

May 25, 2007

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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 each of FairPoint's objections to the second 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,


Daniel E. Will

DEW:kaa

Enclosures

cc: Electronic Service List



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
Second 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 Second Motion to Compel FairPoint's Responses to Data Requests (Group I) filed by the Office of the Consumer Advocate.

Introduction

1. This is a case in which discovery can only be "fairly described as encyclopedic." See Re City of Nashua, Order No. 24, 671 (August 7, 2006), p. 2. In an effort to establish that the proposed transaction at issue – FairPoint's acquisition of control over the land line assets and operations of Verizon New England Inc. ("Verizon") in New Hampshire - will result in no net harm to the public interest, FairPoint has or shortly will have responded to nearly 1500 data requests in 1500 pages and has produced over 1100 pages of documents as attachments. This exercise has found FairPoint producing documents and information concerning nearly every aspect of FairPoint's structure, operations, financial condition, and the transaction at issue. FairPoint has undertaken this effort so as to provide all of the intervening parties, including

OCA, with the information they need to assure themselves that the proposed transaction will result in no net harm. This process, which provides context for OCA's motion, has been exhaustive.

2. Along the way, FairPoint and many of the intervenors, including OCA, have negotiated the meaning and scope of numerous data requests in an effort to understand what each data request seeks and whether and how FairPoint can provide the information sought. FairPoint has objected to many data requests, but has successfully negotiated response parameters that have satisfied both parties. FairPoint and OCA have negotiated several data request objections, with every effort being taken to provide the information sought, if at all relevant to these proceedings.

3. Against that backdrop, OCA's second motion to compel concerns a small set of data requests which seek information, not about the transaction before this Commission, but about negotiations, internal analyses and considerations underlying those negotiations, prior to the FairPoint Board of Director's approval of the transaction. Despite prior orders of this Commission in unrelated proceedings confirming such information to be irrelevant, OCA presses its motion, asserting arguments that this Commission has rejected in those prior orders. For the reasons set forth below, OCA's motion lacks merit and should be denied.

Factual Background

4. The data request process has been complex. FairPoint has spent significant time trying to understand what information some requests sought, determining the propriety of those requests and, in most instances, negotiating with the requester to determine what is sought and how FairPoint can provide it. That process has included the OCA perhaps more than others.

5. The immediate motion concerns four Group I data requests on which FairPoint and OCA have not reached agreement.¹ The four data requests at issue can be characterized generally as seeking information regarding negotiations and internal analyses in advance of the execution of the January 15, 2007 Merger Agreement. The disputed data requests do not relate to the transaction before this Commission for consideration – 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.

6. The following paragraphs describe the specific data requests at issue in OCA's motion and provide an overview of FairPoint's response and the negotiations between FairPoint and OCA.

7. OCA 1-15 sought any and all documents provided by FairPoint and/or Verizon to Lehman Brothers in connection with its role as a financial advisor. FairPoint was also asked to fully describe the scope of Lehman Brothers' engagement.² FairPoint initially objected to OCA 1-15 on the grounds that it seeks confidential or proprietary information of a third party which FairPoint is not authorized to disclose. Additionally, FairPoint objected on the grounds that OCA 1-15 is overbroad, unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, FairPoint responded by stating that Lehman Brothers was engaged to provide financial advisory services related to the proposed transaction, including, but not limited to, assistance with due diligence, financial projections, and financing strategies.

¹ Though not relevant to the issues in dispute, OCA spends considerable time in its motion discussing responses which are not at issue, but which OCA claims are incomplete, erroneous or non-responsive. It bears responding only to say that many of OCA's data requests themselves were either confusing or incredibly overbroad, and in many instances FairPoint had discussions with OCA to understand a request and tried to answer it, only to find out after the fact that the request sought something different altogether. FairPoint will only reiterate that the process has been complex.

² OCA has retracted its request for documents provided by Verizon to Lehman Brothers.

