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January 28, 2010

VIA COURIER

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Dkt. No. 09-95**

Dear Ms. Dortch:

One Communications Corp. ("One Communications"), tw telecom inc. ("tw telecom"), Cbeyond, Inc. ("Cbeyond") and Kentucky Data Link, Inc. ("Kentucky Data Link") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit this letter in response to the Applicants' recent *ex parte* filings[1] and Reply Comments[2] in the above-referenced proceeding. As

[1] Letter from John T. Nakahata, Counsel for Frontier Communications Corporation, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Jan. 22, 2010) ("Frontier's January 22nd *Ex Parte* Letter"); Letter from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Jan. 20, 2010) ("Applicants' January 20th *Ex Parte* Letter"); Letter Requesting Second Protective Order from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Dec. 23, 2009) ("Applicants' December 23rd *Ex Parte* Letter Requesting Second Protective Order"); Letter Providing Confidential Information from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Dec. 23, 2009) ("Applicants' December 23rd Confidential *Ex Parte* Letter"); Letter from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Dec. 22, 2009) ("Applicants' December 22nd *Ex Parte* Letter"); Letter from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Dec. 17, 2009) ("Applicants' December 17th *Ex Parte* Letter"); Letter from John T.

discussed herein, the proposed transaction between Verizon and Frontier poses material risks to wholesale customers and to competition generally. Accordingly, the Commission cannot conclude that the proposed transaction will serve the public interest unless it conditions its approval on requirements that increase the likelihood that the proposed transaction will yield net public interest benefits.[3] The Joint Commenters have proposed conditions, attached hereto as "Attachment A," that should achieve this result. Further, as discussed in Section V *infra*, the existence of settlement agreements between the Applicants and interested parties at the state level, while helpful, does not obviate the need for the FCC to impose the proposed conditions.

I. The Merged Firm Will Lack The Incentive To Provide Wholesale Inputs In Compliance With Its Statutory Obligations.

The Joint Commenters previously explained that there is a significant risk that the Merged Firm will lack the experience, resources or incentive to provide wholesale inputs in compliance with its statutory obligations.[4] The Applicants' Reply Comments and subsequent *ex parte* filings only confirm this conclusion. To begin with, the financial posture of the Merged Firm will be materially less strong than the Applicants would have the Commission believe. In analyzing its financial position post-transaction, Frontier relies in part on the transferred ILEC assets' access lines and revenues as of December 31, 2008.[5] But this is misleading because, although the Applicants state that they will be acquiring approximately 4.79 million revenue-producing access lines,[6] the ILEC assets to be transferred in this transaction have been experiencing dramatic declines in access lines and revenues.

Nakahata, Counsel for Frontier Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Nov. 23, 2009) ("Frontier's November 23rd *Ex Parte* Letter").

[2] Opposition to Petitions to Deny and Reply to Comments by Frontier Communications Corporation and Verizon Communications Inc., WC Dkt. No. 09-95 (filed Oct. 13, 2009) ("Applicants' Reply Comments"); *id.*, Exhibit 1, Declaration of Daniel J. McCarthy ("McCarthy Decl.") & Exhibit 2, Declaration of Stephen E. Smith ("Smith Decl.").

[3] *See, e.g., In re Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd. 8741, ¶ 9 (2009) ("*CenturyTel-Embarq Merger Order*") (explaining that under the Commission's public interest standard of review, the Commission "employs a balancing test weighing any potential public interest harms of the proposed transaction against the proposed public interest benefits").

[4] *See* Petition to Deny of tw telecom inc., One Communications Corp., Integra Telecom, Inc., and Cbeyond, Inc., WC Dkt. No. 09-95, at 17-24 (filed Sept. 21, 2009) ("Joint Commenters' Petition to Deny").

[5] *See* Frontier's November 23rd *Ex Parte* Letter, Attachment, Frontier Investor Presentation (Nov. 2009) at 21 ("Frontier November 2009 Investor Presentation") (showing Spinco access line detail as of Dec. 31, 2008); *id.* at 16 (calculating Frontier *pro forma* revenues based on Spinco 2008 revenues).

[6] *See, e.g., id.* at 21.

By the Applicants' own estimation, the "Verizon Separate Telephone Organization," or "Spinco," lost approximately **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** of its access lines during 2009.[7] It is therefore appropriate to discount the Applicants' estimate of the revenue to be generated by Spinco post-transaction by approximately the same amount. Thus, the Merged Firm will not be as financially strong as the Applicants claim. This is especially so given that the price that Frontier will pay for Spinco does not appear to diminish with the loss of access lines and revenues.

As Frontier itself recognizes, Frontier must stop this trend of access line and revenue loss in order for the proposed transaction to make business sense. Otherwise, the Merged Firm will end up very much like the other firms to which Verizon has previously spun-off unwanted assets—in bankruptcy.[8] According to Frontier, the key to improving the competitiveness and profitability of the transferred ILEC assets as compared to their performance as part of Verizon is to deploy broadband to more customers.[9] Frontier states that, with a strategy focused on broadband deployment, it "expects that in time the product and service penetration rates in the acquired areas will be much closer to the levels achieved in its current service areas, stemming line loss, improving revenues, and resulting in more services for customers."[10] Indeed, Frontier claims to specialize in getting the most out of exactly the types of ILEC assets that are the subject of the proposed transaction—those outside of big urban and suburban markets.[11]

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[7] Applicants' December 23rd Confidential *Ex Parte* Letter, Exhibit 2. This continues a trend in which Spinco lost **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** of its access lines, respectively, during 2007 and 2008. *Id.*

[8] Hawaiian Telcom filed for bankruptcy on December 1, 2008. *See* Hawaiian Telcom Communications, Inc., Form 8-K (filed Dec. 1, 2008), http://www.hawaiiantel.com/LinkClick.aspx?fileticket=8LOqv9l%2BAd8%3D&tabid=370. FairPoint filed for bankruptcy on October 26, 2009. *See* Press Release, FairPoint Communications, Inc., "FairPoint Reaches Agreement with Bank Lenders – Initiates Voluntary Chapter 11 Proceeding," (rel. Oct. 26, 2009), http://phx.corporate-ir.net/phoenix.zhtml?c=122010&p=irol-newsArticle_pf&ID=1345992&highlight=.

[9] *See* McCarthy Decl. ¶¶ 10-15, 19-21 (explaining how Frontier's broadband deployment strategy will improve the performance of the transferred ILEC assets).

[10] *Id.* ¶ 19; *see also* Applicants' December 23rd *Ex Parte* Letter Requesting Second Protective Order at 3 ("Frontier has not hidden that it sees broadband deployment . . . as the key to reducing churn.").

[11] *See* McCarthy Decl. ¶ 13 ("[W]hat may be deemed as a small or secondary market (attracting relatively low investment priority) to a nationally diversified provider can be an important growth market for a more specialized provider which is focused on smaller market operations and is more willing to dedicate capital and operating attention. That is the case here. Providing broadband and related services to underserved or unserved customers in the new Frontier areas represents a significant business growth opportunity for Frontier and is a key driver of this transaction.").

This is, undeniably, a tall order for Frontier with the ILEC assets at issue here. There is a significant risk that Frontier will fail and that, notwithstanding its efforts, line losses will continue at or close to their current high rate in the Verizon territory subject to this transaction. As Frontier's Executive Vice President and COO, Daniel McCarthy, explains, it is "critical" that Frontier have "strategic clarity" as to how it can "deploy its resources most productively."[12] That means, focusing on, among other things, "customer retention," "win-backs of former customers," "operating expense reductions," and "efficient use of capital resources."[13]

The need to squeeze as much profit as possible out of the transferred assets by advancing these goals is entirely incompatible with the need to upgrade Frontier's OSS and meet Frontier's other wholesale obligations to competitors. It cannot be that helping Frontier's competitors is consistent with Frontier's stated objectives of retaining customers, winning back customers lost to competitors, reducing operating expenses, and utilizing capital resources efficiently. Notably, while Frontier describes its success in advancing these objectives in other territories, it does not offer any analysis of the extent to which those areas are served by CLECs to whom Frontier is obligated to provide wholesale inputs. This is unsurprising. The very logic of this transaction is antithetical to Frontier's satisfaction of its statutory obligations to provide wholesale inputs to CLECs. Rather, Frontier's incentive post-transaction will be to focus on increasing its retail revenues and starving its wholesale operations of investment. Accordingly, the Commission cannot find that the proposed transaction is in the public interest unless it imposes conditions to ensure that the Merged Firm complies with its wholesale obligations.

