

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

JOINT APPLICATION OF VERIZON NEW)
ENGLAND INC., FAIRPOINT COMMUNICA-)
TIONS, INC., ET AL. FOR APPROVAL OF)
TRANSFER OF NEW HAMPSHIRE)
ASSETS)

DOCKET DT 07-011

BRIEF OF BAYRING, SEGTEL AND OTEL

Freedom Ring Communications, LLC d/b/a BayRing Communications (“BayRing”), segTEL, Inc. (“segTEL”) and Otel Telekom, Inc. (“Otel”), by its attorney, urge the Commission to approve the Settlement Stipulation entered into by FairPoint Communications, Inc., BayRing, segTEL and Otel (the “CLEC Settlement”)¹ in any final order that approves the proposed transaction, or alternatively, to incorporate the CLEC Settlement Conditions contained in the CLEC Settlement in such final order. Assuming the Commission enters such a final order approving the CLEC Settlement and/or incorporating the CLEC Settlement Conditions, BayRing, segTEL and Otel support the merger without the need for additional wholesale conditions.

ARGUMENT

I. FAIRPOINT HAS AGREED TO REMAIN SUBJECT TO THE SAME REGULATORY OBLIGATIONS AS VERIZON, REDUCING THE RISK OF COMPETITIVE HARMS IN NEW HAMPSHIRE.

The Joint Applicants seek Commission approval of the transaction under RSA 374:26 and RSA: 374:30, both of which require a “public good” determination. In reviewing whether a

¹ The CLEC Settlement has been admitted into the record as FairPoint Exh. 15.

proposed transaction would be for the public good, the Commission has examined both the benefits claimed to result from a proposed transaction and the adverse effects arising or potentially arising out of a proposed transaction.² The Commission has placed conditions upon its approval of merger transactions in order both to secure benefits claimed by the applicants and avoid or mitigate negative impacts that might arise due to the proposed transactions.³ In the Bell Atlantic-NYNEX merger proceeding, DR 96-220, the Commission considered arguments from parties, including Staff and competitors, that the proposed transaction would diminish competition.⁴ The precise conditions imposed have depended on the circumstances of each proposed transaction.

As an ILEC, Verizon currently provides CLECs with access to unbundled network elements, collocation and interconnection services under sections 251(c) and 252(d)(2). CLECs such as BayRing, segTEL and Otel rely on Verizon as their supplier of these unbundled network elements and interconnection services, which they in turn use as inputs to provide their own retail services in competition with Verizon.⁵ As a Bell operating company (“BOC”) that has been permitted to enter the long distance market, Verizon’s service quality in providing these unbundled network elements and interconnection services to its competitors is measured according to the metrics set forth in a performance assurance plan (“PAP”) to guard against backsliding.⁶ The PAP contains penalties that apply in the event that Verizon fails to meet certain metrics.⁷ As a BOC, Verizon is also required to provide CLECs with certain checklist items under section 271.⁸ CLECs such as BayRing, segTEL and Otel are dependent on Verizon’s operating support systems to obtain access to these network

² NECTA/Comcast Exh. 1 at page 5.

³ *Id.*

⁴ *Id.*

⁵ CLECs Exh.1 at page 3, lines 3-6.

⁶ *In the Matter of Application of Verizon New England Inc. Verizon Delaware Inc. (d/b/a Verizon Long Distance) NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Select Services Inc. for Authorization to Provide In-Region InterLATA Services in New Hampshire and Delaware*, WC Docket No. 02-157, Memorandum Opinion and Order, (“New Hampshire 271 Order”) at paras. 171, 174 (2002).

⁷ *Id.* at paras. 169-171.

⁸ CLECs Exh. 1 at page 3, lines 6-7.

elements and interconnection services.⁹ Prior to being permitted to enter the long distance market Verizon was required to demonstrate that such operating support systems are nondiscriminatory.

