STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 07-011

JOINT PETITION OF VERIZON NEW ENGLAND INC., ET AL.
AND FAIRPOINT COMMUNICATIONS, INC.
TRANSFER OF NEW HAMPSHIRE ASSETS OF VERIZON NEW ENGLAND INC., ET AL.

POST-HEARING BRIEF OF ONE COMMUNICATIONS CORP.

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November 20, 2007

TABLE OF CONTENTS

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One Communications Corp. ("One Communications")[1] hereby files this brief in opposition to the petition of Verizon New England Inc., et al. ("Verizon"), and FairPoint Communications, Inc. ("FairPoint") (collectively, the "Petitioners") for approval of the proposed transfer of control in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

The extensive record in this proceeding makes clear that the proposed transaction is inconsistent with the pubic good and will result in net harm to wholesale customers in New Hampshire. The proposed merger poses a major threat to the provision of wholesale services to

[1] One Communications is a competitive local exchange carrier that provides service in New Hampshire through its licensed subsidiaries — Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp. and Lightship Telecom, LLC — all of which do business as One Communications.

[2] *See* Joint Application for Approval of the Transfer of Certain Assets By Verizon New England Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Co. and Verizon Select Services Inc. And Associated Transactions (filed Jan. 31, 2007) ("Petition").

competitive local exchange carriers ("CLECs") by the incumbent local exchange carrier ("ILEC"), Verizon, in New Hampshire. The post-transaction FairPoint ILEC ("Merged Firm") will be highly leveraged, and it has made an ever-growing list of costly promises to stakeholders in this transaction, including those to shareholders (to maintain the same dividend post-merger), organized labor (to provide jobs, pensions and other benefits), and the state government and its citizens (to expand broadband availability statewide). Moreover, the Merged Firm will have little incentive to expend its limited resources on developing the systems and expertise necessary for it to comply with its wholesale obligations under the Telecommunications Act of 1996 ("1996 Act"), even at the level achieved by Verizon. There is an intolerably high risk that FairPoint will fail in this undertaking. While its downstream retail operations might benefit from such failure, competition and New Hampshire consumers would suffer.

Thus, the proposed transaction threatens to turn the clock back to the time before Verizon met the competitive checklist requirements of Section 271 and other obligations under the 1996 Act necessary to open the local market to competition. FairPoint has virtually no experience in providing wholesale unbundled network elements ("UNEs") or interconnection to competitors. Absent clear legal obligations to comply with the checklist and other market-opening obligations, and a strong set of behavioral requirements designed to meet those obligations, the Merged Firm is unlikely to be able to develop new operating support systems ("OSS") for its wholesale and retail operations without seriously diminishing competitors' ability to obtain access to wholesale inputs.

In order to ensure that the proposed transaction does not impair or obstruct competition in the market for wholesale services in New Hampshire, the Commission must not approve the transfer of the Verizon ILECs to FairPoint absent the following conditions. To begin with, the

Commission must require the Merged Firm to comply with the competitive checklist of Section 271 of the Communications Act of 1934 (as amended by the 1996 Act) ("Communications Act"). This condition will ensure that the Merged Firm is subject to the same market-opening requirements of the 1996 Act as Verizon. The Merged Firm must also be precluded from seeking the rural carrier and two-percent carrier protections of Section 251(f)(1) and (2), respectively, of the Communications Act, which permit eligible ILECs to escape bedrock obligations such as those applicable to interconnection, UNEs, and resale. In addition, the Merged Firm must also comply with the following conditions: (1) independent third-party testing of the Merged Firm's wholesale OSS; (2) prohibition on the pass-through of any OSS and other merger-related costs to wholesale customers; (3) prohibition on the Merged Firm and Verizon's reneging on existing special access volume-term discounts (including the requirement that purchasers continue to receive the same discounts post-merger that they received pre-merger); (4) a freeze on the Merged Firm's special access and UNE prices for at least three years; and (5) the requirement that the Merged Firm extend all existing Verizon interconnection agreements and other wholesale arrangements for at least three years.

II. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE PROPOSED TRANSACTION IS CONSISTENT WITH THE PUBLIC GOOD.

The Petitioners have failed to show that the proposed merger is consistent with the public good as required by Section 374:30 of the New Hampshire Revised Statutes. FairPoint has neither the financial soundness nor the technical expertise to develop OSS for the provisioning of wholesale services nor management with the requisite experience to competently run a large Merged Firm with substantial wholesale operations. Moreover, FairPoint's commitments to various stakeholders will result in increased costs for the Merged Firm rather than any synergies, cost savings, or other benefits that can be passed on to consumers in New Hampshire.

A. The Proposed Transaction May Only Be Approved If It Is Consistent With The Public Good.

Under N.H. Rev. Stat. Ann. § 374:30, the Commission may authorize Verizon to transfer its assets in the state to FairPoint only if it finds that such a transfer serves the public good. Section 374:30 provides in pertinent part:

> Any public utility may transfer or lease its franchise, works or system, or any part of such franchise, works or system, exercised or located in this state . . . when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise.

In the proposed transaction, Verizon would transfer its assets, accounts receivable, liabilities, and customer relationships relating to its local exchange, intrastate toll, exchange access, and long-distance operations in Maine, New Hampshire, and Vermont to two companies, "Telco" and "Spinco," which will then be acquired by FairPoint.[3] Thus, Section 374:30 applies and the Petitioners must demonstrate that the proposed transaction serves the public good.

A merger serves the public good if it causes "no net harm." As the Commission has held:

> In New Hampshire, the public interest standard for a merger or acquisition is the test articulated in *Grafton Electric Light and Power Co. v. State*, 77 NH 539 (1915) and applied in *Re CCI Telecommunications of New Hampshire, Inc.*, 81 NH PUC 844, 845 (1996) . . . . Under that test, known as the no net harm test, a proposed transaction must be approved if the public interest is not adversely affected, [or] in the circumstances presented here, if no adverse impact will befall New Hampshire ratepayers as a result of the transaction.[4]

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[3] *See* Petition at 5-7.

[4] *Re Atlantic Connections, LLC*, 1999 NH PUC LEXIS 225, **1-2 (1999) (approving sale of Atlantic Connections to Choice One).

Stated differently, the Commission "must assess the benefits and risks of the proposed merger and determine what the overall effect on the public interest will be, giving the transaction [its] approval if the effect is at worst neutral from the public-interest perspective."[5]

Among the factors that inform the Commission's determination of whether a proposed transaction is consistent with the public good is the financial, managerial and technical competence of the acquiring entity.[6] Here, as discussed below, FairPoint lacks the financial, managerial, and technical expertise to operate the Merged Firm in the public interest. Moreover, the Merged Firm will have powerful incentives to divert the few resources it has to retail service at the expense of wholesale service, resulting in reduced competition in the wholesale market and net harm to wholesale customers in New Hampshire.

B. The Acquiring Company Is Not Financially Sound.

The record makes clear that FairPoint lacks the financial soundness necessary to meet the public good test in New Hampshire. According to Commission Staff consultant Mr. Vickroy, the characteristics of the company's finances and financial structure can be summarized as follows:

a) moderately declining cash flow
b) moderating declining capital expenditures
c) large dividend payments that are a financial driver
d) a heavy debt and interest load caused by a highly leveraged financial structure
e) low levels of book equity that turn negative after two years

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[5] *Re New England Electric System*, 1999 NH PUC LEXIS 12, *20 (1999).

