009 Investor Relations Presentation at 14.

[74] Verizon Communications, Press Release, *Verizon to Divest Wireline Business in 14 States*, at 2 (May 13, 2009), *available at* http://newscenter.verizon.com/press-releases/verizon/2009/verizon-to-divest-wireline.html.

[75] Letter from Darrell V. McGraw, Jr., Attorney General West Virginia to Michael A. Albert, Chairman et al., West Virginia Public Service Commission, Case No. 09-0871-T-PC, at 4 (Aug 21, 2009).

cut its post-merger dividend by 25 percent, "the reduced dividend will still be 30% greater than Frontier's 2008 earnings per share."[76]

These commitments are highly relevant to the quality of wholesale services provided post-transaction, since the Merged Firm will have a significant incentive to live up to commitments that might yield increased revenue or enhance the company's standing with employees or shareholders. Living up to its legal obligations to wholesale customers will only threaten the Merged Firm's profitability since good wholesale services would result in competitors' success. There is therefore a serious risk that the Merged Firm will use the excuse of limited resources and the need to meet commitments to other stakeholders as the basis for starving its wholesale operations, thereby harming competition and consumer welfare.

The Applicants tout that the proposed transaction will reduce Frontier's debt leverage as a basis for its claim that it will have plenty of resources to meet all of its obligations.[77] According to Standard & Poor's, however, the Merged Firm's reduced debt leverage and claimed operating efficiencies "are largely offset by [S&P's] concerns regarding the integration of the acquired Verizon properties longer term, given that the new company will be about 3x the size of Frontier on a stand-alone basis."[78] Moreover, the relevant inquiry for purposes of assessing whether the proposed transaction is in the public interest is not the financial health of Frontier before and after the transaction, but whether the assets at issue will be owned post-transaction by a company that is as strong financially as the existing ownership. In this case, the

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[76] Ohio Consumer Counsel's Motion to Deny Consent and Approval of the Change in Control, or in the Alternative, for the Imposition of Conditions on Merger and Memorandum in Support, Ohio PUC Case No. 09-454-TP-ACO, at 12 (filed Aug. 12, 2009).

[77] *See* Application at 3, 16.

[78] *See* Standard & Poor's Research Update, *Frontier Communications 'BB' Corporate Credit Rating Affirmed Following Proposed Acquisition of Verizon Access Lines*, at 2-3 (May 13, 2009).

answer is no. For example, Verizon's overall leverage ratio (*i.e.*, net debt divided by EBITDA) is 1.8[79] while the leverage ratio of the Merged Firm will be 2.6.[80] Again, the Merged Firm's highly leveraged balance sheet poses the risk that resources will be scarce and expenditures on wholesale service will be the first to go on the chopping block.

2. *The Experience Of The Joint Commenters Further Confirms The Risks To Wholesale Service Posed By The Transaction.*

The Joint Commenters' concern that the proposed transaction could result in significant harm to wholesale customers is further supported by their experiences with both Frontier and Verizon. There are many key wholesale functionalities that Verizon provides today that Frontier appears to be unable to provide. In some circumstances, even Verizon is unable to meet many of its obligations to wholesale customers, but it has at least developed a process for addressing these problems. There is no evidence that Frontier will continue to follow this process for correcting wholesale service problems. Finally, there are yet other circumstances in which Verizon is failing to meet its obligations to wholesale customers, has failed to make any commitment to resolve the problems, and the proposed transaction poses the risk that these problems will go unresolved as the Merged Firm seeks to address commitments to employees and shareholders rather than to wholesale customers.

a. The Joint Commenters' Experience With Verizon And Frontier Raises Questions About The Sufficiency Of The Merged Firm's OSS And Customer Service For Special Access.

With respect to the systems and customer service that support pre-ordering, ordering, provisioning, maintenance, and billing of Verizon's wholesale special access offerings, tw telecom's experience is that Verizon offers a number of features, functionalities and capabilities

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[79] *See* Verizon Communications Inc. SEC Form 8-K, at 2 (filed Sept. 10, 2009).