A. Under Section 1 (b) and (c) of the CLEC Settlement Conditions, FairPoint Will Not Now Or In The Future Seek An Exemption, Suspension Or Modification Of Its Section 251 Obligations Under Section 251(f)(1) or 251(f)(2) of the Communications Act.

Section 251 of the Act is the cornerstone of competition.¹⁰ Section 251(c) requires ILECs such as Verizon to open their networks to competition and provide competitors the ability to purchase unbundled network elements such as local loops (including 2 wire analogue loops, xDSL loops, DS-1 loops and DS-3 loops) and DS-1, DS-3 and dark fiber interoffice transport at cost-based TELRIC rates on a non-discriminatory basis in accordance with FCC rules.¹¹ Importantly, the FCC has held that a requesting carrier is impaired “when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including economic barriers, that are likely to make entry into a market uneconomic.”¹² The FCC’s impairment analysis in the *Triennial Review Order* accounts for intermodal alternatives, self-provisioning of network elements, and the potential ability of a requesting carrier to obtain similar facilities from a third party.^{13 14} Accordingly, if the market-opening provisions of section 251(c) were no longer available at cost-based TELRIC rates in New

⁹ *Id.*

¹⁰ CLECs Exh. 1 at page 16 , lines 1-4 .

¹¹ 47 C.F.R. 51.319(a); 47 C.F.R. 51.319(e).

¹² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd at 16978, 17035, para. 84 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), vacated and remanded in part, affirmed in part, *United States Telecom Ass’n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) (USTA II) cert. denied, 125 S.Ct. 313.

¹³ *Id.* at 17035, 17044-45, paras. 84, 87, 97-98.

¹⁴ In the *Triennial Review Remand Order*, the FCC retained the unbundling framework adopted in the *Triennial Review Order*, but clarified the impairment standard to make clear that when evaluating whether the lack of access to an incumbent LEC network element “poses a barrier or barrier to entry...that are likely to make entry into a market uneconomic,” we make that determination with regard to a reasonably efficient competitor. *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 04-313, 01-338, Order on Remand 20 FCC Rcd 2533, para. 22 (2005).

Hampshire, CLECs would be impaired, economic barriers would make entry in the market uneconomic, and competition for telecommunications services would suffer. The Commission must not let this happen.

Section 251(f) of the Act deals with exemptions, suspensions and modifications of section 251(b) and (c) obligations for rural carriers. Section 251(f)(1) applies to “exemptions” for “rural telephone companies” and reads in pertinent part as follows:

(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES-

(A) EXEMPTION-Subsection (c) of this section shall not apply to a rural telephone company until (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 section 254 ...”

Section 251(f)(2) applies to “suspensions and modifications” for “rural carriers” and reads in pertinent part:

(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS- A local exchange carrier with fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange facilities specified in such petition.”

Verizon is not a “rural telephone company” or a “rural carrier” and is not entitled to seek an exemption, suspension or modification of its wholesale obligations under section 251(f)(1) or (2). However, if the transaction is approved, FairPoint would be eligible to seek a “suspension or modification” under section 251(f)(2), calling into serious question whether the transaction, if approved, would result in the diminution or demise of the market-opening services that Verizon is compelled to offer today at cost-based TELRIC rates under section 251(c) and 252(d)(2). Given that the FCC has already found that CLECs would be impaired in the absence of these facilities, and that economic barriers would make entry uneconomic, the suspension or modification of the obligation to provide network elements, collocation and interconnection services at TELRIC rates

would surely not be for the “public good” as it would undermine competition in New Hampshire to the detriment of end users in the state.

These concerns are fully addressed in the CLEC Settlement. Under paragraph 1(b) of the CLEC Settlement Conditions, FairPoint has agreed that it “will not now or in the future seek or assert rural telephone company classification of Telco for purposes of the Section 251(f)(1) rural exemption.”¹⁵ Under paragraph 1(c), nor will it “now or in the future seek any suspension or modification of any of Telco’s 251(b) or (c) obligations pursuant to section 251(f)(2) of the Act.” BayRing, segtTEL and Otel support these provisions for the reasons described above. Accordingly, the Commission should include this commitment as a binding condition of the merger in any final order approving the proposed transaction to guard against the risk of competitive harms.

