

Via Hand Delivery

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June 8, 2007

Debra A. Howland, Executive Director
& Secretary
Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301



Re: DT 07-011 Joint Application of Verizon New England and FairPoint Communications for Transfer of Assets of Verizon New England

Dear Ms. Howland:

Enclosed for filing on behalf of FairPoint Communications, Inc. are an original and seven (7) copies of FairPoint's objection to the third motion to compel filed by the Office of Consumer Advocate. The confidential information has been redacted from the public version of the objection to the OCA's motion. Seven copies of the objection, including the confidential information, are also enclosed pursuant to RSA 378:43.

A compact disk containing the public version of the objection is also enclosed.

Very truly yours,

A handwritten signature in black ink that reads "Patrick C. McHugh".

Patrick C. McHugh
PCM:kaa
Enclosures
cc: Electronic Service List

NHPUC JUN08'07 PM 4:45

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 07-011

VERIZON NEW ENGLAND INC., BELL ATLANTIC COMMUNICATIONS INC.,
NYNEX LONG DISTANCE CO., VERIZON SELECT SERVICES INC.,
AND FAIRPOINT COMMUNICATIONS, INC.

Transfer of Assets to FairPoint Communications, Inc.

**Objection by FairPoint Communications, Inc. to
Third Motion to Compel by The Office of the Consumer Advocate
(Group I Data Requests)**

NOW COMES FairPoint Communications, Inc. ("FairPoint"), by and through its attorneys, Devine, Millimet & Branch, Professional Association, and respectfully objects to the Third Motion to Compel FairPoint's Responses to Data Requests (Group I) filed by the Office of the Consumer Advocate.

Introduction

1. OCA's Third Motion to Compel closely relates to OCA's Second Motion to Compel, now fully briefed by OCA and FairPoint. In short, the third motion to compel seeks the same category of information as the second motion to compel. OCA supports the third motion with virtually identical arguments as the second motion. The arguments FairPoint asserted in its objection to the second motion apply with equal force to the third motion.¹

¹ Given the similarities between the two motions, FairPoint submits a somewhat abbreviated objection to the third motion, and respectfully refers the Commission to FairPoint's objection to the second motion.

2. OCA's third motion to compel concerns a small set of data requests which seek information not about the transaction before this Commission, but about internal analyses and considerations underlying the negotiations preceding the FairPoint Board of Directors' approval of the transaction. In nearly identical fashion as the second motion, OCA presses its third motion to compel on the basis of arguments that this Commission has rejected in prior orders. For the reasons set forth below and in FairPoint's objection to OCA's second motion, OCA's third motion to compel lacks merit and should be denied.

Factual Background

3. The immediate motion concerns four Group I data requests on which FairPoint and OCA have not reached agreement. The four data requests can be characterized generally as seeking information regarding internal financial analyses completed in advance (some well in advance) of the execution of the January 15, 2007 Merger Agreement that is the subject of this proceeding. The disputed data requests do not relate to the transaction before this Commission—the deal as struck. Instead, the disputed data requests seek highly confidential information exchanged by and between FairPoint and its financial advisors during the period of time prior to execution of the Merger Agreement.

4. The following paragraphs describe the four data requests at issue in OCA's third motion to compel and provide an overview of FairPoint's responses to same. All four data requests concern FairPoint's S-4 filings with the Securities and Exchange Commission (SEC), which filings are publicly available.

5. OCA data request 1-14 requested the following information:

The S-4 states: "During the summer of 2005, FairPoint asked Lehman Brothers, Inc., referred to herein as Lehman Brothers, to convey to Verizon FairPoint's interest in acquiring rural access lines. That led to an initial meeting on September 30,

2005 between management of FairPoint and Verizon. Based on Verizon's initial reaction, FairPoint's management, at FairPoint's December 14, 2005 board of directors meeting, requested approval to pursue further discussions with Verizon, which approval was granted. In December 2005, FairPoint signed a non-disclosure agreement with Verizon." Provide any and all documents prepared for and/or using [sic] during the meeting of September 30, 2005.

