

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Docket No. DT 07-011

**Joint Petition of Verizon New England, Inc., et al,
and FairPoint Communications, Inc.
Transfer of New Hampshire Assets, et al.**

DIRECT TESTIMONY

OF

GARY J. BALL

**ON BEHALF OF FREEDOM RING COMMUNICATIONS, LLC, DBA
BAYRING COMMUNICATIONS, SEGTEL, INC., AND
OTEL TELEKOM, INC.**

July 31st, 2007

Testimony of Gary J. Ball of behalf of BayRing, segTEL, and Otel
PUC Docket No. 07-011

1 **Q. PLEASE STATE YOUR FULL NAME, TITLE AND BUSINESS**
2 **ADDRESS.**

3 A. My name is Gary J. Ball. I am an independent consultant providing
4 analysis of regulatory issues and testimony for telecommunications companies.
5 My business address is 47 Peaceable Street, Ridgefield, Connecticut 06877.

6

7 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND**
8 **PROFESSIONAL EXPERIENCE.**

9 A. I graduated from the University of Michigan in 1986 with a Bachelor of
10 Science degree in Electrical Engineering. I received a Masters in Business
11 Administration from the University of North Carolina – Chapel Hill in 1991, with
12 a concentration in economic and financial coursework. I have worked in the
13 telecommunications industry for the past sixteen years, and I have extensive
14 experience in negotiating and implementing interconnection arrangements with
15 incumbent local exchange carriers, as well as developing and analyzing financial
16 and costing models associated with telecommunications networks and services.

17

18 From 1991 through 1993, I was employed by the Rochester Telephone
19 Corporation (now part of Citizens Communications), where I served in various
20 engineering, financial, and regulatory roles. From 1993 to 1994, I was the
21 manager of Regulatory Affairs for Teleport Communications Group.

22

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1 Beginning in 1994, I served initially as the Regional Director of Regulatory
2 Affairs for MFS Communications Company for the Northeast, and subsequently
3 was promoted to Assistant Vice President of Regulatory Affairs. In that capacity,
4 I was responsible for all aspects of implementation of the Telecom Act in the
5 Verizon region, including negotiation of interconnection agreements and
6 participating in the 271 review for New York. In 1996, WorldCom acquired
7 MFS, after which I was promoted to Vice President of Regulatory Policy
8 Development. In that capacity, I was responsible for coordinating and developing
9 the Company's regulatory positions on issues such as access charges,
10 interconnection, intercarrier compensation, unbundled network elements, and new
11 service technologies. I remained at WorldCom until beginning my own
12 consulting practice in 2002. From November 2005 through April 2007, I was
13 engaged by Pac-West Telecom in a consulting arrangement to act as Director of
14 Government Affairs for the Verizon and BellSouth regions.

15
16 I have testified before the FCC and over 25 states on numerous issues related to
17 telecommunications, including rates, terms, and conditions for unbundled network
18 elements, interconnection, intercarrier compensations, and universal service
19 policy

20
21 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS PROCEEDING?**

22 A. I am testifying on behalf of Freedom Ring Communications, LLC d/b/a
23 BayRing Communications, segTEL, Inc., and Otel Telekom, Inc., three facilities-

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1 based competitive local exchange carriers operating in New Hampshire. BayRing
2 is headquartered in Portsmouth, segTEL is based in Lebanon, and Otel is based in
3 Manchester. These carriers offer local and long distance voice and data services
4 using their own facilities in conjunction with leased unbundled network elements
5 and interconnection arrangements currently provided by Verizon in New
6 Hampshire, and are dependent upon Verizon's wholesale organization and
7 Operational Support Systems (OSS) to provide many of their services.

8
9 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

10 A. The purpose of my testimony is to describe the impacts of FairPoint's
11 proposed acquisition of Verizon's local exchange properties in New Hampshire
12 on competition, and to propose conditions to ensure that the competitive
13 landscape and end users aren't harmed in the process.

14
15 **Q. PLEASE SUMMARIZE YOUR TESTIMONY?**

16 A. FairPoint's proposal is incomplete, lacking both the necessary details and
17 commitments necessary to ensure that competition won't be harmed in the
18 transition from Verizon's operations to those of FairPoint to the detriment of the
19 public good in New Hampshire. FairPoint lacks the resources, experience, and
20 incentive to comply with the wholesale obligations it will take on as the
21 predominant ILEC in New Hampshire. Without proper conditions, the transfer of
22 Verizon's assets to FairPoint will result in increased costs and degraded service to
23 wholesale providers. New Hampshire's end users will ultimately pay the price if

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1 their existing competitive provider is no longer able to provide the same levels of
2 service or if competitors are forced to limit or reduce their service offerings.

3
4 There are three primary areas of uncertainty and concern that must be addressed
5 in advance of approving the transaction. First, FairPoint has neither the financial
6 resources nor the experience Verizon has in providing wholesale services to
7 CLECs. FairPoint has no experience providing the scope and volume of
8 wholesale services that Verizon has reluctantly implemented over the past 10
9 years, and, like Verizon, has no incentive to comply with its wholesale
10 obligations.

11
12 Second, while FairPoint is acquiring the facilities that CLECs currently use, is not
13 acquiring Verizon's multi-state wholesale organization that provisions and
14 supports those facilities, nor will it be utilizing Verizon's operational support
15 systems in perpetuity. As a result, FairPoint, a company with little or not
16 wholesale experience, will be left with the monumental task of creating an
17 entirely new wholesale organization while simultaneously cutting over new and
18 unverified operational support systems and billing platforms. FairPoint will be
19 able to use Verizon's support organizations and systems under the Transition
20 Service Agreement (TSA), but plans to transition to a new system designed by
21 Capgemini, a third party vendor. The TSA is structured to require increasing
22 financial obligations on FairPoint the longer it uses Verizon's systems, so there is
23 a built-in incentive for FairPoint to prematurely cutover to its own organizations

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1 and systems. Furthermore, the increasing income that Verizon receives over the
2 course of time provides little incentive for Verizon to cooperate with FairPoint in
3 the development of effective systems.

