

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

**Verizon New England Inc., Bell Atlantic Communications, Inc.,
NYNEX Long Distance Company, Verizon Select Services Inc.
and
FairPoint Communications, Inc.**

DT 07-011

BRIEF OF VERIZON

I. INTRODUCTION

Verizon New England Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company and Verizon Select Services Inc. (collectively “Verizon”) file this Brief in support of Commission approval of the transfer of Verizon’s local and long distance businesses in New Hampshire (“New Hampshire Business”) to FairPoint Communications, Inc. (“FairPoint”).¹

The standard the Commission must apply in reviewing the transaction is whether it will promote the public good. As demonstrated below and in FairPoint’s Brief, the transfer of the New Hampshire Business to FairPoint will promote the public good and should be approved. FairPoint combines a strong knowledge of consumers’ needs with substantial experience in meeting them, enabling it to operate efficiently and to provide high-quality services, including innovative broadband services, to rural and small urban areas. FairPoint Ex. 6P at 7-8; FairPoint Ex. 8P at 7. In addition, the New Hampshire, Vermont and Maine markets will form the core of FairPoint’s business and will be the focus of its attention. Verizon Ex. 2P at 3.

¹ The transaction and the steps by which it will be effectuated are described in detail in the pre-filed Direct Testimony of Stephen Smith. In addition, the assets and liabilities to be transferred to Spinco, as well as those assets and liabilities of Verizon affiliates not being so transferred, are defined in the Distribution Agreement between Verizon Communications and Spinco dated January 15, 2007. *See* Verizon Ex. 2P at SES-2.

PUBLIC COPY

Further, the proposed transaction is beneficial to Verizon's existing employees and the New Hampshire economy. All Verizon New Hampshire Business employees in New Hampshire will continue their employment after the closing as part of FairPoint, and FairPoint will also create 250 new positions in New Hampshire, as part of more than 675 new positions in Northern New England. FairPoint Ex. 6P at 16; FairPoint Ex. 7P at 4, 23; FairPoint Ex. 8P at 8-9; Tr. 10-30-07 (Nixon) at 15. FairPoint will increase local operational presence and institute new local service centers within Northern New England. For example, the data center and network operations centers will be located in Manchester, New Hampshire, Tr. 10-30-07 (Nixon) at 75, and FairPoint will staff an administrative center in Littleton, New Hampshire. *Id.* at 74. Human resources and legal functions will be operated from FairPoint's offices in Portland, Maine, while services to wholesale customers will be provided from Burlington, Vermont. *Id.* at 74-75.

The transaction offers other concrete benefits to New Hampshire. FairPoint plans to invest over \$16.45 million in New Hampshire within the first 18 to 24 months of operation to expand broadband capability. FairPoint Ex. 14C at BHS-1. FairPoint's broadband expansion plan calls for use of new ADSL-2+ technology which provides an efficient platform for additional services, including IPTV, in the future. FairPoint Ex. 14P at 34.

Moreover, the transaction will be seamless to customers in New Hampshire, who will continue to receive the services currently provided by Verizon on the same rates, terms and conditions. FairPoint Ex. 6P at 26. FairPoint will be subject to the same service quality obligations currently applicable to Verizon, OCA Ex. 14P, and has expressly committed to taking certain actions to improve service quality in the state, such as hiring more outside plant technicians, OCA Ex. 36P. In addition, FairPoint has committed to further enhance the management of utility poles, including improvements in emergency response times in cases of

PUBLIC COPY

pole accidents, pole inspections, maintenance tree trimming, pole relocations and installations, and transfer of facilities from poles. *See e.g.*, National Grid Ex. 2P, PSNH Ex. 3P and Unitil Ex. 2P. Moreover, existing wholesale arrangements, including contracts and tariffs, will not be harmed as a result of this transaction. FairPoint Ex. 2P at 27-28. Finally, FairPoint has the financial resources and business plan to operate the New Hampshire Business in an efficient and fiscally responsible manner.

As detailed below, the concerns raised by the Staff, Office of Consumer Advocate (“OCA”) and Labor Intervenors with respect to certain aspects of this transaction are misplaced. First, in Section II.B, Verizon explains how the Transition Services Agreement between Verizon and FairPoint (the “TSA”) and the Petitioners’ substantial planning and preparation for the cutover (the “Cutover”) from Verizon’s operations support systems (“OSS”) to the new OSS being developed by FairPoint and Capgemini US LLC (“Capgemini”) ensure a smooth and seamless Cutover. In that regard, FairPoint has also agreed to fund and work cooperatively with a third-party monitor to conduct an independent assessment of FairPoint’s readiness for Cutover, which eliminates this issue from the case because it provides the Commission complete assurance of a smooth transition.

In Section II.C, Verizon summarizes the substantial evidence before the Commission showing that Verizon’s network is performing well and that, overall, Verizon is providing good quality service to its customers. Consequently, the current level of retail service quality poses no impediment to FairPoint’s ability to operate the New Hampshire Business or to make good on its commitment to improve service quality, and no basis exists for imposing any service quality-related conditions on approval of this transaction. Verizon also refutes the assertions by the Labor Intervenors that Verizon workers will retire en masse should the transaction be approved.

PUBLIC COPY

In Section II.D, Verizon explains why the Commission has no jurisdiction to award money damages to Unitil and PSNH for alleged tree trimming expenses or to impose any condition relating to such claims, and lays bare Unitil's and PSNH's argument that they have provided sufficient proof of any such claims. In Section II.E, in turn, Verizon explains why there is no basis for granting OCA's request for \$200 million in compensation to ratepayers based on the spin-off of Idearc, Inc. Finally, in Section II.F, Verizon addresses the Commission's lack of lack of authority to impose conditions upon Verizon New England's discontinuance of its franchise.

For all of the reasons below, the transfer of the New Hampshire Business to FairPoint clearly will be beneficial to customers, employees and all affected New Hampshire stakeholders, and will not adversely affect competition. In sum, the proposed transaction promotes the public good and should be approved in a timely manner.

II. ARGUMENT

A. STANDARD OF REVIEW

The New Hampshire Public Utilities Commission has repeatedly held that the standard to be applied to a proposed merger of a utility is the no net harm test.² *See Eastern Utilities Associates*, 76 NH PUC 236, 252-53 (1991); *CCI Telecommunications of NH, Inc.*, 81 NH PUC 844, 845 (1996); *Re National Grid Group, PLC*, 86 NH PUC 95, 98 (2001). When applying the "no net harm test," the Commission determines the overall effect on the public interest and balances the interests of ratepayers against the right of shareholders to be free of regulation which unreasonably restrains legitimate corporate activities. *Eastern Utilities Associates*, 76 NH PUC 236, 252-53 (1991); *CCI Telecommunications of NH, Inc.*, 81 NH PUC 844, 845 (1996).

² In this case, the Petitioners are not proceeding under RSA 369:8,II. *See* Joint Application for Approval of the Transfer of Certain Assets by Verizon et al. at 9. Rather, the Joint Petitioners are proceeding under RSA 374:26, 374:30 and 374:28.