6. FairPoint objected to data request 1-14 to the extent it seeks confidential or proprietary information of a third party which FairPoint is not authorized to disclose. In addition, FairPoint objected to the extent data request 1-14 seeks information protected from disclosure by the attorney client privilege and the work-product doctrine.

7. Without waiving its objections, FairPoint responded by affirming that no documents were prepared for the September 30, 2005 meeting by either party to the transaction. FairPoint further responded by producing 48 pages of highly confidential documents, **[BEGIN PROPRIETARY]**

[END

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8. FairPoint has responded fully to OCA data request 1-14

9. OCA data request 1-17 requested the following information:

The S-4 states: "On May 19, 2006, FairPoint engaged Morgan Stanley & Co. Incorporated, referred to herein as Morgan Stanley, as a financial advisor in connection with a proposed transaction with Verizon." Provide any and all documents provided by FairPoint or Verizon to [Morgan Stanley] in connection with its role as a financial advisor and describe fully the scope of [Morgan Stanley]'s engagement.

10. FairPoint objected to data request 1-17 to the extent it seeks confidential or proprietary information of a third party which FairPoint is not authorized to disclose. In

addition, FairPoint objected to data request 1-17 on the grounds that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

11. Without waiving its objections, FairPoint responded by describing the nature of the work Morgan Stanley was retained to perform in connection with the proposed transaction before the Commission.

12. OCA data request 1-23 requested the following information:

The S-4 states: "On January 2, 2007, FairPoint's board of directors met telephonically with FairPoint's management team, legal counsel and financial advisors to discuss the status of the proposed transaction. . . . Representatives of Deutsche Bank Securities Inc., referred to herein as Deutsche Bank, whose engagement as financial advisor to FairPoint was confirmed on January 4, 2007, participated in the meeting and addressed the scope of the work completed by them in connection with the evaluation of the proposed transaction and indicated that further due diligence in certain areas was required." Provide any and all documents provided by FairPoint or Verizon to Deutsche Bank in connection with its role as a financial advisor and describe fully the scope of Deutsche Bank's engagement."

13. FairPoint objected to data request 1-23 to the extent it seeks confidential or proprietary information of a third party which FairPoint is not authorized to disclose. In addition, FairPoint objected to data request 1-23 on the grounds that it is overly broad, unduly burdensome and seeks information which is not reasonably calculated to lead to the discovery of admissible evidence.

14. Without waiving its objections, FairPoint responded by describing the nature of the work Deutsche Bank was retained to perform in connection with the proposed transaction before the Commission. FairPoint also provided a [BEGIN PROPRIETARY]

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15. OCA data request 1-26 requested the following information:

The S-4 states: "Discounted Cash Flow Analysis of Spinco. Deutsche Bank performed a discounted cash flow analysis for Spinco on a stand-alone basis based on financial estimates for 2007 through 2012 provided by FairPoint. FairPoint management's financial estimates for 2007 through 2012 assumed that FairPoint will make certain capital investments related to the Spinco business after the execution of the merger agreement. Deutsche Bank calculated the discounted cash flow values for Spinco as the sum of the net present values of (i) the estimated future cash flow that Spinco would generate for the years 2007 through 2012, plus (ii) the value of Spinco at the end of that period." Provide any and all information, assumptions and documents upon which Deutsche Bank relied in order to conduct its discounted cash flow analysis, including the rationale for any and all assumptions. For data provided, please provide in a machine-readable Excel format.

16. FairPoint objected to data request 1-26 to the extent it seeks confidential or proprietary information of a third party which FairPoint is not authorized to disclose. In addition, FairPoint objected to the extent data request 1-26 is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence and would require FairPoint to create evidence that does not currently exist. FairPoint could not know the universe of what Deutsche Bank reviewed nor the thought process that drove Deutsche Bank's analysis.