[6] *See, e.g., Re Riverside Water Works, Inc.*, 91 NH PUC 601, 2006 WL 3791415, *3 (2006) (citing *Re Lower Bartlett Water Precinct*, 85 NH PUC 635, 641 (2000); *see also RCN Telecom Services of Pennsylvania, Inc.*, 85 NH PUC 352, 2000 WL 33419472, *5 (2000) ("RCN of NH has evidenced technical, managerial, and financial competence . . . . Accordingly, we find the proposed transfer of operating authority certificates of RCN LD and RCN NH to RCN of PA will result in no net harm, which is the standard by which we evaluate merger petitions.").

f) projected interest coverage and leverage ratios that reflect highly leveraged operations.[7]

FairPoint is a highly leveraged public company that needs the proposed merger to satisfy the demands of its stockholders. Financial projections prepared for FairPoint's Board of Directors show that: (1) FairPoint's total shareholders' equity will "go[] negative" in 2013, falling to a $218 million deficit in 2015;[8] (2) FairPoint is a company that will have "a worsening financial condition . . . with declining free cash flows and rising dividend payment and leverage ratios" between 2008 and 2015;[9] and (3) "[b]ased on *FairPoint's financial advisors' own analysis*, . . . FairPoint management and its Board of Directors believed they had little alternative to pursuing the Verizon Northern New England acquisition, whatever the risks."[10] As Office of the Consumer Advocate ("OCA") witness Mr. Brevitz concludes, "[w]ithout the proposed transaction, FairPoint's prospects are dire."[11]

After the proposed transaction, the Merged Firm will also lack the requisite financial strength to act in the public interest. Through the proposed merger, FairPoint will assume approximately $1.7 billion in new debt,[12] and it will have approximately $2.35 billion in

[7] Staff Exhibit No. 2P (Direct Testimony of Randall E. Vickroy on Behalf of the Staff of the Public Utilities Commission of New Hampshire, at 6 (lns. 8-17) (Aug. 1, 2007) ("Vickroy d.t.")).

[8] Labor Intervenors Exhibit No. 2P (Direct Testimony of Randy Barber on Behalf of CWA and International Brotherhood of Electrical Workers ("IBEW"), at 28 (lns. 12-14) (Aug. 1, 2007) ("Barber d.t.")).

[9] *Id.* at 31 (lns. 11-13).

[10] *Id.* at 32 (lns. 12-14) (emphasis added).

[11] OCA Exhibit No. 1P (Direct Testimony of David Brevitz on Behalf of the Office of the Consumer Advocate, at 25 (ln. 25) (Aug. 1, 2007) ("Brevitz d.t.")).

[12] *See id.*, Exhibit DB-P-3, at 4 (FairPoint analyst presentation of Jan. 16, 2007).

outstanding debt at closing.[13] Indeed, the structure of the transaction, a Reverse Morris Trust ("RMT") (i.e., a tax-free transaction to Verizon's current shareholders), *requires* FairPoint to increase its already high debt leverage.[14]

Notwithstanding the immense debt it will assume, FairPoint has made numerous costly commitments to various stakeholders. For example, FairPoint has publicly promised its shareholders that the Merged Firm will maintain the same dividend post-merger.[15] According to Commission witness Mr. Vickroy, for a company such as FairPoint, "the ability to continue to pay the dividend is paramount."[16] In addition, FairPoint has promised to (1) hire approximately 700 employees;[17] (2) assume all existing collective bargaining agreements with union employees;[18] and (3) assume the pension liability associated with active Verizon employees at

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[13] Verizon Exhibit No. 1P (Direct Testimony of Stephen E. Smith on Behalf of Verizon New England Inc. et al., at 15 (lns. 5-6) (Mar. 23, 2007) ("Smith d.t.")).

[14] *See* Vickroy d.t. at 7 (lns. 16-22):

> The RMT requirement that FairPoint own less than 50 percent of the equity capital of the merged entity causes a large portion of the Spinco sale value to be financed by debt. While FairPoint may have financed the Spinco transaction with a high degree of debt leverage under any circumstances, the RMT structure made higher debt leverage a requirement.

Id. *See also* Brevitz d.t. at 35 (lns. 18-19) and 36 (lns. 7-9) (indicating that FairPoint's original proposed debt leverage for Spinco was 3.25x to 3.5 times EBITDA while "Verizon obviously required more funds from the transaction, since debt leverage of the proposed transaction as announced is 4.1x").

[15] *See* Brevitz d.t., Exhibit DB-P-3, at 5.

[16] Vickroy d.t. at 12 (ln. 11).

[17] *See* Staff Exhibit No. 3P (Direct Testimony of Robert V. Falcone and Charles H. King, Ph.D, on Behalf of The Public Utilities Commission of New Hampshire Staff, at 72 (lns. 19-23) (Aug. 1, 2007) ("Falcone-King d.t.")).

[18] *See* FairPoint Exhibit No. 7 (Rebuttal Testimony of Peter G. Nixon on Behalf of FairPoint Communications, Inc., at 34 (lns. 20-21) (Sept. 10, 2007) ("Nixon r.t.")).

closing.[19] The Applicants have also publicly pledged that the Merged Firm "plans to invest heavily in broadband infrastructure for the purpose of substantially increasing broadband availability following the closing."[20] It is hard to imagine how the Merged Firm will be able to follow through on all of these promises simultaneously, let alone make good on any promises to wholesale customers. In fact, *none* of the debt that FairPoint will assume through the proposed transaction will be used to finance capital improvements that will benefit even retail customers:

> The $2.3 billion in FairPoint debt that is an outcome of the proposed transaction is not incurred to fund fulfillment of operating needs in the Northern New England states. Rather, it is incurred to refinance existing debt, and provide $1.7 billion for elimination of existing Verizon debt. So, much of the debt is incurred essentially in order to permit Verizon to de-leverage.[21]

C. The Acquiring Company Lacks The Management, Experience And Technical Expertise To Provide Wholesale Services.

FairPoint's existing management lacks the experience and ability to meet the wholesale obligations of the Merged Firm. The Merged Firm will be significantly different from FairPoint today in at least two critical respects. *First*, the Merged Firm will grow exponentially in size. FairPoint's total access line equivalents will increase from approximately 300,000 to approximately two million.[22] This represents a more than five-fold increase. Verizon currently serves five times as many residential access lines and 6.81 times as many business access lines in the three states at issue as FairPoint serves nationwide.[23] OCA witness Mr. Brevitz concludes

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[19] Smith d.t. at 17 (lns. 8-12).

[20] *See* Direct Testimony of Michael L. Harrington on Behalf of FairPoint Communications, Inc., at 3 (lns. 8-9) (Mar. 23, 2007) ("Harrington d.t.").

[21] Brevitz d.t. at 35 (lns. 3-7).

[22] *See id.*, Exhibit DB-P-3, at 15.

[23] *Id.* at 18 (lns. 4-5).

that the "relative size difference is such that FairPoint cannot operate the acquired properties with its existing internal 'back office' management and operational support systems and personnel."[24]

Second, the Merged Firm will become a significant provider of wholesale services in the Northern New England area, something that FairPoint is not and has never been. Of the 64,000 access lines that FairPoint now serves in Maine, New Hampshire and Vermont, not a single one is sold to a wholesale purchaser.[25] FairPoint has also confirmed that, for all practical purposes, it has no wholesale access lines in the other states in which it operates as an incumbent LEC.[26] As Dr. Pelcovits observes, FairPoint has a "complete lack of wholesale experience in supporting competitive service providers."[27]

FairPoint lacks the management and experience to comply with the wholesale obligations of the newly-created giant ILEC. The scope of this undertaking is daunting.. For example, the Merged Firm is responsible for establishing "its own service solutions for environmental and safety management, risk management, investor relations, benefit design, compensation planning, diversity compliance, labor relations, staffing, workforce and leadership development, and credit and collections."[28]

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[24] *Id.* (lns. 8-10).

[25] Exhibit ONE-10(P).

[26] Exhibit ONE-11(P).

[27] NECTA/CPNH Exhibit No. 1P (Direct Testimony of Michael D. Pelcovits on Behalf of New England Cable & Telecommunications Association, Inc. and Comcast Phone of New Hampshire, LLC, at 53 (ln. 20) and 54 (ln. 1) (Aug. 1, 2007) ("Pelcovits d.t.")).

[28] Smith d.t. at 25 (ln. 23) and 26 (lns. 1-3).