PUBLIC COPY

The “no net harm” test thus consists of balancing the benefits and risks of the proposed merger to determine its overall impact on the public interest. The primary consideration when conducting a no net harm analysis is the cost to the customer. *Northern Utilities, Inc.*, 83 NH PUC 401 (1998). When considering costs to customers, the Commission has been influenced by a company's willingness to guarantee a certain level of savings to customers as well as incentives for the company to maximize customer benefits. *Public Service Company of New Hampshire*, 85 NH PUC 758 (2000). The Commission also is likely to find no net harm if a merging entity agrees not to seek recovery of merger-related costs or acquisition premiums from customers. *New England Electric System*, 84 NH PUC 502, 510 (1999). Other factors include savings and efficiency gained from economies of scale, the elimination of redundant operations or expenses, and the effect on the regional economy. *Id.* A petitioner’s record of improving maintenance services, introducing improvements to the transmission system, interconnecting new facilities, and reducing transmission costs are all benefits that have been considered in making a no net harm determination. *Id.*

In conducting the net harm analysis, the Commission also considers potential monopoly issues and the accessibility of company books and records that will allow for close regulation of New Hampshire companies. *Public Service Company of New Hampshire*, 85 NH PUC 758 (2000). Another consideration in determining net harm to customers is the technical, managerial and financial competence of the company. *RCN Telecom Service of Pennsylvania, Inc.*, 85 NH PUC 352, 353 (2000). The Commission evaluates the company’s size, expertise, record of performance, ability to maintain service to the public in adverse situations, cost and quality levels, and ability to encourage competition in New Hampshire. *New England Electric System*, 84 NH PUC 502, 510 (1999). Further, the Commission evaluates the company’s ability to

PUBLIC COPY

remain aware of and responsive to local issues and to maintain quality customer service. *Public Service Company of New Hampshire*, 85 NH PUC 758 (2000).

As Peter Nixon and other FairPoint witnesses testified at length, this transaction promises tremendous benefit to the citizens and communities of New Hampshire. *See e.g.*, FairPoint Ex. 7P at 4-11. The overwhelming weight of the evidence establishes that these benefits will include, but are not limited to, the expansion of broadband availability throughout the state, an increased workforce, an enhanced local presence and a commitment to further economic development – all at reasonable rates. *Id.* For these and other reasons stated below, the proposed transaction satisfies the no net harm standard and should be approved.

B. THE TSA AND THE CUTOVER PLANNING AND IMPLEMENTATION EFFORTS OF VERIZON AND FAIRPOINT ENSURE A TIMELY AND SEAMLESS TRANSITION AND CUTOVER.

The Staff, OCA and certain Intervenors allege that the Cutover from Verizon's OSS to the new OSS being developed by FairPoint entails significant risk, and that problems during Cutover or faults in the new OSS could impair the ability of CLECs to compete with FairPoint or may adversely affect the quality of service FairPoint provides to its new wholesale and retail customers. The record evidence, however, demonstrates that the TSA, the Petitioners' extensive Cutover planning and their substantial and ongoing devotion of time, attention and resources to the proper execution of those plans address these issues and will ensure a seamless transition from Verizon to FairPoint. Moreover, Verizon is highly motivated to assure that the transition and the Cutover are effective and seamless. Verizon's shareholders will own roughly 60% of FairPoint's stock after closing. Verizon 2P at 16. Verizon shareholders' significant stake in the new entity creates an incentive for the conversion to occur smoothly. Tr. 10-24-07 (Smith) at 237.

PUBLIC COPY

1. The Transition Services Agreement Ensures That FairPoint Will Have The Time And Services Needed To Commence Operations In A Seamless Manner.

The primary way the Petitioners have ensured a smooth and seamless transition from Verizon to FairPoint is by entering into the TSA. Under the TSA, Verizon will provide FairPoint with certain core centralized administrative and operating support services Verizon provides to its affiliates, until FairPoint has completed development of its own OSS. Verizon Ex. 1P at 22-24, 31 and SES-4 at Section 13.1. The TSA services include accounting, human resources, interconnection support, engineering, network provisioning and support, retail and wholesale support, repair support, information systems support, billing and financial operations (“Centralized Services”). Verizon Ex. 1P at 24-25. Verizon also will separate the systems and data supporting its retained business from the systems and data supporting the transition services (Schedule B Services). *Id.* at 25. Verizon will provide human resources services (Schedule C Services) and support for internet service provider (“ISP”) services (Schedule D Services). *Id.* Finally, the TSA also governs the parties’ joint efforts to plan, prepare for and implement the Cutover from Verizon’s OSS to FairPoint’s new systems. Verizon Ex. 2P at 12; Verizon Ex. 1P at SES-4, Section 7.2. Because the TSA does not limit the time period in which FairPoint can continue to receive TSA services, Verizon Ex. 1P at 23, it allows FairPoint and Capgemini as much time as they need to fully develop and test FairPoint’s new OSS.

The provisions of the TSA ensure that FairPoint will receive high quality services from Verizon. In particular, the TSA obligates Verizon to provide the same quality, timeliness and efficiency of services to FairPoint as it provides to Verizon New England. Verizon Ex. 1P at 31.

PUBLIC COPY

Verizon's performance under the TSA must also meet the standards associated with the Performance Assurance Plan and Carrier to Carrier Guidelines. *Id.* at 32.

The fees under the TSA are appropriate and are the result of arms-length bargaining between Verizon and FairPoint. It provides for FairPoint to pay a fixed one-time fee for firewall installation (under Schedule B of the TSA), a fixed monthly fee for human resource services (under Schedule C), a monthly fee for Centralized Services that varies over time (under Schedule A), and a combination of fixed monthly and service-based fees for ISP services (under Schedule D). *Id.* at 29-30; Verizon Ex. 1P at SES-4, Section 2.1. The base monthly rate under Schedule A is \$170.4 million per year, which is less than the amounts Verizon allocated to Vermont, New Hampshire and Maine for centralized services in 2006, even after accounting for the fact that the three-state allocation covers more services. Verizon Ex. 2P at 18.

The monthly Schedule A fee decreases in months 9-12 of the TSA and then increases starting in month 13. While some parties have expressed concern that the increase in monthly fees may motivate FairPoint to cut over prematurely, the overall, average monthly fee under Schedule A does not increase until the 16th month of the TSA (after considering the combined effect of the decrease and subsequent increase), and it is very unlikely that FairPoint will still need transition services 16 months after closing. Verizon Ex. 2P at 18-19. Moreover, as noted below, the staff of the three regulatory agencies in New Hampshire, Vermont and Maine have recently entered into an agreement to allow a third-party consultant to develop with FairPoint objective testing criteria that the new OSS must satisfy before FairPoint will be allowed to cut over from Verizon's systems. *See* Staff Ex. 61. The entire process has been designed to eliminate any risk of a premature Cutover. *Id.*

PUBLIC COPY

2. The Petitioners' Extensive Cutover Planning And Preparation Efforts Ensure A Smooth Cutover And Minimize Any Risk Of Disruption To Customers.

