

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.

FairPoint Communications, Inc's
Response to Motion for Prehearing Conference with Hearings Officer
and Expedited Decision by The Office of the Consumer Advocate

NOW COMES FairPoint Communications, Inc. ("FairPoint"), by and through its attorneys, Devine, Millimet & Branch, Professional Association, and hereby responds to the Office of the Consumer Advocate ("OCA")'s Motion for a Prehearing Conference with Hearings Officer and Expedited Decision.

Factual Background

1. In Docket DT 07-011, FairPoint and Verizon seek Commission approval of a merger transaction whereby FairPoint seeks to acquire control of the land line assets and operations of Verizon New England Inc. ("Verizon") in New Hampshire, Maine and Vermont. The amount of discovery in this case is unprecedented. In the course of this New Hampshire proceeding, FairPoint alone has produced more than 2,000 responses to data requests and over 3,000 pages of documents as attachments. In so doing, FairPoint was called upon to produce some of its most highly competitively sensitive information. In an effort to protect itself from irreparable harm in disclosing this highly confidential information, while also being as forthcoming as possible, FairPoint endeavored to create a system of classifying responses and

their corollary attachments in accordance with levels of confidentiality. It was necessary to create this system in light of the differing status of the many interveners in this docket and due to the resolutions of discovery disputes on an informal basis. As an example, certain of the interveners are in direct competition with FairPoint; therefore, while they have the ability to sign the Protective Agreement in this docket and receive some confidential information, they are not able to receive competitively sensitive confidential information, due to the irreparable harm FairPoint would suffer as a result of any misuse of the information – whether intentional or otherwise.

2. Preliminarily, FairPoint (i) disputes much of the history provided by OCA in much of paragraphs 1 through 40 of its Motion and (ii) submits that the detailed history is not relevant to the issues now before the Commission. In the interest of conserving the Commission's time, FairPoint will dispense with a protracted historical perspective and instead will focus the Commission's attention on only those facts pertinent to preparation for and conduct of the hearing in this matter.

3. While FairPoint acknowledges that OCA has "expended significant amounts of its limited time and resources" in this proceeding, it is not alone. All parties, the petitioners included, have been called upon to expend significant amounts of time and resources preparing to present the Commission with the information it requires to render an informed decision.

4. FairPoint has gone above and beyond the requirements set forth in Commission rules and decisions to alleviate the burdens of the discovery process on OCA. It has undertaken to do so though no such obligation exists within either Commission rules or Commission decisions. For example, and as noted in a separate pleading filed this day, FairPoint prepared memoranda at OCA's request to assist OCA with confidentiality classification. In addition,

FairPoint resolved discovery disputes with OCA on a voluntary basis in an attempt to prevent the expenditure of time and resources on motion practice. FairPoint even agreed to review OCA's pre-filed testimony and recommend revisions to what FairPoint believed to be significant over-redaction of testimony.

5. Despite such efforts, OCA decided to file a request for the pre-hearing conference in a pleading designed to misconstrue FairPoint's good faith efforts to provide information.

Confidentiality

6. On July 24, 2007, in response to a request by OCA, FairPoint provided OCA and Commission Staff with two confidential memoranda in which it explained the confidentiality classification system and included a list of documents which had been produced at that point, listing the documents by classification level. Each memorandum states that it was prepared for the convenience of OCA and Staff and may not be used as an exhibit within this docket. FairPoint asked that neither OCA nor Staff disclose the contents of the memoranda to any other party to this docket. OCA has filed a separate Motion seeking a determination by this Commission as to the confidentiality of these memoranda.

7. On August 1, 2007, the interveners filed testimony. OCA filed five versions of the testimony of Susan M. Baldwin and four versions of the testimony of David Brevitz. OCA is the only intervener who filed more than one version of confidential testimony.¹

8. On August 23, 2007, in response to a demand from OCA, FairPoint provided OCA redlined versions of the Baldwin and Brevitz testimony, indicating which portions of the testimony could be declassified and made public. As OCA acknowledges in its Motion, FairPoint agreed to make any necessary changes on OCA's behalf and to distribute the revised

¹ Some witnesses filed a public version of their testimony and a confidential version of their testimony.

testimony. FairPoint agreed to undertake this task, though it had no obligation to do so under Commission rules or Commission decisions.

9. OCA has not provided any information to FairPoint regarding its allegation that many of FairPoint's suggested revisions "are not consistent with FairPoint's own redactions of its prefiled testimony, its responses to certain data requests and the related attachments, or FairPoint's memoranda on confidentiality of data responses and attachments." See OCA Motion at para. 36. Nor has OCA provided FairPoint an explanation of the alleged impact of its proposed revisions on the confidential designation of Verizon documents. Rather, on August 24, 2007, counsel for the OCA indicated to Patrick McHugh, counsel for FairPoint, that she would no longer discuss issues regarding confidentiality with FairPoint's counsel.

10. FairPoint acknowledges the practical difficulties associated with a five-tier confidentiality system and is willing to revise the levels of confidentiality. However, in light of the participation in this docket of a number of FairPoint's direct competitors, a three-tier confidentiality system is necessary and proper to protect FairPoint, as well as Verizon, from the substantial irreparable harm that would result from the disclosure of competitively sensitive information to direct competitors. The system should include three classifications of information: Level One: Highly Confidential – Non-Competitors; Level Two: Confidential; and Level Three: Public.

The Creation of Two Levels of Confidential Information is Necessary in this Docket, and This Commission Has Authority to Order the Creation of Two Levels.

11. The New Hampshire Right to Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. See RSA 91-A:4, I. There is a well-settled exception to this rule for records pertaining to "confidential, commercial, or financial interest" whose disclosure would constitute an invasion of privacy. See RSA 91-A:5,

IV. The terms “commercial or financial” include (but are not limited to) information such as business sales statistics, research data, technical designs, overhead and operating cost, and information on financial condition. Union Leader Corp. v. N.H. Housing Finance Authority, 142 N.H. 540, 553 (1997). The New Hampshire Supreme Court has established a balancing test for determining whether an asserted confidential, commercial, or financial interest is outweighed by the public’s interest in disclosure. Id. at 552-553. To show that information is sufficiently confidential to resist disclosure, courts have required the party objecting to disclosure to demonstrate that disclosure is likely to either impair the state’s ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person/entity from whom the information is obtained. Id. at 554. The emphasis is placed on the potential harm that would result from disclosure. Id.

12. Puc 201.04 provides that all documents submitted to the Commission or Staff in an adjudicative proceeding become public record, subject to RSA 91-A, but for certain exceptions, including an exception for documents entitled to confidential treatment according to RSA 378:43.

13. RSA 378:43 provides (with emphasis added) in pertinent part:

I. (a) Any information or records that a telephone utility provides to the public utilities commission or its staff as part or in support of a filing with the commission or in response to a request that the information or records be provided to the commission or its staff shall be maintained confidentially **and shall not be considered public records for purposes of RSA 91-A**, if the information or records satisfy the requirements of paragraph II.

II. In order to obtain confidential treatment under paragraph I, the telephone utility shall represent to the public utilities commission that the information or records

are not general public knowledge or published elsewhere; that measures have been taken by the telephone utility to prevent dissemination of the information or records in the ordinary course of business; and that the information or records:

(a) Pertain to the provision of competitive services; or

(b) Set forth trade secrets that required significant effort and cost to produce, or 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.

Many of the data responses and documents produced and to be produced by FairPoint in this proceeding are entitled to confidential protection, pursuant to RSA 378:43.

14. Puc. 203.08(n) further recognizes that the rule concerning motions for confidential treatment does not apply to materials submitted to the Commission pursuant to RSA 378:43, except that, when reasonably necessary to protect the confidentiality of such materials, the Commission shall issue a protective order requiring other parties receiving the material to maintain its confidentiality.

15. This Commission has consistently recognized that some documents are entitled to confidential protection and need not be disclosed in proceedings before it. See, e.g., Re Public Service Co. of New Hampshire, 90 NH PUC 323 (2005) (allowing for confidential treatment of PSNH's contracts with coal suppliers and firms providing coal transportation); Re Public Service Co. of New Hampshire, 85 NH PUC 463 (2000) (allowing for confidential treatment of business plans prepared by competitive energy suppliers). Information regarding when FairPoint will introduce a product, where it will introduce the product and how it will price the product would allow any competitor to change its own pricing of the same or a similar product earlier and in the

same place. For instance, if competitors are entitled to information that FairPoint plans to offer DSL in a particular town by the end of 2008, the competitor could and would, simply offer it first. These documents should be subject to an additional level of confidentiality.

16. There are a number of interveners in this docket, many of whom are direct competitors of one or both of the petitioners. A good deal of the voluminous information produced by the petitioners is competitively sensitive, such that its disclosure to direct competitors could result in substantial irreparable harm to the competitive position of one or both petitioners.

17. FairPoint has been asked to produce detailed information about its broadband plan for New Hampshire in a number of data requests. As even members of the public know at this point, FairPoint's plan for broadband deployment is a central issue in this proceeding. That being said, FairPoint's internal plans for marketing and actually deploying broadband technology in New Hampshire constitute highly confidential and competitively sensitive information, which, if turned over to FairPoint's direct competitors, could very well negatively impact FairPoint's ability to effectively deploy broadband technology to as many of New Hampshire's consumers as possible. The disclosure of the detailed network information to competitors would allow the competitors to adjust their business plans and marketing plans in response to information produced in a legal proceeding where the competitors otherwise would not have access to such information. Therefore, to require FairPoint to share this competitively sensitive information with those direct competitors who have intervened in this docket could have the effect of limiting FairPoint's ability to deploy broadband technology as widely as possible, which deployment OCA has argued strenuously must occur.

18. It is essential, therefore, that there be a safety mechanism in place in this docket to protect against disclosure of competitively sensitive information of this type to FairPoint's direct competitors. A single level of confidential protection is not sufficient to protect against substantial irreparable harm to FairPoint's competitive position.

19. This Commission has in the past allowed for the establishment of multiple tiers of confidentiality. See Re City of Nashua, 90 NH PUC 316 (2005) (allowing for creation of a level of particularly sensitive information, to which some, but not all interveners were allowed access). Commissions from other states have similarly allowed for the establishment of multiple tiers of confidentiality. See, e.g., Application of Central Telephone Company - Nevada d/b/a Sprint of Nevada, 2005 WL 2332066 (Nev.P.U.C.) (2005) (the "Sprint Proceeding" whereby the Nevada Public Utility Commission granted petitioners' motion to approve protective order establishing two tiers of confidentiality, "Confidential" and "Highly Confidential")²; Re Virginia Electric and Power Company, 2001 WL 34804769 (Va.S.C.C. 2001) (ordering that competitively sensitive information need not be made available to entities that sell electricity on the open market in retail or wholesale transactions); Southwestern Bell Telephone Company Notice of Intent and Application, 18 Tex. P.U.C. Bull. 1137 (1991) (affirming ruling approving a protective order including a highly sensitive information category).

20. This Commission has also taken measures to restrict access to certain types of highly confidential information, beyond the usual strictures applied to confidential material. For example, in Re North Atlantic Energy Corp., 87 NH PUC 396 (2002), J.P. Morgan Securities, Inc. ("J.P. Morgan") requested confidential treatment for two separate categories of information:

² The "Highly Confidential" designation included "particularly sensitive information, the disclosure of which might financially or competitively disadvantage a party and pose a serious business risk, such as particularized data regarding network facilities, revenues and costs, marketing plans and business strategies or information that could affect a company's status in, evaluation by, or access to financial markets."

Internal Confidential Information and Bidder Confidential Information. J.P. Morgan requested more restrictive treatment of Bidder Confidential Information, asking that it only be disclosed to Staff and OCA. This Commission held that J.P. Morgan had made a prima facie showing that the public's interest in disclosure was outweighed by the interests of the parties in confidentiality; therefore, the information was protected from disclosure. The Commission did not agree to limit the Bidder Confidential Information to Staff and OCA. However, it did agree to limit access to the Bidder Confidential Information to counsel and the chairperson of the Board of the single intervening party who had objected to non-disclosure of Bidder Confidential Information. This Commission held that if the intervening party wanted to expand the number of persons who could access the Bidder Confidential Information, it would need to proceed by motion.

21. While a Protective Agreement has been signed in this docket, the single level of confidential protection afforded by the Protective Agreement is not sufficient to guard against the substantial irreparable harm to FairPoint's competitive position that would result if FairPoint's direct competitors, who are interveners in this docket, are allowed access to competitively sensitive information. Therefore, two levels of confidential treatment are necessary in this docket: one for all information that should not be provided to the public, and a more restrictive level for information that should not be available to competitors. Establishing two levels of confidential treatment is clearly supported by law.

22. FairPoint's request for two (2) tiers of confidentiality is neither unusual nor unreasonable. In fact, an OCA consultant – David Brevitz – is familiar with such a process. Mr. Brevitz served as the project team leader for the Bureau of Consumer Protection within the Nevada Office of Attorney General in the Sprint Proceeding.

Conclusion

23. FairPoint respectfully requests that this Commission enter an Order establishing a multi-tier classification system governing this docket and including three classifications of information: Level One: Highly Confidential - Non-Competitors; Level Two: Confidential; and Level Three: Public. Upon entry of an Order, FairPoint will immediately undertake to re-designate all of its data responses and documents produced thus far in accordance with a three-tier system.

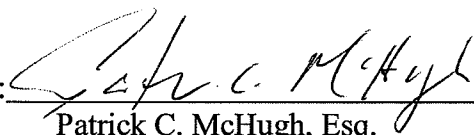
Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.

By its Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

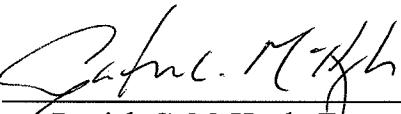
Dated: August 31, 2007

By: 
Patrick C. McHugh, Esq.
Frederick J. Coolbroth, Esq.
Daniel E. Will, Esq.
49 N. Main Street
Concord, NH 03301
(603) 226-1000
pmchugh@devinemillimet.com

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: August 31, 2007

By: 
Patrick C. McHugh, Esq.