

**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 on Motion for Rehearing of Order No. 24,767

ORDER NO. 24,780

July 25, 2007

The Office of Consumer Advocate (OCA) seeks rehearing pursuant to RSA 541:3 of Order No. 24,767 (June 22, 2007), which addressed certain discovery disputes that had arisen between OCA and the joint petitioners in this docket. The underlying proceeding concerns the proposed transfer by Verizon New England, Inc. d/b/a Verizon New Hampshire (Verizon) and certain of its affiliates of the Verizon land line network in New Hampshire (along with similar networks in Maine and Vermont) and the associated utility franchise to FairPoint Communications, Inc. (FairPoint). For the reasons that follow, we deny the request to rehear the matters decided by Order No. 24,767.

At issue in Order No. 24,767 were three motions to compel discovery that had been submitted by OCA in May and early June. One of the motions, granted by the Commission, sought to compel certain discovery responses by Verizon. By motion filed on June 26, 2007, Verizon sought rehearing of this aspect of the Commission's decision. Verizon withdrew the motion on June 29, 2007, reporting that it and OCA had resolved their discovery dispute by agreement. Accordingly, by secretarial letter of July 5, 2007, the Commission confirmed that Verizon was no longer obliged to take any action to comply with Order No. 24,767.

Also addressed in Order No. 24,767 were two OCA motions to compel discovery responses from FairPoint. As noted in the order, the two motions made similar arguments, inasmuch as both motions concerned “materials prepared by FairPoint or its outside advisors that relate to FairPoint’s internal deliberations as to its negotiations with Verizon and the agreements FairPoint ultimately reached with Verizon.” Order No. 24,767, slip op. at 2; *see also* OCA Rehearing Motion at 1 (adopting this characterization of the disputes). The Commission denied both motions, prompting OCA’s request for rehearing.

On July 12, 2007, OCA submitted a pleading captioned “Amended Motion for Rehearing of Order No. 24,767 Regarding FairPoint Communications, Inc. or, in the Alternative, Motion to Vacate Order No. 24,767” (Amended Motion). FairPoint submitted a pleading in opposition to the original OCA motion, as well as the amended version, on July 13, 2007.

According to OCA, the Commission “misconstrued the information sought by the OCA as ‘information about the negotiations’ and not related to the ‘actual agreement of the joint petitioners.’” OCA Rehearing Motion at 1-2. OCA maintained in the original rehearing motion that it sought only information that is related to the terms of the agreement now pending before the Commission. The Consumer Advocate further directed the Commission’s attention to what OCA characterized as new evidence – i.e., a filing made by FairPoint with the federal Securities and Exchange Commission (on that agency’s Form S-4) subsequent to the OCA motions to compel discovery.

The Amended Motion reports on certain events that have transpired since the original motion. According to OCA, it learned on July 9, 2007 that FairPoint would not appeal certain rulings of the Maine Public Utilities Commission (Maine PUC) in that jurisdiction’s parallel

proceeding, concerning an effort by Maine's Office of Public Advocate (the counterpart agency to the OCA in Maine) to obtain documents from FairPoint that are substantially similar if not identical to the documents OCA is seeking here. It appears that the Maine PUC reached a result that is the opposite of the one adopted in Order No. 24,767 with respect to FairPoint documents. OCA reports that it now has access to the documents it sought from FairPoint, Amended Motion at 4 ("FairPoint has produced the disputed documents which were the subject of the OCA's Second and Third Motions to Compel"), but the OCA contends that the dispute nevertheless remains "justiciable," *id.* at 3. As an alternative to the requested RSA 541:3 rehearing, OCA asks the Commission to vacate Order No. 24,767, citing RSA 365:28 (vesting Commission with authority to "annul, set aside or otherwise modify any order made by it"), because of two unresolved issues: (1) the admissibility of the documents at hearing, and (2) the mere fact that the reasoning in Order No. 24,767 is "misconceived and incorrect." *Id.* at 4. Therefore, in the view of OCA, the Commission should vacate Order No. 24,767 with respect to Fairpoint as "moot *nunc pro tunc.*" *Id.*