II. Although The Applicants Will Not Be Developing Entirely New OSS, The OSS Transitions Planned For The Proposed Transaction Pose Many Of The Same Risks As Previous Verizon Spin-off Transactions.

In their Petition to Deny (at 19-22), the Joint Commenters explained that the serious OSS integration problems that arose after previous Verizon spin-off transactions require that the Commission closely examine the basis for the Applicants' claims that the Merged Firm's OSS will function sufficiently post-transaction. The FCC cannot simply take the Applicants at their word that "neither retail nor wholesale customers will experience disruptions in service, ordering, or billing."[14]

The problems experienced in Maine, Vermont and New Hampshire after Verizon spun off its ILEC assets in those states to FairPoint imposed extraordinary costs on competition and consumer welfare. This is not a harm that can simply be dismissed with a waive of the hand as the Applicants suggest. As detailed in the attached Declaration of Paul Olenik, Director of Service Implementation

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[12] *Id.* ¶ 11.

[13] *Id.* ¶ 14.

[14] Consolidated Application for Transfer of Control and Assignment of International and Domestic Section 214 Authority, Exhibit 1, Description of the Transaction and Public Interest Statement, WC Dkt. No. 09-95, at 20 (filed May 29, 2009) ("Application").

for One Communications, as a direct result of Verizon and FairPoint's flawed OSS transition, One Communications experienced myriad problems that have impeded its ability to serve its customers and compete effectively in New England.[15] Among other things, following the cutover, FairPoint was unable to process wholesale orders in a timely manner, resulting in a backlog of numerous orders, including hundreds of One Communications' orders.[16] In addition, FairPoint's databases for Customer Service Records, Address Validation information, and Loop Qualification data contained incomplete and inaccurate information for pre-ordering for as long as six months following the cutover.[17] In fact, FairPoint was forced to conduct multiple updates of approximately 500,000 to 600,000 records in the months following the cutover.[18] The lack of complete and accurate data following the cutover hindered One Communications' ability to submit orders and ultimately resulted in delayed provision of service to One Communications' customers.[19] One Communications also experienced numerous other problems with FairPoint's wholesale OSS related to provisioning, billing, and repair.[20]

It took FairPoint approximately six to eight months to resolve most of these problems.[21] In the process, many One Communications customers cancelled their service orders, resulting in hundreds of thousands of dollars in lost revenues for the company.[22] At the same time, One Communications was forced to devote staff and resources to conducting daily conference calls, performing manual research, and repeating tasks, such as resubmitting orders to FairPoint.[23] One Communications estimates that this lost productivity has cost the company hundreds of thousands of dollars.[24]

The Applicants claim that similar problems will not occur following the proposed transaction because, unlike FairPoint (and Hawaiian Telcom before it), Frontier will not be building new OSS

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[15] *See* Declaration of Paul Olenik on Behalf of One Communications Corp., ¶¶ 4-13 (dated Jan. 20, 2010) ("Olenik Decl.") (attached hereto as "Attachment B").

[16] *See* Olenik Decl. ¶ 5; *see also id.* ¶ 6.

[17] *See id.* ¶ 7.

[18] *See id.* ¶ 8.

[19] *See id.*

[20] *See id.* ¶¶ 9-11.

[21] *See id.* ¶ 12.

[22] *See id.* ¶ 13.

[23] *See id.*

[24] *See id.*

from scratch.[25] According to Frontier, the proposed transaction "involves significantly less operational risk than did the FairPoint transaction" because "Frontier will avoid the significant expense and huge risk associated with developing new systems, as it is using Verizon's existing systems in thirteen states, and its own existing systems in the fourteenth."[26] But the OSS transitions planned for the proposed transaction are not nearly as simple as the Applicants would have the Commission believe. As explained below, even though the Applicants will not be developing entirely new systems, the OSS transitions planned for the proposed transaction pose many of the same risks as the previous Verizon-FairPoint transaction.[27]

A. OSS Transition In The 13 Affected States

As a threshold matter, Frontier will *not* be using Verizon's existing systems in 13 of the 14 affected states (excluding West Virginia) ("13 Affected States"). Rather, Frontier will be relying on a *copy* of Verizon's existing systems. To be sure, there is a difference between creating new systems without the benefit of a prior model to work from (as was the case in the previous Verizon spin-offs to Hawaiian Telcom and FairPoint) and creating a replica of existing systems. Nevertheless, a tremendous amount of work is required to replicate the legacy GTE systems that Verizon currently uses to provide service in the 13 Affected States, migrate the Verizon data to the replicated systems, separate the replicated systems from Verizon's legacy OSS, and transfer the replicated systems to Frontier.[28] As Mr. Olenik explains, "[t]he process of replicating Verizon's systems for the 13 Affected States is a substantial undertaking and could result in major systems failures."[29] In particular, there is "significant room for error in each step of the replication process described by Verizon . . ., including creating 'a functioning separate instance [] of the existing GTE systems used today,' 'load[ing] [it] with all customer-related data,' and transferring 'the replicated systems, including the Fort Wayne data center and the hardware it contains,' to Frontier."[30] The replication process described by the Applicants raises a number of concerns and unanswered questions.

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[25] *See, e.g.,* Applicants' December 22nd *Ex Parte* Letter at 3; Applicants' Reply Comments at 34 & 40; Smith Decl. ¶¶ 17-21.

[26] McCarthy Decl. ¶ 65.

[27] *See* Olenik Decl. ¶¶ 14-21.

[28] For example, according to the Applicants, separating the replicated systems and transferring them to Frontier involves both "relocat[ing] Fort Wayne based systems to other [Verizon] data centers in order to serve those areas utilizing these systems that remain with Verizon, including its Texas, Florida, and most of California operations," and "complet[ing] the movement of servers, systems and applications supporting the transaction-specific service areas into the Fort Wayne center." Applicants' December 22nd *Ex Parte* Letter at 2.

[29] Olenik Decl. ¶ 15.

[30] *Id.* (quoting Smith Decl. ¶¶ 7-13).

First, it is not clear what *exactly* is being replicated. That is, to the extent that the ILEC assets to be transferred in the proposed transaction belong to different legacy GTE operating regions, it is not clear how many "GTE-predecessor systems"[31] will be replicated and whether there are any significant differences between these GTE-predecessor systems that could add to the complexity of the replication of these systems.[32]

Second, Verizon has not provided sufficient information about the testing and validation that it will conduct during the replication process, particularly with respect to the data migration that will occur. As Mr. Olenik states, "it is not clear how Verizon will ensure that its data will be copied accurately and in its entirety."[33] For example, "it is not clear whether Verizon has established benchmarks for determining that the data migration was successful."[34] As One Communications' experience with post-transaction FairPoint demonstrates, failure to migrate Verizon's data accurately and completely could result in significant degradation of Frontier's pre-ordering, ordering, provisioning, billing, and repair functions.[35]

Third, Verizon states that it "plans to operate the replicated systems in full production mode" (i.e., as its customer-facing systems) "for at least 60 days prior to closing, ensuring system performance with Frontier validating the results."[36] Thus, there is a possibility that Verizon will use the replicated systems to serve wholesale customers even though those systems are not be working properly.[37] As Mr. Olenik points out, "Otherwise, there would be no need for Frontier to conduct such a validation while the systems are in 'full production mode.'"[38] Accordingly, the quality of wholesale service provided to Verizon customers could be compromised *even before* the proposed transaction

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[31] Applicants' December 22nd *Ex Parte* Letter at 2.

[32] Olenik Decl. ¶ 15.

[33] *Id.*

[34] *Id.*

[35] *See id.*

[36] Smith Decl. ¶ 10; *see also* Applicants' December 17th *Ex Parte* Letter at 7 ("Verizon will put the duplicate systems into use before closing and will operate the customer-facing systems in full production mode for at least 60 days prior to closing during which time Frontier will validate and confirm the results before closing the transaction.").

[37] *See* Olenik Decl. ¶ 16. Indeed, the Applicants have stated that "*unless and until* Frontier confirms and validates that the systems are working properly, the transaction will not close." Applicants' December 22nd *Ex Parte* Letter at 2 (emphasis added).