4
5 The Commission has an opportunity to learn from and avoid the mistakes made in
6 Hawaii, when Verizon sold its local exchange network to the Carlyle Group, a
7 private equity firm. In that transaction, the Carlyle Group had no experience as a
8 wholesale provider of CLEC services, hastily replaced Verizon's existing
9 operation support systems with a new and unverified system, and provided
10 incomplete information in advance of the transaction, relying on future promises
11 and third party vendors. The transaction was approved without adequate
12 safeguards, and the result has been disastrous for both retail and wholesale
13 customers in Hawaii.

14
15 Third, FairPoint has not committed to be subject to the same regulatory
16 obligations as Verizon. This is of great concern to competitive providers such as
17 BayRing, segTEL, and Otel, who are reliant upon nondiscriminatory
18 interconnection and access to cost-based unbundled network elements. It is
19 essential that this transaction be made transparent and seamless to Verizon's
20 existing wholesale customers, who will be reliant upon FairPoint for
21 interconnection and access to network elements. FairPoint must be subject to all
22 of the same regulations and statutory obligations as Verizon, and must be required
23 to continue to provide all unbundled network elements required under Sections

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1 251 and 271, as well as access to poles, conduits and rights of way under Section
2 224 and continue to be subject to the obligations to negotiate for interconnection
3 in good faith as provided under Section 252.

4
5 In my testimony, I will propose specific safeguards to ensure that the Hawaii
6 situation will not be repeated in New Hampshire. I am proposing that the
7 following safeguards be required before FairPoint is granted approval to assume
8 ownership and control of Verizon's network in New Hampshire:

9
10 1. The New Hampshire Commission must retain ongoing jurisdiction over
11 FairPoint and Verizon while the TSA is in effect and during the cutover, and must
12 retain jurisdiction over FairPoint's system after the cutover to ensure that
13 FairPoint wholesale services, systems, processes and procedures are as at least as
14 good as Verizon's. The conversion from the TSA should only be allowed after
15 Commission review and approval which should be conditioned upon third-party
16 audits of any new proposed system as well as the consideration of CLEC input.

17
18 2. FairPoint must be subject to the same regulatory requirements as Verizon,
19 including but not limited to all obligations under sections 251 and 271 of the
20 Telecom Act.

21

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- 1 3. The Commission should condition its approval on Fairpoint's agreement to
2 offer unbundled network elements required under Sections 251 and 271 at the
3 rates, terms, and conditions in Verizon's tariff 84 and PUC Orders.
4
- 5 4. As the acquirer of dominant ILEC status in the 3 northern New England states
6 FairPoint should be required to adopt best competitive practices and make them
7 uniform across their territory. Such practices would include the review and
8 adoption of Maine and New Hampshire determinations regarding, (1) section 271
9 network element availability¹, (2) pole attachment best practices², and (3) dark
10 fiber best practices³.
11
- 12 5. FairPoint should assume the key voluntary conditions contained in the
13 AT&T/Bellsouth merger, including but not limited to rate freezes on key elements
14 such as UNEs, tandem transit service, and special access, agreement to not count

¹ See, Proposed Revisions to Tariff NH PUC No. 84—(Statement of Generally Available Terms and Conditions)—Petition for Declaratory Order re Line Sharing, NHPUC DT 03-201 and DT 04-176, Order Following Briefing No. 24,442 (March 11, 2005); NHPUC Tariff 84; March 1, 2002 Letter to Edward Dinan from Dennis Keshl; Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Order-Part II, ME PUC Docket No. 2002-682 (September 3, 2004) and Order (September 13, 2005) and Order-Part 2 (November 17, 2005).

² Oxford Networks Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles, Order, ME PUC Docket No. 2005-486 (October 26, 2006) and Order on Reconsideration (February 28, 2007).

³ Proposed Tariff to Introduce the Rules, Regulations, and Related Terms and Conditions Pertaining to the Ordering and Provisioning of Dark Fiber as an Unbundled Network Element, Order, ME PUC Docket No. 2002-243 (April 11, 2007) and Order (March 31, 2006); See, Verizon's Petition for Approval of UNE Remand Tariffs for its Statement of Generally Available Terms and Conditions, Order Approving in Part and Denying in Part Statement of Generally Available Terms and Conditions Additional Unbundled Network Elements, NHPUC Docket DT 01-206, Order No. 23,948; Proposed Revisions to Tariff NHPUC No. 84—(Statement of Generally Available Terms and Conditions)—Petition for Declaratory Order re Line Sharing, DT 03-201 and DT 04-176, Order Following Briefing No. 24,442 (March 11, 2005); NHPUC Tariff 84.

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1 MCI's collocations as part of any impairment analysis, extensions of existing
2 interconnection agreements for 3 more years, and agreement not to seek or give
3 effect to forbearance from the unbundling of any loop or transport facility.

4 **Q. WHAT IS YOUR UNDERSTANDING OF THE PROPOSED**
5 **TRANSACTION?**

6 A. FairPoint is proposing to purchase Verizon's local exchange assets in
7 Vermont, New Hampshire, and Maine for \$2.7 billion. The sale of three entire
8 states to a company with no BOC background and no wholesale experience is
9 monumental, and it raises many important regulatory and operational concerns.

10

11 A key point of the transaction is that FairPoint will not be purchasing Verizon's
12 wholesale organization, including its employees, systems, and procedures, nor
13 will it utilizing Verizon's operational support systems. FairPoint instead intends
14 to be building its own organization and systems from scratch, and will utilize a
15 Transitional Service Agreement (TSA) in which FairPoint will utilize Verizon's
16 systems for a fee for a limited time.