[80] *See* Frontier May 13, 2009 Investor Relations Presentation at 15.

that Frontier does not. *First*, Verizon is the only incumbent LEC to offer a nationwide service level agreement for special access DS1 and DS3 facilities. The National Service Level Agreement Plan ("Plan")[81] compares Verizon's actual performance to customer-specific on-time installation and mean-time-to-restore thresholds for DS1 and DS3 circuits and provides customers with bill credits if Verizon fails to meet these thresholds.[82] In 2008, tw telecom received more than $100,000 in credits from Verizon under the Plan.

Second, Verizon provides tw telecom with monthly performance reports that contain provisioning metrics[83] and repair metrics[84] for the DS1 and DS3 special access circuits that tw telecom purchases from Verizon. Frontier does not provide tw telecom with such reports.

Third, Verizon holds customer summits during which it solicits feedback from its large wholesale customers.[85] Frontier does not offer these summits.

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[81] *See generally* Verizon Tariff FCC No. 1 § 2.7.3, 2nd Revised Pages 2-85 to 2-95 (effective Oct. 18, 2008) (describing "2009 National SLA Plan for Qualifying Services").

[82] *See id.* § 2.7.3.1, 2nd Revised Pages 2-91 to 2-92 (providing that for each calendar month under the Plan, if Verizon provisions less than 95 percent of the DS1 circuits or 95 percent of the DS3 circuits that a customer purchases from Verizon by the committed due date, then the customer will receive, depending on the number of days "missed," a one-time credit of between 25 percent and 100 percent of one month of monthly recurring charges for each circuit that was installed after the due date); *see id.* at 2nd Revised Pages 2-93 to 2-95 (providing that for each calendar month under the Plan, if Verizon's mean-time-to-restore for all DS1s and DS3s purchased by a customer is greater than 3.99 hours and 2.99 hours, respectively, then the customer will receive a one-time credit of $250 and $1000, respectively, for each circuit whose repair time exceeded this threshold).

[83] These metrics include Due Date On Time, Customer Not Ready Rate, Delay Days, New Circuit Failure Rate, New Circuit Failures Without Repeats, and Firm Order Commitment On Time.

[84] These metrics include Mean Time To Repair Without No Trouble Found, Cleared Within 24 Hours, Mean Time To Repair With No Trouble Found, Customer Premises Equipment Failure Rate, Failure Frequency Rate, and Repeat Failure Rate.

[85] For example, Verizon held a Customer Ordering and Provisioning Summit in June 2009 to solicit feedback from its Wholesale Access customers "on what would make the ordering and

Fourth, tw telecom is electronically bonded with Verizon such that tw telecom can (1) conduct address verification, Carrier Facility Assignment verification, and service order verification electronically; (2) receive order conformation notifications electronically; and (3) submit and monitor trouble tickets electronically. tw telecom also receives order completion notifications from Verizon via an electronic interface. By contrast, Frontier does not have any of these capabilities.

Fifth, Verizon provides tw telecom with email order completion notifications. Frontier does not.

Sixth, when customers such as tw telecom order DS1 special access circuits under Verizon's Term Volume Plan, Verizon's systems automatically provision and bill the transport component of each circuit as a "MetroLAN" rate element when MetroLAN is the least expensive rate element available to the customer.[86] It is unclear whether Frontier's systems will have this same capability.

Seventh, it should also be noted that while, as mentioned, Frontier touts the fact that it has "consolidat[ed] five billing systems in the last five years,"[87] tw telecom experienced significant billing problems immediately after Frontier switched to a new billing platform in October 2008.

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provisioning processes more efficient." *See* 2009 Verizon Partner Solutions Customer Order & Provisioning Summit Presentation, at 3 (June 10-11, 2009), *available at* http://www22.verizon.com/wholesale/attachments/apphome_releases/OrderingSummitFullPresentation.pdf.

[86] Because the MetroLAN rate element replaces the fixed and per-mile mileage transport costs with a flat rate regardless of the distance traversed on a fiber ring, it is a much less costly transport option. *See, e.g.*, Verizon Tariff FCC No. 14 § 5.6.16(A), 1st Revised Page 5-93 (effective June 12, 2004) ("MetroLAN transport is provided at a flat-rate per month charge per DS1 . . ., per LAN traversed, regardless of the number of miles the circuit is routed on the fiber ring."). A large number of the DS1 special access circuits that tw telecom purchases from Verizon include the MetroLAN rate element.