There is simply no basis for concluding that existing FairPoint management has the expertise or ability to manage all facets of such a large company efficiently. FairPoint has "supplement[ed]" its "expertise with management experience from larger companies"[29] and recently hired nearly a dozen executives to fill the top management positions for the company's business and wholesale operations.[30] However, contrary to Mr. Lippold's assertions, this does not by any means ensure success. As Staff witness Mr. Antonuk observes, these senior level executives will be working together—many, if not all of them—for the first time to create a wholesale operations business unit from the ground up, and their responsibilities will extend beyond the for the Merged Firm's New England operations to include legacy FairPoint network operations in other parts of the country.[31] More importantly, this entirely new business unit will have few, if any, experienced middle managers and other employees during the critical transition period for establishing wholesale back office systems and processes.[32] According to the testimony of Staff consultants Messrs. Falcone and King,

> FairPoint has only just begun this daunting task by filling a handful of jobs at the senior management levels and has indicated that it will not start by filling the majority of the remaining positions until late in the fourth quarter of 2007. This allows very little time for hiring, staffing and training before FairPoint's projected May 2008 cutover date. *If FairPoint does not fill its open positions and complete the training of its new employees before the cutover, customer service will suffer*.[33]

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[29] FairPoint Exhibit No. 6 (Direct Testimony of Peter G. Nixon on Behalf of FairPoint Communications, Inc., at 14 (lns. 9-10) (Mar. 23, 2007) ("Nixon d.t.")).

[30] *See* FairPoint Exhibit No. 1 (Rebuttal Testimony of Brian Lippold on Behalf of FairPoint Communications, Inc., at 9 (lns. 4-5) (Sept. 10, 2007) ("Lippold r.t.")).

[31] *See* Staff Exhibit No. 4 (Direct Testimony of John Antonuk on Behalf of The Public Utilities Commission of New Hampshire, at 26 (lns. 5-8, 12-15) (Aug. 1, 2007) ("Antonuk d.t.").

[32] *See* Antonuk d.t. at 25 (lns. 10-13).

[33] Falcone-King d.t. at 87 (lns. 5-11) (emphasis added).

This risk is exacerbated by the fact that, as Messrs. Falcone and King explain, there is a shortage of qualified candidates for numerous "specialized network operations jobs such as network engineering and network surveillance that Verizon has historically performed in work centers outside of the northern New England area."[34]

FairPoint therefore has no wholesale systems or processes in place[35] and no experience in meeting the wholesale requirements of Sections 251, 271 or 272 of the Communications Act or in providing wholesale special access services.

D. The Acquiring Company's Lack Of Management Experience And Technical Expertise Creates The Serious Risk That Its Wholesale Services And Operations Will Not Function Adequately.

It is clear that FairPoint does not have the technical expertise to provide wholesale services to CLECs in New Hampshire. According to Staff witnesses Messrs. Falcone and King, "FairPoint has no experience in providing the full range of wholesale local service offerings required of Verizon" and for the few wholesale services it does offer, FairPoint "has no experience doing so through automated interfaces."[36] FairPoint itself has conceded that it is exploring new territory. Among other things, it is acquiring a wholesale business that it has not had before. According to FairPoint witness Michael Haga, "there are aspects of this acquisition that obviously make this transition different from others we have done, namely the size of the

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[34] *Id.* at 76 (lns. 19-21).

[35] FairPoint has stated that it "recently completed thirty-one company conversions to a single operating environment. This included basic BSS/OSS functionality. *Wholesale services were not part of the service offering of the companies; therefore, there were no wholesale data to convert*." Exhibit ONE-15(P) (emphasis added).

[36] Falcone-King d.t. at 106 (lns. 1-4). In fact, FairPoint still uses faxes, phone calls, emails, and even U.S. mail to process orders and receive trouble reports. *See id.* (lns. 5-7).

transaction, the need to migrate from existing Verizon systems and the addition of a wholesale business serving CLECs and other wholesale customers."[37]

This lack of experience as a wholesale provider creates a significant risk that wholesale service in New Hampshire will deteriorate post-merger. Under the TSA, Verizon will provide FairPoint "with major support services until such time as [FairPoint] develops its own support systems and groups to provide these services."[38] The Merged Firm will be required to pay millions of dollars in fees to Verizon each month to assist in performing wholesale functions. Those fees increase over time,[39] at a monthly rate of approximately 3.4 percent.[40] Therefore, the Merged Firm will have a strong incentive to discontinue reliance on Verizon as soon as possible:

> These arrangements could be deleterious to wholesale and retail customers if they induce FairPoint to rely on sub-standard replacement systems rather than Verizon's established systems, or force FairPoint to move from Verizon's systems prematurely.[41]

Similarly, CLEC witness Mr. Ball testified that "[c]learly, even if FairPoint's systems aren't ready by the end of the first year, they will be under great financial pressure to cutover to their

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[37] FairPoint Exhibit No. 2 (Direct Testimony of Michael Haga on Behalf of FairPoint Communications, Inc., at 4 (lns. 12-16) (Mar. 23, 2007) ("Haga d.t.")).

[38] Smith d.t. at 23 (lines 8-9).

[39] *See id.*, Exhibit VZ-SES-1; *id.*, Exhibit VZ-SES-4 at Art. II, § 2.1(a)-(b) (providing that FairPoint will pay Verizon for so-called Schedule A services, including wholesale support services, at a fee of $14.2 million per month for the first eight months following closing; for each month beginning in the ninth month, $500,000 less than for the prior month until the 13th month; $14.7 million for the 13th month; and for each month following the 13th month until termination of the agreement, $500,000 more than the amount paid for the prior month"); *id.*, Exhibit VZ-SES-4b at § VPS.SR.1 (delineating Verizon's obligations to FairPoint with respect to wholesale service requests during transition).

[40] Pelcovits d.t. at 54 (lns. 18-19).

[41] *Id.* at 54 (lns. 19-20), 55 (lns. 1-3).

own systems to avoid the mounting payments to Verizon."[42] Indeed, premature discontinuance would be a "win-win" for the Merged Firm since it would experience lower costs and its competitors would experience degraded service, thus harming the competitors' reputations for service quality and enhancing the Merged Firm's competitive position.

This is not simply a theoretical problem; wholesale customers' experience in Hawaii after Verizon sold Hawaiian Telcom ("HawTel") to the Carlyle Group, a private equity firm, provides concrete evidence that spin-off transactions can result in serious wholesale service quality degradation. When it approved the merger, the Hawaii PUC imposed conditions to ensure that the risks of OSS changes would be minimized. Unfortunately, these measures, which did not include automatic financial penalties for HawTel's failure to meet the stipulation requirements, proved to be insufficient to prevent a major breakdown in HawTel's wholesale OSS after the consummation of the spin-off transaction. By all accounts, the highly leveraged company utterly failed in its systems integration efforts—including contingency planning—following consummation of the transaction.[43]

This failure of wholesale services caused Time Warner Telecom to file a request (which is still pending) for an investigation and independent audit of the operational readiness of HawTel's back office systems in July 2006.[44] Little appears to have changed since then. In its

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[42] CLECs Exhibit No. 1 (Direct Testimony of Gary J. Ball on Behalf of Bayring Communications, segTEL and Otel Telekom, at 10 (lns. 3-5) (July 31, 2007) ("Ball d.t.")).

[43] *See, e.g.,* Pelcovits d.t. at 20-23; *see also* Ball d.t. at 12 (lns. 1-28) and 13 (lns. 1-11); Staff Exhibit No. 4 (Supplemental Testimony of John Antonuk on Behalf of the Staff of the Public Utilities Commission of New Hampshire, at 7 (lns. 9-13) (Sept. 10, 2007) ("Antonuk s.t.")) (explaining that premature cutover resulted in "[p]oor customer service, significant additional expense for [HawTel], and loss of customers").

[44] *See* Pelcovits d.t. at 23 (lns. 11-18) and 24 (lns. 1-2).

2006 Form 10-K filed with the SEC on March 31, 2007, HawTel acknowledged that following the original cutover to HawTel's OSS, "critical systems related to back-office functions such as customer care, order management, billing, supply chain, and other systems inter-facing with our financial systems, lacked significant functionality."[45] The company disclosed that this deficiency had "substantially impacted . . . customer satisfaction (as evidenced by a large increases in the customer call volumes at our work centers)."[46] Recognizing the enormous tasks still in front of it, HawTel cautioned in its Form 10-K that "there is no assurance" that its systems would "achieve full functionality."[47] The resulting financial and operational pressures on the company will doubtless cause it to focus wherever possible on fixing its retail service problems at the expense of the wholesale service problems that have harmed Time Warner Telecom and other CLECs.

