

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 16-872

**Joint Petition for Findings in Furtherance of the Acquisition of
FairPoint Communications, Inc. and its New Hampshire Operating
Subsidiaries by Consolidated Communications Holdings, Inc.**

**FAIRPOINT'S MOTION FOR LEAVE TO REPLY,
AND FAIRPOINT'S REPLY, TO LABOR INTERVENORS'
RESPONSE TO OBJECTIONS TO MOTION TO COMPEL**

1. FairPoint Communications, Inc. ("FairPoint") hereby respectfully moves the Public Utilities Commission ("Commission") for leave to reply to the "Response of Labor Intervenors to Objections to Motion to Compel" (the "Response"), which was filed on behalf of the Labor Intervenors¹ on February 23, 2017.

2. The Commission should reject Labor Intervenors' request to gain access to some or all of FairPoint's pre-merger submission to the Federal Trade Commission in compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (the "HSR Act"). As FairPoint explained in its original Objection to the Motion to Compel, submissions under the HSR Act are statutorily confidential, under 15 U.S.C. § 18a(h), subject to a disclosure exemption when disclosure "may be relevant to any administrative or judicial action or proceeding."

3. Labor Intervenors' Response entirely fails to demonstrate how disclosure of FairPoint's HSR documents would be relevant under the narrow statutory scope of the present acquisition proceeding.

4. Nor have Labor Intervenors attempted to overcome the Commission's "established principle" that discovery in utility merger proceedings is allowed only concerning the actual

¹ The Labor Intervenors are: Communications Workers of America Local 1400 and International Brotherhood of Electrical Workers ("IBEW") Locals 2320, 2326, and 2327, which form IBEW System Council T-9.

merger as it is presented, and not on the parties' pre-merger thinking about the proposed transaction. *In re Verizon New England, Inc.*, DT 07-011, Order No. 24,767 (June 22, 2007).

5. Finally, FairPoint is concerned about the implication that discovery activities in other state proceedings, which apply different statutory standards, can or should lend weight to a similar discovery request in New Hampshire.

I. Labor Intervenors Ignore the Narrow Statutory Scope of the Present Proceeding.

6. Labor Intervenors' reliance on state regulatory proceedings involving fully regulated utilities entirely ignores the enormous difference in scope of the Commission's narrow statutory review in this proceeding. Unlike the utility companies involved in the *Unitil* case in New Hampshire,² or in the Montana and Delaware cases cited by Labor Intervenors, FairPoint's ILEC-ELECs are now substantially deregulated. The Commission should apply a much stricter standard of relevance in a proceeding with a narrow scope of review rather than one subject to comprehensive regulatory review.

7. The Commission is reviewing the present transaction under RSA 374:30, II, which asks the Commission to make a finding that Consolidated "is technically, managerially, and financially capable of maintaining the obligations of an incumbent local exchange carrier set forth in RSA 362:8 and RSA 374:22-p." The two referenced statutes concern FairPoint's existing ILEC-ELEC obligations regarding basic retail service (in RSA 362:8) and wholesale services (in RSA 374:22-p).

8. New Hampshire now expressly eliminates any requirement that the Commission must approve this transaction. *See* RSA 374:30, I ("commission approval shall not be required for any . . . transfer, lease, or contract by an excepted local exchange carrier").

² *Joint Petition of Unitil Corp. and Northern Utilities Natural Gas for approval of a stock acquisition*, DT 08-048 ("*Unitil*"), Order No. 25,014 on Motions for Confidential Treatment (Sept. 22, 2009).

9. Similarly, while the two statutes at issue in the *Unitil* case, RSA 374:33 and RSA 369:8, II(b), each requires Commission approval for stock acquisitions, both statutes were amended in 2011 to prohibit their application to ELECs. *See* RSA 374:33 (“commission approval shall not be required for any acquisition of an excepted local exchange carrier”) & RSA 369:1-a (“The provisions of this chapter shall not apply to any excepted local exchange carrier”).

10. The narrow statutory scope of this proceeding necessarily constrains the information that is relevant to the Commission’s review. Labor Intervenors have not even attempted to explain how FairPoint’s pre-merger assessment of the competitive impacts of the proposed transaction, as expressed in FairPoint’s HSR documents, might be relevant to the Commission’s assessment of Consolidated’s capabilities to maintain the basic service and wholesale service obligations of an ILEC-ELEC. The simple fact is that the HSR documents are not relevant to the issues before the Commission.