As a part of the TSA, Verizon and FairPoint have established a framework for FairPoint's transition from reliance on Verizon's systems to its own systems. Verizon Ex. 1P at 27. These arrangements are based on a set of jointly-developed, comprehensive plans, and the Petitioners are closely coordinating their Cutover preparations and testing in order to assure a seamless Cutover. In addition, a successful transition to FairPoint's OSS depends upon a single Cutover, and therefore proposals for a system-by-system or state-by-state Cutover should be rejected.

Verizon, FairPoint and Capgemini have devoted and continue to devote massive resources to Cutover planning and preparations to Cutover. Verizon and FairPoint began joint Cutover planning soon after the transaction was announced in January. *Id.* at 28. A Cutover Planning Committee was established that includes senior leaders of Verizon, FairPoint and Capgemini and that meets on a weekly basis. Verizon Ex. 2P at 2. Verizon members of the team include Stephen Smith, two members of his staff, and over 30 specialists from the Telecom, Enterprise, Wireless and Corporate Support groups. Verizon Ex. 1P at 27. The committee has developed a number of tools to ensure close coordination among them, including processes for issues management and change management, a detailed final delivery matrix, a web-based tool for sharing information and frequent data mapping sessions. Verizon Ex. 2P at 5-6. In addition, the parties have engaged in several multi-day meetings and workshops to discuss the Verizon OSS to be replaced, discuss extract system data, and review static and dynamic data samples, among other topics. *Id.* at 6. On top of all that, the parties are engaged in daily teleconferences among the Cutover team and subject matter experts. *Id.* at 5; Tr. 10-24-07 (Smith) at 131.

PUBLIC COPY

Chief among the parties' planning documents are the Cutover Plan and the Cutover Preparation Tasks, prepared by Verizon and FairPoint, respectively, but with input from each other. Verizon Ex. 2P at 2-4; Verizon Ex. 2HC at SES-5(2). The Cutover Plan describes the specific actions Verizon will take to convey the Northern New England business to FairPoint. Verizon Ex. 2P at 3-4. Verizon will engage roughly 400 of its subject-matter experts, representing 30 major organizational groups, in the course of executing the Cutover Plan. *Id.* at 16. Likewise, FairPoint's Cutover Preparation Tasks identifies the work FairPoint will perform to receive, map and test the data extracts (see below) and receive the hand-off of business operations from Verizon. *Id.* at 4. Together, the Cutover Plan and Cutover Preparation Tasks provide a comprehensive set of Cutover arrangements.

Critically, those arrangements include two full tests of the Cutover process in the forms of "dry runs," in which Verizon has and/or will deliver to FairPoint full data extracts from its "golden source" systems that provide the electronic data FairPoint will need to operate the business. The purpose of the data extracts is to test how well Verizon can extract the appropriate data from its systems and deliver it to FairPoint, as well as the readiness and ability of FairPoint's systems to upload and use the data. In each dry run, Verizon Information Technology teams extract, test and confirm that data has been successfully extracted from all targeted systems and that each set of extracted data is complete. Once Verizon provides the test data extract, FairPoint and Capgemini process the data through a series of conversion programs developed by Capgemini and then load it into the new FairPoint systems. From there, FairPoint and Capgemini determine whether the conversion programs functioned as intended and whether the data was successfully input and accepted by the system. *Id.* at 7-8.

PUBLIC COPY

The first data extract has been completed, and Verizon, Capgemini and FairPoint have been meeting weekly to work through the results and to plan for delivery of the next data extract. Tr. 10-22-07 (Haga) at 148-49; Tr. 10-24-07 (Smith) at 226. For future extracts, Verizon will meet with FairPoint and Capgemini to obtain feedback on the extraction and delivery process for the other extracts. These sessions will provide lessons that will be used to improve the second and final extract processes. Verizon Ex. 2P at 7-8. FairPoint expects that the January 2008 data extract will provide the company with a very good estimate for the exact amount of time that Cutover will take. By the time of Cutover, FairPoint will have “a very precise set of actions that have kind of minute-by-minute, hour-by-hour set of activities that [it] will track.” Tr. 10-22-07 (Haga) at 147.

Under the TSA, FairPoint has sole authority to determine when it is ready to cut over and to provide notice of readiness of Cutover to Verizon. Tr. 10-24-07 (Smith) at 107. Mr. Smith testified that in the unlikely event that FairPoint provides such a notice but he felt that FairPoint was not ready for Cutover, he would discuss the matter with FairPoint’s president, Mr. Nixon, who has been “open and receptive” in every conversation Mr. Smith has had with him. Tr. 10-24-07 (Smith) at 150. In any event, FairPoint’s lead executive for Cutover planning, Michael Haga, testified that it is more important to FairPoint to have a problem-free Cutover than it is to meet the planned Cutover date, and that FairPoint “would not cut if we’re not ready.” Tr. 10-22-07 (Haga) at 146. At Cutover, Verizon will stop processing business activities and deliver the data extract, and FairPoint will run the data through conversion programs and upload the data into its systems.

Verizon will also provide record counts and other system metrics to confirm that the data being provided to FairPoint is complete. Verizon Ex. 2P at 9. The Cutover itself is expected to

PUBLIC COPY

take approximately 3 to 5 days, and will begin on a weekend in order to reduce the number of business days before FairPoint will have live systems support of customer information. *Id.* at 9. FairPoint will process orders during the transition manually. Tr. 10-22-07 (Haga) at 146. During that brief period, network operations will continue as usual.

In sum, the comprehensive Cutover Plan and Cutover Preparation Tasks, the enormous amount of planning and preparation work by Verizon and FairPoint, the multiple tests in the form of data extracts, the role of the third party monitor, and the timing of the Cutover itself are all designed to ensure a seamless Cutover at the appropriate time; they reflect the complete commitment by both Verizon and FairPoint to the successful completion of the process of handing over the business from one operator to another.

a. The sale of Verizon Hawaii provides “lessons learned” that will ensure a successful Cutover.

Critics of the proposed transaction have suggested that the cutover experience of Hawaiian Telecom will be representative of what will happen in New Hampshire, Vermont and Maine. The allegation is simply not credible. Mr. Smith presented unrefuted testimony of the dissimilarities of these two transactions, from the nature of the acquirer, the time allotted to the transition, the expertise of the systems developer, and the level of dedication of FairPoint to successfully completing its Cutover. Verizon Ex. 2P at 10. Verizon and FairPoint have developed arrangements that will avoid a repetition of the problems that arose in Hawaii.

Unlike FairPoint, the purchaser in Hawaii was a private equity firm with no telecommunications experience. It was required to assemble its management team during the period of regulatory review, closing and cutover. Verizon Ex. 1P at 11. The management team at FairPoint, on the other hand, has substantial experience in acquiring and operating rural landline telephone operations. FairPoint Ex. 6 at 8. It has an excellent understanding of the

PUBLIC COPY

requirements necessary to assure a successful Cutover. Verizon Ex. 2P at 11. Simply put, the FairPoint organization is fully competent to assume operations.