8. OCA 1-38 sought copies of any cash flow analyses showing post-transaction projected cash flows for FairPoint, including cash from operations, transaction costs, operational savings or costs estimated from the transaction, capital requirements, debt service and repayment requirements, dividend requirements, and “free cash flow.” FairPoint initially objected to OCA 1-38 on the grounds that it is vague, overbroad and unduly burdensome. Without waiving this objection, FairPoint produced **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

9. OCA 1-43 seeks documents relating to the work performed by investment advisors for FairPoint regarding the acquisition of the Verizon New England properties. FairPoint initially objected to OCA 1-43 on the grounds that it seeks information protected by the attorney-client privilege and attorney work product doctrine, and that it is not reasonably calculated to lead to the discovery of admissible evidence. In addition, FairPoint objected on the grounds that OCA 1-43 seeks information proprietary to third parties not under the control of FairPoint. Without waiving these objections, FairPoint provided responsive materials in the form of a **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

10. OCA 1-44 seeks all presentations to FairPoint’s Board of Directors or any of its committees, working groups, etc., concerning the purchase of the Verizon land lines in Maine, New Hampshire and Vermont. FairPoint initially objected to OCA 1-44 on the grounds that it seeks information protected by the attorney-client privilege and attorney work product doctrine, and that it is not reasonably calculated to lead to the discovery of admissible evidence. In

addition, FairPoint objected on the grounds that OCA 1-44 is overbroad, unduly burdensome, and seeks some of FairPoint's most confidential and proprietary information. Without waiving these objections, FairPoint provided responsive materials in the form of the same **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

11. FairPoint has also provided **[BEGIN PROPRIETARY]**³

[END PROPRIETARY]

Argument

12. With respect to each of these disputed data requests, OCA and FairPoint have engaged in lengthy discussions concerning their scope, subject matter, relevance and OCA's stated need for the information. In its motion, OCA seeks a significant volume of confidential and proprietary information that is extraneous to the transaction presently before this Commission. This Commission has made clear on multiple occasions that information concerning negotiations and analyses leading up to a contract is not relevant to proceedings concerning the final contract. OCA offers no principled basis for this Commission to deviate from that established principle. For these reasons, as explained in more detail below, FairPoint requests that OCA's motion be denied.

³ **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

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

13. OCA recites the correct standard according to which this Commission reviews discovery disputes: “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.

14. While it may be true that not many data requests reach the outer limits of discoverability, 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 proposition that what 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. Re City of Nashua, Order No. 24,654 at p. 4.

15. In Re City of Nashua, for example, a party moved to compel information relating to negotiations that led to certain contracts before the Commission. The moving party argued that the information would show what costs would be incurred through the contracts, suggesting

that the opposing party may not have been forthcoming about those costs. Re City of Nashua, Order No. 24,654 at p. 2. In denying the motion, this Commission acknowledged the liberal discovery standard, but pointed out that the liberal standard “does not exempt discovery requests from principles of reasonableness and common sense.” Id. at p. 3. This Commission reminded the parties that its ultimate decision related to the costs of the contracts themselves, as fixed by the contractual documents, “regardless of how the contracting parties may have regarded them during contract negotiations and regardless of whether the assumptions that drove such negotiations [were] at variance with public statements.” Id. at p. 5 (emphasis added). The contracts themselves, not the negotiations, formed the basis of the proceedings before the Commission. Id. This Commission concluded that the information sought concerning the events leading up to the final contracts was not relevant to any issue before the Commission. Id. at p. 4.

16. In its analysis, this Commission relied on its prior order in Re PSNH, in which this Commission considered a party’s motion to compel information “arising out of” the negotiation of contracts associated with a wood yard Public Service Company of New Hampshire proposed to construct as part of a conversion of a coal fired plant to a wood fired plant. Order No. 24,310 (April 16, 2004), p. 1-2. This Commission viewed the negotiations as confidential and competitively sensitive and stated that “[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem information about the negotiations themselves admissible.” Id. at p. 7. For those reasons, the requests could not be characterized as reasonably calculated to lead to the discovery of admissible evidence, and this Commission denied the motion to compel. Id.

