

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.

**Motion to Compel Response to Data Request to The Office of the Consumer Advocate
by FairPoint Communications, Inc.**

NOW COMES FairPoint Communications, Inc. ("FairPoint"), by and through its attorneys, Devine, Millimet & Branch, Professional Association, and respectfully moves to compel the Office of the Consumer Advocate ("OCA") to provide a response to FairPoint's Data Request OCA-54.

Introduction

1. This is a case in which FairPoint seeks Commission approval of a transaction through which it would acquire control of the land line assets and operations of Verizon New England Inc. ("Verizon") in New Hampshire. In the course of this proceeding, FairPoint has responded to nearly 1500 data requests and has produced over 1100 pages of documents as attachments. FairPoint undertook 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 to the public.

2. On August 10, 2007, FairPoint served data requests of its own upon the interveners, including OCA. FairPoint asked OCA to respond to only eighty (80) data requests.

OCA voiced objections to nearly half (twenty-nine (29)) of the data requests FairPoint served upon it, including FairPoint Data Request OCA-54, which is the subject of this Motion.

3. FairPoint made a good faith effort to negotiate with OCA in order to find some common ground with respect to the purportedly objectionable data requests, and the parties were able to reach an agreement with respect to certain of FairPoint's data requests.¹ OCA, nonetheless, objects to any response to FairPoint Data Request OCA-54. For the reasons set forth below, FairPoint now moves to compel a response to FairPoint Data Request OCA-54.

Factual Background

4. Susan M. Baldwin is one of OCA's disclosed expert witnesses in this matter. Ms. Baldwin stated in her direct testimony that in 2006, she provided technical assistance to the OCA in connection with its participation in this Commission's investigation of a proposed alternative regulation plan ("AFOR") for Verizon, FairPoint's co-petitioner in this docket. Baldwin Direct Testimony, page 1, lines 11-14. As FairPoint understands it, based on conversations between FairPoint counsel and OCA counsel, Ms. Baldwin served as a disclosed, testifying expert on behalf of OCA in the AFOR proceedings, as opposed to an undisclosed consultant.

5. FairPoint Data Request OCA-54 concerned Ms. Baldwin's testimony, and it requested the following information:

Please refer to Ms. Baldwin's testimony at page 1, lines 11 to 14.
Please produce all documents relating to the referenced assistance Ms. Baldwin gave to OCA in the Public Utilities Commission ("PUC")'s investigation of a proposed alternative regulation plan (AFOR) for Verizon NH (Docket No. DT 06-072).

6. OCA objected to providing a response to FairPoint Data Request OCA-54 as follows:

¹ FairPoint appreciates that following negotiation, OCA has agreed to provide some response to certain data requests which originally triggered objections. FairPoint hereby reserves its rights with respect to all of OCA's objections, though they are not the subject of this Motion.

Objection. The request for “all documents” is vague, overbroad and unduly burdensome. The request seeks information or data protected by the attorney-client privilege and/or attorney work-product doctrine. The request seeks information that is not reasonably calculated to lead to the discovery of admissible evidence regarding whether the proposed transaction with FairPoint meets the public interest standard.

7. FairPoint followed up with OCA in an effort to arrive at a compromise resolution. OCA first protested that the information might capture attorney-client and work product information. FairPoint made it clear to OCA that none of FairPoint’s data requests should be construed as seeking protected information. FairPoint also reminded OCA that the communications and indeed, entire files of retained experts, are generally discoverable and rarely protected by the attorney-client privilege or work product doctrine.

8. Without conceding the discoverability of the information Data Request OCA 54 sought, FairPoint offered to accept a response limited to identification and production of all information that Ms. Baldwin utilized in the Verizon AFOR proceedings which she carried over and used for the purpose of supporting her opinions in these proceedings. Exhibit 1, August 23, 2007 e-mail correspondence from counsel for FairPoint to Rorie E.P. Hollenberg, Staff Attorney for OCA.

9. OCA sought clarification as to whether FairPoint was asking it to identify whether any portion of Ms. Baldwin’s testimony or exhibits as produced in this docket were prepared and/or used in the AFOR docket, and if so, to what extent they were so used. FairPoint promptly replied with the requested clarification, confirming OCA’s understanding of its proposal.

10. OCA summarily rejected FairPoint’s proposal without any further discussion or explanation. OCA did not deliver that rejection until this morning, the same day upon which the revised scheduling order in these proceedings requires FairPoint to file any motions to compel.

Exhibit 2, August 24, 2007 e-mail correspondence from Attorney Hollenberg to counsel for FairPoint.

11. Counsel for FairPoint subsequently asked Consumer Advocate, Meredith Hatfield to confirm that no materials provided in the AFOR docket were utilized for purposes of Ms. Baldwin's testimony in this docket. Ms. Hatfield refused to provide such confirmation.

Argument

12. The standards governing discovery in proceedings in this Commission are broad and liberally slanted toward allowing discovery. In that regard, discovery requests in actions before this Commission need only 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). A motion to compel seeking discovery of information which could under any circumstance be considered relevant must be granted. See Re PSNH, 86 NH PUC at 731-32.