[87] Application at 21.

Most importantly, Frontier incorrectly billed tw telecom for at least $18,000 that month. In addition, the Details Page of many invoices lacked details, and where details were provided, that information was often inconsistent with the information listed on the Summary Page of the same invoice.

Finally, although Verizon has deployed finished Ethernet in several serving wire centers that will be impacted by the proposed transfer (namely Durham, North Carolina; Beaverton, Oregon; and Everett, Washington), it is not clear that Frontier has the experience or expertise required to provide wholesale finished Ethernet special access services to tw telecom in these areas. This is a serious problem because many (perhaps most) Ethernet customers require that their service provider serve all or most of their business locations. tw telecom can serve locations with significant telecommunications needs over its own loop facilities, but tw telecom cannot efficiently deploy such facilities to the many locations with relatively limited telecommunications demand. At those locations, the incumbent LEC generally owns the only wireline facility connected to the end user. tw telecom must therefore be able to purchase incumbent LEC special access Ethernet at such locations. If this service is unavailable, there is a significant threat that customers will forego purchasing Ethernet even at their larger locations.

b. The Joint Commenters' Experience With Verizon And Frontier Raises Questions About The Sufficiency Of The Merged Firm's OSS And Customer Service For Unbundled Network Elements And Other Wholesale Inputs.

i. Integra

In Integra's experience, Verizon's OSS for UNEs in the areas subject to this transaction has numerous serious problems that Verizon had been working hard to remedy. Unfortunately, Verizon stopped this work, apparently because it planned to off-load the local exchange assets at issue in this proceeding to Frontier.

The list of Verizon system failures for UNEs is long indeed. For example, Integra has found that Verizon's raw loop data is often incorrect. When wholesale customers such as Integra order 2-wire analog loops from Verizon, they must indicate whether or not the loop is designed or not designed (i.e., served by a remote terminal) based on the information contained in Verizon's own databases. Frequently, however, that information is wrong, causing Verizon to delay provisioning of Integra's order and, ultimately, provisioning of retail service to Integra's end-user customer.

Integra has found that Verizon's connecting facility assignment ("CFA") records or Cross Connect Equipment Assignment ("CCEA")—records which indicate whether a particular connection point between Integra and Verizon is available within a Verizon central office—are frequently inaccurate. As a result, after it places an order for a UNE loop, Integra often receives a "jeopardy" notification indicating that a particular connecting facility is not available when Integra's records correctly indicate that it is in fact available. Resolving this discrepancy extends the interval between the date that Integra submits a request for service from Verizon and the date on which Integra can provide retail UNE-based service to its end-user customer. Integra has also found that, unlike other incumbent LECs such as Qwest that permit wholesale customers to retrieve 100 CFA records from their databases at a time, Verizon's Wholesale Internet Service Engine ("WISE") OSS allows Integra to retrieve only one such record at a time, thereby further delaying service delivery to Integra's retail customers.

Integra has also found that Verizon's customer service records ("CSRs"), or as Verizon refers to them, Customer Service Inquiries ("CSIs"), are also frequently inaccurate. When a Verizon customer switches to UNE-based service with Integra, Verizon often fails to timely update the CSR/CSI accordingly, thereby preventing Integra from submitting repair or other requests to Verizon for that customer account. At the same time, when a customer disconnects its UNE-based service with Integra and switches to Verizon, Verizon fails to timely update the CSR/CSI accordingly and continues to bill Integra for the UNEs at issue. Furthermore, when Verizon does not update its CSRs/CSIs, its CFA/CCEA and outside plant records are also not updated. This is particularly troublesome when Integra seeks to serve customers in multi-tenant buildings. For example, when an Integra customer in a multi-tenant building disconnects service and Verizon fails to timely update the CSR/CSI, Integra's ability to provide timely service to a new customer in the same building may be hindered because Verizon's CFA and outside plant records incorrectly indicate that the connecting facility is occupied when it is in fact available.