17. In these proceedings, 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) (noting that pursuant to the “no net harm” test, approval of a proposed transaction is required if the public interest is not adversely affected). The Commission’s only concern, therefore, is the transaction before it.

18. In this discovery process, FairPoint has provided a universe of information concerning the merger transaction, including information about FairPoint. FairPoint has produced a highly confidential **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

19. 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 the OCA motion is irrelevant.

II. OCA’s Relevance Arguments Provide No Basis To Deviate From Settled Commission Discovery Orders

20. OCA makes no mention of the Commission orders that squarely contradict OCA’s contention that it is entitled to discovery of information leading up to the final contract before the Commission. The arguments OCA does do not differ from arguments this Commission has already rejected and provide no basis for deviation from the clear and sensible rule that emerges from prior Commission orders.

21. At the outset, OCA admits that it has no idea what any of the documents requested might contain. Instead, OCA's motion resides in the realm of theoretical relevance. See OCA motion at ¶¶26 ("it is not possible to state specifically what the evidence will be"); 37 (same).

22. The data requests at issue in OCA's motion, requests 1-15, 1-38, 1-43 and 1-44, all seek documents provided to or received from FairPoint's financial advisors concerning analysis and negotiation of the transaction. OCA asserts three different claims of relevance. 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.

23. First, OCA contends that the information will unveil FairPoint's "spin" or reveal something FairPoint has to hide. See OCA motion at ¶¶ 4, 58. Putting aside the propriety of suggesting, without any supporting evidence or documentation, that FairPoint has "spun" the information or is hiding anything from any party to this proceeding, this Commission has already rejected such arguments as a basis to compel information about the negotiations leading up to a contract. In Re City of Nashua, this Commission made clear that "the facts that drive the Commission's ultimate decision relate" to the contracts in question, "regardless of how the contracting parties may have regarded them during contract negotiations and regardless of whether the assumptions that drove such negotiations are at variance with public statements." Order No. 24,654 at p. 4. In short, what matters is the terms of the final agreement between FairPoint and Verizon and information relevant to that agreement. Even if OCA could point to some "spin" or to something FairPoint might be hiding, that would not make the information relevant.

24. 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 Motion at ¶¶28 (re: 1-15); 35 (re: 1-38), 51 (re: 1-43); 58 (re: 1-44). As described above, however, this Commission has already 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 enough information to allow OCA and this Commission to evaluate FairPoint's financial condition has already been produced.

25. 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 Motion at ¶29. As with the "spin" argument, OCA points to no evidence even suggesting some gap. More fundamentally, this Commission has made clear that even the assumptions that lead to a final deal are not relevant, even if those assumptions differ from public statements (something OCA does not and can not allege). Re City of Nashua, Order No. 24,654 at p. 4. OCA does not explain why what it seeks is any different than what this Commission has denied in prior cases.

26. 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

27. OCA's motion, seeking irrelevant information concerning the period of time leading up to the transaction at issue in these proceedings, should not be confused with OCA's ability and success in obtaining the information it needs to analyze, understand and evaluate

FairPoint and the proposed transaction. 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.

28. As described above, OCA does not establish the relevance of the information it seeks. Similar to the petitioner in Re City of Nashua, moreover, FairPoint has provided a significant volume of data about the transaction at issue, FairPoint's operations, structure and financial condition, as well as detailed testimony on those issues. FairPoint has even produced **[BEGIN PROPRIETARY]**

[END PROPRIETARY] All of that information and those witnesses "are 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.

Conclusion

29. For the above stated reasons, FairPoint respectfully requests that OCA's motion to compel be denied.

Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.

By its Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: May 25, 2007

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: May 25, 2007

By: 

Daniel E. Will, Esq.