Mr. Smith could not have been more clear about the stark contrast between Hawaiian Telecom and FairPoint in regard to their relative preparations for Cutover:

...I described it as night and day. And it is that dramatically different. Most distinguishing is the level of commitment to this process by the FairPoint team.

First, you are dealing with a team, a senior team, that is seasoned and has been working as a team. They've all been together since the late nineties....They have worked together through multiple acquisitions. They know each other. They know what to do. They've committed, you know, Mr. Nixon to be – to run these three states and to prepare for that. They've quickly hired in the help that they need at the operational level.

At Carlisle [sic] [Hawaiian Telecom], the process did not occur until late in the game. They were looking to – they basically said “We have a contract with Bearing Point. We've done all we need to do.” And they hired in some senior folks who had not worked together and they largely relied on the Bearing Point team to do it all.

The Bearing Point team ... was not engaged under a formal master services agreement until February of – January or February of 2005, some, you know, seven, eight months into the process. So all work prior to that was very, very insignificant and very inconsistent.... There was no ownership of the process.

FairPoint has a high level – FairPoint has a high level of commitment from Capgemini and has quickly established the employees below the senior level who are going to own these processes. And they are very, very active in our discussions with them.

The process is different. We are – we have a much more rigorous process between the parties, much more engaged process, which they freely agreed to. In fact, from day one, they effectively had us as part of their team...

When they showed up in February, they had a timeline, they had a master architecture. They invited us to bring our senior IT team to that meeting so that they could lay out for us exactly how they were going to set up the business and who they were thinking about as the major vendors for the key components of their back office. They took suggestions from us, they went back and rethought on those and, in fact, made some changes to what they had otherwise thought of as a first course of action.

* * * *

FairPoint, from day one, has had Capgemini working the process. They're on a 17-month calendar process. And every indication we're getting, all the meetings, all the

PUBLIC COPY

subject-matter experts, all the team meetings that we draw on – so we have regular weekly meetings with them. And in advance of those meetings, we poll all of the teams who are working with them, saying, “What are the issues? What are the issues? What are the issues?” And the process is very rich. They know what needs to get done. They’re asking all the right questions. They’re making good solid demands or requests of us... We have been, as a company, very impressed.

Tr. 10-24-07 (Smith) at 224-228.

Mr. Smith further testified that Verizon and FairPoint also have a far higher level of communication and coordination than existed in Hawaii, including the creation of the FairPoint Cutover Preparation Tasks and the requirement of significant test data extract feedback. Verizon Ex. 2P at 11-13; Tr. 10-24-07 (Smith) at 51-52. This is important because the evidence established that the troubles experienced by Hawaiian Telcom did not arise from the cutover itself – i.e. the delivery of systems data from Verizon to Hawaiian Telcom – but rather from the fact that Hawaiian Telecom’s new OSS were not fully functional at the time of cutover. *See* CLEC Ex. 1 at 11, citing Hawaiian Telcom’s 10-K Statement to the SEC; NECTA/CPNH Ex. 1P at 19-20; Tr. 10-24-07 (Smith) at 73. As Mr. Smith testified, the Hawaiian buyer was “extremely uncooperative” in sharing information with Verizon about its readiness for cutover, Tr. 10-24-07 (Smith) at 149, in contrast to FairPoint, which has always been “open and receptive,” *id.* at 150. Whereas Verizon received very little feedback from Hawaiian Telcom concerning its success in converting and uploading Verizon’s data extracts onto its systems prior to cutover, FairPoint’s Cutover Tasks provides Verizon a far better understanding of the systems being developed by Capgemini to receive and use Verizon’s data after Cutover, thereby addressing any potential incompatibility. Verizon Ex. 2P at 12-13. Further, the additional meetings among Verizon, FairPoint and Capgemini also provide feedback into the status of FairPoint’s conversion and uploading processes and its new OSS. *Id.* at 13.

PUBLIC COPY

The independent third-party monitor, Liberty Consulting Group, whose function is described in Staff Exhibit 61, will also assist in the development of objective testing criteria, prior to testing the new systems, to ensure full functionality on Cutover. Staff Ex. 61; Tr. 10-30-07 (King) at 112-114. Commission approval of this arrangement in conjunction with its approval of the transaction will alleviate any remaining concerns that Cutover not take place until FairPoint's new OSS is ready.

b. The entire Cutover must occur at one time, rather than in phases.

The Cutover must be accomplished on a one-time, final basis, in order to minimize the risk of error and to avoid unnecessary expense. Verizon's administrative and operating support systems and services are highly integrated and interdependent. For instance, customer orders move from entry to provisioning to billing to accounting to financial reporting. These systems cannot be separated without great cost and risk. Verizon Ex. 2P at 13-14. A system-by-system phase-in would create significant operational risks, due to the disaggregation of related files. It would be extremely complex and prohibitively expensive, and would create the risk of disruption of related activities. *Id.* at 14. Further, Verizon and FairPoint are already 11 months into a 17 month cutover process. A radical change in direction at this stage would undo the significant work effort that has already been accomplished and expose the entire process to extensive rework and unnecessary expense, further delaying the planned Cutover date with no benefits to customers. For these reasons, a phased-in Cutover, or simultaneous operation of the Verizon and FairPoint systems during Cutover, would be problematic and unworkable. A state-by-state phase-in must also be rejected. It would also involve an enormous amount of additional work to isolate data relevant to each state. Verizon 2P at 14. It would not reduce the risks associated with a one-time cutover, but instead would increase the level of complexity. *Id.* Indeed, the

PUBLIC COPY

Joint Settlement Stipulation and other settlement agreements FairPoint reached with various CLECs are convincing evidence that wholesale customers are satisfied with the proposed process without the need for a potentially disruptive, staggered cut over of systems. *See e.g.*, FairPoint Ex. 15P (BayRing, segTEL and Otel), Ex. 75C (PAETEC), Ex. 76C (DSCI), 77C (Level 3).

When completed, the Cutover must also be final. It would be impractical and imprudent for Verizon to maintain shadow systems during or after Cutover, because it would be enormously costly and complicated to assure that FairPoint's and Verizon's systems were fully integrated and because any attempt to serve the same customers would create the risk of missing, duplicate or improperly-recorded information. Verizon Ex. 2P at 15; Tr. 10-24-07 (Smith) at 157. It would also create the risk that FairPoint and Verizon would duplicate the same activities, such as taking service orders and scheduling installation dates on an inconsistent basis, as well as create confusion about bill adjustments and customer payments. Tr. 10-24-07 (Smith) at 157. Accordingly, the Commission must reject proposals to phase-in the Cutover on a system-by-system or a state-by-state basis, or to maintain a shadow set of Verizon systems after Cutover. Verizon Ex. 2P at 13-14.

C. VERIZON PROVIDES GOOD QUALITY SERVICE, THE COMMISSION SHOULD NOT IMPOSE CONDITIONS RELATED TO SERVICE QUALITY, AND SERVICE QUALITY POSES NO OBSTACLE TO FAIRPOINT'S OPERATION OF THE NEW HAMPSHIRE BUSINESS.