Through the Change Management Process ("CMP"), Verizon communicated to Integra and other wholesale customers that resolving these problems was "feasible"[88] and Verizon had been working to address them until this year. In January 2009, the company announced that it had eliminated all funding for the CMP for 2009.[89] Consequently, Verizon is no longer working to resolve dozens of OSS changes requested by CLECs over the past several years, the vast majority of which Verizon had determined were feasible.[90] Here, the Applicants have not given

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[88] *See, e.g.*, Prioritization Working Group Change Request History at 7 (Sept. 8, 2009), *available at* http://www22.verizon.com/wholesale/utils/attach-redirect/?target=/wholesale/attachments/calendar/Sep09PWGChangeRequestHistory.pdf ("PWG Change Request History") (stating that Integra's January 2007 request that Verizon's systems "[a]llow for correct and convenient determination if a loop should be ordered as designed or non-designed" is "feasible"); *see also id.* at 5 & 12 (stating that Eschelon's November 2005 request for expansion of the pre-order view in Verizon's WISE OSS to query up to 100 CFA records at a time is "feasible" and that Integra's October 2005 request that Verizon address deficiencies in its CFA validation tool is "feasible"); *see id.* at 20 (stating that Integra's September 2005 request that Verizon improve its CSIs "to include all circuits and complete information on those circuits" is "feasible").

[89] *See* Verizon Change Management Meeting Transcript, at 9-10 (Jan. 13, 2009), *available at* http://www22.verizon.com/wholesale/attachments/calendar/Jan09Transcript.pdf.

[90] *See generally* PWG Change Request History.

any indication that Frontier will pick up where Verizon left off to resolve these outstanding OSS problems. In fact, as discussed above, it is likely that the systems used to support the transferred assets will deteriorate further post-transaction.

ii. FiberNet (a One Communications company)[91]

In FiberNet's limited experience with Frontier's OSS and customer service in West Virginia, it has found that Frontier does not provide certain features and capabilities that Verizon provides. For example, in FiberNet's experience, Verizon provides monthly performance reports on a customer-specific basis but Frontier does not. This is significant because it is not clear that the Merged Firm will be able to maintain the same intervals for ordering, provisioning, maintenance, repair, or billing of UNE loops as Verizon, especially given that Frontier's OSS in West Virginia may not be able to accommodate the increase in wholesale demand post-merger.

Furthermore, FiberNet's interconnection agreement with Frontier in West Virginia provides that Frontier may reject a port request if the Frontier customer at issue has paid the balance due on his or her account with Frontier.[92] This is a clear violation of Frontier's duty as an incumbent LEC to provide number portability under Section 251(b)(2).[93] FiberNet's interconnection agreement with Verizon does not contain this provision.

It is also unclear to FiberNet whether the Merged Firm will be able to offer the same level of customer service support that Verizon offers. For instance, in FiberNet's experience,

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[91] FiberNet, LLC ("FiberNet"), a business unit of One Communications, provides service to residential and business customers in West Virginia and parts of Pennsylvania.

[92] *See* Agreement for Local Interconnection between Citizens Telecommunications Company of West Virginia and FiberNet, LLC (dated Nov. 16, 2001) ("Frontier-FiberNet ICA"), Attachment 2, § 1.2 ("Citizens will not, however, make the End User's previous telephone number available to CLEC until the End User's outstanding balance has been paid.").

[93] *See* 47 U.S.C. § 251(b)(2).

Verizon assigns an account manager to each wholesale customer to serve as an initial point of contact for service issues; provides detailed point of contact lists or escalation lists for the various wholesale functions it performs;[94] and makes industry letters, CLEC User Forum materials and information about its wholesale OSS, business practices and processes available on its website.[95] There is a risk that the Merged Firm will not be able to provide the same care to wholesale customers, particularly given Frontier's lack of significant experience in providing wholesale service and its lack of financial resources post-merger. Indeed, in light of the financial pressures that will be on the Merged Firm, there is also a risk that it will seek to pass through costs related to the OSS transition in West Virginia and the other affected states to wholesale customers.