17

18 **Q. HAS FAIRPOINT ADEQUATELY DESCRIBED ITS PLANS FOR**
19 **ITS WHOLESALE ORGANIZATION AND OPERATION SUPPORT**
20 **SYSTEMS?**

21 A. No. FairPoint has provided little specific information about its proposed
22 wholesale organization or its operational support systems, nor has it committed to
23 any type of certification process to assure the Commission and competitors that its

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1 OSS is at least as good, if not better than, Verizon's. Instead, under the TSA,
2 Fairpoint's Notice of Readiness for cutover includes only a representation by
3 Fairpoint "to the effect that Fairpoint has made arrangements to operate the
4 acquired business without any Schedule A or D services." [See, Fairpoint
5 response to CLEC FDR III-2.]
6

7 **Q. HAS FAIRPOINT COMMITTED TO ANY SPECIFIC TIMELINES**
8 **FOR ITS WHOLESALE ORGANIZATION AND OPERATIONAL**
9 **SUPPORT SYSTEMS?**

10 A. No. In his testimony, Mr. Smith states that the parties expect that the
11 cutover will occur within 15 months after closing. The agreement allows
12 FairPoint to use Verizon's services indefinitely, but there are financial penalties
13 that begin to accrue after the first year.
14

15 **Q. DO THE FINANCIAL ARRANGEMENTS IN THE TSA GIVE**
16 **FAIRPOINT AN INCENTIVE TO PREMATURELY IMPLEMENT THE**
17 **CUTOVER TO ITS OWN ORGANIZATION AND SYSTEMS?**

18 A, Yes. The TSA includes extremely high fees for use of its support
19 organizations and systems, including significant financial penalties to FairPoint
20 for failing to cutover to its own systems by the end of the first year. Per Mr.
21 Smith's testimony (page 29), FairPoint must pay Verizon \$14.2 million per month
22 for the first eight months of the TSA. The rates then decrease by \$500,000 per
23 month for the next 4 months, but on the 13th month, the rates go back up to \$14.7

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1 million, and increase by \$500,000 per month each month after. By the end of the
2 second year, FairPoint will be paying \$19.7 million per month, and by the end of
3 the third year, \$25.7 million per month. Clearly, even if FairPoint's systems
4 aren't ready by the end of the first year, they will be under great financial pressure
5 to cutover to their own systems to avoid the mounting payments to Verizon.

6 **Q. HAS FAIRPOINT ACKNOWLEDGED THE FINANCIAL PRESSURE OF**
7 **GOING BEYOND THE FIRST YEAR IN ANY OF ITS FINANCIAL**
8 **DISCLOSURES?**

9 A. Yes. In an SEC S-4 filing FairPoint made on June 29, 2007, it noted:
10 "[i]n addition, if the combined company continues to require services from
11 Verizon under the transitions services agreement after the one-year anniversary of
12 the closing of the merger, the fees payable by the combined company to Verizon
13 pursuant to the transition service agreement will increase significantly, which
14 could have a material adverse effect on the combined company's business,
15 financial condition and results of operations. " Amendment 3 to FairPoint SEC
16 Registration Statement, June 29, 2007, page 26]

17 **Q. WHY IS IT SUCH A RISK TO ASSUME THAT FAIRPOINT WILL**
18 **BE ABLE TO IMPLEMENT ITS NEW WHOLESALE ORGANIZATION**
19 **AND OPERATIONAL SUPPORT SYSTEMS WITHOUT**
20 **ENCOUNTERING ANY DIFFICULTIES?**

21 A. It would be unreasonable to assume that a company with limited or no
22 experience operating as a wholesale provider, that is also attempting to implement
23 new and untried systems at a breakneck pace, will not encounter any difficulties.

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1 It has been my experience that companies always underestimate the complexity of
2 updating and integrating systems as part of a merger or acquisition. This is
3 especially true when existing customer services and processes are reliant upon
4 legacy systems that have been developed over a long period of time.

5 **Q. HAS FAIRPOINT ACKNOWLEDGED THE RISKS ASSOCIATED WITH**
6 **TAKING OVER VERIZON'S WHOLESALE OPERATIONS IN ITS**
7 **FINANCIAL DISCLOSURES?**

8 A. Yes. At page 25 of the S-4 mentioned above, Fairpoint states “[a]ll of the
9 risks associated with the integration process could be exacerbated by the fact that
10 FairPoint may not have a sufficient number of employees to integrate FairPoint’s
11 and Spinco’s businesses or to operate the combined company’s business.

12 Furthermore, Spinco offers services that FairPoint has no experience in providing,
13 the most significant of which are competitive local exchange carrier wholesale
14 services. FairPoint’s failure or inability to hire or retain employees with the
15 requisite skills and knowledge to run the combined business, may have a material
16 adverse effect on FairPoint’s business. The inability of FairPoint’s management
17 to manage the integration process effectively, or any significant interruption of
18 business activities as a result of the integration process, could have a material
19 adverse effect on the combined company’s business, financial condition and
20 results of operations.”

21 **Q. PLEASE DESCRIBE WHAT HAPPENED WHEN VERIZON SOLD**
22 **ITS HAWAII PROPERTY TO THE CARLYLE GROUP?**

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1 A. In March of 2004, Verizon and the Carlyle Group requested permission
2 from the Hawaii PUC to transfer ownership of Verizon Hawaii to the Carlyle
3 Group. A TSA was implemented to transition the back office organizations and
4 operational support systems from Verizon to Carlyle. In April of 2006, Hawaiian
5 Telcom, which is the name of the new entity, prematurely cutover to its own
6 systems designed by BearingPoint, a third party vendor, leading to numerous
7 problems for both retail and wholesale customers.

8
9 The scope of these problems was detailed in Hawaiian Telcom's own 10-K filing
10 with the SEC, in which it states:

11 On the April 1, 2006 cutover date, while the major network operational
12 systems were built and functioned without significant problems, critical
13 systems related to back-office functions, such as customer care, order
14 management, billing, supply chain, and other systems interfacing with our
15 financial systems, lacked significant functionality. This led to deficiencies
16 in billings and collections, revenue assurance, and order entry flow-
17 through. Despite BearingPoint's efforts to improve the functionality of
18 the related systems, we continued to experience many of these same
19 issues, requiring us to incur significant incremental expenses in 2006 to
20 retain third-party service providers to provide call center and manual
21 processing services in order to operate our business.