B. Under Section 2 of the CLEC Settlement Conditions, FairPoint Has Agreed to Offer Checklist Items As If it Were a BOC And Has Agreed to PUC Jurisdiction to Resolve Disputes.

Verizon is a BOC and is compelled to offer checklist items under section 271 at “just and reasonable” and “non-discriminatory” rates. As the FCC has stated, the checklist requirements “establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under section 251.”¹⁶

Under paragraph 2(a) of the CLEC Settlement Conditions, notwithstanding any determination by the FCC as to whether or not FairPoint is a BOC, FairPoint has agreed that it will provide as “Settlement Items” all of the section 271 checklist items that the FCC rules or has ruled that BOCs generally must provide at rates that are “just and reasonable and not unreasonably discriminatory, as if governed by sections 201(b) and 202(a) of the Communications Act.”¹⁷ Under

¹⁵ FairPoint Exh. 15, CLEC Settlement Conditions, para. 1(b).

¹⁶ *TRO Remand Order*, para. 653.

¹⁷ FairPoint Exh. 15, CLEC Settlement Conditions, para. 2(a). Additionally, para 2(f) provides that nothing in section 2 constitutes an admission that FairPoint is a BOC.

paragraph 2(c) of the CLEC Settlement Conditions, BayRing, segTEL and Otel may request any settlement item required to be provided under paragraph 2 (a), and the parties will enter into good faith negotiations concerning the rates, terms and conditions for such item.¹⁸ If the parties do not reach an agreement, BayRing, segTEL and Otel may seek resolution of any disputed rates, terms and conditions from the Commission, which under the terms of the CLEC Settlement Conditions, would apply the federal standard for the rates, terms and conditions for such item.¹⁹ Additionally, under paragraph (d) of the CLEC Settlement Conditions, Fairpoint has agreed to provide CLECs, at their option, with wholesale DSL and linesharing offerings for at least a three year period.²⁰ BayRing, segTEL and Otel support these conditions. The Commission should include these commitments as a binding condition to any Commission order approving the transaction in order to mitigate the risk of competitive harms.

C. FairPoint Will Abide By The Same PAP that Applies to Verizon, Except For a 30 Day Grace Period Following the Cutover. FairPoint Will Also Propose a Successor PAP.

When the FCC approved Verizon's application to enter the long distance market in New Hampshire, it found that the PAP, "together with our section 271(b)(6) authority and the continuing oversight of the ... state [commission], provide reasonable assurance that the local market will remain open after 271 authority is granted."²¹

Under paragraph 2(e) of the CLEC Settlement Conditions, Fairpoint will be subject to the PAP in effect at the merger closing date and will not challenge the Board's jurisdiction to enforce it. After the merger closing date, FairPoint will work with the CLECs and state regulatory commission staffs, including the New Hampshire Staff, to develop a simplified, uniform PAP for New

¹⁸ *Id.* at para. 2(c)

¹⁹ *Id.* .

²⁰ *Id.* at para. 2(d).

²¹ *New Hampshire 271 Order* at para. 171.

Hampshire, Maine and Vermont. FairPoint will begin this process by proposing a revised PAP that could be implemented in all three states.²² Finally, as a compromise, the parties have agreed to a grace period of one month following the cutover date from the reporting requirements and penalties under the PAP.²³ BayRing, segTEL and Otel support these provisions in the CLEC Settlement Conditions and urge the Commission to include them as binding conditions in any final order approving the transaction.

D. Under Section 3 of the CLEC Settlement Conditions, CLECs and a Third Party Consultant Selected by the States Will Have Input into the Readiness Criteria That Will Help Indicate Whether FairPoint’s Wholesale Systems Are Ready for Cutover. To The Extent That Any Material Modification is Made to the Role of the Third Party Consultant in Reviewing FairPoint’s Wholesale OSS, Such Modifications Will Apply to the CLEC Settlement Without Affecting the Other Terms.