OCA and Labor Intervenors claim that the Commission should be concerned with Verizon's service quality and should therefore require extensive plant audits following closing and impose new service quality measurements on FairPoint. In addition, the Labor Intervenors assert that Verizon's retail service quality is so poor that FairPoint may not have the "significant" resources allegedly needed to improve it, and that service quality will be further eroded by the mass retirement of Verizon workers upon consummation of the transaction. These claims have

PUBLIC COPY

no merit. The evidence in this proceeding demonstrates that Verizon provides quality service to its customers, over a well-maintained network, and no basis exists for the claim that FairPoint's commitment to improve service quality would require capital spending beyond FairPoint's budget or capabilities. Likewise, there is no basis for imposing conditions in this docket concerning pole-related issues.

1. Verizon Provides Good Quality Service.

Substantial evidence before the Commission demonstrates that Verizon's retail service quality is good and, far from deteriorating, is improving. OCA and the Labor Intervenors base their criticism of Verizon in large part on service quality metrics that have not changed with the fast changing telecommunications landscape. It became clear at the hearing that OCA is blind to these changes and thus does not assess service quality in its true context. For example, at the hearing, OCA witness Baldwin demonstrated a steadfast refusal to acknowledge that Verizon's **Begin Confidential*****End Confidential** line loss for residential customers and **Begin Confidential*****End Confidential** line loss for business customers are an indication that Verizon no longer has a "near-monopoly hold" on the basic local exchange market. Tr. 11-01-07 (Baldwin) at 26-29; Verizon Exs. 23C, 24C, and 25C. The Commission should afford no weight to OCA's testimony on service quality, given its unwillingness to factor in the realities of the telecommunications industry in 2007. The unreasonableness of Ms. Baldwin's position was further evidenced by her testimony that "there's **no** set of conditions that would make the transaction in the public interest," Tr. 11-01-07 (Baldwin) at 8 (emphasis added), while at the same time making clear that she does not want Verizon to continue providing service in New Hampshire. *Id.* at 20. In other words, neither FairPoint's assuming the assets nor Verizon's staying would satisfy her.

PUBLIC COPY

Based on service quality data from the past two and half years, Verizon has met or exceeded the relevant benchmark standard for seven of ten measures, with limited exceptions. Verizon met all of the installation measures from 2005 through June 2007, except for the year 2006 where the average Held Orders over 30 Days metric exceeded its 6 per month standard by **Begin Confidential*****End Confidential**. Verizon Ex. 3C at 9. Verizon met all of the Company Accessibility and Customer Trouble Report measures for that same time period. *Id.* Importantly, Verizon's Consumer and General Business Provisioning measures reflect very high levels of satisfaction with consumers reflecting a **Begin Confidential*****End Confidential** satisfaction rate and businesses reflecting a **Begin Confidential*****End Confidential** satisfaction rate. These rates reflect what customers *actually* consider to be Verizon's service quality, perhaps the best measure to consider. *Id.* at 10.

In addition to the service quality measurements, other service performance measures demonstrate that Verizon provides good quality service. Verizon retains a third party to undertake Customer Care Index ("CCI") satisfaction surveys. Of the six categories measured (consumer provisioning, business provisioning, consumer repair, business repair, consumer inquiry and business inquiry), a significant majority of the survey respondents indicated that Verizon has provided good quality service that meets their needs and expectations. Verizon Ex. 3C at 13. Further, from 2003 through 2006, the percent of customers rating Verizon's performance as satisfactory or better has increased in four of the six CCI survey categories. ("Consumer Inquiry" declined slightly.) *Id.*

Further, OCA provided no analysis of residential customer complaints. OCA's failure to acknowledge that Verizon's number of complaints per access line in 2006 was only **Begin Confidential*****End Confidential** is a convenient oversight of important and

PUBLIC COPY

relevant data. *Id.* at 14. The Labor Intervenors' witness, Dr. Kenneth Peres, in turn offered ARMIS data in an effort to show that Verizon's quality of service has declined since 2001. The ARMIS figures for the rate of complaints on which he relies, however, distort Verizon's performance, because the absolute number of complaints (244 in 2006) remains extremely low even with the annual increases he shows. Labor Ex. 1P at 19.

Whether measured by the service quality benchmarks, consumer surveys, the Commission's own statistics or ARMIS figures, the above review demonstrates that Verizon is currently providing good quality service, and a number of those data points show that service quality is on the rise. Therefore, there is no basis for imposing even tighter service quality metrics on FairPoint, and there is similarly no basis for the contention that service quality will require an additional investment by FairPoint.

2. Verizon's Plant Is In Good Condition.

OCA and Labor Intervenors assert that Verizon's plant is inadequate, claiming that Verizon has not devoted adequate attention to capital improvements. There is no evidence to support these claims and, in any event, there is no basis for any action by the Commission.

As demonstrated in Mr. Nestor's testimony, Verizon has made substantial investments in its network and operations in New Hampshire. Over the past four years, Verizon has invested on average **Begin Confidential*****End Confidential**. Verizon Ex. 3C at Table 1. OCA, in an effort to support its claim that Verizon has shifted capital investments away from outside plant, selectively analyzes Verizon's capital investment data by looking at non-FiOS capital expenditures as a percentage of ILEC revenues and on a per access line basis. Yet OCA fails to recognize that Verizon's investment in FiOS is highly relevant to the analysis, because

PUBLIC COPY

FiOS investment supports basic telephone service. Verizon Ex. 3P at 6. The Commission should not rely on OCA's myopic view.

Perhaps the most compelling evidence that Verizon's plant is in good shape consists of the field and plant records evaluation undertaken by FairPoint. Not only did FairPoint review a representative sample of Verizon's assets, but it also had no reason to "sugar coat" the results, since its analysis was critical to the determination of whether to acquire the New Hampshire Business and the appropriate price to pay for it. There is no evidence whatsoever that the deal that was struck between FairPoint and Verizon was anything but arms-length, and between a willing buyer and seller. One must reasonably conclude that under these circumstances, FairPoint was and is satisfied with the condition of Verizon's plant.

Importantly, FairPoint's testimony at the hearing demonstrated just that point. Mr. Smee testified that Verizon's network infrastructure in New Hampshire is fundamentally sound, Tr. 10-29-07 (Smee) at 116-117, and it was Mr. Harrington's opinion that FairPoint would be receiving a network over which it will be able to provide "high quality communications services." FairPoint Ex. 14P at 11-12. Mr. Smee further explained at the hearing that his conclusion was based on FairPoint's due diligence and analysis of Verizon's trouble-report rates. Tr. 10-29-07 (Smee) at 116-117. Mr. Smee indicated that, on average, Verizon meets the two reports per-hundred-lines-in-service standard. *Id.* Approximately 25% of Verizon's wire centers have a lower trouble report rate, while a very limited number experience a trouble report rate of 2.5, which affect approximately 36,000 of the 500,000 access lines in New Hampshire. *Id.* FairPoint's assessment of Verizon's infrastructure is further supported by Verizon's performance under service quality standards, in which Verizon has met or exceeded the relevant benchmark standard for seven of the ten measures for the year. *See supra* Section C(1).