22
23 The 10-K then proceeds to discuss a \$52 million settlement reached with
24 Bearingpoint for failure to provide the services it had committed to, as well as a
25 subsequent agreement with another third party vendor, Accenture, to fix
26 Bearingpoint's systems. This restoral effort is planned to continue into 2008.
27 Hawaiian Telcom's 10-K describes the current problems and the efforts they are
28 being forced to undertake to correct these problems:

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1 The lack of full system functionality following the Transition Period
2 substantially impacted both customer satisfaction (as evidenced by large
3 increases in the customer call volumes at our work centers) and collection
4 efforts in 2006. However, our remediation and systems recovery efforts
5 began in 2006 are beginning to show some improvements. Functionality
6 is improving for our critical systems related to back-office functions such
7 as customer care, order management, and billing systems. As a result,
8 while systems issues still exist, we are experiencing fewer collection
9 treatment delays, physical bill delivery problems and order flow-through
10 issues, and customer call volumes at our work centers have decreased. We
11 continue to work to improve our system functionality.
12
13

14 **Q. IS THERE OTHER IMMEDIATE EVIDENCE TO SUPPORT THE**
15 **NOTION THAT IMPLEMENTING NEW SYSTEMS IS FRAUGHT WITH**
16 **PROBLEMS?**

17 A. Yes. On page 25 of his testimony, Mr. Nixon describes what he terms “a
18 significant service problem in Maine” due to converting the company billing
19 system to a new vendor. Clearly, FairPoint’s own experiences in this matter are
20 evidence that even the best intentioned systems upgrades are subject to
21 unforeseen problems that can have dramatic customer-impacting consequences.
22

23 **Q. WHAT CONDITIONS SHOULD BE IN PLACE TO MINIMIZE**
24 **THE CUSTOMER AND COMPETITIVE IMPACTS OF TURNING UP A**
25 **NEW OSS?**

26 A. It is essential that whatever new systems FairPoint wishes to implement be
27 fully tested by an independent auditor before being cutover for live usage. The
28 Commission should require Verizon and FairPoint to be bound to operate under
29 the TSA until FairPoint’s systems are fully tested and audited at FairPoint’s sole

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1 expense. Additionally, the Commission should require the formation of a rapid
2 response team similar to that created in Maine as part of the Maine PUC's 271
3 review to immediately deal with any problems that might arise post cutover.
4 Furthermore, the Commission should order the establishment of a funding
5 mechanism to provide CLECs the ability to recover any costs they are required to
6 incur to conform their existing systems and process to FairPoint's new systems, as
7 well as provide insurance to CLECs if any competitive damage is encountered
8 due to systems not being appropriately implemented. I recommend that this be
9 funded by placing 10 percent of the amounts billed by Verizon to FairPoint under
10 the TSA into such a fund. This funding mechanism could be simply administered
11 by an independent third party across the three FairPoint states.

12
13 **Q. PLEASE DESCRIBE THE CURRENT COMPETITIVE**
14 **ENVIRONMENT IN NEW HAMPSHIRE AND ELSEWHERE.**

15 A. Since the passage of the Telecom Act, there have been two parallel trends
16 that together have diminished the ability of competitors to operate and grow their
17 business as well as secure financing. The first is the massive consolidation that
18 has occurred among AT&T and Verizon. Both carriers have extended their
19 scopes both horizontally, through acquisitions of additional ILEC assets, as well
20 as vertically, through the acquisitions of AT&T and MCI. These acquisitions of
21 the two largest interexchange carriers provided a dual benefit of simultaneously
22 eliminating their two major competitors, while dramatically extending the scopes
23 of their services, adding long distance, internet backbone, and local fiber and

1 enterprise customer assets. Additionally, both AT&T and Verizon have grown to
2 be the predominant wireless providers in their own regions, and are now
3 implementing their own fiber-based cable television offerings as well.

4
5 During this period of consolidation of market power, federal regulators have been
6 systematically deregulating AT&T and Verizon. They have been able to
7 eliminate their obligations to provide unbundled network elements in such areas
8 as switching and broadband services, have obtained increased price flexibility on
9 key special access services, and have been able to avoid living up to their
10 obligations to implement and honor publicly available interconnection
11 agreements.

12
13 This counterintuitive approach to regulation, in which carriers receive less
14 regulatory oversight as they build market power, has left the competitive
15 landscape scarred and barren. Very few of the original competitors that were
16 formed after the Telecom Act are still in existence, and many of those that are
17 have had to endure endless cycles of bankruptcies, layoffs, and withdrawal of
18 service offerings.

19
20 **Q. HOW DO VERIZON'S REGULATORY OBLIGATIONS**
21 **INFLUENCE THE ABILITY OF COMPETITORS TO PROVIDE**
22 **SERVICES IN NEW HAMPSHIRE?**

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1 A. The cornerstone of competition in the telecom industry is Section 251 of
2 the Telecom Act, which requires incumbent local exchange carriers such as
3 Verizon to interconnect with other carriers and provide unbundled network
4 elements at cost-based TELRIC rates in a nondiscriminatory manner. As a BOC
5 that chose to enter the lucrative long-distance market, Verizon also has additional
6 obligations under Section 271 of the Act, which require it to provide a much
7 broader array of unbundled network elements than is required under Section 251
8 due to the FCC limiting UNEs in its Triennial Review Order⁴ and Triennial
9 Review Remand Order⁵ decisions as well as various forbearance petitions. The
10 provisions in the Act requiring nondiscriminatory access and cost-based pricing
11 for interconnection and network elements were put in place in recognition that the
12 incumbent LECs would have no incentive to provide these critical components
13 without regulatory oversight and intervention. Competitors should be able to
14 access elements either through their own negotiated interconnection agreements,
15 through opting into other carriers' agreements, or through Tariff 84, as ordered by
16 the Commission in connection with its review of Verizon's 271 application.

17

18 **Q: WHAT IS THE DIFFERENCE BETWEEN VERIZON'S OBLIGATIONS**
19 **UNDER SECTIONS 251 AND 271?**

⁴ Report and Order and Order on Remand and Further Notice of Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 96-98 et al, FCC 03-36, 18 FCC Rcd 16978 (rel Aug 21, 2003) (TRO).

⁵ In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel Feb. 4, 2005) (TRO Remand Order or TRRO)

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1 A. It is helpful to understand that Congress attempted to balance the Telecom
2 Act with both incentives and regulatory obligations for the incumbent local
3 exchange carriers to open their markets. Section 251 of the Act provides a list of
4 obligations required of the ILECs and Section 271 provides incentives that will
5 allow BOCs to enter new lines of business in exchange for voluntarily offering to
6 open their markets:

7
8 Section 251 is the “stick” in this “carrot and stick” approach. Section 251
9 obligations are involuntary obligations that were placed by Congress upon most
10 incumbent local exchange carriers (including all Bell Operating Companies).
11 These obligations require the ILECs to open their networks to competition and
12 provide competitors the ability to purchase unbundled network elements at cost-
13 based rates on a non-discriminatory basis. The primary determinant of eligibility
14 for a Section 251 element is not based on the ILEC, but based upon whether a
15 new competitive entrant would be “impaired” without access to the UNE. As
16 such, Section 251’s primary purpose is to provide incentives and to promote
17 competition, and it has been implemented with the knowledge that the ILECs
18 would not provide these network elements at these conditions without being
19 forced to by law.

