

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DT 16-872
Consolidated Communications Holdings, Inc.

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

**RESPONSE OF LABOR INTERVENORS
TO OBJECTIONS TO MOTION TO COMPEL**

As requested in the letter from the Executive Director dated February 22, 2017, Communications Workers of America Local 1400 and International Brotherhood of Electrical Workers ("IBEW") Locals 2320, 2326, and 2327, that form the IBEW System Council T-9 (collectively "Labor Intervenors") file this Response to the Objections of FairPoint Communications, Inc. ("FairPoint") to Labor Intervenors' Motion to Compel Discovery Responses. In particular, the letter requested a response to FairPoint's assertion that FairPoint cannot be compelled to provide documents it provided to the Federal Trade Commission in FairPoint's Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR") filing, citing *Lieberman v. Federal Trade Commission*, 771 F.2d 32 (2nd Cir. 1985) ("*Lieberman*").

Initially, Labor Intervenors would note that the *Lieberman* decision is more than 30 years old and that state utility commissions have reviewed dozens, if not hundreds, of proposed mergers and acquisitions since that time. During the past 30 years, to the best of Labor Intervenors' knowledge, no state utility commission has denied parties access to HSR filings based on *Lieberman* or for any other reason related to an interpretation of the HSR.

The reasons for that are clear. *Lieberman* addressed a narrow issue of federal law. As stated by the Second Circuit in its opinion: "The question is whether section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h) (1982), enacted as part of the Hart-Scott-Rodino Antitrust

Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 ("H-S-R"), prohibits the [Federal Trade] Commission from furnishing premerger information to state attorneys general acting in their *parens patriae* capacities." *Lieberman* at 33.¹

That is, the question before the court was whether Section 18a(h) prohibited the Federal Trade Commission ("FTC") from disclosing information that was in the FTC's possession solely because it was contained in an HSR filing. The Court held that Section 18a(h) prohibited the FTC from disclosing HSR documents. *Lieberman* at 37-40.

That decision, however, is irrelevant to the issue of whether the parties to the proposed transaction are required to disclose the documents in a separate proceeding in which they are parties, such as this state regulatory proceeding. In fact, this Commission and other state utility commissions have addressed that specific issue.

In 2009, this Commission reviewed Section 18a(h) and held that the confidentiality provision in the HSR provided a basis for having a protective order that kept HSR documents confidential. Importantly, the utility was required to provide the documents to the parties, but the documents were provided subject to the typical confidentiality protections that exist in a protective order. Specifically, the Commission ruled:

Additionally, regarding the request for confidential treatment of the Hart-Scott-Rodino filing, Staff 1-1/OPA 3-5, such filings are generally not subject to public disclosure pursuant to Federal law. See 15 U.S.C. § 18a(h). It is normally appropriate to defer to the federal government's judgment with regard to the confidentiality of such information. See *Public Service Company of New Hampshire*, 85 NH PUC at 467. Accordingly, this is an additional reason for our conclusion that the information identified therein should be given confidential treatment.

¹ The specific provision in federal law provides as follows: "**Disclosure exemption.** Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress." 15 U.S.C. § 18a(h) (hereafter "section 18a(h)").

Unitil Corp and Northern Utilities, Inc., Docket No. DG 08-048, Order No. 25,014 (Sept. 22, 2009), slip op. at 6, 2009 N.H. PUC LEXIS 84, *10.

Two other rulings from state utility commissions are instructive concerning this issue. In 1999, the Montana Public Service Commission evaluated legal arguments very similar to those made by FairPoint here. The Montana commission held that section 18a(h) dealt solely with restrictions on the FTC's ability to provide documents in response to information requests under federal law, and that the parties to the transaction were required to produce HSR documents before the state utility commission. That commission held: "The Hart-Scott-Rodino Act has the purpose of protecting certain information maintained by the Federal Government from access by the public under the Freedom of Information Act. Likewise, the public is prevented access to this information by the Protective Order, while the necessary parties and the Commission have access under the protections provided by Montana law." *Joint Application of Qwest Communications Corp. and US West Communications, Inc.*, 1999 Mont. PUC LEXIS 121, *5-6 (Dec. 14, 1999).

More recently, a hearing examiner with the Delaware Public Service Commission reviewed a similar attempt by merging utilities to prevent access to HSR documents. The examiner's decision reviewed section 18a(h), *Lieberman*, and other authorities and concluded as follows:

I find that 18 U.S.C. § 18a(h) was not intended to prohibit a non-governmental entity (such as the Joint Applicants) from producing the bidding documents from a Hart-Scott-Rodino filing in a state administrative proceeding like this one after being ordered to do so, considering that the parties requesting such documents have signed confidentiality agreements or are bound by state law from disclosing the contents of such documents. The Joint Applicants shall produce these documents

Delmarva Power & Light Co., Exelon Corp, PEPCO Holdings, Inc., Purple Acquisition Corp., Exelon Energy Delivery Co., LLC, 2014 Del. PSC LEXIS 102, *6 (Aug. 25, 2014).

Thus, these cases consistently reject attempts by the parties to a proposed merger to use federal law to prevent the production of documents on which they relied in developing the proposed transaction. The mere fact that the documents were provided to the FTC in an HSR filing is irrelevant to the parties' duty to produce relevant documents in discovery.

Finally, as requested in the Executive Director's letter, Labor Intervenors confirm that they have received, under a protective order, a substantive response to the same discovery requests in the Maine proceeding reviewing the proposed transaction between FairPoint and Consolidated. That protective order provides the FairPoint and Consolidated HSR documents to Labor Intervenors' counsel and expert witness (with the exception of one Consolidated HSR document that is available only to Labor Intervenors' counsel). Maine Public Utilities Commission Docket No. 16-00307, data requests IBEWL-003-001, IBEWL-003-002, and OPA-002-009 (Consolidated HSR documents); and IBEWL-004-001 (FairPoint HSR documents).

Labor Intervenors' request to intervene in the Vermont proceeding has not yet been ruled upon, so Labor Intervenors do not yet have discovery rights or access to confidential documents in the Vermont proceeding. Labor Intervenors, however, have been provided with the public responses to discovery requests made by the Vermont Department of Public Service, and those public responses include a statement indicating that Consolidated has provided the Department of Public Service with the HSR filing pursuant to the provisions of a protective order. Vermont Public Service Board Case No. 8881, data request DPS.CC.1-18.


WHEREFORE, the Labor Intervenors respectfully request the Commission to dismiss the Joint Petitioners' objections and compel the Joint Petitioners to provide complete and

accurate responses to Discovery Requests of Labor Intervenors as set forth in Labor Intervenors'
Motion to Compel.

Respectfully submitted,

Labor Intervenors,

BY:



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