[38] Olenik Decl. ¶ 16.

closes.[39] Moreover, the Applicants do not describe the process that they will use to resolve problems that arise during this 60-day period.[40]

Fourth, Verizon plans to conduct its own pre-production testing of the replicated systems,[41] but there is no opportunity for an independent third party with expertise in wholesale OSS transitions and integrations or the CLECs that will be using the replicated systems both before and after closing to review the Applicants' OSS transition plans or to conduct their own testing.[42] Furthermore, while "Frontier will have the opportunity to provide feedback on [Verizon's] test plan, to review the results of Verizon's [pre-production] testing, and to request that other tests be run,"[43] it is unclear how useful Frontier's input will be given that Frontier has relatively little experience in serving wholesale customers and Frontier's existing OSS lack many of the functionalities of Verizon's OSS.[44] Indeed, the wholesale customers that have been using Verizon's systems for years are in a much better position than Frontier to identify potential problems with the replicated systems before they are put into full production mode. For the same reasons, it is not clear why Frontier has the experience and expertise to "confirm[] and validate[] that the [replicated] systems are working properly," and in so doing, make the final determination that the transaction can close.[45]

Fifth, according to Frontier, "Frontier will retain the Verizon employees who today are involved in operating [Verizon's] systems and who have the experience, skill, and knowledge to use them."[46] But Verizon employees cannot be forced to take employment with Frontier. In fact, there is no way for the Applicants to know which Verizon employees will move to Frontier and how long after the closing of the proposed transaction those employees will stay. Indeed, if, as Verizon states,

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39 *See id.*

40 *See id.*

41 *See* Applicants' December 22nd *Ex Parte* Letter at 2.

42 In Frontier's January 22nd *Ex Parte* Letter, it states for the first time in this proceeding that "CLECs will also have an opportunity to test [the replicated systems] prior to close." Frontier's January 22nd *Ex Parte* Letter, Attachment 1, at 2. However, other than permitting Comcast to conduct testing pursuant to their settlement agreement with Comcast's subsidiaries in four of the affected states, *see* note 117 *infra*, the Joint Commenters are unaware of any other commitments by the Applicants to permit all CLECs in the 13 Affected States to conduct pre-closing testing. In any event, for the reasons discussed above, CLECs should be permitted to conduct testing of the replicated systems *before they are put into full production mode*. *See also* Olenik Decl. ¶ 24.

43 Applicants' December 22nd *Ex Parte* Letter at 2.

44 *See* Joint Commenters' Petition to Deny at 24-27 & 30-31.

45 *See* Applicants' December 22nd *Ex Parte* Letter at 2.

46 McCarthy Decl. ¶ 56.

"Verizon will continue to own former GTE companies [in California, Florida, and Texas], and those operations will continue to use systems substantially similar to the ones Frontier is acquiring,"[47] then it would seem that Verizon would want to retain the employees that have the expertise in operating those systems. Thus, purported assurances that the same employees that run Verizon's existing systems for the 13 Affected States will run the replicated systems for Frontier post-transaction cannot be credited.

Sixth, the Applicants have in place a "systems maintenance agreement" under which "Verizon will maintain the OSS, providing patches, upgrades, and system enhancements, for one to five years after close" and "Frontier can terminate the agreement at any time after the first year without penalty, or choose to take over systems maintenance in whole or in part."[48] The Applicants explain that "[i]f these functions were not performed by Verizon, Frontier would have to hire a staff or contractor to perform similar functions for these 13 state systems."[49] But if Frontier were actually acquiring the Verizon employees with the expertise to operate and maintain the replicated systems, no such agreement would be necessary. In addition, addressing the issue of systems maintenance via contract has obvious risks, namely that Frontier will have a financial incentive not to renew the contract after one year even if its provision of wholesale service could benefit from renewal of the agreement.

Seventh, according to Frontier, over time, Frontier may merge the replicated systems into its existing systems.[50] As Mr. Olenik states, "[t]his raises the risk that Frontier is merely postponing any OSS integration issues that would otherwise occur at closing until long after closing when regulators are no longer watching."[51] Indeed, Frontier would have the Commission ignore the implications of a major, complex, and risky integration of critical OSS that may occur at some point in the future even though this integration is a direct consequence of the proposed transaction. If the FCC were to accept this logic, it would create a loophole for merging parties to avoid critical regulatory scrutiny of integration risks by simply delaying the OSS integration for some time.[52]

B. OSS Transition In West Virginia

Verizon states that the cutover from Verizon's wholesale OSS to Frontier's existing OSS in West Virginia will be smooth because "the transferring company [is] merely extracting data and

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[47] Smith Decl. ¶ 13.

[48] Applicants' December 22nd *Ex Parte* Letter at 2.

[49] *Id.*

[50] *See* McCarthy Decl. ¶ 56.

[51] Olenik Decl. ¶ 17.

[52] Indeed, according to an investment analyst's report submitted into the record by Frontier, "[t]he systems conversion process has a very long runway for Frontier to complete (possibly five years)." *See* Frontier's January 22nd *Ex Parte* Letter, Attachment 3, Frank G. Louthan IV et al., Raymond James & Associates, Inc., U.S. Research, "Frontier Communications Corp.," at 3 (dated Jan. 19, 2010).

transferring that data to existing, tested, operational systems of the acquiring company."[53] While it is true that Frontier will be using its own systems in West Virginia post-transaction, the planned cutover poses a substantial risk that wholesale service will deteriorate post-transaction for several reasons.

First, even though the cutover will be to Frontier's existing systems in West Virginia, there is still a significant risk that Verizon's data will not be migrated accurately and in its entirety.[54] According to Jack Wade, Vice President of Fiber Engineering and Operations Support Systems for FiberNet, LLC, a One Communications company, the accuracy of the migrated data is critical to all aspects of Frontier's operations post-transaction.[55] For example, historical data must be migrated from Verizon's systems to Frontier's systems completely and accurately in order for wholesale customers such as FiberNet to make informed decisions about how to expeditiously restore service to a particular retail customer.[56] According to Mr. Wade, "[l]oss of historical data is one of the biggest and most common problems resulting from a data migration such as the one planned for the proposed transaction."[57]

Moreover, while Frontier has stated that, in the event of a problem with the cutover, it plans to rely on a "'shadow' OSS load" that it will create one month before cutover,[58] the "shadow" OSS will only be as accurate as the data migrated to it.[59] As Mr. Wade explains, "without sufficient testing, including cyclic redundancy checking, there is a risk that the 'shadow' OSS will rely on corrupt data."[60] Additionally, without ongoing updates to the data that is transferred to the "shadow" OSS one month before closing, the "shadow" OSS data will become quickly outdated as transactions occur, thereby compromising the historical data associated with each customer account.[61]

Second, while the Applicants imply that all that is required for the cutover in West Virginia is for Frontier to map Verizon's data "to its own comparable systems,"[62] the reality is that Frontier's

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[53] Smith Decl. ¶ 16.

[54] Declaration of Jack Wade on Behalf of FiberNet, LLC, WC Dkt. No. 09-95, ¶ 11 (dated Jan. 26, 2010) ("Wade Decl.") (attached hereto as "Attachment C").

[55] *See id.*

[56] *See id.*

[57] *Id.*

[58] *See* Applicants' December 22nd *Ex Parte* Letter at 3.

[59] Wade Decl. ¶ 12.

[60] *Id.*

[61] *See id.*

[62] Smith Decl. ¶ 14.

systems are not at all "comparable" to Verizon's wholesale OSS in West Virginia.[63] As explained by Mr. Wade, "in order for a data migration to be successful, the platform to which all of the data is moving must also be at least as robust as the platform from which the data is coming," but "[t]hat is not the case here."[64] In fact, according to Mr. Wade, "FiberNet has found that Frontier's OSS in West Virginia are vastly inferior to Verizon's OSS in West Virginia" because Frontier's systems are "largely manual" while Verizon's systems are electronic.[65] For instance, FiberNet is able to place all of its pre-orders and orders for new facilities and its repair requests for existing facilities with Verizon electronically using web-based graphical user interfaces.[66] By contrast, FiberNet is required to place orders with Frontier by filling out the requisite forms in Microsoft Word and Excel and faxing or emailing them to Frontier.[67] According to Mr. Wade, because Frontier's systems lack most of the functionalities of Verizon's OSS, it will not be easy to map Verizon's data to Frontier's systems.[68] This is troubling given that, in the Applicants' view, "map[ping] Verizon's services and data into Frontier's systems" is "the principal transition task" in West Virginia.[69]

Third, although Frontier states that the Synchronoss wholesale gateway for electronic bonding that it has purchased for West Virginia "is an existing system that other carriers, including Embarq and AT&T[,] are already using,"[70] the reality is that the Synchronoss gateway and the industry-standard application programming interfaces ("APIs") that Frontier plans to deploy[71] are still *new to Frontier*.[72] As Mr. Olenik explains, "the process required for deploying these capabilities and integrating them into a legacy back-office system is complex and raises a lot of unanswered questions."[73] For instance, Mr. Olenik states, "it is not clear whether these upgrades will provide all of the same functionalities as

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[63] *See* Wade Decl. ¶ 13.