PUBLIC COPY

Thus, the evidence overwhelmingly supports the conclusion that Verizon's physical network is in good condition, and there is no basis for requiring FairPoint to conduct extensive plant audits following closing. The record also offers no evidence that FairPoint will need to make "significant" capital investments in the network, and certainly nothing even remotely approaching a level that would be beyond FairPoint's budget or financial capacity. Assertions to the contrary are not well founded.

3. There Is No Credible Evidence That There Will Be A Mass Retirement Of Verizon Workers.

The Labor Intervenors assert that if the transaction is approved, service quality will erode in part due to the potential retirement of skilled Verizon workers. The Labor Intervenors rely on hearsay and unreliable data, alleged to be a "survey," both of which were obtained after a concerted union campaign opposing the transfer of the Verizon assets.

The evidence is unequivocal that the unions opposed the transfer of the Verizon assets long before any transfer was even announced. As early as May 2006 and throughout the fall of 2006, the Labor Intervenors were asking that their members "fight Verizon's attempt to sell landlines in Vermont, Maine and New Hampshire." *See e.g.*, Verizon Ex. 15 P; *see also* Verizon Exs. 16P, 18P, 19P, 20P, 21P and 22P. This all, of course, was well before the Verizon-FairPoint transaction was announced in January 2007

It is not surprising that against this backdrop, the Labor Intervenors opposed the transaction when it actually was announced. Having prejudged the transaction, the Labor Intervenors then, through the testimony of Dr. Peres, rely on hearsay and unsubstantiated statements of union officials who were not available for cross examination at the hearing to bolster their claims that workers would retire from Verizon en masse upon consummation of the deal. Tr. 10-31-07 (Peres) at 219. In an attempt to overcome the obvious unreliability of these

PUBLIC COPY

statements, Dr. Peres sought to substantiate his allegations with survey results. However, at the hearing, Dr. Peres admitted that the results were scientifically unsound: “Was it scientific at all? In the sense of—not in those terms, no.” *Id.* at 221. As Dr. Peres revealed at the hearing, the surveys were handed out by union stewards to “whoever they could,” *id.*, instead of distributed to all members, and there was no effort to contact the 66% of members who did not respond. *Id.* at 223-224, 230.

Even if one were to assume that the survey is reliable, which it is not, the results are less than compelling. Only 17.7% of the New Hampshire employees indicated that they were seriously considering leaving Verizon if the transaction were approved. Tr. 10-31-07 (Peres) at 230. In other words, approximately 82% of the relevant employees were not seriously considering leaving the company. *Id.* at 231. This is hardly evidence of a potential mass retirement of Verizon employees. Dr. Peres also conceded that whether any particular worker decided to retire may have nothing at all to do with FairPoint’s acquiring the Verizon assets. *Id.* at 227. Given the complete unreliability of this data, the Commission should give it no weight in assessing the transaction.

4. The Record On Dual Poles Is Scant And Does Not Support Imposing Any Condition On Approval Of This Transaction.

Unitil, PSNH, National Grid and the Municipalities expressed concern regarding the existence of dual poles. An objective view of the record, however, demonstrates that there is no basis for concluding that Verizon’s attention to this issue is inadequate; nor is there a basis for imposing any condition concerning dual poles on approval of this transaction. Indeed, no party

PUBLIC COPY

has claimed that Verizon is violating any service quality standard or other applicable requirement with respect to dual poles.³

There is limited information in the record on the dual pole issue, which provides an insufficient legal basis to impose conditions or take other actions. At present, there are 6,464 dual poles, or 1.4% on a base of 447,876 poles in Verizon's operating territory in New Hampshire. Verizon Ex. 32P at 2. In 2007 alone, Verizon has removed 3,709 dual poles. Verizon Ex. 29P. The reasons for dual poles are complex. For instance, the Verizon-Unitil Joint Ownership Agreement provides that responsibility for removing an old pole shifts from one party to the other after 60 days' notice, but the 60-day notice period begins only when Verizon is properly notified that all other attachers have relocated their facilities. *See* Unitil Ex. 1P at TPM-1; Tr. 10-31-07 (Nestor) at 124-125. Moreover, FairPoint, in its Memoranda of Understanding ("MOUs") with Unitil, National Grid and PSNH, has agreed to remove any existing double poles within 36 months of Cutover, thereby obviating any action by the Commission on the issue.⁴ Unitil Ex. 2P, PSNH Ex. 3P and National Grid Ex. 2P. If the Commission were dissatisfied with FairPoint's commitment under the MOUs regarding dual poles, it would be appropriate to consider that issue as part of the pending pole docket, DM 05-172 – not as part of this proceeding.

³ Verizon's Joint Ownership Agreements and Joint Use Agreements, *see e.g.*, Unitil Ex. 1P at TPM-1 and Verizon Ex. 26P, for instance, merely provide that responsibility for removing old poles may shift from one party to the other 60 days after provision of notice. *See e.g.*, Verizon Ex. 26P at 27. They do not specify a timeframe for removal.

⁴ Especially in light of these agreements, it would be inappropriate to impose responsibility for dual poles on Verizon. There is no evidence to support the contention that FairPoint was unaware of the number of dual poles when it negotiated to acquire Verizon's northern New England business. As a result, it would not be appropriate to require Verizon to fund the elimination of dual poles, fundamentally altering the benefit of the bargain the parties negotiated.

PUBLIC COPY

**D. THE COMMISSION SHOULD REJECT UNITIL'S AND PSNH'S
CONTRACT CLAIMS AGAINST VERIZON.**

Both Unitil and PSNH request that the Commission award them money damages as part of this docket based on alleged claims under their respective Joint Ownership Agreements with Verizon.⁵ The Commission should deny this request because it does not have jurisdiction to award money damages and, even if it did, neither Unitil nor PSNH has met its burden of proof on these claims.

1. The Commission Has No Jurisdiction to Award Money Damages.

There can be no question that the Commission is an agency of limited jurisdiction, with only those “powers ... the legislature has delegated to it, and such delegation ‘does not extend beyond expressed enactment or its fairly implied inferences ... power and authority not granted are withheld.’” *State v. New Hampshire Gas & Elec. Co.*, 86 N.H. at 29, citing *Petition of Boston & Maine Railroad*, 82 N.H. 116 (1925); see also *Appeal of Public Serv. Co. of N.H.*, 122 N.H. 1062, 1066 (1982) (PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute); *Appeal of Public Serv. Co. of N.H.*, 130 N.H. 285, 291 (1988).

While the legislature has granted the Commission authority over some types of contracts, such as affiliate contracts, RSA Ch. 366, special contracts, RSA 378:18, and contracts with municipalities, RSA 378:20, there is no statute granting the Commission authority over a contract merely because a utility is a party to it. See *Nelson v. Public Serv. Co. of N.H.*, 119 N.H. 327, 329 (1979) (“the commission does not have exclusive jurisdiction over all matters concerning public utilities.”). Further, just because the Commission has been granted the right of

At the hearing, there was a question whether PSNH's claims arose out of a Joint Ownership Agreement or Joint Use Agreement. PSNH agreed to proceed based on the terms of Verizon Ex. 26P. Tr. 10-31-07 at 35.

