STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 07-011

VERIZON NEW ENGLAND, INC. et alia

Joint Petition for Authority to Transfer Assets and Franchise to FairPoint Communications, Inc.

Order Following Second Pre-Hearing Conference

O R D E R N O. 24,792

September 27, 2007

I. INTRODUCTION

This order takes up certain recommendations made by the Commission's General Counsel, Donald Kreis, pursuant to RSA 363:17 as set forth in his letter of September 6, 2007. Merits hearings in this matter, which involve a request for authority to transfer the Verizon landline network in New Hampshire to FairPoint Communications, Inc., commence on October 22, 2007. By secretarial letter of August 29, 2007, the Commission granted a request of the Office of Consumer Advocate (OCA) for a pre-hearing conference before a hearings examiner to address issues related to the confidentiality of information and exhibits.

The pre-hearing conference took place as scheduled on September 6, 2007 and, as already noted, Mr. Kreis, acting as hearings examiner submitted his report and recommendations later that day. A transcript of the prehearing conference was filed, following which parties were given five days to file objections to the recommendations. OCA filed its concurrence on September 20, 2007. Verizon filed an objection the following day. Intervenor Irene Schmitt, a Verizon customer, filed a letter on September 21 that, while not styled as an objection, discussed her access to confidential materials in light of the hearings examiner's recommendations.

II. CONFIDENTIALITY CLASSIFICATION AND HEARING PROCEDURE

We begin with the issues on which the parties appearing at the prehearing conference are in agreement. The participants agreed that there should be at least three categories of information and documents, including pre-filed direct testimony: public, confidential and highly confidential. The public documents include those which are available for public inspection and copying pursuant to RSA 91-A:4. The confidential and highly confidential documents are those that the parties agreed should not be publicly available in light of RSA 378:43 (governing public availability of certain information filed by telecommunications utilities). Confidential information consists of data shared with signatories to protective agreements with the Joint Petitioners (Verizon New Hampshire and affiliates as well as FairPoint). Highly confidential information consists of competitively sensitive data that has been, and would continue to be, withheld from business competitors of the joint petitioners, regardless of party status. The participants agreed that, in order to maintain the appropriate level of confidentiality with respect to the two categories of non-public information, the Commission should exclude the public and, as to highly confidential information, business competitors of the joint petitioners, from the hearing room as appropriate.

The agreement necessitated the re-classification of certain documents, particularly pre-filed testimony, in light of the joint petitioners' original designations of four distinct categories of confidential documents. The joint petitioners agreed to undertake this work, subject to review as necessary.

We agree with the pre-hearing conference participants and the hearings examiner that this approach is reasonable. As noted by the hearings examiner, RSA 378:43 protects information if,

first, such information is not general public knowledge or published elsewhere, second, measures have been taken to prevent dissemination in the ordinary course of business, and, third, the information pertains "to the provision of competitive services" or "set[s] forth trade secrets that required significant effort and cost to produce" or is "other confidential, research, development, financial, or commercial information, including customer, geographic, market, vendor, or product specific data, such as pricing, usage, costing, forecasting, revenue, earnings, or technology information not reflected in tariffs of general application." RSA 378:43, II.

The Commission may, after notice and hearing, determine *sua sponte* or upon request of a party that information or records are not entitled to confidential treatment under the statute, but the affected utility has 30 days to seek reconsideration, followed by the right to appeal. RSA RSA 378:43, III. We must treat as confidential any information subject to review upon rehearing and/or appeal.

Obviously, there is much RSA 378:43 information at issue in this proceeding, and we have no reason at this point to disturb the parties' agreement as to what specific information is entitled to RSA 378:43 protection. But we note the possibility of revisiting such determinations, inasmuch as not all persons with a potential interest in public disclosure – a universe not limited to parties with formal intervenor status – have had an opportunity to raise issues related to public disclosure. Reserving the possibility of possible requests for public disclosure of information designated as confidential is consistent with longstanding Commission practice.

We further agree with the prehearing conference participants and the hearings examiner that it would defeat the purposes of RSA 378:43 to discuss information protected by the statute in a public as opposed to a closed hearing. In this regard, RSA 378:43, I(b) provides that

information or records placed "into the record during a telephone utility proceeding shall be maintained confidentially and shall not be considered public records." We conclude therefore that the Legislature has created a limited exemption to the public hearing requirements that would normally apply pursuant to RSA 91-A:2, II ("[a]ll public proceedings shall be open to the public"). But, consistent with the letter and spirit of RSA 91-A, we will expect the parties to minimize as much as possible the necessity of closing portions of the hearing in this case to the public. To do otherwise would undermine public confidence in whatever decision we ultimately render, a situation that is not in the interest of any party.