[64] *Id.*

[65] *Id.* ¶ 5.

[66] *See id.*

[67] *See id.*

[68] *See id.* ¶ 13.

[69] Applicants' December 22nd *Ex Parte* Letter at 3.

[70] *Id.* at 4.

[71] *See* McCarthy Decl. ¶ 56.

[72] Frontier is making these upgrades in apparent recognition of the fact that its existing OSS in West Virginia are largely manual and lack most of the functionalities of Verizon's wholesale OSS.

[73] Olenik Decl. ¶ 19.

Verizon's gateway and APIs, how well the gateway and APIs will be integrated into Frontier's existing systems, and whether Frontier employees will know how to work with these upgraded systems."[74]

Fourth, it is not clear that Frontier's systems will be able to accommodate the vast amounts of data that will be transferred to Frontier.[75] Frontier claims that a 600,000 line increase to "systems that already support about 2.2 million lines" is a "significant, but manageable increase,"[76] but this means that Frontier will be increasing the number of lines supported by its existing systems by almost one-third.[77] As Mr. Wade observes, "[g]iven that Frontier's systems are largely manual and lack most of the functionalities of Verizon's systems, it is difficult to see how this will be a 'manageable' increase."[78] Furthermore, while Frontier claims that "Frontier's systems are fully scalable," it is not clear that Frontier's OSS in West Virginia will be able to accommodate the substantial increase in *wholesale* orders that it will receive post-transaction.[79] For instance, Frontier has not provided the volume of UNE, special access, customer service record, and number portability requests that it currently processes per month in West Virginia compared to Verizon's wholesale OSS for West Virginia.[80]

III. There Is A Material Risk That The Merged Firm Will Perpetuate Verizon's Anticompetitive Conduct, Thereby Slowing Broadband Deployment.

While the proposed transaction poses the threat that the Merged Firm will fail to provide the same level of wholesale service quality as Verizon and fail to provide wholesale inputs in compliance with its statutory obligations, the Commission must also recognize that Verizon has failed to comply with its legal obligations to wholesale customers in several important respects. Such failures have prevented competitors such as FiberNet from deploying broadband to a substantial portion of the territory served by the incumbent LEC assets at issue here.

First, Verizon has slow-rolled FiberNet's effort to obtain access to more than 3,000 remote terminals in West Virginia.[81] FiberNet has not been able to establish a single collocation arrangement in a remote terminal in West Virginia. The consequences of this inability to collocate are significant.

[74] *Id.*

[75] *See* Wade Decl. ¶ 14.

[76] McCarthy Decl. ¶ 58.

[77] *See* Wade Decl. ¶ 14.

[78] *Id.*

[79] *See* Olenik Decl. ¶ 18.

[80] *Id.*; *see also* Wade Decl. ¶ 14.

[81] *See* Wade Decl. ¶ 20.

FiberNet has determined that, if it had access to Verizon's remote terminals throughout the state, it could provide broadband service to an additional 15,000 businesses and 150,000 residential access lines.[82]

Second, Verizon has discriminated against FiberNet in providing access to Verizon's poles in West Virginia.[83] Among other things, Verizon does not process FiberNet's pole attachment applications within 45 days as required by the FCC's rules[84] and Verizon's make-ready intervals are unreasonably long (i.e., an average of 240 days for 2009).[85] FiberNet has determined that if delays by Verizon and the electric utilities associated with all aspects of the pole attachment process were reduced by 50 percent, FiberNet could double the markets that FiberNet enters each year, resulting in fiber being built to an additional 10 to 15 communities per year.[86]

Third, Verizon has increasingly rejected FiberNet's orders for DS1 UNE loops on the basis that "no facilities are available."[87] This has forced FiberNet to purchase these inputs as special access, which substantially increases FiberNet's costs and in turn, reduces the number of customers that FiberNet can serve.[88] For example, between February 2007 and July 2009, Verizon rejected 32 percent of FiberNet's DS1 UNE loop orders and forced FiberNet to purchase these inputs as special access.[89] As a result, FiberNet incurred $221,825 in additional costs.[90] If FiberNet's loop orders had all been fulfilled as UNEs, FiberNet could have provided service to approximately 66 percent more DS1-served customers.[91]

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[82] *See id.* ¶ 21. The Joint Commenters' Petition to Deny (at 31) incorrectly stated that FiberNet had estimated that if it had access to Verizon's remote terminals in West Virginia, FiberNet could provide broadband service "to an additional 15,000 business and residential access lines" in the state.

[83] *See* Wade Decl. ¶ 22.

[84] Specifically, Verizon has taken an average of 206 days to process pole attachment applications filed by FiberNet between January 31, 2008 and March 6, 2009. *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.* ¶ 23.

[88] *See id.*

[89] *See id.*

[90] *See id.*

[91] *See id.*

With this conduct, Verizon has preserved a broadband-free environment in West Virginia. Indeed, the perverse logic of this transaction is that Verizon is now "cashing in" on its success in preventing FiberNet from deploying broadband throughout West Virginia and other areas. This is because Frontier's willingness to buy the ILEC assets at issue depends largely on the opportunity to deploy broadband to areas to which no intramodal competitor (and in some cases no competitor at all) has deployed broadband.[92] The value proposition of this transaction for Frontier—the opportunity to deploy broadband where little or no competition exists—can only be maintained if Frontier perpetuates Verizon's anticompetitive conduct. Therefore, it is entirely reasonable, and in fact, critically important, that the Commission address this merger-specific harm with robust remedial conditions.

IV. There Is A Material Risk That The Merged Firm Will Not Comply With Its Obligations Under Section 251(c) Of The Act.

As explained in the Joint Commenters' Petition to Deny[93] and Kentucky Data Link's Comments,[94] it is possible that the Merged Firm will seek to avoid its wholesale obligations under Section 251(c) by claiming the exemption applicable to rural telephone companies under Section 251(f)(1) of the Act.[95] The Merged Firm should be prevented from doing so in the legacy Verizon territory in West Virginia. As a Bell Operating Company ("BOC") in West Virginia,[96] the Merged Firm will have an ongoing duty to comply with the competitive checklist under Section 271, including

[92] *See, e.g.,* Frontier's November 23rd *Ex Parte* Letter at 1 ("Frontier's strategy and approach to provide service to these types of unserved and underserved areas specifically includes increasing the broadband availability and subscribership in these areas. . . . In many areas in which Frontier will be deploying broadband, it may be the first wireline provider to offer broadband services."); *see also supra* note 11.

[93] *See* Joint Commenters' Petition to Deny at 36.

[94] *See* Comments of Kentucky Data Link, Inc., WC Dkt. No. 09-95, at 5 (filed Sept. 21, 2009) ("Kentucky Data Link's Comments").

[95] Section 251(f)(1)(A) provides that a "rural telephone company" is exempt from obligations applicable to all incumbent LECs under Section 251(c) until (1) "such company has received a bona fide request for interconnection, services, or network elements," and (2) "the State commission determines . . . that such request is not unduly economically burdensome [and] is technically feasible." 47 U.S.C. § 251(f)(1)(A).

[96] As the Joint Commenters have explained, under Commission precedent, the Merged Firm should be classified as a BOC in the legacy Verizon territory in West Virginia under Section 3(4) of the Act. *See* Joint Commenters' Petition to Deny at 35 (citing *In re Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 514, ¶ 33 (2008)).

some of the market-opening requirements of Section 251(c),[97] as a condition of its ability to provide in-region long distance service in West Virginia.[98] It would be flatly inconsistent with this duty for the Merged Firm to claim an exemption from those market-opening requirements pursuant to Section 251(f)(1). In the other 13 states affected by the proposed transaction, Verizon has not, to our knowledge, sought an exemption under Section 251(f)(1) and a change in this policy by Frontier would represent a merger-specific harm—one that threatens the widespread deployment of broadband by competitors.