17. OCA and FairPoint have worked together to try to resolve these issues without motion practice. These efforts have included FairPoint's production of [BEGIN

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[END PROPRIETARY]

18. Through the process of answering nearly 1,500 data requests, FairPoint has provided OCA more than sufficient documentation for OCA to determine whether this transaction will cause no net harm, including, without limitation: **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

Argument

I. This Commission Has Repeatedly Refused To Compel Production Of The Precise Information OCA Seeks.

19. It is well settled that “discovery should be relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence.” Re Public Service of New Hampshire, 86 NH PUC 730, 731-32 (2001). Broad though it is, this standard “does not exempt discovery requests from principles of reasonableness and common sense.” Re City of Nashua, Order 24,654 (August 7, 2006), *citing* State v. Barnes, 150 N.H. 715, 719 (2004). At the outer limits, where a motion to compel seeks discovery of information which could under no circumstance be considered relevant, the motion must be denied. Re PSNH, 86 NH PUC at 731-32. The information OCA seeks lies beyond the outer limits.

20. This Commission has made it clear that information concerning negotiations, considerations and analyses leading up to a final contract can under no circumstances be considered relevant to proceedings concerning that contract, and therefore, the Commission has routinely denied motions to compel such information. See Re City of Nashua, Order No. 24,654 (August 7, 2006), p. 3, *reconsideration denied by Re City of Nashua*, Order No. 24,671 (September 22, 2006), p. 3; Re PSNH, Order No. 24,310 (April 16, 2004), p. 7. The

Commission's rulings rest on the precept that all that is relevant is the transaction before the Commission, as fixed by the operative contractual documents, regardless of how the parties regarded the negotiations and regardless of the assumptions upon which the parties relied.² Re City of Nashua, Order No. 24,654 at p. 4.

21. In this proceeding, the only matter before the Commission for approval is the terms of the final Merger Agreement and the related contracts between FairPoint and Verizon. The Commission is charged with reviewing this specific proposed transaction to determine whether it will adversely affect the public interest. Re New England Electric System, 84 NH PUC 502 (1999). The Commission's only concern, therefore, is the transaction before it.

22. In this discovery process, FairPoint has provided a universe of information concerning FairPoint itself and the merger transaction that is the subject of this proceeding. FairPoint has produced **[BEGIN PROPRIETARY]**

[END PROPRIETARY] More generally, FairPoint has provided all manner of information, through detailed pre-filed direct testimony, responses to data requests and document production, concerning FairPoint's financial condition,

² The Commission decisions are described in detail in FairPoint's objection to the second motion to compel.

structure and operations. OCA and its consultants have more than enough information to ensure that the residential ratepayers are represented in this docket.

23. As in Re City of Nashua, discovery in this case has been “encyclopedic.” Order No. 24,671 at p. 2. OCA has a tremendous volume of information that relates to the transaction before this Commission. As in the Re City of Nashua and Re PSNH proceedings, the further information sought in OCA’s third motion to compel as in the second motion, is irrelevant, and the motion must be denied.

II. OCA’s Relevance Arguments Have Been Rejected In Prior Commission Discovery Orders.

24. OCA’s arguments supporting its claim of relevance have already been rejected in prior Commission orders. At the outset, as it did in its second motion to compel, OCA admits that it has no idea what relevant information, if any, the requested documents might contain. Instead, OCA speculates as to what the information sought might contain and reveal. See OCA’s third motion to compel at ¶¶30, 44, 53, 63 (“it is not possible to state specifically what the evidence will be.”)

25. The data requests at issue in OCA’s motion, requests 1-14, 1-17, 1-23 and 1-26, all seek documents provided to or received from FairPoint’s financial advisors concerning analysis and negotiation of the proposed transaction during the period of time pre-dating entry into the Merger Agreement before this Commission. OCA asserts three different claims of relevance. None is any different than the bases raised in OCA’s second motion to compel. None is any different than the bases rejected by this Commission in the prior cited orders, and none is persuasive in light of those orders.

26. First, OCA speculates that the information will unveil FairPoint’s “spin” or reveal something FairPoint has to hide, though OCA offers nothing to support that speculation. See

OCA's third motion to compel, ¶¶4, 35, 36. This Commission has already rejected such arguments as a basis to compel information about the negotiations leading up to a contract. Re City of Nashua, Order No. 24,654 at p. 4. The universe of relevant information is limited to the terms of the final agreement between FairPoint and Verizon. Even if OCA could point to some "spin" or to something FairPoint might be hiding, the information sought would not thereby become relevant.

27. Second, OCA asserts that the information might shed light on FairPoint's proposed debt levels and financial condition, and, not so subtly, the likelihood that FairPoint will be "financially distressed" in the future. See OCA's third motion to compel, ¶32. This Commission has flatly stated that information concerning assumptions that drove contract negotiations, even if at variance with public statements, is not relevant. Re City of Nashua, Order No. 24,654 at p. 4. More than ample information to allow OCA and this Commission to evaluate FairPoint's financial condition, including debt, has already been produced.

28. Third, OCA argues that the information leading up to the transaction at issue in these proceedings will allow the parties and the Commission to compare model results to the actual accounting and financial data to illustrate "gaps" between the two. See OCA's third motion to compel, ¶33. Again, OCA points to no evidence even suggesting a gap. In addition, FairPoint has produced sufficient financial data for OCA to find any gaps if they did exist. More fundamentally, this Commission has made clear that the assumptions that lead to a final deal are not relevant, even if those assumptions differ from public statements (something OCA does not allege, much less prove). Re City of Nashua, Order No. 24,654 at p. 4.

29. In short, OCA makes none other than the precise types of arguments the moving parties made in the Re City of Nashua and Re PSNH proceedings, all of which this Commission rejected in denying motions to compel similar types of information.

III. OCA Has Or Can Get The Information It Needs Through Other Means, Including by Using the Extensive Information FairPoint Has Already Produced.

30. OCA's third motion to compel, seeking irrelevant information concerning the period of time leading up to the transaction at issue, ignores OCA's ability and past success in obtaining the information it needs to analyze, understand and evaluate FairPoint and the proposed transaction, i.e., the only information relevant to this proceeding.

31. In its order denying the moving party's motion for reconsideration in Re City of Nashua, this Commission pointed out that it had not ruled that the cost information about the contracts at issue was irrelevant. "Rather, consistent with established precedent, we declined to require a litigant to disgorge materials developed in confidential contract negotiations with the expectation that, to the extent the terms of the contracts or the context of their negotiation are relevant, there are ample other ways of discovering the information." Re City of Nashua, Order No. 24,671 at p. 3. This Commission noted that the opposing party had provided detailed contracts, as well as detailed testimony, setting forth financial projections and assumptions concerning the issues in the proceedings. Similarly, in this proceeding, FairPoint has already produced a wealth of information to OCA, including, without limitation, **[BEGIN PROPRIETARY]**

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PROPRIETARY]

32. FairPoint has even produced [BEGIN PROPRIETARY]

[END PROPRIETARY] OCA and its consultants are armed with or can easily seek via other avenues the information they would need to perform endless analyses on their own. All of the information produced provides “reasonable avenues through which [OCA] can adduce evidence” about FairPoint’s ability to consummate the transaction and operate in New Hampshire. Re City of Nashua, Order No. 24,671 at p. 3. OCA has made no showing that the information it has received is inadequate. Absent such a showing, its third motion to compel must be denied.

Conclusion

33. For the above stated reasons, as further articulated in FairPoint’s objection to the second motion to compel, FairPoint respectfully requests that OCA’s third motion to compel be denied.

Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.

By its Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: June 8, 2007

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing objection was hand delivered this day to the Office of Consumer Advocate.

Dated: June 8, 2007

By: 

Daniel E. Will, Esq.