In opposition, FairPoint contends that the Commission should deny the motion for rehearing as moot. According to FairPoint, "[t]he fact that a party disliked a Commission order and disagrees with the Commission's reasoning, in the absence of any dispute to adjudicate, does not create a justiciable controversy." FairPoint Opposition at 4. FairPoint further contends that, on the merits, OCA is not entitled to rehearing because the Commission correctly determined that "the only relevant information in this transaction was produced prior to July 9, 2007 in its responses to the OCA's Data Requests." *Id.* at 5. According to FairPoint, OCA seeks to reverse established Commission precedent, cited in Order No. 24,767, about the non-discoverability of

negotiation-related materials in support of a new principle that everything considered by the negotiating parties in advance of their actual agreement is discoverable because it had a bearing on whatever deal was ultimately struck.

We agree with FairPoint that because it is uncontroverted that OCA has now received the materials it sought via the two discovery motions, the controversy addressed in OCA's rehearing motion is no longer justiciable and the questions raised are moot. As the New Hampshire Supreme Court has noted, "the question of mootness is one of convenience and discretion and is not subject to hard-and-fast rules. Generally, however, a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." *In re Juvenile 2005-212*, ___ N.H. ___, 917 A.2d 703, 705 (2007) (quoting [*Appeal of Hinsdale Fed. of Teachers*, 133 N.H. 272, 276 \(1990\)](#)). "Academic" is an accurate way to describe a discovery dispute once the party seeking the discovery has acquired the materials through some other means.

Although the Court has recently noted that "[a] decision upon the merits may be justified where there is a pressing public interest involved or future litigation may be avoided," *In re Guardianship of R.A.*, ___ N.H. ___, ___, 920 A.2d 1213, 1215-16 (2007) (citation omitted), that is not the situation here, *see also Appeal of Hinsdale Federation of Teachers*, 133 N.H. 272, 276 (1990) (noting exception to mootness doctrine for questions that are "capable of repetition yet evade[] review") (citation omitted). To be sure, the underlying proceeding involving the proposed transfer of Verizon's land line network is of significant and pressing public interest, but the same cannot be said of the relatively arcane question of when documents shedding light on negotiations are discoverable in an administrative proceeding that addresses the question of

whether the product of those negotiations is consistent with the public interest. As the parties have noted, and as we observed in Order No. 24,767, this kind of discovery problem is one the Commission has addressed on more than one previous occasion, from which we infer that one more order discussing the issue is unlikely to affect the likelihood of whether similar problems will require adjudication in the future. Nor do such issues tend to evade review, given the availability of appropriate mechanisms resolving discovery disputes.

OCA advances, however, the argument that, although it now has the documents it sought to compel FairPoint to produce, the question of their admissibility remains unresolved. While a document that is discoverable is not necessarily admissible, (nor is a document that is not discoverable, though acquired through other means, necessarily inadmissible) OCA expresses concern that FairPoint may seek to rely on Order No. 24,767 to argue that the documents at issue here, which were found not to be discoverable but which were acquired through other means, may not become part of the record before the Commission in deciding the merits of the case. The admissibility of such documents is a separate question not properly the subject of rehearing in this instance but will be addressed at the appropriate time if raised during the hearings in this proceeding.

Although the Commission may conceivably take a different approach in the future, in this instance it would accomplish nothing to rehear a discovery dispute that developments in another jurisdiction have overtaken. Correspondingly, there is no necessity in these circumstances to vacate Order No. 24,767. Accordingly, we deny the OCA's motion for rehearing as moot and having stated no good reason for rehearing. Finally, we note that all of the disputes addressed in

that order have been resolved and, thus, no party need take further action with respect to the matters discussed therein.

Based upon the foregoing, it is hereby

ORDERED, that the motion of the Office of Consumer Advocate for rehearing of Order No. 24,767 is DENIED.

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

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director & Secretary