Finally, in FiberNet's experience, some of Verizon's conduct with respect to processing and provisioning wholesale orders in West Virginia is anticompetitive and the proposed transaction may only exacerbate these problems. *First*, Verizon has slow-rolled the processing of an application submitted by FiberNet in August 2008 for collocation in one of Verizon's more than 3,000 remote terminals in West Virginia. According to FiberNet's estimates, FiberNet could provide broadband service to an additional 15,000 business and residential access lines in West Virginia if it had access to Verizon's remote terminals.

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[94] Verizon provides points of contact for each of the following wholesale groups: Wholesale Customer Care, Customer Inquiry Response Team, National Market Center, Regional CLEC Coordination Center, Regional CLEC Maintenance Center, Wholesale Billing Claims Center, and Collocation Working Group.

[95] *See generally* Verizon Partner Solutions, http://www22.verizon.com/wholesale/ (last visited Sept. 16, 2009).

Second, Verizon has increasingly been rejecting FiberNet's orders for DS1 UNE loops on the basis that "no facilities are available."[96] As a result, FiberNet has been forced to purchase these inputs at much higher, tariffed special access rates. This significantly increases FiberNet's costs and thereby reduces the number of customers it can serve.[97] Moreover, provisioning intervals for DS1 UNE loops are subject to state-established regulations, but the FCC has not established similar regulations for DS1 interstate special access loops. Consequently, when Verizon forces FiberNet to purchase these inputs as special access rather than UNEs, FiberNet's delivery of service to its end-user customers is delayed.

Third, Verizon does not process FiberNet's pole attachment applications within the 45-day timeframe prescribed by the FCC's rules.[98] In fact, Verizon has taken an average of 206 days to process FiberNet's pole attachment applications filed between January 31, 2008 and March 6, 2009.[99]

Fourth, when an end user that purchases voice and ADSL service over the same line from Verizon seeks to switch to FiberNet for ADSL service, Verizon requires that the customer call Verizon directly to request that the line sharing be removed even though FiberNet already has

[96] In 2007 and 2008, Verizon rejected 26 percent and 29 percent, respectively, of FiberNet's DS1 UNE loop orders on this basis. From January 1, 2009 to July 30, 2009, however, Verizon has rejected 43 percent of FiberNet's DS1 UNE loop orders on a purported "no facilities" basis.

[97] For example, between February 2007 and July 2009, Verizon rejected 32 percent of FiberNet's DS1 UNE loop orders and forced FiberNet to purchase these circuits as special access. As a result, FiberNet incurred $221,825 in additional costs. Had FiberNet's entire order been fulfilled as UNE loops, it could have provided service to approximately 66 percent more DS1-served customers.

[98] *See* 47 C.F.R. § 1.1403(b) (requiring the incumbent LEC to either grant access or confirm denial in writing within 45 days of the request for access).

[99] *See* Letter from Thomas Jones, Counsel to FiberNet, LLC, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 09-51 & WC Dkt. No. 07-245, Attachment at 20 (filed Sept. 16, 2009).

authorization to make that request on the customer's behalf. This delays the provision of ADSL service to a potential new FiberNet customer and provides Verizon with an opportunity to engage in unlawful retention marketing.

Following the spin-off, Frontier will likely lack the experience, resources or incentive to fix these problems. In fact, given that the Merged Firm will be cutting over to a new OSS in West Virginia at closing and will have five times as many access lines in the state, it is likely that these problems will only get worse.

B. There Is A Material Risk That The Merged Firm Will Increase Wholesale Rates Post-Transaction.

In their Application, Frontier and Verizon have acknowledged the need to prevent the diminished economics of scale or scope caused by the proposed spin-off from arbitrarily increasing special access prices. Accordingly, the Applicants make the following promise:

> For both retail enterprise and wholesale customers with volume and term agreements, following the transaction the parties will adjust all revenue commitments and volume thresholds so that customers that maintain the volumes they currently purchase in acquired states and Verizon's remaining states, respectively, will continue to qualify for the same volume discounts in the respective areas. Frontier will reduce pro rata the volume commitments provided for in agreements to be assigned to or entered into by Frontier or tariffs to be concurred in and then adopted by Frontier, without any change in rates and charges or other terms and conditions, so that such volume pricing terms will in effect exclude volume requirements from states outside of the affected states. Verizon will do the same with respect to service it will continue providing outside of those regions.[100]

Unfortunately, the Applicants do not expressly state that the Commission should establish this commitment as a legal requirement or that the Merged Firm should be subject to enforcement penalties in the event the Merged Firm fails live up to this commitment.