Nor is there a factual basis in the record for concluding that Frontier would be unable to take advantage of the Section 251(f)(1) exemption post-transaction. An examination of the instant Application and the definition of "rural telephone company" under Section 3(37) of the Act does not resolve the matter. A "rural telephone company" is defined in Section 3(37) of the Act as:

> [A] local exchange carrier *operating entity* to the extent that such entity— (A) provides common carrier service to any local exchange carrier study area that does not include either—(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.[99]

The Commission has defined "operating entity" as that term is used in Section 3(37) as the "corporate entity bearing legal responsibility for the local exchange services provided."[100] Thus, it is entirely possible that the Merged Firm could create (or indeed has already created) one or more subsidiaries that provide telephone exchange service to fewer than 50,000 access

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[97] *See* 47 U.S.C. § 271(c)(2)(B).

[98] *See id.* § 271.

[99] 47 U.S.C. § 153(37) (emphasis added).

[100] In 1999, the Commission sought comment on whether the term "operating entity" in Section 3(37) "refers to an entity operating at the study area level or the holding company level." *In re Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Further Notice of Proposed Rulemaking, CC Dkt. Nos. 96-45 & 97-160, FCC 99-120, ¶ 251 (1999). The Commission subsequently determined that "operating entity" means the "corporate entity bearing legal responsibility for the local exchange services provided," "regardless of whether that entity serves a single or multiple study areas." *See In re Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High-Cost Support for Non-Rural LECs*, Tenth Report & Order, 14 FCC Rcd. 20156 ¶¶ 452, 454 (1999).

lines and therefore, fall within the definition of "rural telephone company" under Section 3(37)(B).

Additionally, it may be possible for the Merged Firm to fall within the definition of "rural telephone company" under Section 3(37)(C).[101] The Commission has explained that a "study area" is "a geographical region generally composed of a telephone company's exchanges within a single state," but that "[t]here are instances . . . where a telephone holding company may have several wholly owned telephone subsidiaries within a single state and each one or a combination of subsidiaries may constitute separate study areas."[102] Thus, Frontier could have a pre-existing subsidiary that provides service to a study area with fewer than 100,000 access lines and that subsidiary would therefore qualify as a rural telephone company under Section 3(37)(C).[103] Frontier already serves fewer than 100,000 access lines in seven of the states at issue.[104] For example, as of December 31, 2008, Frontier provided service to only 552 access lines in Ohio; to 4,647 access lines in Indiana; and to 12,626 access lines in Oregon.[105] As of the same date, Verizon provided service to fewer than 100,000 access lines in three of the states at issue (i.e., 6,297 access lines in Arizona; 24,205 access lines in California; and 35,989 access lines in Nevada).[106]

V. The Commission Must Impose Conditions In Order To Mitigate The Risks Posed By The Proposed Transaction And Find That The Transaction Is In The Public Interest.

The Commission must impose conditions on any approval of the proposed transaction in order to mitigate the risks described herein and in the Joint Commenters' Petition to Deny.[107]

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[101] *See* 47 U.S.C. § 153(37)(C).

[102] *See In re Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking, 5 FCC Rcd. 5974 ¶ 4 (1990).

[103] Study area boundaries are frozen as they were on November 15, 1984. *See* 47 C.F.R. § 36, Appendix-Glossary. Exchanges that Frontier acquires from Verizon will remain separate from Frontier's existing study areas unless Frontier petitions for and obtains a waiver of its study area definitions from the Commission. *See In re Federal-State Joint Board on Universal Service*, Order, 19 FCC Rcd. 11538 ¶ 12 n.31 (2004) ("A carrier must apply to the Commission for a waiver of the study area boundary freeze, if it wishes to sell or purchase additional exchanges and the transaction requires the alteration of an existing study area boundary.").

[104] *See* Frontier November 2009 Investor Presentation at 21.

[105] *See id.*

[106] *See id.*

[107] Among other things, in their Petition to Deny, the Joint Commenters explained that there is a material risk that the Merged Firm will increase wholesale rates post-transaction. *See* Joint

Most of those risks are direct results of the proposed transaction. Where this is the case, the FCC should adopt conditions designed to prevent the merger-specific harms in question. But the Commission must also recognize that it is impossible to determine the magnitude of the harm that this transaction will ultimately cause to competition and consumer welfare. The previous Verizon spin-off transactions in Hawaii and in Vermont, New Hampshire and Maine imposed extraordinary costs on retail customers, wholesale customers and consumer welfare more generally. The Commission cannot dismiss the possibility of a similar outcome for this transaction. Moreover, even a "successful" spin-off of the ILEC assets at issue to Frontier will likely result in Frontier continuing Verizon's anticompetitive practices (e.g., denial of access to remote terminals, slow-rolling access to pole attachments and implausibly high rates of "no facilities" UNE order rejections) as part of its efforts to squeeze as much profit out of the assets as possible. It cannot be consistent with the public interest to enable Verizon to engage in such conduct, to cash-in on it in the proposed transaction, and then to enable the purchaser to prosper by perpetuating the obviously anticompetitive conduct. Even if the perpetuation of such conduct is not viewed as merger-specific, imposing merger conditions to address this conduct and in turn, establish the preconditions for competition post-transaction, is the only way to ensure that the overall benefits of the proposed transaction outweigh the overall risks. In other words, to achieve net public interest benefits, the FCC may need to adopt conditions that extend beyond a narrow definition of merger-specific harm.

Nor is there any question that the FCC has the authority to adopt such conditions. The Commission has the authority under Section 214(c) of the Act to attach "such terms and conditions as in its judgment the public convenience and necessity may require."[108] As the

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Commenters' Petition to Deny at 33-34. The Joint Commenters also explained that there is a material risk that the Merged Firm will not be able to provide the same functionalities and the same level of customer service support that Verizon currently provides. *See id.* at 24-33. For example, in provisioning special access services, Verizon, unlike Frontier, offers nationwide service level agreements for DS1 and DS3 special access facilities, provides monthly wholesale performance reports, conducts annual customer summits for large wholesale customers, and uses e-bonding to support a range of ordering, provisioning, maintenance and repair functionalities. *See id.* at 24-26. Verizon also provides wholesale customers such as tw telecom with least-cost billing for DS1 special access circuits ordered under Verizon's Term Volume Plan (i.e., Verizon's systems automatically provision and bill the transport component of each circuit as a "MetroLAN" rate element when MetroLAN is the least expensive rate element available to the customer). *See id.* at 26 & n.86. Perhaps most importantly for the future of broadband to businesses, Verizon has expertise in the provision of Ethernet service to wholesale customers whereas it is not at all clear that Frontier has such expertise or, if it does, whether it is willing to use it. *See id.* at 27. Additionally, in provisioning UNEs and other wholesale inputs to customers such as FiberNet, Verizon provides dedicated account managers, detailed point-of-contact lists, monthly wholesale performance reports, industry letters, CLEC User Forum materials, and other information, but it is not clear that FiberNet will be able to do the same post-transaction. *See id.* at 30-31.

[108] 47 U.S.C. § 214(c).

FCC has recognized, it has the authority "to rely upon [its] extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits."[109]

In fact, in merger review proceedings, the Commission has often imposed conditions (or adopted applicants' voluntary commitments as conditions) that advance the pubic interest even though the conditions do not narrowly redress transaction-specific harms. For example, in the *SBC-AT&T Merger Order*, the Commission adopted as a condition of its approval the applicants' voluntary commitment to offer stand-alone DSL despite the Commission's finding that the transaction was "not likely to result in anticompetitive effects for mass market services."[110] The Commission concluded that "this commitment will serve the public interest."[111] The Commission also adopted as conditions of its approval the applicants' commitments with respect to Internet backbone services (i.e., maintaining settlement-free peering arrangements, publicly posting peering policies, and complying with the principles of the FCC's *Internet Policy Statement*) even though the Commission expressly found "no likely anticompetitive effects for Internet backbone and related services as a result of the merger."[112] Again, the Commission found that the Internet backbone "commitments will serve the public interest."[113] The Commission made similar findings of no merger-specific harm and yet imposed similar conditions in the *Verizon-MCI Merger Order*.[114] More recently, in the *CenturyTel-Embarq Merger Order*, the Commission adopted as conditions of its approval a number of the applicants' voluntary commitments even though they did not address harms arising directly out of the transaction between CenturyTel and Embarq because those conditions "will serve the public interest."[115]

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[109] *In re Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio, Inc., Transferee,* Memorandum Opinion and Order and Report and Order, 23 FCC Rcd. 12348, ¶ 33 (2008).