FairPoint and Verizon have entered into a Transition Services Agreement (“TSA”). Under the TSA, Verizon will perform certain operating support functions, including all of the support and systems that CLECs currently use for the preordering, ordering, provisioning, maintenance and repair and billing for wholesale services, until FairPoint notifies Verizon that it is ready to cutover to its systems. As the Commission and the FCC have previously found, non-discriminatory access to Verizon’s operating support systems is a prerequisite to competition.²⁴ The FCC has determined that without nondiscriminatory access to the BOC’s OSS, a competing carrier “will be severely disadvantaged, if not precluded altogether, from fairly competing” in the local exchange market.²⁵

Under the CLEC Settlement Conditions, FairPoint will:

- i) Provide wholesale customers with a preliminary wholesale operations support systems (WOSS) interface test plan;

²² FairPoint Exh. 15, CLEC Settlement Conditions, para. 6(c).

²³ *Id.* at para. 6(e).

²⁴ *Verizon New Hampshire 271 Order*, Appendix F, para. 25.

²⁵ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket 99-295, Memorandum Opinion and Order, para. 83 (1999).

- ii) Will provide an opportunity for CLECs and a single regulatory staff consulting firm expected to be chosen by agreement of the three state utility regulatory commissions from among their respective consulting firms participating in the docket to provide input into the WOSS acceptance criteria (the Readiness Criteria), which will consist of an objective test defect severity level classification criteria that the regulatory staff consulting firm and FairPoint agree will establish objective measures for testing whether FairPoint's systems are ready for cutover and whether FairPoint's new WOSS architecture functions as proposed, and thus will indicate whether FairPoint is ready to provide Verizon with a "Notice of Readiness to Cutover" under the terms of the TSA;
- iii) Will provide a final CLEC testing schedule;
- iv) Will develop contingency plans for specified workaround situations and
- v) Will provide a final Cutover schedule.²⁶

Additionally, BayRing, segTEL and Otel have agreed to abide by and accept the Readiness Criteria as may be agreed to by the Governmental Authorities of the three states and to refrain from advocating for Readiness Criteria testing other than what is contained in the Settlement.

Importantly, to the extent that any material modification is made to the role of the third party consultant retained by the three states in reviewing FairPoint's wholesale OSS and determining whether FairPoint is ready for cutover, such modification will apply to the CLEC Settlement and will not affect the other terms contained in it.²⁷ Accordingly, since the three states and FairPoint have now entered into a Tri-State Agreement that modifies and broadens the role of the third party consultant, BayRing, segTEL and Otel will obtain the benefit of such modification without it affecting the other terms in the CLEC Settlement.

BayRing, segTEL and Otel support the CLEC Settlement Conditions as they pertain to the review of FairPoint's OSS and the cutover from Verizon's systems to those of FairPoint, and in its entirety. Accordingly, BayRing, segTEL and Otel respectfully request the Commission to approve the CLEC Settlement and/or incorporate the CLEC Settlement Conditions, including the provisions that apply to FairPoint's OSS, in any final order approving the transaction.

²⁶ FairPoint Exh. 15, CLEC Settlement Conditions, para. 3(a).

²⁷ *Id.* at paras. 3(b) and 8(c).

II. FAIRPOINT HAS AGREED TO MANY OF THE SAME VOUNTARY CONDITIONS THAT SBC VOLUNTARILY AGREED TO IN ITS MERGER WITH AT&T IN ORDER TO GUARD AGAINST COMPETITIVE HARMS.