20
21 Section 271 obligations are very different. They apply to the Bell Operating
22 Companies and their successors and assigns. Section 271 is voluntary in that
23 compliance with Section 271 carries a reward to Bell Operating Companies

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1 allowing the BOCs to sell inter-Lata competitive services for the first time since
2 the 1984 consent decree that finalized the AT&T divestiture. The BOCs were
3 never forced to comply with Section 271 – instead they chose to comply (and
4 promise ongoing compliance) in return for legalized access to lucrative markets.
5 The Section 271 approval process for Verizon’s predecessors (such as New
6 England Telephone) in many states was contentious and participating parties were
7 very concerned about the Bells backsliding on their continuing Section 271
8 obligations after they received approval. A half-decade later these fears have
9 been proven to be well-founded.

10
11 **Q. WHAT HAS BEEN VERIZON’S APPROACH TO ITS**
12 **REGULATORY OBLIGATIONS UNDER THE TELECOM ACT?**

13 A. Verizon has been the most aggressive BOC in terms of attempting to shed
14 its regulatory obligations and transition to a purely commercial environment.
15 Despite the promises of Verizon’s predecessor entities to provide Section 271
16 elements in their state approval processes they have resisted any attempts to
17 enforce these obligations, Verizon has appealed PUC orders in Maine and New
18 Hampshire which would require them to include network elements required under
19 Section 271 in their wholesale tariff. Instead of making these UNEs publicly
20 available on a non-discriminatory basis, Verizon seeks to offer them only through
21 confidential commercial arrangements, which Verizon apparently asserts are not
22 under the jurisdiction of state regulators. It is important to note that Verizon’s

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1 approach to these obligations has been substantially more aggressive than the
2 other Bell Companies.

3

4 **Q. HOW DOES THIS TRANSLATE INTO CONCERNS OVER THE**
5 **FAIRPOINT TRANSACTION?**

6 A. Competitors could very well end up with the worst of both worlds,
7 inheriting Verizon's hostile regulatory stance combined with FairPoint's
8 inexperience and limitations as a wholesale provider. FairPoint's current offer to
9 simply adopt Verizon's existing regulatory approach is insufficient for
10 competitors. The Commission should use this as an opportunity to begin healing
11 the regulatory environment for competitors in New Hampshire.

12

13 **Q. WHY IS IT IMPORTANT THAT FAIRPOINT BE SUBJECT TO**
14 **THE SAME SECTION 271 REGULATION AS VERIZON?**

15 A. Absent Section 271, FairPoint's obligations to provide certain UNEs will
16 be limited to those available under the FCC's impairment analysis conducted in
17 the TRO and TRRO. The FCC in the TRO has ruled that, even if a UNE is no
18 longer required based upon the 251 necessary and impair standard, it still may be
19 required under Section 271.

20

21 **Q. WHAT ARE SOME OF THE KEY UNES THAT ARE IMPACTED**
22 **BY THE DISTINCTION BETWEEN SECTION 251 AND SECTION 271?**

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1 A. In its TRO and TRO Remand orders, the FCC's impairment analysis
2 concluded that certain loop, switching, and transport UNEs did not meet the
3 necessary and impair standard contained in Section 251. Included in this analysis
4 was its conclusion that CLECs would not be impaired without TELRIC access to
5 certain types of loops and loop functions, including dark fiber and line sharing,
6 and transport also including dark fiber in certain locations.

7

8

9

10 **Q. WHAT IS LINE SHARING?**

11 A. Line sharing allows providers to lease the high frequency portion of a
12 customer's loop for the provision of broadband DSL services. This is beneficial
13 to customers, who can avail themselves of competitive broadband services
14 without being required to change voice service providers. It also broadens the
15 scope and availability of broadband service providers by removing the significant
16 barrier to entry that would exist if all providers were required to provide both
17 voice and broadband services.

18

19 **Q. WHAT IS DARK FIBER?**

20 A. Dark Fiber provides for the ability to lease fiber optic strands between
21 two points, allowing a competitive provider to design and control its own services
22 by attaching its own optical terminating equipment to the fiber. Dark Fiber can be
23 used in the form on loops, providing fiber connectivity between and end users'

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1 premises and a competitive providers network, sub-loops, providing connectivity
2 between a remote terminal or comparable facility and a competitive providers'
3 network, or it can in the form of interoffice transport, providing connectivity
4 between wire centers allowing competitive providers to link different components
5 of their networks. Dark fiber can also be used for entrance facilities, which
6 allows competitive providers to access their transport services in a aggregated
7 form at a given wire center.

8
9
10 **Q. CAN LINE SHARING AND DARK FIBER BE REQUIRED AS 271**
11 **UNES?**

12 **A. Yes.** The Commission can condition its approval of the transaction on
13 FairPoint's agreement to offer Section 271 elements such as dark fiber and line
14 sharing in accordance with this Commission's orders. Both the New Hampshire
15 and Maine commissions have ruled that, while the FCC determined that line
16 sharing and certain dark fiber facilities are no longer required at TELRIC rates
17 under section 251, Verizon still has an independent legal obligation to offer them
18 under section 271. Both commissions ruled that they had the authority to enforce
19 section 271 commitments Verizon had made and required Verizon to offer such
20 elements in a wholesale tariff at "just and reasonable rates." (Both of these
21 Orders have been appealed by Verizon.) Furthermore, the FCC's 271 orders
22 approving Verizon's entry into the long distance markets in many states including
23 New Hampshire and Maine relied upon Verizon's provision of dark fiber and line

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1 sharing, explicitly referring to line sharing and dark fiber loops and or transport as
2 checklist items 4 and 5 and instructing the states to be vigilant to guard against
3 backsliding. The FCC's Order for New Hampshire analyzes line sharing as an
4 offering under checklist item 4 as well. At the same time the Triennial Review
5 Order (TRO) explicitly removed any requirement that Section 271 UNEs be
6 provided at TELRIC rates, simply requiring that the rates be "just and
7 reasonable."