11. Even if the Labor Intervenors had provided some basis for relating the HSR documents to the narrow issues now before the Commission, the connection would be far too attenuated and tangential to outweigh FairPoint’s statutory right to non-disclosure under 15 U.S.C. § 18a(h). The Motion to Compel must be denied.

II. Labor Intervenors have not overcome the Commission’s “established principle” in discovery disputes in merger proceedings.

12. The requested HSR documents by definition involve FairPoint’s pre-merger view of the proposed transaction. The information thus falls squarely under the Commission’s “established principle that the Commission will not compel the discovery of information simply to shed light on the thinking of parties that enter into contracts subject to our review.” *In re Verizon New England, Inc.*, DT 07-011, Order No. 24,767 (June 22, 2007).

13. Labor Intervenors have not attempted to show how FairPoint's pre-merger view of the proposed transaction, as reflected in its HSR documents, has any relevance to the Agreement and Plan of Merger that is under review by the Commission.

14. Especially in this proceeding, which already involves a narrow statutory standard for the Commission's review, the Commission should not abandon its established principle barring the compelled discovery of petitioner's pre-merger assessments of the proposed transaction.

III. The Commission should not give weight to discovery activities in other states.

15. FairPoint is concerned that the Executive Director asked Labor Intervenors to report on discovery activities in the parallel proceedings in Maine and Vermont. As Labor Intervenors indicate, FairPoint disclosed portions of its HSR documents to Labor Intervenors pursuant to a protective agreement in Maine, while discovery has not yet begun in Vermont. Nonetheless, the status of discovery in the other states is not relevant to the discovery process in New Hampshire.

16. First, the statutory scope of the Maine and Vermont proceedings is broader than the statutory scope of the present proceeding in New Hampshire. Maine and Vermont have not substantially deregulated their ILECs, the way New Hampshire has with its ILEC-ELECs. As a result, whether the Maine Public Utilities Commission determines that HSR submissions "may be relevant" (and subject to disclosure under 15 U.S.C. § 18a(h)) in its parallel proceedings should have no bearing on the New Hampshire Commission's decision under its own, narrower statutory standard. The New Hampshire Commission should resolve the Motion to Compel by applying the specific standards of New Hampshire law to the facts presented. Under the narrow scope of RSA 374:30, II, the Commission should rightly conclude that FairPoint's HSR documents are not relevant to the Commission's statutory review in this proceeding.

17. Similarly, Labor Intervenors' access to confidential materials in Maine should have no bearing on Labor Intervenors' request for access to the same or similar materials in New Hampshire. The protective agreement presently in place in the Maine proceeding expressly prohibits any party from using the confidential information obtained under that agreement in any other proceeding. Even if Labor Intervenors may have obtained knowledge of the contents of FairPoint's HSR documents through discovery in Maine, they are not permitted to use that knowledge in New Hampshire.

18. The Commission should reject any suggestion that disclosure of confidential information in Maine reduces or in any way affects the need for non-disclosure in New Hampshire. The New Hampshire Commission must make its own independent decision regarding confidentiality issues and should not give any weight to the decisions made by other state commissions in parallel proceedings.

IV. Conclusion

19. In the present proceeding, the Commission must determine whether the relevance, if any, of FairPoint's HSR documents to the narrow issues in this proceeding outweighs FairPoint's statutory right of confidentiality under 15 U.S.C. § 8a(h). The Labor Intervenors make a broad claim of relevance without making any effort to tailor their claims to the narrow scope of the Commission's statutory review in this proceeding. The Labor Intervenors have also not responded to FairPoint's objection that the HSR documents are not relevant under the Commission's "established principle" of barring discovery of a party's pre-merger evaluation of the transaction, as contrasted with a review of the actual transaction that has been presented to the Commission. Finally, FairPoint is concerned about suggestions that the discovery decisions

that other states, in parallel proceedings, have reached have any bearing on the decision that the New Hampshire Commission must reach in this proceeding under New Hampshire law.

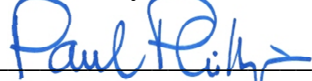
WHEREFORE, FairPoint respectfully requests that the Commission:

- A. Grant leave to FairPoint to make the foregoing reply;
- B. Give due consideration to FairPoint's reply;
- C. Deny Labor Intervenors' Motion to Compel; and
- D. Order such other relief as may be appropriate.

Respectfully submitted this 24th day of February, 2017.

FAIRPOINT COMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I, Paul J. Phillips, Esq., hereby certify that on the date indicated below, I caused the attached to be served pursuant to N.H. Admin. Rule Puc 203.11

Dated: February 24, 2017



Paul J. Phillips, Esq.