Prior to entering into the CLEC Settlement, BayRing, segTEL and Otel witness Gary Ball's testimony was that "FairPoint lacks the resources, experience, and incentive to comply with the wholesale obligations it will take on as the predominant ILEC in New Hampshire" and, that without proper conditions, "the transfer of Verizon's assets to FairPoint will result in increased costs and degraded service quality to CLECs."²⁸

Prior to the CLEC Settlement, BayRing, segTEL and Otel witness Ball proposed some key safeguards to mitigate the risks to competition that were voluntarily agreed to by SBC and Verizon in connection with recent merger proceedings, including:

- 1) a cap on the rates for unbundled network elements, tandem transit and special access services;
- 2) a three-year extension of interconnection agreements;
- 3) an agreement not to seek forbearance under section 10 of the Communications Act; and
- 4) An agreement not to reclassify wire centers for purposes of non-impairment.²⁹

FairPoint has substantially agreed to these key provisions to mitigate the risk of competitive harms.

First, FairPoint has agreed to cap the rates for unbundled network elements, tandem transit and interconnection services in Verizon's tariff 84 for at least three years.³⁰ Accordingly, carriers such as BayRing, segTEL and Otel that have purchased unbundled network elements and interconnection services under tariff 84 will continue to be able to do so. FairPoint has also agreed to cap interstate

²⁸ CLECs Exh. 1 at pages 3-6.

²⁹ CLECs Exh. 1 at pages 7-8, 34-35.

³⁰ FairPoint Exh. 15, CLEC Settlement Conditions, paras. 4 (d), (e), and (f). In return, BayRing, segTEL and Otel have agreed in para. 4(h) not to seek any decrease in any of Telco's rates for tandem transit service, any decrease in wholesale services in wholesale tariffs, any decrease in Telco's rates for services in the SGAT, or any increase in the discount offered in TSR tariffs.

and intrastate access charges for the same period.³¹ For settling CLECs, FairPoint has also agreed to extend existing CLEC interconnection agreements and intercarrier agreements for at least three years.³² Finally, in paragraph 1(d) of the CLEC Settlement Conditions, FairPoint has agreed not to seek to reclassify as non-impaired any wire not currently classified as non-impaired.³³ BayRing, segTEL and Otel urge the Commission to include these commitments in any final order that approves the transaction as binding enforceable conditions to mitigate the risk of competitive harms.

III. THE COMMISSION SHOULD INCORPORATE THE CLEC SETTLEMENT AND/OR THE CLEC SETTLEMENT CONDITIONS IN THEIR ENTIRETY IN ANY FINAL ORDER APPROVING THE TRANSACTION.

For all of the reasons described above, BayRing, segTEL and Otel urge the Commission to approve the CLEC Settlement in its entirety in any final order that approves the proposed transaction, or alternatively, to incorporate the CLEC Settlement Conditions contained in such CLEC Settlement in their entirety in any such order approving the transaction.

BayRing, segTEL and Otel are aware that certain parties have expressed concerns that the CLEC Settlement may somehow be unjustly discriminatory or preferential. This was certainly not the intent. The CLEC Settlement was publicly filed and provides that the CLEC Settlement Conditions will become effective only if the Commission incorporates them in a final order approving the transaction.³⁴ Assuming the Commission enters such a final order approving the

³¹ *Id.* at paras. 5(a), (b) and (c). In return, BayRing, segTEL and Otel have agreed not to seek a decrease in any of Telco's interstate or intrastate access rates for at least three years.

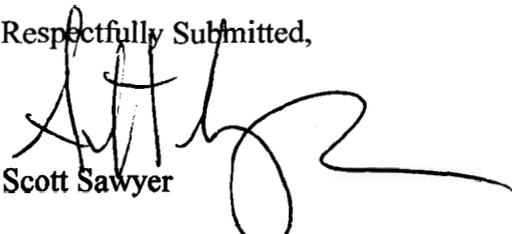
³² *Id.* at paras 4(a), (b), and (c).

³³ *Id.* at para. 1(d).

³⁴ FairPoint Exh. 15, CLEC Settlement Conditions, para. 8(c).

CLEC Settlement and/or the CLEC Settlement Conditions, BayRing, segTEL and Otel support the merger without the need for additional wholesale conditions.

Respectfully Submitted,



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