8
9
10 **Q. DID MAINE, LIKE NEW HAMPSHIRE, REQUIRE VERIZON TO**
11 **CONTINUE OFFERING THESE 271 UNES IN A WHOLESALE TARIFF?**

12 A. Yes. As with New Hampshire, Maine required Verizon to offer 271 UNEs
13 in a wholesale tariff. Both of these decisions have been appealed and are pending
14 in the First Circuit, which has increased regulatory uncertainty in New Hampshire
15 and in Maine. As noted earlier, this transaction also creates substantial
16 operational and regulatory risks and harms. Fairpoint could reduce some of the
17 uncertainty and risk by agreeing to offer section 271 elements in a wholesale tariff
18 and honoring New Hampshire and Maine PUC orders regardless of what happens
19 in the appellate litigation. Unfortunately, in his response to CLEC FDR III-1(c),
20 Fairpoint witness Nixon states "Fairpoint is not a BOC, and therefore should not
21 be subject to a state order imposing requirements on Verizon pursuant to Section
22 271 of the Act."

23

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1 **Q. WOULD IT PROMOTE THE PUBLIC GOOD IF FAIRPOINT OFFERED**
2 **TO PROVIDE 271 ELEMENTS IN A WHOLESALE TARIFF IN NEW**
3 **HAMPSHIRE AND NOT GIVE EFFECT TO ANY APPEAL OF THE**
4 **COMMISSION'S ORDERS IN THIS REGARD?**

5 A. Yes. Competitive providers would have access to these elements without
6 the need for protracted negotiation and litigation. Additionally, the Commission
7 would have oversight of the rates, terms, and conditions of these offerings, and
8 would be able to ensure that FairPoint was providing nondiscriminatory access to
9 these elements. The existence of such a tariff without the continued risks and
10 uncertainly associated with appellate litigation would also help to ensure that the
11 proposed transaction meets the public good and would not harm competition.

12
13

14 **Q. IS FAIRPOINT OFFERING TO ASSUME VERIZON'S**
15 **REGULATORY OBLIGATIONS RELATIVE TO THESE OFFERINGS?**

16 A. No. In response to data requests, Fairpoint has stated that it does not
17 consider itself to be a Bell Operating Company (BOC), and FairPoint has made it
18 clear that it will not be subject to the same 271 requirements as Verizon, meaning
19 that FairPoint wishes to expand on Verizon's already aggressive level of
20 deregulation, which will certainly be to the detriment of competition in New
21 Hampshire.

22

1 **Q. IS FAIRPOINT OFFERING TO PROVIDE 271 UNES WITHOUT**
2 **THE NEED FOR LITIGATION?**

3 A. No. In responses to CLEC 1-3, 1-4, and 1-7(j) FairPoint asserts that it
4 does not concede it will become a “BOC” as a result of the transaction, will not be
5 generally subject to Section 271, and will not include Section 271 elements in a
6 wholesale tariff.

7

8

9

10 **Q. DO YOU AGREE THAT FAIRPOINT WILL NOT BE A BELL**
11 **OPERATING COMPANY?**

12 A. No. In Section 3(4)(A) of the Telecom Act, New England Telephone is
13 specifically identified as a Bell Operating Company, and Section 3(4)(B) includes
14 in the definition “any successor or assign of any such company that provides
15 wireline telephone exchange service.” Clearly, FairPoint, as a purchaser of
16 Verizon’s New England Telephone assets, meets this definition.

17

18 **Q. WHAT COMMITMENTS HAS FAIRPOINT MADE TO IMPROVE**
19 **ITS ABILITY TO SERVE ITS WHOLESALE CUSTOMERS?**

20 A. None. In his testimony (page 7 and 8), Mr. Leach discusses FairPoint’s
21 plans for expansion of its retail services, specifically attempting to increase DSL
22 penetration and provide new bundles of service, but provides no mention of any
23 specific improvement for wholesale providers, except the assertion that the

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1 wholesale customers will benefit generally from FairPoint's network
2 improvements.

3

4 **Q. IS FAIRPOINT'S APPROACH TOWARDS WHOLESALE**
5 **CUSTOMERS ADEQUATE IN THIS INSTANCE?**

6 A. No. It is clear from Mr. Leach's testimony that FairPoint's focus is going
7 to be on pursuing retail customers and satisfying its investors. It would be
8 irrational for FairPoint to focus on its wholesale customers, who are also
9 competitors, with this goal in mind. That is why it is critical that FairPoint be
10 subject to all of Verizon's regulatory requirements and preexisting agreements
11 with regulators, as these contain the necessary protections for competitors who
12 must purchase critical network elements and interconnection services from
13 incumbents who control bottleneck facilities.

14

15 **Q. IN HIS TESTIMONY (PAGE 27), MR. NIXON STATES THAT,**
16 **AMONG OTHER THINGS, FAIRPOINT WILL ADOPT ALL OF**
17 **VERIZON'S INTERCONNECTION AGREEMENTS AND WHOLESALE**
18 **TARIFFS, AND WILL NOT SEEK AN EXEMPTION FROM OR**
19 **MODIFICATION OR SUSPENSION OF SECTION 251(B) OR (C) AS A**
20 **RURAL CARRIER UNDER THE TELECOM ACT. WHY IS IT ALSO**
21 **NECESSARY THAT THEY ADOPT VERIZON'S 271 OBLIGATIONS?**

22 A. Section 271 requires that the BOCs maintain the specific list of checklist
23 items above and beyond what has been required under Section 251, including

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1 UNEs such as dark fiber loops and transport, as well as line sharing. Carriers that
2 wish to obtain these elements will be harmed if they are no longer have the right
3 to obtain them as due to FairPoint being released from Verizon's obligations.

4

5 **Q. SHOULD TRANSPARENCY BE A MINIMUM REQUIREMENT?**

6 A. Yes. A core goal of the Telecommunications Act of 1996 was to benefit
7 the public good by increasing competition in the local telecommunications
8 market. I can't imagine how it would be in the public interest to diminish the
9 rights of competitors as part of this transaction. Indeed, it will tend to obstruct or
10 prevent competition if competitors' rights are diminished. FairPoint has stressed
11 that it will be able to improve service quality and increase the number of services
12 throughout the region by being more focused and efficient than Verizon. This
13 should apply to wholesale services to competitors in equal measure.