III. INFORMATION FROM HART-SCOTT-RODINO MATERIALS

Beyond these general questions of confidentiality, the hearings examiner's report and subsequent pleadings reveal a dispute concerning certain information that has been made available to some but not all parties. At issue is so-called Hart-Scott-Rodino (HSR) materials, i.e., information submitted to the U.S. Justice Department and the Federal Trade Commission pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, which provides federal authorities an opportunity to conduct an antitrust review of certain corporate ownership transactions.

The Labor Intervenors (i.e., the Communications Workers of America and the International Brotherhood of Electrical Workers) first raised this issue in a discovery motion submitted on April 20, 2007, but they withdrew the motion on June 19, 2007. Presumably this is because of developments in the parallel proceeding before the Maine Public Utilities Commission. In Maine, the Joint Petitioners agreed to produce the HSR materials to the Labor Intervenors and the Maine Office of Public Advocate (that state's counterpart agency to the OCA). *See* Procedural Order of May 3, 2007 in Maine Public Utilities Commission Docket No.

2007-67 (reporting this agreement).[1] We understand this agreement to have had the effect of giving OCA access to these materials as well.

The question taken up at the prehearing conference concerns whether intervenor Irene Schmitt and her counsel, Attorney Alan Linder of New Hampshire Legal Assistance, should also have access to this information. The hearings examiner concluded that Ms. Schmitt is "entitled to full disclosure of the unredacted materials in the case because her expected compliance with the nondisclosure agreement she has signed is more than sufficient to protect the joint petitioners' right to confidential treatment of information." By letter of September 21, 2007, Mr. Linder sought portions of pre-filed testimony containing information from the HSR materials.

Verizon objects to the hearings examiner's recommendation and Mr. Linder's request. It makes the following arguments: (1) that the hearings examiner unfairly raised this issue *sua sponte* at the prehearing conference, after Mr. Linder indicated no intent to seek this information, and (2) that notwithstanding the views of the hearings examiner applicable law justifies not disclosing the information to Ms. Schmitt or her counsel.

We take up the legal issue first. Verizon relies upon the text of the Hart-Scott Rodino Act itself, which provides in relevant part that HSR information filed with the federal authorities "shall be exempt from disclosure" under the federal Freedom of Information Act "and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding." 18 U.S.C. §18a(h). Verizon further invokes federal case law to the effect that this exemption is to be strictly construed.

[1] Orders of the Maine Public Utilities Commission are available via that agency's web site, www.maine.gov/mpuc/index.html.

In our view, the cited statutory language supports rather than undermines Ms. Schmitt's request for access to information from the HSR materials. As an initial matter, we observe that the Freedom of Information Act governs the public's right of access to information filed with federal agencies and does not resolve the question of whether a party subject to discovery in administrative proceedings before a New Hampshire state agency must provide information to another party. Moreover, even if 18 U.S.C. § 18a(h) were directly applicable to this situation, the statute contains an explicit exemption for information or material that is "relevant to any administrative . . . proceeding." Finally, Verizon's agreement to provide the information in Maine undermines its assertion that the information cannot be disclosed in New Hampshire.

Anticipating the latter point, Verizon contends Ms. Schmitt and her attorney are not entitled to HSR information notwithstanding the Maine disclosures because "no third-party intervenors" (other than state agencies and Labor) have been provided access to the HSR material in any of the state proceedings in Maine, Vermont and New Hampshire." Verizon Objection at 6. This is unavailing because there is really no basis for characterizing Ms. Schmitt as a "third-party intervenor" in some sense that the Labor Intervenors are not.

Next we consider the contention that Ms. Schmitt is not entitled to information from the HSR materials because it was the hearings examiner and not Ms. Schmitt who initially raised the issue. According to Verizon, the hearings examiner "stepped beyond his role not only by suggesting that a party [i.e., Ms. Schmitt] abandon [her] position, but then by indicating that he would advocate for that new position on the party's behalf." *Id*. at 5. This, in the opinion of Verizon, "turns the Commission's discovery process on its head," is "flatly inconsistent" with

unspecified Commission rules, is unfairly prejudicial and raises significant but unspecified due process questions. *Id*.