PUBLIC COPY

“general supervision of all public utilities and the plants owned, operated or controlled by the same,” “general supervision” does not give the Commission general jurisdiction over utilities; it merely establishes incidental authority to reinforce the specific powers mentioned in RSA 374. *State v. New Hampshire Gas & Elec. Co.*, 86 N.H. 16, 31-33 (1932). Where the legislature wanted to grant the Commission authority over disputes between parties, it certainly knew how to do so. *See* RSA 362-A:5 (granting Commission jurisdiction over any disputes arising under RSA Ch. 362-A).

Thus, in the first instance, there is no statutory basis upon which the Commission can rely to exert its jurisdiction over the Joint Ownership Agreements. In fact, the Commission itself has recognized the limited nature of its jurisdiction in the past and refused to grant money damages and equitable relief based on its lack of authority to do so. In *Public Serv. Co. of N.H.*, 86 NH PUC 407 (2001), the Commission refused to grant a customer monetary damages for losses allegedly associated with voltage variations on the basis that it “lack[s] the authority to award civil damages to a utility customer as a result of service provided by a utility that is of deficient quality.... Neither the statutes governing the Commission, nor the Administrative Procedure Act, permit the Commission to provide such a remedy.” *Public Serv. Co. of N.H.*, 86 NH PUC at 410-411. The Commission further held that under RSA 365 it was limited to ordering the utility to make reparation payments to customers. *Id.* at 411. In *Verizon N.H.*, 93 NH PUC 83, 85 (2005), the Commission re-affirmed that it does not have the authority to award monetary damages, and that it may only impose remedies in the form of reparations of payments made for “any rate, fare, charge or price demanded and collected by any public utility.” *See also Verizon N.H.*, 87 NH PUC 172, 193-94 (2002) (Commission lacked authority to require payments for substandard performance to payees other than limited customer rebates under RSA 365:29 and

PUBLIC COPY

state “fines” under RSA 365:41). In *Global NAPs, Inc.*, 88 NH PUC 454 (2003), for example, the Commission refused to grant Verizon the opportunity to set off in equity against Global NAPs’ claims, holding that it did not have the authority to impose equitable remedies because it had not been vested with such power by the legislature.

Unitil and PSNH do not even claim that there is an express contract provision under the Joint Ownership Agreements that supports Commission jurisdiction – assuming that parties can consent to PUC jurisdiction that the legislature has chosen not to confer, which they cannot (*see infra* Section F). In fact, no such provision exists. There is no dispute that the Agreements themselves do not provide for Commission jurisdiction, as neither of the Agreements contain any governing law provision or refer to the Commission in any manner whatsoever. Tr. 10-31-07 (Hybsch) at 44; *see* Verizon Ex. 26P, PSNH Ex. 5P, Unitil Ex. 1P at TPM-1.

Thus, when one combines the holding of *Nelson* – that the Commission does not have jurisdiction over all matters relating to utilities – with the Commission’s decisions in *Public Serv. Co. of N.H.*, *Verizon N.H.* and *Global NAPs, Inc.* regarding its limited and specific remedial authority and the lack of legislative grant of contract jurisdiction, it is clear that the Commission has no authority to grant Unitil and PSNH’s requests for money damages. For this reason alone, the Commission should reject the Unitil and PSNH claims and decline to impose any condition whatsoever relating to tree trimming maintenance expense. *See also infra* Section F.

2. Unitil and PSNH Have Failed to Meet Their Burden of Proof.

Even if the Commission were to conclude that it had jurisdiction, which it does not, neither Unitil nor PSNH has met its burden of proof on the claims. Both Unitil and PSNH would have the Commission “superintend something very much like a civil lawsuit, in which the

PUBLIC COPY

contending parties generate competing evidence, a verdict is rendered and the wronged party is made whole,” *see Public Serv. Co. of N.H.*, 86 NH PUC at 410-411, something the Commission is prohibited from doing. But even if the Commission could do so, neither Unitil nor PSNH has presented reliable and credible evidence on which the Commission could render a decision. In short, they have not met their burden of proof.

At the hearing, it became clear that Unitil could not even identify the amount of money damages it was seeking from Verizon, Tr. 10-30-07 (Meissner) at 233, and it did not provide any invoices or other documentary evidence in support of its alleged claim, despite its ability to do so. *Id.* at 233-234. As a result, Verizon could not conduct cross examination on the amount in dispute, because it was not known at the hearing. It is startling to think that the Commission could lawfully award any damages – or require the escrowing of funds until such a determination, if any, is made – on such an incomplete record. Further, while Unitil has been quick to criticize Verizon for disputing amounts it has been billed for tree trimming expense, the testimony was clear that Unitil’s own billing process is fraught with error. In at least one case, Verizon’s audit of Unitil’s invoices revealed that 47.8% of the amounts billed by Unitil were incorrect. *Id.* at 234-235. These invoices contained amounts charged to Verizon for tree trimming in parts of the state where Verizon provides no service, or where Verizon had no attachments to the poles in question. *Id.* at 235-237. Unitil also failed to demonstrate that it had obtained Verizon’s consent to the trimming, which Unitil is required to do under the Joint Ownership Agreement. Tr. 10-31-07 (Meissner) at 235-236; *see* Unitil Ex. 1P at TPM-1 at 48.

PSNH’s claim for damages is also fatally flawed. PSNH seeks \$506,000 for tree trimming to which Verizon never agreed, an explicit requirement of the Joint Ownership Agreement. Verizon Ex. 26P at 17 (“When it is agreed that both parties will benefit from such

PUBLIC COPY

Joint Tree Trimming the division of cost will be 75% Electric Company and 25% Telephone.”). Further, not only did PSNH not calculate the \$506,000, it never invoiced Verizon for it and cannot explain or document the basis of the amount. Tr. 10-31-07 (Hybsch) at 37-38. Apparently, the amount was arbitrarily determined by a member of the Commission’s electric Staff in a PSNH rate case in which Verizon was not a party, in order to determine what amount of tree trimming PSNH could recover from its customers. This amount was part of the give-and-take of settlement between PSNH and the parties in that docket. *Id.* Yet PSNH claims that it should be paid the \$506,000 out of a sense of “fairness,” **regardless** of whether it is entitled to payment under its contract with Verizon. PSNH Ex. 4P; Tr. 10-31-07 (Hybsch) at 52-53. It is clear that PSNH has not met its burden of proof because there is no reliable record evidence supporting its claim.

E. THE COMMISSION SHOULD REJECT OCA'S RECOMMENDATION THAT VERIZON PAY \$200 MILLION TO RATEPAYERS FOR THE SPIN-OFF OF IDEARC.

In a parting swipe at Verizon, OCA asks that the Commission order Verizon to pay \$200 million to ratepayers to compensate them for the spin-off of Idearc, Inc. OCA’s recommendation is not supported by any record evidence or legal basis and should be rejected.