The Petitioners provide no reason to think that the situation in New Hampshire will be any different than it has been in Hawaii. In their Petition, Verizon and FairPoint do not even attempt to show that the Merged Firm's wholesale operations will function properly. FairPoint instead claims that it is qualified to perform as a wholesaler because it operates two CLEC subsidiaries.[48] This is like saying that a driver's license gives one the expertise to design, manufacture and sell cars. The unstated corollary of FairPoint's claim is that it has no experience whatsoever provisioning UNEs or designing an OSS needed for wholesale

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[45] *See* Ball d.t. at 12 (lns. 12-15) (internal citation omitted).

[46] *Id.* at 13 (lns. 2-3).

[47] *See* Pelcovits d.t., Exhibit NECTA/CPNH-MDP-15, at 25.

[48] *See* Haga d.t. at 4 (lns. 8-10)

operations, or otherwise performing the functions necessary to effectively serve multiple CLECs that rely on thousands of UNEs and resold loops today in the affected area.

In their testimony, Petitioners attempt to differentiate the experience of the Carlyle Group in its acquisition of Verizon's local exchanges in Hawaii on several grounds, none of which is convincing.[49] *First*, FairPoint asserts that the Carlyle Group lacked the requisite experience to manage HawTel.[50] Even if this were true, FairPoint has failed to demonstrate that it has any more experience in developing wholesale OSS than the Carlyle Group did when it acquired HawTel. To the contrary, FairPoint has *no* experience in operating a wholesale telecommunications business.

Second, the Petitioners assert that FairPoint will be using a different consulting firm to assist in the creation and integration of back office systems than the firms retained by HawTel.[51] But there is no basis for concluding that the firm FairPoint has retained, Capgemini, will be any more successful here than BearingPoint or Accenture has been in Hawaii.[52] The Petitioners' description of Capgemini's experience and expertise could equally apply to BearingPoint or any other consulting firm that provides systems integration and other solutions for merging telecommunications carriers. The Petitioners consistently cite their employment of Capgemini to

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[49] *See, e.g.,* Verizon Exhibit No. 2P (Rebuttal Testimony of Stephen E. Smith on Behalf of Verizon New Hampshire et al., at 9 (lns. 18-23), 10 (lns. 1-23) & 11 (lns. 1-13) (Sept. 10, 2007) ("Smith r.t.")).

[50] *Id.* at 10 (lns. 5-6).

[51] *See id.* at 9 (lns. 21-23).

[52] *See id.* at 10 (lns. 15-22). In fact, according to Staff witness Mr. Antonuk, Capgemini "has not previously developed systems that support such a comprehensive set of telecommunications functions." Antonuk s.t. at 5 (lns. 15-17). Mr. Antonuk states that "[t]his is not surprising, as the only other company that has attempted a similar telecommunications back-office systems development undertaking was Hawaiian Telcom." *Id.* (lns. 16-19).

divert attention from FairPoint's lack of experience in the provision of wholesale services.[53] However, retaining a consulting firm to assist in systems integration is not a panacea for problems that will likely occur during integration. Whatever experience Capgemini has in telecom consulting, it does not make up for FairPoint's complete lack of experience in the provision of wholesale services to competing carriers.

It is clear, therefore, that FairPoint has neither the technical expertise nor the management experience to provide satisfactory wholesale services to Verizon's existing customers in New Hampshire, including One Communications.

E. The Proposed Transaction Will Not Result In Any Synergies, Cost Savings Or Other Efficiencies That Will Benefit New Hampshire Customers.

Petitioners cannot demonstrate that their merger will generate efficiencies that will benefit New Hampshire consumers in the form of, for example, lower rates. Petitioners' businesses are not complementary. Nor will the proposed merger eliminate duplicative operations or systems. Rather, the record is replete with evidence of significantly increased operating expenses and capital expenditures rather than cost savings. To begin with, the Merged Firm will hire 700 new employees[54] and create three new local customer service centers in Northern New England.[55] The most significant purported benefits of the proposed merger—"increased investment in existing network infrastructure and services," "improved broadband availability, job creation, and investment in new local service support centers"—will require

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[53] *See, e.g., id.* at 9 (lns. 22-23) & 10 (lns. 3-5, 18-22).

[54] *See* Falcone-King d.t. at 72 (lns. 19-23).

[55] Petition at 13.

more, not fewer, expenditures.[56] Moreover, according to the Commission's witness Mr. Antonuk, because FairPoint will be inheriting "3,000 employees working now under a very different corporate culture" and "[r]ecent increases in separation rates suggest that the Verizon employee population is in a state of internal flux," this "efficiency-robbing factor[] . . . can be expected to affect the new company well after the merger closing date."[57]

Even after one-time costs have been incurred, it is difficult to imagine how these expenditures will be offset by increased efficiencies in other parts of the business. Based on his analysis, Commission Staff consultant Mr. Antonuk concludes that the efficiency estimates that FairPoint does purport it will achieve are unreliable:

> We do not place significant reliance on the synergy estimates, as we have not seen any substantial analytical support for them. FairPoint has a vastly smaller base than Verizon across which to spread its costs, whether they consist of common administrative and general and governance and support costs, or whether they consist of the costs of technical operating, supervision, service, or other such groups. It is extremely atypical to find that a reduction in scope and scale will produce an increase in cost efficiency.[58]

FairPoint concedes that "other than the identified efficiencies resulting from the replacement of certain Verizon allocated functions and their associated costs, FairPoint has not assumed any cost-cutting measures and, in fact, has assumed some rising operating costs."[59] It is therefore entirely possible that, rather than resulting in efficiencies that can be passed on to the public in the form of reduced rates, the one-time and recurring costs incurred by the Merged Firm will

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[56] FairPoint Exhibit No. 8P (Prefiled Testimony of Walter E. Leach, Jr. on Behalf of FairPoint Communications, Inc., at 12 (lns. 10-13) (Mar. 23, 2007) ("Leach p.f.")).

[57] *See* Antonuk d.t. at 31 (lns. 5-10).

[58] Antonuk d.t. at 28 (lns. 11-16).

[59] Leach p.f. at 35 (ln. 23), 36 (lns. 1-3).

cause rates for New Hampshire's retail residential and business customers and its wholesale customers to increase.

III. ABSENT THE IMPOSITION OF APPROPRIATE CONDITIONS, THE PROPOSED TRANSACTION WILL CAUSE NET HARM TO COMPETITION IN THE WHOLESALE SERVICES MARKET IN NEW HAMPSHIRE.

FairPoint's financial instability, lack of technical expertise, inexperienced management, and promises to various stakeholders, including employees and shareholders, all create the substantial risk that the proposed merger will harm competition. *First*, the Merged Firm has overwhelming market power over local transmission facilities in New Hampshire. CLECs have only a 12 percent share of end-user switched access lines in the state (and the vast majority of those are provided via Verizon loops), compared to a nationwide average of 17 percent.[60] The Merged Firm will also control the only end-user connection to the overwhelming majority of business customers in the state. For example, as of June 2006, competitors with their own loop facilities served only 8.7 percent of total switched access lines in New Hampshire.[61] There will be virtually no competitors to the Merged Firm in the deployment of last mile loop facilities to end user customers. The combination of retail market share and control over upstream transmission inputs means that the Merged Firm is unquestionably dominant in the provision of local transmission services demanded by residential as well as small and medium business customers.

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[60] *See* Pelcovits d.t., Exhibit NECTA/CPNH-MDP-3, at 1.

[61] *See* OCA Exhibit No. King 63P (FCC Local Telephone Competition: Status as of June 30, 2006, Tables 7 & 11 (rel. Jan. 31, 2007)).

Second, barriers to entry are high, particularly in connection with deployment of local loop and transport facilities.[62] This means that it is highly unlikely that any competitor will deploy last mile loop facilities in the future.