13. To the extent OCA claims that the information lacks relevance, the objection is puzzling. Files, materials, and even drafts of documents prepared by experts are routinely requested and produced in adversary proceedings. FairPoint is entitled to investigate and discover whether Ms. Baldwin's positions on the same or similar issues pertinent to both the AFOR docket and this case before the Commission were consistent, and if they were not, FairPoint is entitled to question Ms. Baldwin regarding any inconsistencies. FairPoint is also entitled to investigate and discover whether Ms. Baldwin's work for OCA demonstrates any particular bias or prejudice, and to understand the nature of the relationship and history between OCA and Ms. Baldwin. Finally, FairPoint is entitled to discover any materials which Ms. Baldwin has reviewed or prepared in the AFOR proceedings on which she relies in those

proceedings. Ms. Baldwin made the information relevant by importing her work on the AFOR proceedings into these proceedings.

14. To the extent OCA claims attorney client privilege or work product protections, the objection is equally puzzling. FairPoint Data Request OCA-54 sought discovery of information which is clearly relevant to this proceeding, particularly in light of Ms. Baldwin's status as a disclosed expert witness for OCA. Ms. Baldwin is a disclosed, paid expert whose status makes her entire file, including correspondence with OCA, subject to discovery. See, e.g., Re Hampton Water Works, Inc., 84 NH PUC 703, 704 (1999) (holding that where intervener's expert witness provides pre-filed testimony, intervener has to make the witness available to respond to data requests and to supply the documents the witness used to develop his testimony, even assuming the information could be obtained elsewhere). Assuming the information is relevant to these proceedings, privileges that the information lacks in other proceedings do not attach now. Even if some documents might be protected from disclosure, it is highly unlikely that all documents are so protected. OCA ought to demonstrate the basis for any such claim rather than rely on a blanket assertion, by producing at least a log of documents OCA claims are protected, which OCA has not agreed to do. To the extent OCA can demonstrate some privileged documents, OCA should produce all others that are not privileged.

15. To the extent OCA contends that the data request is unduly burdensome, the objection is unavailing. FairPoint counsel offered to relieve the OCA of any burden by simply making the files available for FairPoint counsel review at OCA's offices. FairPoint would be willing to undertake to duplicate any documents and provide a copy of those documents to OCA. FairPoint, in other words, does not request the OCA to undertake any unusual burden; FairPoint

is willing to take any burden upon itself. OCA declined FairPoint's accommodation and yet maintains that the data request is unduly burdensome.

Conclusion

16. As none of OCA's objections has merit, OCA must respond to the data request. For the above stated reasons, FairPoint respectfully requests that OCA be compelled to provide a response to FairPoint Data Request OCA-54. Alternatively, OCA should be required to withdraw all portions of Ms. Baldwin's testimony that rely, refer or otherwise pertain to the information OCA refuses to produce.

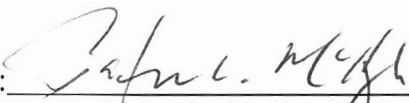
Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.

By its Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: August 24, 2007

By: 
Frederick J. Coolbroth, Esq.
Daniel E. Will, Esq.
Patrick C. McHugh, 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 motion was hand delivered this day to the Office of Consumer Advocate.

Dated: August 24, 2007

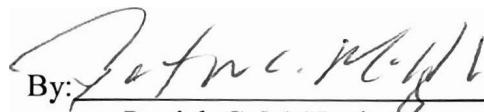
By: 
Patrick C. McHugh, Esq.

EXHIBIT 1

Daniel E. Will

From: Hollenberg, Rorie [Rorie.E.P.Hollenberg@oca.nh.gov]
Sent: Thursday, August 23, 2007 4:35 PM
To: Daniel E. Will
Cc: Patrick C. McHugh; Hatfield, Meredith
Subject: RE: OCA Objections to FRP data requests

Dan -- Just to make sure that I am clear, are you looking for the OCA to identify whether and the extent to which any portion of Susan's testimony or exhibits were prepared and/or used in the AFOR docket? Rorie

Rorie E.P. Hollenberg
Staff Attorney
Office of Consumer Advocate
21 S. Fruit St., Ste. 18
Concord, N.H. 03301
(603) 271-1173
rorie.e.p.hollenberg@oca.nh.gov

Statement of Confidentiality

The information contained in this electronic message and any attachments to this message may contain confidential or privileged information and are intended for the exclusive use of the intended recipient(s). Please notify the sender immediately at (603) 271-1173 or rorie.hollenberg@puc.nh.gov if you are not the intended recipient, and destroy all copies of this electronic message and any attachments. Thank you.

-----Original Message-----

From: Daniel E. Will [mailto:dwill@devinemillimet.com]
Sent: Thursday, August 23, 2007 1:21 PM
To: Hollenberg, Rorie
Cc: Patrick C. McHugh
Subject: Re: OCA Objections to FRP data requests

Rorie-

Would you agree to answer 54 to the extent that anything she has done in the AFOR case will be used in this case?

Dan

Dan Will, Esq.
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8/24/2007

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-----Original Message-----

From: Hollenberg, Rorie <Rorie.E.P.Hollenberg@oca.nh.gov>

To: Daniel E. Will

CC: Hatfield, Meredith <Meredith.A.Hatfield@oca.nh.gov>; Hollenberg, Rorie <Rorie.E.P.Hollenberg@oca.nh.gov>

Sent: Thu Aug 23 12:24:30 2007

Subject: OCA Objections to FRP data requests

Dan – Just wanted to get back to you concerning the OCA’s objections to FRP’s data requests, which we discussed yesterday. We will respond to 56 and 59. Our objection to 54 stands. Have a good day. Rorie

Rorie E.P. Hollenberg

Staff Attorney

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