[110] *In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of* Control, Memorandum Opinion and Order, 20 FCC Rcd. 18290, ¶ 101 (2005) ("*SBC-AT&T Merger Order*"); *see also id.* ¶ 104.

[111] *Id.* n.322.

[112] *Id.* ¶ 108.

[113] *Id.*

[114] *See In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶¶ 102, 105 & n.320 (2005) ("*Verizon-MCI Merger Order*"); *see also id.* ¶ 109.

[115] For instance, the Commission adopted the following conditions, among others: (1) "Orders will be processed [by the merged company] in compliance with federal and state law, as well as the terms of applicable interconnection agreements"; (2) "CenturyTel companies will not limit the number of ports

Furthermore, contrary to the Applicants' suggestions,[116] the existence of settlement agreements between the Applicants and interested parties at the state level[117] does not obviate

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that can be processed"; (3) "No later than 30 months after the Transaction Closing Date, the CenturyTel companies will provision DS1 loops within 6 business days, 80 percent of the time"; (4) "When a number is ported from CenturyTel, E-911 records will be unlocked at the time of porting"; and (5) "the merged company will make available retail broadband Internet access . . . to 90 percent of its broadband eligible access lines using wireline technologies within three years of the Transaction Closing Date." *See CenturyTel-Embarq Merger Order*, Appendix C.

[116] *See, e.g.*, Applicants' January 20th *Ex Parte* Letter at 2-3.

[117] The Applicants have reached settlement agreements with several CLECs, including tw telecom, in Oregon and Washington, and a settlement agreement with Comcast's subsidiaries in Illinois, Ohio, Oregon, and Washington. *See* Stipulation, Oregon PUC No. UM 1431 (filed Dec. 3, 2009), Attachment 1, Settlement Conditions ("OR CLEC Settlement"), http://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAR&FileName=um1431har134014.pdf; Multiparty Settlement, Washington UTC Docket No. UT-090842 (filed Dec. 23, 2009), Attachment 1, Settlement Conditions ("WA CLEC Settlement"), http://wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/c9619f71064ae14e882576950074e59d!OpenDocument; Settlement Agreement with Comcast Phone, LLC on behalf of its subsidiaries, Comcast Phone of Illinois, LLC d/b/a Comcast Digital Phone, Comcast Phone of Ohio, LLC, Comcast Phone of Oregon, LLC, and Comcast Phone of Washington, LLC, Oregon PUC No. UM 1431 (filed Dec. 8, 2009) ("Comcast 4-State Settlement"), http://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAR&FileName=um1431har155856.pdf. Because the text of the Settlement Conditions attached to the OR CLEC Settlement and the WA CLEC Settlement are identical, those conditions are referred to in Attachment A to this letter as "OR/WA CLEC Settlement." Frontier has also reached settlement agreements with CLECs, including FiberNet, in West Virginia as well as with Comcast's subsidiary in West Virginia. *See* Joint Stipulation and Agreement for Settlement with CLECs and U.S. Cellular, West Virginia PSC Case No. 09-0871-T-PC (filed Jan. 11, 2010) ("West Virginia CLEC Settlement"), http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=287242&NotType='WebDocket'; Settlement Agreement with Comcast Phone of West Virginia, LLC, West Virginia PSC Case No. 09-0871-T-PC (filed Jan. 11, 2010) ("Comcast West Virginia Settlement"), http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=287242&NotType='WebDocket'. Additionally, the Applicants have reached settlement agreements with state regulatory commission staff in Oregon, Washington, and Ohio. *See* Stipulation, Oregon PUC No. UM 1431 (filed Dec. 4, 2009), http://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAR&FileName=um1431har102913.pdf; Settlement Agreement, Washington UTC Docket No. UT-090842 (filed Dec. 24, 2009), http://wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/04524cb7901b823b882576b0006b19ac!OpenDocument; Stipulation and Recommendation—Joint Applicants, Staff and the Office of the Ohio Consumers' Council, PUC of Ohio Case No. 09-454-TP-ACO (filed Dec. 8, 2009), http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A09L08B61659F10681.

the need for the FCC to impose conditions at the national level. To begin with, the conditions reached in the various settlement agreements do not apply in all of the states affected by the proposed transaction. Indeed, as the Applicants have pointed out, four of the affected states (Idaho, Indiana, Michigan, and Wisconsin) do not even require state commission approval of the transfer.[118]

Moreover, the conditions reached in the various settlement agreements are the product of negotiations that took place in the context of state commission merger review proceedings. As a result, some of the conditions contained in the settlement agreements are insufficient and incomplete in certain respects. For example, while the West Virginia CLEC Settlement permits CLECs to conduct pre-cutover testing,[119] it does not require the Applicants to retain an independent third party consultant to review the Applicants' cutover plans and to conduct its own assessment of the readiness of Frontier's systems for cutover. Independent third-party oversight of the entire cutover process could minimize the risk that CLECs discover major problems with Frontier's systems once CLECs are finally able to conduct testing. In addition, the Applicants point out that "Frontier has also committed [under the West Virginia CLEC Settlement] not to cut over to its systems until it has validated that the wholesale OSS and Synchronoss Front End system are functioning and operational."[120] Given that, as discussed in Section II.B. above, Frontier's OSS in West Virginia are vastly inferior to Verizon's OSS, Frontier has not provided information on the amount of wholesale business it conducts in West Virginia today, and Frontier has not previously operated a Synchronoss Front End system in West Virginia, it is unclear why Frontier is qualified to decide whether its systems are "functionally comparable to what Verizon is providing prior to closing."[121]

In addition, although "as part of the Applicants' settlements in certain states, Verizon has agreed to undertake pre-production and pre-closing testing of the replicated systems" for the 13 Affected States and to allow a third-party reviewer to validate those results, there is still no opportunity for CLECs and an independent third-party consultant to conduct their own testing of the replicated systems and thereby minimize the data migration and other risks discussed in Section II.A above. Thus, the replicated OSS conditions reached in the various state-level agreements are insufficient. Contrary to the Applicants' assertion,[122] it is therefore irrelevant that those conditions will apply to the common OSS used for all 13 Affected States.

In light of the foregoing, the Commission should establish comprehensive conditions that apply to the Merged Firm as a whole, in all affected states, and that complement the

[118] *See* Applicants' December 22nd *Ex Parte* Letter n.1.

[119] *See* Applicants' January 20th *Ex Parte* Letter at 2.

[120] *Id.*

[121] West Virginia CLEC Settlement ¶ 10.

[122] *See* Applicants' January 20th *Ex Parte* Letter at 3.

conditions established at the state level. The Joint Commenters have proposed such conditions in Attachment A. Where relevant in Attachment A, the Joint Commenters have briefly noted in italics their rationale for requesting the proposed condition despite the existence of a condition covering the same subject matter in one or more of the various state-level settlement agreements.

VI. Conclusion.

For all of the reasons discussed herein, the Commission should impose the conditions proposed in Attachment A on any approval of the proposed transaction.

Respectfully submitted,

Thomas Jones
Nirali Patel

Counsel for One Communications Corp., tw telecom inc., Cbeyond, Inc., and Kentucky Data Link, Inc.

Attachments

ATTACHMENT B

REDACTED - FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications Filed by Frontier Communications	)	
Corporation and Verizon Communications Inc.	)	WC Docket No. 09-95
for Assignment or Transfer of Control	)	

DECLARATION OF PAUL OLENIK

1. I am Paul Olenik, Director of Service Implementation, for One Communications Corp. ("One Communications"). In this role, I am responsible for end-to-end fulfillment of all orders in my assigned territory, the New England and Mid-Atlantic regions. I work closely with One Communications' customers, internal departments, sales teams, incumbent LECs, competitive LECs, and competitive access providers. I have been employed by One Communications for five years. During this time, I have held positions in Circuit Design, Provisioning, Voice Translations, Data Provisioning, and Transport. Prior to joining One Communications, I was employed by Verizon Communications for nine years, most recently in Verizon's Carrier Account Team Center in Boston, Massachusetts. The Carrier Account Team Center served competitive LECs who were doing business in the New England and New York regions. I was responsible for DS1 and DS3 circuit installation in areas of New York. In my last year with Verizon, I was also responsible for managing both Verizon's New England Wholesale Repair Call Center, which answered and processed all trouble ticket reporting for the center, and Verizon's Customer Care Group, which handled all provisioning and installation escalations.