Third, by acquiring the local exchanges of Verizon, a dominant carrier, FairPoint will retain Verizon's market power and bottleneck control over essential facilities. Through its newly dominant position in the local exchange market in New Hampshire, FairPoint will gain the incentive and ability to discriminate against competitors. Indeed, the FCC has held that ILECs have a powerful incentive to deny, delay and degrade wholesale services offered to their competitors.[63] As explained below, the Merged Firm will likely act on this incentive by allocating its limited resources—including its constrained cash reserves, inexperienced management, and reputation for poor service—to fixing problems with its retail service while allowing wholesale service to deteriorate. As a result, the Commission is obligated under the public good standard of Section 374:30 to impose certain conditions, as suggested herein, on the Merged Firm.

A. The Commission Must Treat The Merged Firm As A BOC In New Hampshire, Subject To The Competitive Checklist Of Section 271 And Other Market-Opening Requirements Of The 1996 Act.

In order to ensure that New Hampshire's local telephone markets remain open to competition, the Commission must condition the merger approval upon the Merged Firm's

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[62] *See, e.g., In re Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd. 2533, ¶ 150 (2005) ("*Triennial Review Remand Order*" or "*TRRO*") ("Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities.").

[63] *See In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶¶ 214, 253 (1999) (subsequent history omitted).

treatment as a Bell Operating Company ("BOC") in New Hampshire. This is because the most important statutory requirements uniquely applicable to a BOC are that it comply with the competitive checklist of Section 271(c) of the Communications Act (including the Section 251(b) and (c) obligations listed therein) and the nondiscrimination requirements of Section 272(e) (which have not sunset), as a precondition for entering the in-region long distance market and retaining its authorization to provide such service on a going-forward basis.[64] Treating the Merged Firm as a BOC is the only way to eliminate the very real possibility that the Merged Firm will refuse to comply with these bedrock legal requirements.

Further, although FairPoint has consistently stated that it "is not a Bell Operating Company (BOC) and will not be a BOC after closing,"[65] the plain language of the Communications Act states otherwise. Under Section 3(4)(A) of the Communications Act, the term BOC "means any of the following companies" including "New England Telephone and Telegraph Company."[66] New England Telephone and Telegraph is known today as Verizon New England Inc., Petitioner in the instant proceeding.[67] Thus, Verizon New England is a BOC.

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[64] 47 U.S.C. §§ 251, 271-72.

[65] *See, e.g.,* Nixon r.t at 8 (lns. 4-5); *see also* NECTA/CPNH Exhibit No. 83P (Proposal For Decision and Brief of FairPoint Communications, Inc., Joint Petition of Verizon New England Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof, and FairPoint Communications, Inc. for approval of an asset transfer, acquisition of control by merger and associated transactions, Docket No. 7270, at 92, ¶ 349 (filed Oct. 17, 2007)).

[66] 47 U.S.C. § 153(4)(A).

[67] Verizon New England is a wholly-owned subsidiary of NYNEX Corporation, which is in turn a wholly owned subsidiary of Verizon Communications Inc. *See* Petition ¶ 1; *see also* Smith d.t. at 6 (lns. 4-6) ("[Verizon New England (VNE)] will distribute the stock of Telco to VNE's parent, NYNEX Corporation" and "NYNEX will distribute the stock of Telco to its parent, Verizon"). FairPoint admitted in its response to a data request that Verizon New England is the same company or a successor to New England Telephone and Telegraph Company. *See* Exhibit ONE-25(P).

Also, if that BOC transfers any LEC facilities, including those in New Hampshire, Maine, and Vermont, to FairPoint, the transferred LEC facilities must continue to be classified as BOC facilities. Section 3(4)(B) of the Communications Act explicitly states that "any successor or assign" of a BOC listed in Section 3(4)(A), including New England Telephone and Telegraph Company, which provides "wireline telephone exchange service," is a BOC.[68] Under the relevant common law test applied by the FCC, FairPoint should be considered a "successor or assign" of Verizon if there is "substantial continuity" between Fair Point and Verizon in the relevant geographic and product markets.[69] Such continuity exists here. For example, FairPoint has stated that "[n]o existing Verizon retail service will be discontinued or interrupted as a result

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[68] 47 U.S.C. § 153(4)(B); *see also* Exhibit ONE-25(P) (FairPoint acknowledging the language of Section 3(4)(B)); *In re Sacred Wind Communications, Inc. and Qwest Corp. et al.*, Order, 21 FCC Rcd. 9227 (2006) (Chief, Wireline Competition Bureau) ("*Sacred Wind Order*"). When the FCC's Wireline Competition Bureau approved Qwest's sale of rural exchanges in New Mexico to Sacred Wind Communications, it rejected Sacred Wind's argument that because Sacred Wind was "merely acquiring 2,300 copper lines from Qwest, it [wa]s not acquiring an 'exchange' *per se*." *Sacred Wind Order* ¶ 20. The Bureau held that Sacred Wind was in fact acquiring exchange assets, facilities, and customers from Qwest in order to provide "telephone exchange service" and therefore, "Sacred Wind, as a successor to Qwest, meets the definition of an incumbent LEC pursuant to Section 251(h)(1) of the Act." *Id.* ¶ 25. The Bureau did not specifically address whether the successor entity can be classified as a BOC as opposed to merely an ILEC. However, the logical inference from the Bureau's analysis is that, as a successor to Qwest, an ILEC that is also a BOC, Sacred Wind meets the statutory definition of a BOC. Likewise, with respect to the instant transaction, the Merged Firm will acquire facilities from—and thus become a successor to—Verizon New England, an ILEC which is also a BOC. Accordingly, the Merged Firm will satisfy the statutory definition of a BOC under Section 3(4)(B) and be subject to all provisions of the Act applicable to BOCs.

[69] *See, e.g., Howard Johnson Co,* 417 U.S. 249, 261 (1973) (holding that "continuity of identity in the business enterprise necessarily includes, we think, a substantial continuity in the identity of the workforce across change in ownership"); *Fall River Dying v. NLRB*, 482 U.S. 27, 43 (1987) (holding that in determining whether substantial continuity exists, courts will look to "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.").

of the proposed transaction";[70] it will continue to provide wholesale services in the same manner as Verizon;[71] it will adopt Verizon's interconnection agreements;[72] it will largely retain Verizon's workforce and Verizon's existing collective bargaining agreement and continue to provide benefits for retired Verizon employees.[73] As Mr. Skrivan has testified, "what FairPoint is trying to do [is], . . . '*[w]e want to step into the shoes of Verizon*.'"[74]

Although FairPoint has stated that it would comply with Verizon's obligation to provide wholesale inputs to local competitors, including compliance with the competitive checklist of Section 271(c),[75] this promise must be a binding condition of any merger approval order.

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[70] Petition at 10.

[71] Nixon d.t. at 27 (lns. 10-13).

[72] *See infra* Part III.D.

[73] Petition at 13. Indeed, FairPoint's ILEC operations post-merger in northern New England will be larger than Verizon's are now given the addition of Verizon's lines to those that "FairPoint classic" operates now. It is untenable for such an ILEC not to be considered a BOC under the Communications Act.

[74] Hearing Tr. 10/25/07 at 101 (lns. 7-10) (emphasis added). FairPoint witness Mr. Skrivan cites certain cases in his rebuttal testimony where a non-BOC acquired certain BOC exchanges and was not subsequently regulated as a BOC. *See* FairPoint Exhibit No. 4 (Rebuttal Testimony of Michael T. Skrivan on Behalf of FairPoint Communications, Inc., at 19 (lns. 10-17) ("Skrivan r.t.")). Mr. Skrivan admits, however, that none of these transactions involved the sale of a BOC's entire ILEC business in an entire state or, as in this transaction, three contiguous states. *See* Hearing Tr. 10/25/07 at 103-04.