The basis of these assertions is that, in a motion submitted on September 4, 2007, Mr. Linder sought access to a less redacted version of pre-filed testimony upon a clarification of his client's right to information withheld by FairPoint but not Verizon. In support of this view, Verizon points out that Mr. Linder originally filed but later withdrew an earlier version of this motion containing references to both Verizon and FairPoint. Verizon also correctly points out that it was the hearings examiner, and not Mr. Linder, who first raised the possibility at the pre-hearing conference that he and his client might be entitled to access to completely unredacted versions of all testimony, including testimony relying on HSR materials. The hearings examiner then made clear at the prehearing conference itself, and again in his report and recommendation, his opinion that Ms. Schmitt was entitled to have completely unredacted testimony.

The worst that can be inferred about the situation, from Verizon's perspective, is that it was surprised by Ms. Schmitt's renewed efforts to gain access to unredacted testimony. To the extent that this constituted a problem, it was cured by Verizon having been given the opportunity to argue its position via objection to the hearings examiner's recommendations.

We perceive nothing untoward about the fact that the hearings examiner indicated to Ms. Schmitt that she might be entitled to fully unredacted testimony. What we are dealing with here is not new discovery but the disclosure of pre-filed testimony and documents that have already been circulated between the petitioners, staff, OCA, and Labor to a party that is not a competitor and who has signed a confidentiality agreement. The fairness of the end result is also supported by Mr. Linder's statement that:

> As I said before, during the course of the discovery proceedings, I was trying to work within the parameters that the parties had created themselves. It wasn't until I read the testimony of the OCA, Staff, and Labor that I realized the extent of the information that I had not been provided with. And, so, and I'm not sure I'm still going to know – reading their testimony, it's hard to tell which information has been withheld by the expert witnesses that are Hart-Scott-Rodino materials -- I mean sourced. So, our position is, we tried to work within the parameters. We didn't realize the extent of the information that was -- that we weren't being provided with. We, really, we need that information at least to the extent that it's referenced in the testimonies of OCA, Staff and Labor. And, our position now is, we would like that information. We feel that we would need it to assist us in presenting our ultimate position and recommendations to the Commission in this case.
>
> I apologize to any party, to the extent that what I appear to be agreeing to in the past is different than what I'm saying today. *I simply didn't realize the extent of the information that was being withheld* and how extensively Labor, OCA, and Staff were relying on that information as part of their expert witness testimony.

Tr. 9/6/07 at 25-26 (emphasis added).

In the context of civil litigation, the New Hampshire Supreme Court has stressed that trial judges enjoy broad discretion in the discovery realm, notably characterizing the judge's task as not merely ruling but "managing and supervising." *See, e.g., Blagbrough Family Realty Trust v. A&T Forest Products, Inc.*, ___ N.H. ___, ___, 917 A.2d 1221, 1232 (2007) (citation omitted). This implies that parties should be prepared for proactive efforts to attain fairness of the sort undertaken here by the hearings examiner, subject in this instance to the additional protections afforded by our right to reject recommendations under RSA 363:17.

IV. OPERATING SYSTEMS TEST PROCESS DOCUMENT

The last issue considered by the hearings examiner concerns the so-called Operating Systems Test Process Document prepared for Fairpoint, which sought to limit production of this document and portions of testimony addressing information in the

document. The hearings examiner recommended that we direct FairPoint to disclose the document to all parties that have signed a confidentiality agreement, noting that the document relates to a central issue in the case, namely, the extent to which FairPoint is capable of transitioning from Verizon operating the land-line network to FairPoint operating it. Although the hearings examiner indicated he expected FairPoint to object to this recommendation, FairPoint did not do so. We agree with the hearings examiner that all parties are entitled both to the document and references to information in it, assuming they have entered into an appropriate agreement with FairPoint to protect the confidentiality of the information.

V. HEARING PROCEDURE

A review of the hearings examiner's recommendations, and the transcript of the prehearing conference, makes clear that significant issues about the conduct of the hearings that begin next month remain unresolved. In the main, these issues relate to logistics about the handling of exhibits, the preparation of transcripts and measures to assure the appropriate confidentiality of information pursuant to RSA 378:43, I(b). To assist in the efficient and orderly conduct of the hearings, we have scheduled an informal conference for October 9, 2007 at 1:30 p.m., to be conducted by the Commission's general counsel. The purpose of the informal conference is for the parties to seek agreement on appropriate hearing procedures, in the absence of which we will issue an order based upon the general counsel's report of the conference.

Based upon the foregoing, it is hereby

ORDERED, that the September 6, 2007 recommendations of the hearings examiner in this docket are adopted; and it is further

ORDERED, that parties wishing to affect determinations as to hearing procedures in this docket may attend an informal conference scheduled for October 9, 2007 at 1:30 p.m.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of September, 2007.

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary