THE STATE OF NEW HAMPSHIRE

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September 6, 2007

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: Docket No. DT 07-011
Verizon New Hampshire et alia
Petition for Transfer of Assets to FairPoint Communications
Prehearing Conference of September 6, 2007

Dear Ms. Howland:

As you know, the Commission directed me to conduct a pre-hearing conference today in the above-referenced proceeding, thereafter making findings and recommendations pursuant to RSA 363:17. The purpose of this letter is to communicate those findings and recommendations, along with certain understandings reached among the parties that participated in the prehearing conference.

The Commission scheduled the pre-hearing conference at the request of the Office of Consumer Advocate (OCA), which was concerned about both the logistics and the legal implications, both for hearing and preparation for hearing, of various confidentiality designations made by the petitioners in the context of the non-disclosure agreements they had obtained from parties obtaining information in discovery. These designations, in turn, have led to the creation of multiple versions of certain witnesses' pre-filed direct testimony. Intervenor Irene Schmitt, a Verizon customer, also expressed concerns, arising largely out of her not having received certain confidential information and certain portions of testimony based on confidential information.

Appearing at the prehearing conference were joint petitioner FairPoint Communications, joint petitioners Verizon New Hampshire and its affiliates, the New Hampshire Telephone Association (NHTA), the jointly appearing Labor Intervenors, OCA and Commission Staff. I am pleased to report that at the prehearing conference these parties were able to reach agreement on many, but not all, of the issues under discussion.

I. Legal Authority for Withholding Information from Public Disclosure

I heard the parties at length on the question of what legal authority either requires or authorizes the Commission to treat as non-public any evidence introduced at hearing as well as those portions of the hearings themselves at which such confidential information is discussed. Based on those arguments, and the pleadings on file, I recommend that the Commission determine that authority exists for certain limitations on access to the hearings and the hearing record.

In my view, the relevant authority is found in RSA 378:43. This statute unambiguously provides that applicable information or records "shall not be considered public records for purposes of RSA 91-A." RSA 378:43, I(a). Although this language refers to "public records" and contains no explicit reference to public meetings (including Commission hearings), I conclude that the blanket reference to the Right-to-Know Law, RSA 91-A, as opposed to a specific reference to the public documents provisions of the Right-to-Know Law, RSA 91-A:4 and :5, reflects a legislative intent to make the confidentiality provisions of RSA 378:43 applicable both to documents *and* hearings.

Sub-paragraph (b) of paragraph I of RSA 378:43 buttresses this view of the statute. This sub-paragraph refers to applicable "*information* and records that public utilities commission staff or a party places into the record during a telephone utility proceeding" and requires not only that the records be treated as non-public but that the information and records be "maintained confidentially." (Emphasis added.) The explicit reference to maintaining as confidential certain information introduced into a hearing record further supports the notion that the Legislature intended to require the Commission to treat certain portions of hearings related to telephone utilities as confidential.

RSA 378:43 protects only specific kinds of information and materials. The information

(a) must not be general public knowledge or published elsewhere,

(b) must be subject to prior measures taken by the telephone utility to prevent dissemination of the information in the ordinary course of business, and

(c) must pertain "to the provision of competitive services" or "set forth trade secrets that required significant effort and cost to produce" or be "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. In other words, the reach of this statute is broad indeed. On the other hand, the Commission is not required simply to accept utility representations that information or documents meet the enumerated standards. The Commission may, after notice and hearing, determine that information or records are not entitled to confidential treatment, but in such an instance the statute provides the affected utility with 30 days to seek reconsideration. RSA RSA 378:43, III. There is also an explicit reference to a right of appeal. *Id.*

It is the public policy of the Commission, and New Hampshire generally, to maximize the public's ability to scrutinize the workings of government. *See* RSA 91-A:1 (noting that "openness in the conduct of public business is essential to a democratic society" and thus it is necessary "to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people"). Therefore it is with the greatest reluctance that I recommend any measures to the Commission that would have the effect of limiting public access to the agency's adjudicative proceedings, particularly in a case that has engendered as much public concern as this docket has. However, I conclude that RSA 378:43 entitles the joint petitioners to shield from public disclosure, in connection both with documents on file at the Commission and information introduced at hearing, matter that meets the three statutory conditions set forth above.

What this means, in my view, is that applicable New Hampshire law recognizes two kinds of information and documents: public and confidential. Neither RSA 91-A nor RSA 378:43 recognize what are apparently four distinct categories of confidential information that the joint petitioners have identified in connection with the non-disclosure agreements they have entered into with various other parties and Staff. However, and as the joint petitioners have pointed out, apart from issues of public disclosure they have a legitimate interest in limiting the access of their business competitors to certain information that, while non-public pursuant to RSA 378:43, would ordinarily be shared in discovery with all other parties to the proceeding, even parties that compete with Verizon and/or FairPoint. It would arguably defeat a central purpose of RSA 378:43 if competitors could gain access to otherwise protected information simply by meeting the relatively low threshold for intervenor status in a docket.

II. Reclassification of Information in Pre-Filed Testimony and Treatment of Confidential Information at Hearing

Therefore, and subject to two exceptions noted below, what the parties at today's prehearing conference agreed to is the reclassification of the prefiled testimony (including any appended exhibits) into three categories: public, confidential and highly confidential. "Public" information would be fully available under RSA 91-A and its discussion at hearing will be completely open to the public. "Confidential" information is information that is exempt from public disclosure under RSA 378:43, making it exempt from public disclosure and subject to consideration at hearing in closed sessions at which only parties that have entered into non-disclosure agreements with the joint petitioners, as well as Commission and OCA personnel, will be present. "Highly confidential" information would be subject to these restrictions as well, but will also be withheld from participating business competitors of the joint petitioners, with representatives of those competitors required to be absent from the hearing room during consideration of these materials at hearing.

At the prehearing conference, there was considerable discussion of the fact that reclassifying the parties' pre-filed testimony to conform to the rubric outlined above is no small undertaking. There was agreement that it is appropriate to assign the relevant tasks, including the work of producing new paper versions of the testimony, to the joint petitioners. Accordingly, the joint petitioners agreed to undertake a review of the pre-filed testimony and, on or before Monday, September 17, 2007, submit proposed reclassified versions of these documents to me as well as to Staff and OCA. (The Labor Intervenors would not be involved in this process because their testimony does not require reclassification, except insofar as material they have identified as "super confidential" would now be classified as "highly confidential.") I, Staff and OCA would then review the proposed reclassifications and either endorse them or conduct further discussions with the joint petitioners. My expectation is that we would promptly agree upon reclassified versions of the testimony that are acceptable to OCA, Staff and the joint petitioners, which would then undertake the necessary copying, disseminating and filing with the Commission.

OCA expressed the concern that the reclassification might trigger a need to conduct a similar review of certain discovery documents. At my suggestion, the parties agreed to defer that issue pending the reclassification of testimony. I agreed to work with the parties on any subsequent review of discovery documents that may be necessary.

In the circumstances, I believe the resolution described above is a reasonable one, fairly accommodating the potentially competing imperatives of RSA 378:43 and the notions of due process and public accountability that surround administrative adjudication.

Adopting this approach is also likely to have the salutary benefit of avoiding what could be a protacted delay in the proceedings, given the rehearing and appellate rights contained in RSA 378:43. Accordingly, I recommend that the Commission endorse these recommendations at its earliest convenience.

III. Irene Schmitt

Unfortunately, two areas of disagreement remain. The first concerns Irene Schmitt, the Verizon customer who has intervened and is represented by New Hampshire Legal Assistance. Although Ms. Schmitt has entered into a non-disclosure agreement with the joint petitioners, she has thus far been provided only with redacted versions of pre-filed testimony and discovery documents. Ms. Schmitt is not a competitor of the joint petitioners and has no employment-related relationships with them. Therefore, in my judgment she 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. I asked counsel for Ms. Schmitt what measures would, in the circumstances, allow New Hampshire Legal Assistance to prepare adequately for hearing. Counsel responded by requesting unredacted versions of the Staff, OCA and Labor Intervenors prefiled testimony, without waiving any right upon review of those documents to seek additional information previously circulated to others in discovery. The joint petitioners agreed to provide these materials to New Hampshire Legal Assistance on or before Friday, September 14, 2007, subject to the exception set forth in the following paragraph.

Verizon and affiliates object to providing Mrs. Schmitt with information, contained in the prefiled testimony of the Labor Intervenors and possibly in other testimony as well, that derives from materials originally furnished to the U.S. Justice Department and the Federal Trade Commission pursuant to the Hart-Scott-Rodino Act, which is a mechanism for antitrust review of mergers prior to their consummation. These materials were the subject of a discovery motion filed by OCA earlier in the case, subsequently mooted because OCA obtained the materials when they were disclosed to its counterpart agency in Maine as part of the parallel proceeding there.

Since OCA and others already have the Hart-Scott-Rodino information in question, I perceive no legal basis for withholding it from Ms. Schmitt. It is therefore my recommendation that the Commission direct the joint petitioners to furnish completely unredacted versions of the prefiled testimony, including any Hart-Scott-Rodino information, to her. Verizon wishes to reserve the right to object to this recommendation – and to do so following a review of the expedited transcript it has requested of today's pre-hearing conference. I recommend that the Commission preserve Verizon's rights in

this fashion, which necessarily means this information would be redacted from the testimony she will receive on September 14.

IV. Operating Systems Test Process Document

FairPoint continues to press its view that a document it identifies as the "operating systems test process document" as well as any testimony based on that document be disclosed in unredacted form only to Staff and OCA. In support of its view, FairPoint made two arguments: (1) the document is difficult to understand and thus subject to misinterpretation by non-experts, and (2) the document contains information that is extremely competitively sensitive, since it reveals details about precisely how FairPoint plans to undertake the formidable technical task of assuming control of Verizon's landline network in Maine, New Hampshire and Vermont.

In my judgment, and without intending to disparage FairPoint's earnestly pressed contentions about the sensitivity of the document in question, I recommend that the Commission direct FairPoint to disclose the document (and the information in the document, to the extent discussed in any testimony) in its entirety to parties that have entered into an appropriate non-disclosure agreement. The parties have filed their nondisclosure agreements, which were drafted by the joint petitioners. I have reviewed them and find they are more than adequate to protect FairPoint's admittedly significant privacy interest with respect to the operating systems test process. Indeed, because FairPoint's capacity to transition the network successfully from Verizon to FairPoint is such a central issue in this case, it is especially important that all parties have a full and fair opportunity to review the document.

My understanding is that FairPoint intends to object to this recommendation. In the circumstances it makes sense for the Commission to give FairPoint the opportunity to review today's transcript, as Verizon has requested, prior to filing its objection.

V. Conclusion

To summarize, I recommend that the Commission accept the rubric I have outlined above relative to the reclassification of information in this proceeding into the categories of public, confidential and highly confidential, as to both access to documents and access to the upcoming hearings. I further recommend that the Commission establish a deadline for objections to my recommendations that is some reasonable but limited number of days following the receipt of the transcript of today's prehearing conference.

I have taken the liberty of suggesting it would be reasonable for the parties to proceed on the assumption that the Commission will accept the recommendations that were agreed

upon today. Thus the joint petitioners will immediately begin the somewhat onerous task of reclassifying the prefiled testimony of all parties. While the Commission is obviously not obliged to accept any of my recommendations, I request that the Commission advise the parties at its earliest convenience if the general approach outlined above is not satisfactory.

Today's prehearing conference was very successful, thanks to the spirit of cooperation and compromise that prevailed. I thank the participants for their assistance. Persons with questions should feel free to call me at 271.6006.

Sincerely,

Donald M. Kreis
General Counsel

Cc: Service List