[75] *See* Nixon r.t. at 8 (lns. 1-4) (FairPoint "will assume all of Verizon's wholesale contracts as of the closing," and it "agrees to provide services that Verizon provides today, including those that meet the 14-point 'competitive checklist' set forth in section 271(c)(2)(B) of the federal Communications Act"). In the Vermont Public Service Board proceeding, FairPoint has stated that it would agree to provide the competitive checklist items but that FairPoint would not be a BOC post-closing. *See* NECTA/CPNH Exhibit No. 83P, at 80, ¶ 342. However, FairPoint has also averred in the Vermont case that "[b]ecause FairPoint has committed to adopt Verizon's rights and obligations under state regulation in Vermont, *it is not necessary for the Board to specifically condition its approval of the transaction on these commitments.*" *Id.* at 88, ¶ 341 (emphasis added). On the contrary, if FairPoint commits to adopting such rights and obligations,

Congress established the legal requirements applicable to BOCs because mere voluntary commitments would have been insufficient to compel them to open local markets to competition. In fact, Congress placed special obligations on BOCs on a state-by-state basis, to remain in compliance with the competitive checklist of Section 271(c) and with Section 272 *because even the extensive legal requirements applicable to incumbent LECs under Section 251(c)* were insufficient to ensure BOCs' continued cooperation in the provision of inputs to CLECs. This is of course sensible in light of a BOC's powerful incentives to deny access to needed inputs throughout each state in which it operates.[76] Thus, unless FairPoint's promise to comply with the competitive checklist is made a binding condition of any merger approval, the door would be left open for the Merged Firm to change its mind about providing wholesale inputs to competitors and effectively gut the BOC-specific provisions of the Act.

While FairPoint has promised that it would provide the Section 271 checklist items, it has also stated that if this commitment became a binding condition of any merger approval by the Commission, only those CLECs that are party to the Settlement Stipulation[77] would be permitted to enforce disputes over pricing of such elements before the NH PUC.[78] All other CLECs would

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(continued)

there is no reason for the company not to agree to make these commitments binding conditions of merger approval.

[76] *See generally Application by Verizon New England Inc. et al., for Authorizations to Provide In-Region, InterLATA Services in Vermont*, Memorandum Opinion and Order, 17 FCC Rcd. 7625 (2002).

[77] *See* FairPoint Exhibit No. 15 (Settlement Stipulation Among FairPoint Communications, Inc., Freedom Ring Communications, LLC d/b/a Bayring Communications, LLC, SegTEL, Inc. and Otel Telekom, Inc. (dated Oct. 17, 2007)) ("Settlement Stipulation").

[78] *See* Hearing Tr. 10/25/07 at 107-09.

need to file their complaints regarding pricing of these elements with the *FCC*.[79] Such differential treatment of similarly situated CLECs makes no sense for several reasons. *First*, it cannot be the case that an agency possesses subject matter jurisdiction over the same service or facility when requested by CLEC A but not when requested by CLEC B. This is because the elements at issue are either Section 271 UNEs that, according to FairPoint, come within the jurisdiction of the FCC or they are State 271 UNEs that come solely within the jurisdiction of the NH PUC as a result of a conditional approval of the merger. The jurisdictional analysis cannot turn on the identity of the CLEC requesting the facility.

Second, FairPoint cannot alter either agency's subject matter jurisdiction via contract. The NH PUC is an agency created by statute, and the State legislature has authorized it to regulate certain matters relating to telecommunications.[80] Likewise, the FCC is an agency created by Congress and is authorized to regulate communications pursuant to the Communications Act. Accordingly, private citizens, or in this case three CLECs, cannot expand upon the subject matter over which the agency has jurisdiction pursuant to statute. Any condition of the merger providing for jurisdiction over competitive checklist item pricing disputes should therefore apply to *all* CLECs in this proceeding.

Third, even if both this Commission and the FCC had concurrent subject matter jurisdiction over the elements at issue here, such that either the Commission or the FCC could enforce FairPoint's obligations with respect to such elements, FairPoint has not shown — and it is incomprehensible that it *could* show — how it may by contract *exclude* a non-contracting party from the jurisdiction of one tribunal or the other.

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[79] *See id*.

[80] *See* NH Rev. Stat. Ann. § 363 *et seq*.

Finally, in addition to providing Section 271(c) competitive checklist items, FairPoint has agreed to provide wholesale DSL and line sharing for three years,[81] but *only* to the three CLECs that have entered into the Settlement Stipulation.[82] The Commission should not sanction FairPoint's systematic discrimination against New Hampshire CLECs by approving this and other provisions that FairPoint asserts should apply only to the three settling CLECs.[83] It is entirely reasonable for FairPoint to provide wholesale DSL and line sharing for three years to *all* CLECs. Indeed, such a condition cannot be that harmful to FairPoint if it has already agreed to it with three CLECs.

The Commission must also require the Merged Firm to comply with Section 272(e) of the Communications Act as a condition of merger approval. FairPoint claims that it will not be subject to the nondiscrimination requirements of Section 272(e) post-transaction.[84] Specifically, FairPoint asserts that the requirements of Section 32.27 of the FCC's rules "are generally the same as those imposed for pricing transactions under Section 272(e)."[85] This argument is without merit. Section 32.27 establishes accounting regulations for transactions with affiliates.[86] Section 272(e) governs the rates, terms and conditions of local exchange and exchange access

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[81] Settlement Stipulation, Exhibit 1, ¶ 2.d.

[82] Hearing Tr. 10/22/07 at 26 (lns. 3-8).

[83] *See infra* Part III.D.

[84] *See* Hearing Tr. 10/25/07 at 111 (lns. 18-24) (stating that the Merged Firm will not agree to be subject to the nondiscrimination requirements of Section 272(e) because "there are provisions that apply to independent telephone companies and apply to all LECs which essentially cover the same ground").

[85] FairPoint Exhibit No. 50, at 1 (Oral Data Request - provision of Act which would impose obligations similar to those imposed on BOCs by Section 272(e)).

[86] *See* 47 C.F.R. § 32.27.

services provided by BOCs and their affiliates to unaffiliated carriers. For example, Section 272(e)(1) provides that BOCs must fulfill requests for exchange services and exchange access within the same amount of time as it does for itself or its own affiliates.[87] In another example, Section 272(e)(3) requires BOCs to charge their affiliates no less than the same amount for exchange service and exchange access that they charge to unaffiliated interexchange carriers.[88] None of these nondiscrimination requirements has anything to do with the rules governing the recording of transactions with affiliates in the carrier's regulated accounts. In fact, Section 272 contains a separate provision, Section 272*(b)(2)*, that governs accounting of BOCs' transactions with affiliates.[89] Moreover, Section 272(b)(2) has sunset while the nondiscrimination requirements of Section 272(e) have not.[90] It is clear, therefore, that the accounting rules in Section 32.27 are entirely irrelevant to the issue of whether FairPoint should be subject to Section 272(e) of the 1996 Act.

FairPoint also argues that the requirements of Sections 201(b) and 202(a) of the Communications Act that rates and practices be just and reasonable and not unjustly or unreasonably discriminatory obviate the need for the Merged Firm to comply with Section 272(e).[91] This argument should also be rejected. To begin with, as mentioned, Section 272 governs the provision of local exchange services and all exchange access services, including intrastate exchange access services. Sections 201(b) and 202(a) do not apply to these services,

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[87] 47 U.S.C. § 272(e)(1).

[88] 47 U.S.C. § 272(e)(3); *see also* 47 U.S.C. §§ 272(e)(2) and (4).

[89] 47 U.S.C. § 272(b)(2).

[90] *See* 47 U.S.C. § 272(f) (excluding the provisions of Section 272(e) from the sunset).

[91] *See* FairPoint Exhibit No. 50, at 2.

because those provisions govern interstate services only.[92] But even with regard to interstate exchange access services, it is clear that Congress believed that Section 272(e) requirements were necessary since Sections 201(b) and 202(a) already applied to interstate exchange access services provided by BOCs when Congress enacted Section 272(e). Congress' decision to adopt Section 272(e), therefore, reflects its considered judgment that the general provisions of Sections 201 and 202 were insufficient by themselves and that the threat of discrimination could only be adequately addressed through the specific behavioral requirements of Section 272(e).[93] Indeed, Congress thought that these specific requirements were so important that it expressly excluded them from the automatic sunset applicable to other provisions of Section 272. There is therefore no basis for concluding that the application of Sections 201(b) and 202(a) obviates the need for the Merged Firm to be subject to Section 272(e).