OCA’s witness Susan Baldwin conveniently ignores two important facts. First, ratepayers have already received the value of any relationship between Verizon and Idearc. Those non-regulated directory advertising revenues were included in Verizon’s rates in 1990 as a result of its last rate case. Verizon Ex. 3P at 17-18. Second, FairPoint has indicated that it will maintain Verizon’s current rates. Thus, if the transaction is approved, the value of those revenues will continue to be reflected in rates charged to customers. *Id.* To now compel

PUBLIC COPY

Verizon to pay customers \$200 million more would constitute an unjustified and unlawful double payment and an improper taking.

The Commission also has made clear that it would conduct a further proceeding to determine the value of any future imputation of directory advertising revenues. *See Verizon New Hampshire*, 89 NH PUC 382 (2004).⁶ That has not occurred. To award any amount to customers at this time would be speculative at best, and the inappropriateness of such action is further compounded by the fact that FairPoint has not even indicated an intent to change its rates.

Finally, the Commission determined in its Yellow Pages Order No. 24,345, *id.*, that revenue imputation was an appropriate means by which to address the issue of revenues derived from the publication of yellow pages directories. That order was affirmed on appeal. Verizon continues to impute yellow pages revenues for state regulatory purposes in New Hampshire in accordance with Commission Order No. 24,345. OCA Ex. 73P. Since FairPoint will assume Verizon's regulatory obligations going forward, the issue of the appropriate value of imputation and its impact will be addressed, if at all, in the future – either in a separate proceeding to determine any value of imputation or at the time of a future rate case. In the meantime, until and unless the PUC's Yellow Pages Order No. 24,345 is changed by the Commission or a court of competent jurisdiction, it is Verizon's position that FairPoint would be bound by it, like any other order that is binding on Verizon in New Hampshire. OCA Ex. 73P.

For these reasons, the Commission should reject OCA's recommendation.

⁶ OCA acknowledged this very point in filings made to the Commission and the New Hampshire Supreme Court. Verizon Ex. 3P at 17-18, n18.

PUBLIC COPY

F. THE COMMISSION SHOULD NOT IMPOSE CONDITIONS ON VERIZON AS PART OF THE APPROVAL OF THE TRANSACTION.

At the hearing, the Commission inquired on multiple occasions whether the public interest required the imposition of any conditions on Verizon New England's proposed discontinuance of its franchise. It does not. There is no record basis to impose conditions on Verizon based on the transfer of its New Hampshire assets. While the parties may disagree about Verizon's performance under a few service quality measures, there is substantial evidence that Verizon's customers are extremely satisfied with its service. Missing a benchmark standard for a particular exchange does not support a finding of declining service quality across the network statewide or the imposition of conditions to address such an issue. Indeed, in the past, the Commission has allowed a utility to transfer its assets and discontinue its franchise without imposing any conditions on the departing owner where, unlike Verizon, the utility has been egregious in its failure to meet its requirements of providing safe and reliable service. *See e.g., Westco Utilities, Inc.*, 85 NH PUC 325 (2000) (Commission, as part of granting discontinuance of franchise and transfer of assets, declined to impose fines and penalties on utility based on deficient service even where supported by evidence). If conditions were not warranted in the *Westco* case, they certainly are not warranted here.⁷

Further, Mr. Smith was clear in his testimony that Verizon seeks approval of the agreement that the parties reached and presented to the Commission, and Verizon would be unlikely to proceed with the transaction if conditions were imposed on it. Tr. 10-24-07 (Smith)

⁷ Moreover, even assuming that the PUC would be warranted in imposing penalties for service quality failures, which it is not, any such action would be subject to proper notice and an opportunity for hearing. *See e.g.*, N.H. Admin. Rules, Puc 203.12 (Notice of Adjudicative Proceeding); Puc 102.04 ("Contested case' means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by the commission after an opportunity for hearing"); *see also* RSA 365:29 (reparations and right to hearing). As OCA's Ms. Baldwin admitted: "The appropriate docket for consideration of this [service quality] issue is DT 04-019. The merits of Verizon's service quality problems and the quality of service standards applicable to Verizon NH are not subject to dispute in this docket." Verizon Ex. 3P, Attach. JFN-III (OCA Data Responses 6 and 7-11).

PUBLIC COPY

at 235. While not necessarily couched in terms of altering the purchase price negotiated by the parties, the imposition of conditions nonetheless could change the terms of the agreement by benefiting one party over the other – in essence, altering the purchase price – something the Commission should not endorse.

Finally, because administrative bodies are agencies of limited jurisdiction, *see supra* Section D(1), the agency can only take actions within its sphere of authority. “[D]eviations from an agency’s statutorily established sphere of action cannot be upheld based upon agreement, contract, or consent of the parties.” 2 Am. Jur. 2d Admin. Law § 283; *see also Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 7 P.3d 900, 904 (Wyo. 2000) (“If an agency lacks subject matter jurisdiction, any proceeding conducted by it has a fundamental defect which cannot be cured by waiver or consent by the parties.”); *OToole v. Bd. of Treasurers*, 648 N.W.2d 342, 346 (S.D. 2002) (“An administrative agency may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void.”). Thus, any attempt by the Commission to regulate beyond the limits of the jurisdiction conferred upon it by New Hampshire law is invalid, notwithstanding a party’s concession to its jurisdiction. *Greenwood v. N.H. Pub. Util. Comm’n*, No. 06-cv-270-SM (D.N.H. July 19, 2007).

The net effect is that the Commission may not impose any conditions regarding subjects over which it has no jurisdiction in the first instance. In this case, that would mean that the Commission may not impose conditions relating to Unitil and PSNH’s claims for money damages; nor, for that matter, may it impose conditions on FairPoint relating to interstate DSL service, such as requiring certain rates for DSL service for a specified period of time. Further, the Commission should refrain from imposing any conditions regarding service quality or poles, since those issues have not been fully litigated in this docket and there is not a sufficient record

PUBLIC COPY

upon which to make such a determination. Simply put, the Commission should approve the transaction as presented, without imposing any conditions on Verizon.

III. CONCLUSION

For the above reasons, and for the reasons identified in FairPoint's Brief, the Commission should approve in a timely manner the transfer of the New Hampshire Business by Verizon to FairPoint, as presented and without the imposition of conditions on Verizon.

Respectfully submitted,

Verizon New England Inc.
Bell Atlantic Communications, Inc.
NYNEX Long Distance Company
Verizon Select Services Inc.

By Their Attorneys,

November 21, 2007

By: Victor D. Del Vecchio, Esquire /maj
Victor D. Del Vecchio, Esquire
Verizon New England Inc.
d/b/a Verizon New Hampshire
185 Franklin Street
Boston, MA 02110-1585

MCLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Steven V. Camerino
Sarah B. Knowlton
11 So. Main St., Ste 500
Concord, NH 03301
Telephone (603) 226-0400

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2007, a copy of Verizon's Brief has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.

Victor D. Del Vecchio, Esquire /maj
Victor D. Del Vecchio, Esquire