[100] Application at 20.

Furthermore, the proposed transaction poses the risk that the Merged Firm will charge higher UNE prices than Verizon currently charges in the areas subject to the spin-off transaction. In West Virginia, for example, Frontier's wholesale rates are generally higher than Verizon's rates for UNE 2-wire analog loops and conditioned copper loops,[101] pole attachment rentals,[102] conduit leasing[103] and physical collocation.[104] In light of the Merged Firm's increased debt, its commitments to various stakeholders and its OSS transition costs, there is a material risk that wholesale customers will be forced to pay higher rates as a result of the proposed transaction.

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[101] For example, in Density Cell 2 in West Virginia, Verizon charges a monthly recurring charge of $22.04 for 2-wire analog UNE loops and $22.04 for 2-wire xDSL compatible loops. *See* Appendix A To The Pricing Attachment – Verizon West Virginia Inc. and FiberNet, LLC at 13 & 16 (dated July 16, 2005), to Interconnection Agreement Between Bell Atlantic-West Virginia, Inc. and FiberNet, LLC (dated Sept. 30, 1998). By contrast, in the Bluefield, West Virginia cluster, which is comparable to a location in Density Cell 2, Frontier charges a monthly recurring charge of $35.18 for 2-wire analog UNE loops and $48.35 for 2-wire digital conditioned loops. *See* Frontier-FiberNet ICA, Attachment 3, at 6.

[102] Verizon currently bills Frontier an annual pole attachment rental rate of $4.24 per attachment. By contrast, Frontier charges FiberNet an annual rental rate per pole of $16.25. *See* Pole Attachment Agreement by and between Citizens Telecommunications Company of West Virginia and FiberNet, LLC, Appendix 1, § 1.1.

[103] Verizon charges FiberNet a conduit occupancy fee of $2.50 per foot annually in West Virginia. *See* License Agreement For Pole Attachments In West Virginia Between Bell Atlantic-West Virginia, Inc. And FiberNet, LLC, Appendix I, at 2 (dated May 13, 1998). By contrast, Frontier charges FiberNet a conduit occupancy fee of $0.96 per foot *per month* in West Virginia. *See* Underground Conduit Agreement by and between Citizens Telecommunications Company of West Virginia and FiberNet, LLC, Appendix 1, § 1 (dated May 1, 2002).

[104] For example, Verizon charges a nonrecurring engineering fee for physical collocation of $3,481.18 while Frontier's fee is $6,240.00. *Compare* Verizon West Virginia Inc. Network Interconnection Services Tariff P.S.C.-W.Va.-No. 218, § 2.J.1.a, 1st Revised Page 50 (effective May 6, 2002) *with* Frontier-FiberNet ICA, Attachment 5, Exhibit B, at 1. In addition, Verizon charges a monthly recurring floor space charge per 100 square feet of $227.00, while Frontier charges a monthly recurring floor space charge per 100 square feet of $858.00. *Compare* Verizon West Virginia Inc. Network Interconnection Services Tariff P.S.C.-W.Va.-No. 218, § 2.J.1.f, 2nd Revised Page 51 (effective Jan. 13, 2003) *with* Frontier-FiberNet ICA, Attachment 5, Exhibit B, at 1.

C. There Is A Material Risk That The Merged Firm Will Attempt To Avoid Verizon's Obligations As A Bell Operating Company Or Even Its Obligations As An ILEC.