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[92] *See* 47 U.S.C. §§ 201(b), 202(a); *see also* Section 2(b) of the Act (requiring that the terms of the Act be construed not to give the FCC authority over intrastate services) *Id.* § 152(b).

[93] *See, e.g., United States v. Ahlers*, 305 F.3d 54, 58 (1st Cir. 2002) ("We presume that Congress intended all words and provisions contained within a statute to have meaning and effect, and we will not readily adopt any construction that renders any such words or phrases meaningless, redundant, or superfluous."); *see also Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) ("When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.").

B. The Merged Firm Must Be Prohibited From Seeking The Rural Exemption And Other Protections Of Section 251(f) Of The Communications Act.

While FairPoint has voluntarily agreed not to seek the protections[94] in Section 251(f)(1)[95] or Section 251(f)(2)[96] of the Communications Act, the Commission must prohibit the Merged Firm from seeking such relief as a condition of any merger approval. Even the possibility that the Merged Firm could claim eligibility for these protections will have a chilling effect on

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[94] NECTA/CPNH Exhibit No. 83P at 92, ¶ 347; Hearing Tr. 10/22/07, at 24.

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

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

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

[96] Section 251(f)(2) differs in several important respects from Section 251(f)(1). While Section 251(f)(1), applies only to *rural* LECs and offers only an *exemption* from the requirements of Section 251*(c)*, Section 251(f)(2) establishes a procedure for all ILECs "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" to request *suspension or modification* of the requirements of *either* Sections 251(b) *or* 251(c). Under Section 251(f)(2), a state commission must grant the suspension or modification petition of any ILEC with less than 2 percent of subscriber lines nationwide where suspension or modification is (A) needed to avoid (i) "adverse economic impact on users of telecommunications services generally," (ii) undue economic burden; or (iii) technical infeasibility; and (B) is consistent with the public interest. The Merged Firm will own far less than 2 percent of the nation's approximately 175 million switched access lines nationwide. Thus, even if the Merged Firm did not qualify as a rural telephone company for purposes of Section 251(f)(1), without a binding prohibition on seeking eligibility under Section 251(f)(2), it could have a basis for trying to for a suspension or modification of any of the resale, number portability, dialing parity, rights-of-way, and reciprocal compensation requirements of Section 251(b) in addition to the interconnection, unbundling, collocation and other requirements of Section 251(c).

competition. Such a condition is particularly important given that FairPoint has repeatedly argued that, post-transaction, it will not be a BOC under the Communications Act.[97] As discussed above, FairPoint's position is flatly inconsistent with the requirement that a "successor or assign" of a BOC continue to be classified as a BOC. If transferring BOC local exchange networks to another firm could free BOCs from the core market-opening provisions of Sections 251 and 271, the ILECs would cease functioning as BOCs in the process. The "successor or assign" provision of Section 3(4)(B) would thereby be rendered meaningless.

If the Merged Firm is not precluded from seeking Section 251(f) exemptions, competition in New Hampshire, and with it New Hampshire consumers, will suffer. For over ten years the Commission has sought to promote telecommunications competition by the application of Section 251 and the other provisions of the 1996 Act. Allowing the Merged Firm to escape its obligations under Sections 251 and 271 would remove a fundamental building block of the Commission's efforts. The mere fact of this transaction should not undo years of effort by the Commission in promoting the good of the state through telecommunications competition.

C. The Commission Must Impose Conditions To Ensure That Creation Of The Merged Firm's Operating Support Systems Does Not Harm Consumers Or Obstruct Competition In The Market For Wholesale Services In New Hampshire.

There is a substantial risk that the Merged Firm will fail to meet its most basic obligations under Section 251(b) and (c) as well as Sections 271 and 272. As explained, the Merged Firm must acquire the capability to support extensive wholesale operations, including building its own wholesale OSS and developing its own employee expertise in meeting ILEC wholesale obligations. The Merged Firm will have powerful incentives to divert resources away from

[97] *See supra* Part III.B; *see also* Hearing Tr. 10/22/07 at 26 (lns. 10-11); NECTA/CPNH Exhibit No. 83P at 92, ¶ 349 (citing Nixon r.t. at 7 and Lippold r.t. at 14-15).

wholesale obligations and toward meeting its commitments to shareholders, unions, and end-users. In fact, given that FairPoint has much more experience in providing retail than wholesale service, there is good reason to expect that it will resolve retail issues more readily and quickly than wholesale issues. Once it has accomplished this, the Merged Firm would have a powerful incentive to discontinue the TSA in light of the TSA's fee structure.[98] As discussed above, the result may be similar to, or worse than, that experienced by the customers of Hawaiian Telcom after its post-merger wholesale OSS breakdown. To ensure that wholesale customers in New Hampshire do not suffer a similar fate, the Commission must attach the following conditions to approval of the proposed merger. These and similar conditions have been proposed by several witnesses in this proceeding.[99]

1. Independent Third-Party Testing of the Merged Firm's OSS.

The Merged Firm must retain an independent third party with expertise in ILEC wholesale OSS operations and must design and follow a plan for the third party expert's review of all aspects of ordering, provisioning, maintenance and repair for UNEs, special access facilities, and interconnection in the region served by the transferred ILECs. The Commission, the Maine PUC, and the Vermont Public Service Board have received a proposal from Liberty Consulting Group ("Liberty") to conduct this testing and monitor the cutover from Verizon's back-office systems to those developed by Capgemini for FairPoint.[100] Among other things,

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[98] *See* Part II.D *supra*; *see also* Antonuk s.t. at 6 (lns. 18-20) (testifying that "the resulting financial impact [of the TSA's fee structure] will create an incentive for FairPoint to terminate the TSA prematurely, leading to poor service for New Hampshire customers").

[99] *See, e.g.*, Pelcovits d.t., Exhibit NECTA/CPNH-MDP-1, at 2 (outlining OSS-related conditions proposed by Dr. Pelcovits); *see also* Antonuk s.t., Exhibit A (listing Staff's proposed conditions).

[100] *See* Staff Exhibit No. 61, at 1 (Tri-State Agreement on FairPoint Cutover Monitoring Statement of Scope) ("Statement of Scope").

Liberty's Statement of Scope provides that the plan for wholesale OSS testing must be subject to review and comment by interested parties and the Commission.[101] This should be a condition of merger approval. However, Liberty's proposed plan does not go far enough.

First, any plan for independent third-party testing that is approved as a condition of the merger must include a provision that the Merged Firm will be prohibited from converting wholesale operations from Verizon's OSS to the Merged Firm's OSS until the independent third party has determined that: (1) the Merged Firm's wholesale OSS operate at a level of service quality *at least equal to Verizon's prior to the transaction*; and (2) the Merged Firm has established not only the processes and procedures for, but *dedicated sufficient resources* to, its wholesale OSS operations to ensure that its OSS will continue to operate at a level of service quality at least equal to Verizon's prior to the transaction.

Second, the independent third-party tester's conclusions should be subject to notice and comment *and approval* by the Commission prior to any cutover to the Merged Firm's wholesale OSS. More importantly, to the extent that the Commission accepts Liberty's plan for testing OSS and monitoring the cutover process as a condition of the merger, the Commission must also authorize the Staff to prevent FairPoint from going forward with any cutover if Liberty determines that FairPoint is not sufficiently ready to do so. Without any authority to act on the monitoring reports provided by Liberty, the Staff's receipt of such information would be meaningless.

Third, any plan for independent third-party OSS testing and monitoring must include a prohibition on having a "black out" period in which wholesale OSS do not function during the

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[101] *Id.* at 2.

cutover from Verizon's systems to the Merged Firm's systems.[102] In addition, Section 271 performance assurance plans ("PAPs") must apply during this transition period.[103]

Fourth, the Statement of Scope provides that "[i]f the cutover process proceeds without significant problems, Liberty's review will end at cutover."[104] However, the definition of "significant problems" is unclear, and it is not clear which party will decide whether such problems with the new systems exist. Liberty must clarify this aspect of post-cutover review. Furthermore, some problems may not arise immediately following cutover and an independent third-party monitor should be retained for at least three months after cutover occurs to address such problems.