2. One Communications, with corporate headquarters in Burlington, Massachusetts, and operational headquarters in Rochester, New York, is the largest privately-held, multi-regional integrated telecommunications provider in the United States. One Communications

offers advanced telecommunications solutions (including data and Internet services, VoIP and voice services, and bundled services) via DS0, xDSL, DS1, DS3, and OCn loops to approximately 160,000 small and mid-sized business customers in 18 states across the Northeast, Mid-Atlantic and Upper Midwest, plus Washington, D.C. One Communications competes with Verizon in areas served by incumbent LEC exchanges that are the subject of the proposed spin-off transaction between Verizon and Frontier (the "Applicants") in Indiana, Michigan, Ohio, West Virginia, and Wisconsin.

3. The purpose of this declaration is to (1) describe the problems that One Communications and its customers experienced in Maine, New Hampshire, and Vermont as a result of the flawed OSS transition that occurred during and after the spin-off transaction between Verizon and FairPoint Communications, Inc. ("FairPoint"); and (2) describe the risks that the OSS transitions planned for the proposed spin-off transaction between Verizon and Frontier pose for One Communications and its customers in Indiana, Michigan, Ohio, West Virginia, and Wisconsin.

I. AS A RESULT OF VERIZON AND FAIRPOINT'S FLAWED OSS TRANSITION, ONE COMMUNICATIONS EXPERIENCED NUMEROUS PROBLEMS THAT HAVE IMPEDED ITS ABILITY TO SERVE ITS CUSTOMERS AND COMPETE EFFECTIVELY IN NEW ENGLAND.

4. When the cutover from Verizon to FairPoint's OSS occurred on or about January 30, 2009, FairPoint's wholesale OSS were not operationally ready and were inadequate for One Communications to perform basic functions related to pre-ordering, ordering, provisioning, billing, maintenance, and repair. As a result, One Communications experienced numerous problems that have impeded its ability to serve its customers.

5. First, One Communications' orders were not processed by FairPoint in a timely manner. FairPoint had instituted a two-week "blackout" period following the cutover during

which it would not process any orders received. However, once the blackout period ended, FairPoint's systems were still unable to timely process orders. Among other things, large quantities of data (e.g., address records, inventory records, and orders placed with Verizon prior to the cutover) were not mapped properly during the data migration and FairPoint's systems did not function properly and interact with each other as expected. These systems failures resulted in a backlog of numerous orders, including hundreds of One Communications' orders. In fact, One Communications has determined that between January 9, 2009 (the date on which FairPoint required new orders whose provisioning dates fell during the week before the cutover to be placed via FairPoint's new Wisor systems rather than via Verizon's systems) and March 31, 2009, approximately two months after the cutover, FairPoint completed only 58 percent of One Communications' orders. This situation was made worse by the fact that FairPoint was forced to process backlogged orders manually. As a result, completion of One Communications' orders was delayed for days, weeks, and even months. A few of the orders that One Communications submitted around the time of the cutover were not completed until December 2009.

6. Importantly, FairPoint was also unable to process emergency orders in a timely manner. Such orders are typically placed in response to medical emergencies or law enforcement needs (e.g., requests for a Change Telephone Number or Change Directory Listing in response to a restraining order). The process for fulfilling emergency orders that FairPoint had defined prior to the cutover simply did not work after the cutover. As a result, these emergency orders had to be processed manually and required approval at the Director level. One Communications did not receive a timely response for these orders, and in some cases, did not receive any response at all. One Communications believes that Verizon and FairPoint

dramatically underestimated the volume of emergency orders that FairPoint would receive post-transaction.

7. Second, for as long as six months following the cutover, One Communications was unable to consistently obtain complete and accurate Customer Service Records ("CSRs"), Address Validation information, and Loop Qualification data from FairPoint for pre-ordering. For instance, One Communications' employees could not retrieve complete CSRs from FairPoint's systems (i.e., One Communications could not view all of the telephone numbers associated with a particular CSR). FairPoint's CSR database sometimes timed out when One Communications' employees attempted to request CSRs and One Communications could not receive timely responses to manual CSR requests. In addition, FairPoint's Address Validation database rejected a large quantity of One Communications' orders as non-serviceable when the address at issue was indeed serviceable. Furthermore, due to inaccuracies and incomplete data in FairPoint's Loop Qualification database, One Communications' employees were often forced to rely on MapQuest to check the distance between a serving central office and a customer's premises to ensure that the customer was serviceable for the technology at issue. Whenever One Communications received a denial from FairPoint's Loop Qualification database even though the customer was in fact serviceable for the technology at issue, One Communications was forced to submit its order to FairPoint manually.

8. To my knowledge, FairPoint was forced to conduct multiple updates of approximately 500,000 to 600,000 records in the months following the cutover. Among other things, the lack of complete and accurate data following the cutover affected One Communications' ability to submit orders and ultimately resulted in delayed provision of service to One Communications' customers. In some cases where One Communications received an

invalid jeopardy notification after submitting an order to FairPoint, FairPoint was not able to resolve the problem itself and instead had to wait for its consultant, Capgemini, to clear the jeopardy, thereby further delaying installation to One Communications' customer.

9. Third, One Communications received Provisioning Completion Notices ("PCNs") and Billing Completion Notices ("BCNs") from FairPoint even though provisioning or billing for the order at issue had *not* been completed. FairPoint had to resolve these cases manually. However, FairPoint subsequently failed to update its Directory Listings and E911 records accordingly, thereby negatively affecting One Communications' customers. Premature PCNs also resulted in premature dispatch of technicians to the field. In addition, premature BCNs resulted in double billing of the same customer from both FairPoint and One Communications.

10. Fourth, One Communications experienced difficulties coordinating hot cuts with FairPoint. More specifically, because of defects in FairPoint's systems, FairPoint was forced to perform hot cuts to One Communications manually but FairPoint subsequently failed to update its systems accordingly. When FairPoint eventually performed clean up of the inventory records in its systems, orders appeared as having not been completed (even though the orders correctly appeared as having been completed in One Communications' systems) and FairPoint would put the One Communications customers at issue back on FairPoint's network, thereby causing service outages for those One Communications customers.

11. Fifth, One Communications experienced many problems related to repair of FairPoint's wholesale services. For example, because FairPoint is not able to test T1 circuits remotely, a technician must be dispatched each time testing is required. However, whenever FairPoint experienced systems or process issues, its technicians tried to prevent One Communications' employees from opening trouble tickets manually, thereby further delaying

trouble ticket resolution. In another example, because much of the data on Verizon's systems did not properly flow over to FairPoint during the migration, One Communications experienced great difficulty in opening trouble tickets. Specifically, because the relevant FairPoint database did not contain complete and accurate Connecting Facilities Assignment information, opening such a ticket could take more than one week. In some cases, FairPoint had to engage a third-party vendor to validate its own records. In addition, in certain instances, when One Communications was finally able to open a trouble ticket electronically, a One Communications employee would call FairPoint approximately one hour later for a status update on the ticket and would be told that the ticket at issue was "lost" and that One Communications would have to resubmit the ticket. All of these problems contributed to delays in dispatching FairPoint's technicians to restore service to One Communications' customers in a timely fashion. In some cases, when FairPoint finally dispatched a technician to a One Communications customer's premises, the technician arrived without any information about the customer's service problem and asked the customer what kinds of repairs were needed.

12. These are just some examples of the many problems that One Communications experienced following the cutover from Verizon's systems to FairPoint's systems in New England. It took FairPoint approximately six to eight months to resolve most of the problems described above. One Communications is still conducting weekly calls on delayed or troubled orders today. Furthermore, despite working with FairPoint's information technology department for months, One Communications has not yet received a completely accurate bill from FairPoint.

13. FairPoint's faulty OSS has hindered One Communications' ability to serve its customers, increased One Communications' costs, and caused One Communications to lose substantial revenue. Many One Communications' customers cancelled their requested services,

resulting in hundreds of thousands of dollars in lost revenues for the company. One Communications has also been forced to devote staff and resources to conducting daily conference calls, performing manual research, and repeating tasks, such as resubmitting orders. One Communications estimates that this lost productivity has cost the company hundreds of thousands of dollars. Ultimately, competition, and therefore consumers, have suffered in Maine, New Hampshire and Vermont as a result of the problems associated with a poorly managed transition from Verizon's wholesale OSS to FairPoint's OSS.