Remarkably, the Applicants offer no commitment that the Merged Firm will abide by Verizon's obligations as a BOC in West Virginia or that the Merged Firm will forego seeking to avoid Section 251(c) pursuant to the rural exemption in Section 251(f)(1).[105]

In the *FairPoint-Verizon Merger Order*, the FCC held that "FairPoint will be a Bell Operating Company (BOC) following this transaction."[106] The Commission explained its reasoning as follows:

> [W]e interpret the terms "successor or assign" as used in section 3(4) [of the Act] 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.[107]

Given that Verizon is a BOC in West Virginia, Frontier should assume the same legal obligations under Section 271 and 272 that apply to Verizon in West Virginia today.[108] But the Applicants

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[105] It should be noted that the Merged Firm will not qualify for a suspension or modification under Section 251(f)(2) of the requirements of Section 251(b) or (c) because it would not have, at the holding company level, less than two percent of the nation's subscriber lines in the aggregate. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS 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 Report: As Of June 30, 2008, at Table 1 (WBC July 2009) (showing 154,654,847 total end-user switched access lines nationwide); Frontier May 13, 2009 Investor Relations Presentation, at 27 (showing that the Merged Firm will have 7,045,006 access lines).

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

[107] *Id.*

[108] Verizon West Virginia is the successor to the Chesapeake and Potomac Telephone Company of West Virginia. *See* Verizon\Community\Verizon West Virginia\Information\Company

have offered no reason to believe that the Merged Firm will live up to its obligation as a BOC in West Virginia.

Moreover, it is conceivable that the Merged Firm will seek to avoid complying with the requirements of Section 251(c) entirely in the legacy Verizon territories by claiming eligibility for the rural exemption under Section 251(f)(1).[109] Verizon has not sought the protection of Section 251(f)(1), and the Joint Petitioners lack the necessary information to determine whether the Merged Firm would be eligible to take advantage of this provision. But even the threat that the Merged Firm might seek to exploit Section 251(f)(1) in the future chills competitors' incentive to invest in competitive entry in the areas subject to the proposed transaction. Again, the Applicants have said nothing to diminish this concern in their filing with the Commission.

D. There Is A Material Risk That The Proposed Transaction Will Impede Increased Deployment Of Broadband.

Despite the Applicants' claim that the proposed transaction will spur broadband deployment, it is more likely that it will have the opposite effect.[110] The Applicants claim that the Merged Firm will increase investment in broadband by generating $300 million in annual operating expense savings and strengthening its balance sheet.[111] As explained above, however, the debt leverage of the Merged Firm will be higher than that of Verizon. Moreover, the Applicants' claim that the Merged Firm will be able to achieve half a billion dollars worth of synergies is speculative.

History, http://www22.verizon.com/about/community/wv/information/info_history.html (last visited Sept. 17, 2009). Therefore, it is a BOC under Section 3(4)(A)-(B) of the Act. *See* 47 U.S.C. § 153(4)(A)-(B).

[109] *See* 47 U.S.C. § 251(f)(1).

[110] *See* Application at 2.

[111] *Id.* at 3.

In fact, it is likely that the proposed transaction will actually hinder the deployment of broadband to businesses. As mentioned, Verizon has deployed finished Ethernet in several serving wire centers that will be impacted by the proposed transfer, but it does not appear that the Merged Firm will have the necessary expertise or resources support these services.

It is also likely that the proposed transaction will impede broadband deployment in rural and sparsely populated areas. The situation in West Virginia illustrates the problem. Verizon's anticompetitive conduct has made the situation in West Virginia bad already. For example, as mentioned above, FiberNet could provide broadband to thousands more homes and businesses in West Virginia if Verizon would not slow roll the processing of remote terminal collocation applications.[112] In fact, FiberNet has deployed fiber transport to many remote terminal facilities in West Virginia to which Verizon itself has not deployed fiber and from which Verizon does not offer broadband. Likewise, FiberNet must also obtain timely access to pole attachments in order to increase deployment of fiber transport, but Verizon also slow rolls the processing of these applications.[113] Unfortunately, there is no indication that the Merged Firm will have the resources to address these problems. If anything, the likely problems with the Merged Firm's OSS, the threat that the Merged Firm will increase wholesale prices, and the threat that the Merged Firm will seek to avoid BOC or incumbent LEC requirements entirely will almost certainly reduce the level of broadband competition and deployment in West Virginia even further.

IV. CONCLUSION.

For the foregoing reasons, the Commission should deny the instant Application.

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[112] *See supra* Section III.A.2.b.ii.

[113] *See id.*

Respectfully submitted,

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