2. Prohibition On Passing Through Costs Of The New OSS To Wholesale Customers.

The Merged Firm should be prohibited from forcing wholesale customers to incur extra expenses as a result of (1) the inefficiencies created by the proposed transfer or (2) its adoption of new wholesale OSS. For example, the Merged Firm should not be permitted to charge wholesale customers for training their employees in its new OSS; wholesale customers should not be required to develop their own OSS interfaces or other OSS features in order to continue to operate as they have prior to the proposed transaction; and the Merged Firm should be prohibited

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[102] FairPoint has stated that it will institute a black-out period during which it will be prevented from doing any provisioning activity and system updates for approximately five days. *See* Falcone-King d.t. at 43 (lns. 15-21).

[103] FairPoint essentially admits there will be problems with its OSS during and after the cutover by requesting a two-month suspension of the PAP for some CLECs and a one-month suspension for CLECs that are parties to the Settlement Stipulation. *See* Hearing Tr. 10/25/07, at 113. The Commission should reject this. At the very least, the Commission should ensure that there is no discrimination among CLECs allow for a one-month suspension vis-à-vis all CLECs, and not just parties to the Settlement Stipulation.

[104] Statement of Scope, at 4.

from seeking to recover any of the costs associated with its adoption of new wholesale OSS in wholesale rates of any kind. As Dr. Pelcovits has testified, "[i]t would not be reasonable to require the competitors to bear these costs, as they are directly related to this merger."[105] The Commission can accomplish this objective by both a direct prohibition on pass-through of these costs and by a freeze on wholesale rates for an appropriate period of time (*e.g.*, at least three years).

D. The Merged Firm And Verizon Must Be Prohibited From Reneging On Special Access Discounts And The Merged Firm Must Extend All Inter-carrier Agreements.

The proposed transaction threatens to deprive competitors of the benefits of their existing special access volume-term service arrangements. The sale of the Verizon ILEC facilities covering three states, including New Hampshire, will substantially reduce the volume of special access that companies like One Communications purchase from Verizon. This will give the Merged Firm the opportunity to assert that, after the transaction, One Communications no longer purchases sufficient volumes of special access to qualify for the price discount (and must therefore pay higher prices going forward) and other terms and conditions available under One Communications' current volume-term plan. Verizon might also assert that, after the transaction, One Communications must pay higher special access rates and no longer benefit from other terms and conditions that apply today under the Verizon special access volume-term plan in the states where Verizon continues to own incumbent LEC assets. The Merged Firm and Verizon could seek to make these arguments, even though One Communications continues to purchase *exactly the same volume of special access from Verizon and Merged Firm together that it purchased from Verizon prior to the transaction.*

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[105] Pelcovits d.t. at 57 (lns. 13-15).

To prevent the proposed transaction from impairing competition in this manner, the Commission must freeze the Merged Firm's special access, UNE, and other wholesale agreement prices for a reasonable period of time (*e.g.,* at least three years). Neither the Merged Firm *nor Verizon* should be permitted to charge higher special access rates to purchasers under volume-term arrangements because they no longer meet the minimum volume required for a particular discount. Thus, the Merged Firm *and Verizon* should continue to honor all provisions of existing special access tariffs *except* to the extent that they could exploit diminished economies of scale or scope caused by the transaction. Under this condition, the Commission should require that, after the transaction, the Merged Firm and Verizon offer the same special access discounts as those offered by Verizon today but conditioned on proportionate volume levels for the three states and for the remaining Verizon service areas. For example, if a CLEC has been obtaining a ten percent discount under a special access volume commitment plan from Verizon, it should continue to receive the same discount (1) from the Merged Firm on the condition that the CLEC meets a volume commitment that is appropriately adjusted to reflect the reduction in the size of relevant geographic territory to include only Maine, New Hampshire, and Vermont; and (2) from Verizon on the condition that the CLEC meets a volume commitment that is appropriately adjusted to reflect the reduction in the size of relevant geographic territory to exclude Maine, New Hampshire, and Vermont. In this manner, the Commission can diminish the harm to competition posed by the transfer of the Verizon incumbent LECs to the Merged Firm.

The Commission must also preclude the Merged Firm from exploiting any opportunities created by the proposed transaction to raise rivals' costs under existing interconnection agreements, special access wholesale arrangements, or other inter-carrier agreements. For example, there is no basis for enforcing any provision allowing the Merged Firm to cancel or renegotiate an interconnection agreement because of a transfer of the incumbent LECs to the Merged Firm.

It is worth noting that FairPoint has agreed to extend existing interconnection agreements and prorate special access volume-term discounts for three years *only* for those parties in this proceeding that have entered into the Settlement Stipulation.[106] For parties without settlement agreements, FairPoint has agreed to extend interconnection agreements and volume discounts for only one year.[107] There is no reason for FairPoint to treat similarly situated parties differently in this manner. *First*, the parties to the Settlement Stipulation have agreed that the terms of the agreement will "not be enforceable unless approved in their entirety by the NHPUC as a condition of the Commission's approval of the merger."[108] Thus, FairPoint is asking the Commission to issue an order and impose merger conditions that would apply to some CLECs and not others. Such discrimination is flatly inconsistent with the nondiscrimination requirements of Section 378:10 of the New Hampshire Revised Statutes.[109] Moreover, Section 378:10 applies because the special access volume-term discounts consist of jurisdictionally mixed services that are subject to state law.[110]

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[106] *See* Hearing Tr. 10/22/07, at 28 (lns. 16-23); Hearing Tr. 10/25/07, at 115 (lns. 6-24), 116 (lns. 1-6).

[107] *See id.* A one-year extension is especially insignificant in light of Staff witnesses' recommendation that the Merged Firm "provide for a period of *five years* after close *all products and services*, including collocation options, that Verizon offers, regardless of whether these services stem from Verizon's status as a BOC." Falcone-King d.t. at 124 (lns. 13-16) (emphasis added).

[108] Settlement Stipulation ¶ 9.

[109] N.H. Rev. Stat. Ann. § 378:10.

[110] *See id.*; *Qwest Corp. v. Scott*, 380 F.3d 367, 374 (8th Cir. 2004) (holding that states may exercise jurisdiction over special access services unless expressly preempted by the FCC).

Second, in the Settlement Stipulation, the "CLEC Coalition" (i.e., the three CLECs that are party to the agreement) "stipulates that it supports the Merger with the conditions set forth" in the agreement and that the proposed conditions "adequately address" the "issues and concerns raised in said docket."[111] In other words, the conditions, including those that extend interconnection agreements and special access volume-term discounts for three years, resolve the public interest problems posed by the proposed transaction. The logical inference is that conditions that extend interconnection agreements and special access volume-term agreements by only one year fail to "adequately address" the "issues and concerns raised in the docket." Finally, given that FairPoint would agree to at least some of the aforementioned special access arrangement and inter-carrier agreement proposals in the Vermont Public Service Board proceeding,[112] FairPoint should have no objection to binding conditions to the same effect in New Hampshire.

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[111] Settlement Stipulation ¶ 10.

[112] *See* Exhibit No. 83-P at 88-91, ¶ 342. FairPoint claims that it will extend interconnection agreements for all CLECs in Vermont for three years but will do so in New Hampshire only for those CLECs that have entered into the Settlement Stipulation on the ground that an Alternative Form of Regulation ("AFOR") is in effect in Vermont. Hearing Tr. 10/22/07 at 35 (lns. 12-18) ("In Vermont, there is an AFOR in effect, where the – many of the rates are frozen, I believe, for three years or three more years."). This argument is entirely without merit. As FairPoint witness Mr. Lippold conceded on cross-examination at hearing, the AFOR in Vermont does not apply to interconnection agreements. *Id.* (lns. 19-21).

IV. CONCLUSION

For the foregoing reasons, One Communications urges the Commission to deny the instant Petition, or alternatively, to impose conditions on its approval that are consistent with the arguments made herein.

Respectfully submitted,

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November 20, 2007