II. DESPITE THE APPLICANTS' PLANS TO USE EXISTING SYSTEMS, THE OSS TRANSITIONS FOR THE PROPOSED VERIZON-FRONTIER TRANSACTION POSE MANY OF THE SAME RISKS AS THE PREVIOUS VERIZON-FAIRPOINT TRANSACTION.

14. I have reviewed the portions of the Declaration of Daniel J. McCarthy and the Declaration of Stephen E. Smith on behalf of Frontier and Verizon, respectively, filed in this proceeding on October 13, 2009, that pertain to the OSS transitions that the Applicants will undertake as part of the proposed spin-off transaction. In paragraph 65 of his testimony, Mr. McCarthy states that the proposed transaction "involves significantly less operational risk than did the FairPoint transaction" in large part because Frontier will be "using Verizon's existing systems in thirteen states, and its own existing systems in the fourteenth." Similarly, in paragraph 20 of his testimony, Mr. Smith states that the proposed "transaction does not involve newly developed systems that might suffer from the design and integration problems experienced" during previous Verizon spin-off transactions. Although it is true that Frontier will be using Verizon's systems in 13 of the affected states ("13 Affected States") and that Frontier will be using its own systems in West Virginia, the OSS transitions for the proposed transaction still pose many of the same risks for One Communications and other CLECs as the previous Verizon-FairPoint transaction.

15. The process of replicating Verizon's systems for the 13 Affected States is a substantial undertaking and could result in major systems failures. To begin with, to the extent that the exchanges to be transferred in the proposed transaction belong to different legacy GTE operating regions, it is not clear how many legacy GTE systems will be replicated and whether there are any significant differences between these legacy GTE systems (such as whether some of the systems have been upgraded over time and others have not, resulting in multiple versions of the systems) that could add to the complexity of the replication of these systems. There is also significant room for error in each step of the replication process described by Verizon in paragraphs 7-13 of Mr. Smith's testimony, including creating "a functioning 'separate instance' [] of the existing GTE systems used today," "load[ing] [it] with all customer-related data," and transferring "the replicated systems, including the Fort Wayne data center and the hardware it contains," to Frontier. Further, even if, as Mr. Smith states in paragraph 9 of his testimony, "Verizon will do its own testing and validation during the replication process," it is still not clear how Verizon will ensure that its data will be copied accurately and in its entirety (e.g., it is not clear whether Verizon has established benchmarks for determining that the data migration was successful). As evidenced by One Communications' experience with FairPoint following the cutover from Verizon's wholesale OSS to FairPoint's OSS, failure to duplicate Verizon's data accurately and completely could result in significant obstacles to timely pre-ordering, ordering, provisioning, billing, and repair of Frontier's wholesale services.

16. Mr. Smith also states in paragraph 10 of his testimony that "Verizon plans to operate the replicated systems in full production mode for at least 60 days prior to closing, ensuring system performance with Frontier validating the results." Accordingly, it is possible that Verizon will use the replicated systems to serve wholesale customers even though those

systems may not be working properly. Otherwise, there would be no need for Frontier to conduct such a validation while the systems are in "full production mode." This could jeopardize the quality of wholesale service provided to Verizon customers even before the closing. In addition, Verizon and Frontier do not describe the process that they will use to resolve problems that arise during the 60-day "full production mode" period. Moreover, Verizon does not explain whether and when the Verizon data (customer addresses, services purchased, and so on) that changes during that 60-day time period will be updated in the replicated systems before closing. Up-to-date data is critical to timely pre-ordering, ordering, provisioning, billing, and repair of Frontier's wholesale services.

17. Furthermore, Mr. McCarthy states in paragraph 56 of his testimony that over time, Frontier may merge the replicated systems into Frontier's existing systems. This raises the risk that Frontier is merely postponing any OSS integration issues that would otherwise occur at closing until long after closing when regulators are no longer watching.

18. The process of cutting over from Verizon's OSS to Frontier's OSS in West Virginia is also a substantial undertaking that could also result in major systems failures. Mr. Smith states in paragraph 14 of his testimony that "Verizon will identify the relevant customer data and furnish Frontier with data descriptions, data formats and layouts, and a series of full test data extracts from the Verizon systems which hold the data" and that Frontier will then "receive the test data, map them to its own comparable systems, and then load and test its systems to confirm that the data have been mapped properly." As with the replication process, there is significant room for error with each step of this cutover process. In addition, while Mr. McCarthy states in paragraph 58 of his testimony that "Frontier's systems are fully scalable" and that a 600,000 line increase to "systems that already support about 2.2 million lines" is a

"significant, but manageable increase," it is not clear that Frontier's OSS in West Virginia will be able to handle the substantial increase in *wholesale* orders. For example, Frontier has not provided the volume of UNEs, special access, CSRs, and number portability requests that it currently processes per month in West Virginia as compared to Verizon's wholesale OSS for West Virginia.

19. Mr. McCarthy states in paragraph 56 of his testimony that for West Virginia, Frontier has recently purchased a Synchronoss gateway for electronic bonding and that it will deploy industry standard application programming interfaces ("APIs"). However, the process required for deploying these capabilities and integrating them into a legacy back-office system is complex and raises a lot of unanswered questions. For example, it is not clear whether these upgrades will provide all of the same functionalities as Verizon's gateway and APIs, how well the gateway and APIs will be integrated into Frontier's existing systems, and whether Frontier employees will know how to work with these upgraded systems.

20. For both of the OSS transitions, Verizon and Frontier have also failed to explain whether there will be a blackout period, and if so, when it will occur and how long it will last. If there will be a blackout period, the Applicants should provide estimates on how long it will take Frontier to process orders submitted during that period. The Applicants should also make clear whether there is a date on which CLECs can no longer place orders via Verizon's systems and whether there is a date on which CLECs will be able to place orders via Frontier's new systems. The Applicants have also failed to describe the manual processes that Frontier will have in place in the event of systems failures post-transaction.

21. Finally, based on Mr. Smith and Mr. McCarthy's testimony, Verizon and Frontier's OSS transitions do not include any opportunity for CLECs to review the Applicants'

OSS transition plans or to conduct pre-production or pre-closing testing of the replicated OSS for the 13 Affected States or pre-cutover testing of Frontier's OSS for West Virginia.

22. In order to minimize the risks that One Communications and other wholesale customers will experience service problems similar to those they experienced following the cutover to FairPoint's wholesale OSS, the Applicants should be required to hire an independent third-party consultant, approved by the FCC, to oversee each of these processes. For the OSS transition in the 13 Affected States, the consultant should establish readiness criteria to assess whether Frontier's replicated systems are ready for closing. Specifically, the consultant should use that criteria to assess whether (1) Verizon has properly replicated its OSS and separated the replicated systems from its legacy OSS; (2) whether the replicated systems were properly transferred to Frontier; and (3) the extent to which the replicated systems will be fully operational at closing. The closing should not be allowed to take place until the consultant has found that the replicated systems for the 13 Affected States operate at least at the same level of service quality as Verizon's systems before the transaction.

23. For the OSS transition in West Virginia, an independent third-party consultant should establish readiness criteria and use that criteria to conduct a pre-cutover assessment, including testing and a mock cutover, to determine the readiness of Frontier's wholesale OSS for cutover. The cutover in West Virginia should not be allowed to take place until the consultant has found that Frontier's wholesale OSS operate at least at the same level of service quality as Verizon's wholesale OSS prior to the transaction.

24. The FCC should allow CLECs to review Verizon and Frontier's OSS transition plans for the 13 Affected States and Verizon and Frontier's cutover plan for West Virginia. The FCC should also allow CLECs to conduct testing of Frontier's systems for West Virginia at least

30 days before cutover and to conduct testing of the replicated systems for the 13 Affected States at least 30 days before those systems are operated by Verizon in full production mode. CLECs should have the opportunity to test real data in a test environment that will mirror the live environment. Before the cutover from Verizon's systems to FairPoint's systems in New England, One Communications was given the opportunity only to test against incomplete information in a test environment. One Communications' employees were told that the data would be complete and accurate once FairPoint's systems went "live," but that was not the case. The FCC should prevent the same mistake from happening here.

25. The FCC should also require similar oversight and testing of the future integration of the replicated systems for the 13 Affected States into Frontier's existing systems.

REDACTED - FOR PUBLIC INSPECTION

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Paul Olenik

Dated: 1/20/2010