14

15 **Q. IN HIS TESTIMONY (PAGE 27), MR. NIXON STATES THAT**
16 **“FAIRPOINT WILL NOT TAKE THE POSITION THAT THIS**
17 **COMPANY IS A RURAL TELEPHONE COMPANY ENTITLED TO**
18 **EXEMPTION UNDER SECTION 251(C) OBLIGATIONS UNDER**
19 **SECTION 251(F)(1) ... OR TO SUSPENSION OR MODIFICATION OF**
20 **SECTION 251(B) OR 251(C) OBLIGATIONS UNDER SECTION 251(F)(2)**
21 **OF THE COMMUNICATIONS ACT” WHAT IS YOUR**
22 **UNDERSTANDING OF THE MEANING OF THIS “COMMITMENT”?**

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1 A. Based upon a review of the rebuttal testimony of Fairpoint witness
2 Michael Skrivnan in Vermont, Fairpoint appears to have backpedaled from Mr.
3 Nixon’s direct testimony. According to Mr. Skrivnan, “Fairpoint will not claim
4 251(f)(1) rural exemptions at closing or in the future,” but “reserves the right to
5 approach the Board in the future seeking the 2% suspensions and modifications.”
6 [Vermont PSB Docket 7270, Skrivnan Pre-filed Rebuttal at 26].

7

8 **Q. WHAT WOULD BE THE IMPACT UPON COMPETITION IF**
9 **FAIRPOINT RECEIVED RELIEF AS A RURAL TELEPHONE**
10 **COMPANY UNDER SECTION 251(F)(2)?**

11 A. Fairpoint would be relieved of critical 251 obligations, meaning that it,
12 any time in the future, could limit or even eliminate competitors access to
13 unbundled elements, cost-based pricing, and other general requirements of
14 incumbent carriers such as Verizon. Indeed, in his Vermont rebuttal testimony at
15 page 27, Mr. Skrivnan provides relief from TELRIC as an example of the relief
16 that could be obtained under Section 251(f)(2).

17

18 **Q. IS FAIRPOINT’S PROPOSAL TO RETAIN THE RIGHT TO SEEK THE**
19 **SUSPENSION OR MODIFICATION OF SECTION 251(B) AND (C)**
20 **UNDER SECTION 251(F)(2) AS A RURAL TELEPHONE COMPANY**
21 **CONSISTENT WITH ITS PLEDGE TO MEET ALL OF VERIZON’S**
22 **EXISTING REGULATORY OBLIGATIONS TOWARDS ITS**
23 **WHOLESALE CUSTOMERS?**

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1 A. No. In fact, it is the exact opposite. Fairpoint is intending to keep a major
2 deregulatory card in its back pocket for use at any time after the merger. If
3 Fairpoint can suspend, modify, or even eliminate most of its key 251 obligations,
4 competition will obviously be much worse off. Even if Fairpoint petitions for
5 relief and fails, competitors will still be forced to deal with the uncertainty and
6 litigation cost of the resulting proceedings to review the petition.

7

8 **Q. WHAT WOULD THE BENEFITS OF IMPLEMENTING A BEST**
9 **COMPETITIVE PRACTICES CONDITION ACROSS THE REGION?**

10 A. Implementation of such a rule would guarantee that competitive providers
11 could maximize their service offerings across the region, and also be able to have
12 consistent service offerings across the region by avoiding situations in which
13 elements either aren't available, or aren't available under the same terms and
14 conditions from state to state. A best practices approach would avoid forcing
15 competitive providers to continuously litigate issues in each state, and would also
16 free up regulatory resources to focus on oversight of the key transitional and
17 operational issues associated with this transaction.

18

19 **Q. CAN YOU PROVIDE SOME SPECIFIC EXAMPLES OF**
20 **WHOLESALE SERVICES THAT FAIRPOINT SHOULD BE PROVIDING**
21 **AND IMPROVING IN NEW HAMPSHIRE AS PART OF A**
22 **COMMITMENT TO PROVIDE BEST COMPETITIVE PRACTICES**
23 **ACROSS THE REGION?**

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1 A. Yes. Fairpoint should commit to provide all of the Section 271 UNEs that
2 the Commission has ordered Verizon to provide in Docket No. DT 03-201 and
3 DT 04-176. Additionally, there are improvements that Fairpoint should make in
4 connection with Verizon’s Section 251 dark fiber offering and practices
5 concerning pole attachments. This is an area where Fairpoint can show with very
6 little effort that it intends to improve the provision of wholesale services in New
7 Hampshire.

8
9 Verizon’s policies for the installation of dark fiber transport in New Hampshire
10 are more restrictive than in Maine, where Fairport also proposes to acquire
11 Verizon’s assets. The Verizon wholesale organization that has responsibility over
12 dark fiber is not being transferred to Fairport. In the Vermont proceeding, in
13 response to Sov/Seg 2-9 and 2-7, Fairport states that it has no written policies or
14 procedures in connection with dark fiber and would be willing to enter into
15 negotiations in the normal course of business to make changes regarding the
16 provision of dark fiber. In his prefiled direct testimony at page 23, Fairpoint
17 witness Nixon stated that his “overarching objective will be to provide service
18 that is comparable to or better than that currently provided.” If that is the case,
19 agreeing to the competitive best practices referred to below should be easy for
20 Fairpoint to agree to. As the FCC has determined and the courts have upheld,
21 CLECs are impaired without having access to dark fiber transport [except for
22 limited circumstances]. There can be no question that 251 obligations are

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1 continuing obligations not “open for discussion,” but mandated to be
2 implemented.

3
4 BayRing, segTEL and Otel propose that FairPoint commit to the following
5 improvements over Verizon’s current dark fiber transport offering. First, if an
6 inquiry reveals that there is no dark fiber available, FairPoint should provide the
7 CLEC with written documentation and a fiber map in a reasonable time frame,
8 along with an evaluation of any alternative indirect routes as it is required to do in
9 Maine. Second, Verizon’s current policy for reserving spare fiber pairs for its
10 own maintenance and repair in New Hampshire is overly conservative, which in
11 reduces the fibers that are available to CLECs. FairPoint should agree to
12 implement spare and maintenance reservations in New Hampshire according to
13 the same policy Verizon currently provides in Maine. FairPoint should agree to to
14 provide dark fiber separation services as Verizon provides in Maine.

15
16 Furthermore, as FairPoint will be acquiring Verizon’s poles, conduits, and rights-
17 of-way within New Hampshire they should subject themselves to an evaluation of
18 their practices for access to these important facilities and to adopt any recent pole
19 attachment best practices ordered in either Maine or Vermont.

20

21 **Q. HOW ARE THESE SERVICES CURRENTLY OFFERED IN NEW**
22 **HAMPSHIRE?**

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1 A. The 271 UNEs identified above don't appear to be generally available.
2 Although the New Hampshire commission required these elements to be included
3 in Tariff 84 in connection with its review of Verizon's 271 application, this
4 decision was overturned by the federal court in New Hampshire and is now
5 pending before the First Circuit Court of Appeals.

6

7 **Q. WHAT DO YOU PROPOSE TO MAKE CERTAIN THESE**
8 **SERVICES ARE READILY AVAILABLE?**

9 A. In Maine and New Hampshire, the state commissions have required
10 Verizon to offer these services in a wholesale tariff, making them generally
11 available to any requesting carrier without the need to engage in lengthy and
12 protracted negotiation, and also making them subject to the oversight of the
13 respective state commissions. Unfortunately, these decisions have been appealed,
14 leading to further regulatory uncertainty. I recommend as provision of approval,
15 Fairpoint must agree to offer these services in a wholesale tariff. Doing so would
16 reduce the uncertainty involved in the pending litigation at the First Circuit and
17 would reduce the overall level of operational and regulatory uncertainty caused by
18 the proposed transaction.

19

20 **Q. ARE THERE CONDITIONS FROM OTHER MERGERS AND**
21 **TRANSACTIONS THAT WOULD BE HELPFUL FOR THE**
22 **COMMISSION TO CONSIDER IN THIS TRANSACTION?**

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1 A. Yes. Verizon itself is still subject to conditions related to its acquisition of
2 MCI. Also, the recent merger between BellSouth and AT&T contained many
3 conditions that would be beneficial if applied to this transaction.
4

5 **Q. WHAT ARE THE KEY CONDITIONS THAT VERIZON AND SBC**
6 **VOLUNTARILY AGREED TO IN THE VERIZON/MCI AND SBC/AT&T**
7 **MERGERS?**

8 A. There are numerous agreed-to provisions in these merger proceedings that
9 should be applicable to this transaction as well. Some key provisions:
10

- 11 1. Rate freezes on critical CLEC inputs, such as UNEs, special access, and
12 tandem transit services. Both Verizon and AT&T agreed to freeze the rates they
13 charge for UNEs.
- 14 2. Agreement to not count preexisting company-owned collocation arrangements
15 as part of any impairment analysis. FairPoint should not count MCI collocations
16 as part of its impairment analysis to help ensure that the transition doesn't enable
17 additional deregulation.
- 18 3. Allow carriers to extend existing interconnection agreements for 3 additional
19 years. Also, allow carriers to use pre-existing interconnection agreements as
20 starting point for new negotiations, and to allow carriers to opt-into any available
21 agreement in any other states.
- 22 4 Agreement not to seek forbearance on any loop or transport UNEs under the
23 Act.

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1

2

**Q. HOW WOULD THESE CONDITIONS BE BENEFICIAL TO
ENSURING THAT COMPETITON IS NOT HARMED IN THIS
TRANSACTION?**

3

4

5

A. These merger conditions essentially renew many of the protections that should be maintained under 251 and 271 of the Act. By ensuring stable rates for competitively sensitive services, and by allowing competitors to avoid having to renegotiate existing agreements with a new entity, the Commission can ensure that competitive harm will be minimized by requiring these conditions.

6

7

8

9

10

11

**Q. YOU'VE MADE NUMEROUS RECOMMENDATIONS
THROUGHOUT YOUR TESTIMONY. CAN YOU SUM THEM UP IN
THE FORM OF A CHECKLIST?**

12

13

14

A. Yes. It is a significant risk to New Hampshire to allow its local exchange network to be sold to an inexperienced provider, especially if this provider is introducing new systems. I am proposing that the following safeguards be required before FairPoint is granted approval to assume ownership and control of Verizon's network in New Hampshire:

15

16

17

18

19

20

1. The New Hampshire Commission must retain ongoing jurisdiction over FairPoint and Verizon while the TSA is in effect and during the cutover, and must retain jurisdiction over FairPoint's system after the cutover to ensure that FairPoint wholesale services, systems, processes and procedures are as at least as

21

22

23

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1 good as Verizon's. The conversion from the TSA should only be allowed after
2 Commission review and approval which should be conditioned upon third-party
3 audits of any new proposed system as well as the consideration of CLEC input.
4

5 2. FairPoint must be subject to the same regulatory requirements as Verizon,
6 including but not limited to all obligations under sections 251 and 271 of the
7 Telecom Act.
8

9 3. The Commission should condition its approval on Fairpoint's agreement to
10 offer unbundled network elements required under Sections 251 and 271 at the
11 rates, terms, and conditions in Verizon's Tariff 84, Tariff 86 and PUC Orders.
12

13 4. As the acquirer of dominant ILEC status in the 3 northern New England states
14 FairPoint should be required to adopt best competitive practices and make them
15 uniform across their territory. Such practices would include the review and
16 adoption of Maine and New Hampshire determinations regarding, (1) section 271
17 network element availability, (2) pole attachment best practices, and (3) dark fiber
18 best practices.
19

20 5. FairPoint should assume the key voluntary conditions contained in the
21 AT&T/Bellsouth merger, including, but not limited to, rate freezes on key
22 elements such as UNEs, tandem transit service, and special access, agreement to
23 not count collocations as part of any impairment analysis, extensions of existing

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1 interconnection agreements for 3 more years, and agreement not to seek or give
2 effect to forbearance from the unbundling of any loop or transport facility.

3

4 **Q. DOES THAT CONCLUDE YOUR TESTIMONY?**

5 A. Yes, it does.

6

7

8