

BEFORE THE NEW HAMPSHIRE 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.

**OFFICE OF CONSUMER ADVOCATE'S MOTION FOR
PREHEARING CONFERENCE WITH HEARINGS EXAMINER
AND EXPEDITED DECISION**

The Office of Consumer Advocate (the "OCA") respectfully requests an expedited decision on this motion for a prehearing conference with the Commission's hearings examiner. In support, the OCA states the following facts and law.

I. Introduction

1. The procedural schedule in this case required the OCA and others to file testimony on or before August 1, 2007.¹
2. For more than a month before filing its testimony, the OCA initiated and maintained discussions with both Verizon and FairPoint about how to protect their confidential information. The OCA expended significant amounts of its limited time and resources on these discussions, attempting to clarify its obligations under the Protective Agreement with Verizon and FairPoint.
3. The OCA's efforts were necessitated by the fact that the companies had conditioned their disclosures to the OCA in discovery on numerous levels of confidentiality.² The companies' conditions dictated that only certain parties were entitled to see certain responses and/or attachments.

¹ Secretarial Letter dated August 7, 2007

² Based upon information and belief, conditions similar to those required of the OCA were required of Commission Staff and, to a lesser extent, the attorneys for the Labor Intervenors.

4. Mindful of the seriousness of a violation of a protective agreement and the difficulty – if not impossibility – of retracting an improper disclosure, the OCA sought and, after several requests, eventually received specific, written guidance from both companies as to how it should redact its testimony.³
5. In its initial memorandum (classifying only attachments), dated June 25, 2007, FairPoint prescribed four levels of confidentiality for different materials: “Highly Confidential Level 1”; “Highly Confidential Level 2”; “Highly Confidential Level 3” and “Confidential.” For various reasons, in the weeks that followed, FairPoint revised the attachment-related memorandum several times and eventually produced an additional memorandum that classified its data requests.⁴
6. Verizon produced its confidentiality list on July 16, 2007, just days before the then pending deadline for the filing of testimony, July 20. In its list, Verizon prescribed three levels of confidentiality: “Note 1”; “Note 2” and “Note 3.”
7. Of note, Verizon’s and FairPoint’s classifications were (and are) not exactly the same. Most obviously, FairPoint’s confidentiality categories decrease (from the highest of “Highly Confidential Level 1” to the lowest of “Confidential”) and Verizon’s increase (from the lowest of “Note 1” to the highest of “Note 3”). Verizon’s “Note 3” and “Note 1” correspond to FairPoint’s Highly Confidential Level 2 and Confidential, respectively. Verizon’s “Note 2,” however, does not correspond to any of FairPoint’s levels and FairPoint’s “Highly Confidential Level 3” does not correspond to any of Verizon’s levels.

³ See Attachments filed with a motion to seal, filed concurrently with this motion.

⁴ See *id.*

8. The OCA realized and confirmed these differences on July 18. Also, in a joint conference call with counsel for FairPoint and Verizon, the OCA specifically requested that the companies work together to develop a unified classification system under which the companies' allegedly confidential materials would be protected. This never occurred.
9. Due to the impending deadline for the filing of testimony, the OCA notified the companies that it would follow FairPoint's classification structure.⁵ In order to do so, the OCA bore the burden and expense of translating Verizon's levels to match those of FairPoint.
10. The OCA also specifically asked FairPoint if the OCA could combine the two highest levels. This was based upon a representation of Labor, which indicated that it believed that it had access to all of the materials produced in discovery. FairPoint refused to allow this, stating that there were differences between the top two levels.
11. In a case of this magnitude and size, particularly in light of the massive volume of information and the quick pace of the procedural schedule, FairPoint's and Verizon's requirements for redaction were (and are) extensive and very difficult to comply with. FairPoint's directions were (and are) extremely conservative, erring on the side of non-disclosure. At times, FairPoint's directions were (and are) inconsistent or contradictory.

⁵ As a result, the individuals who, according to Verizon, were entitled to receive a version with "Note 2" information and data, received the most analogous FairPoint version of "Confidential."

12. Nevertheless, through the last moments of producing its testimony, the OCA persevered in its efforts to abide by these directions and its obligations under the Protective Agreement.
13. As a result, the OCA produced five versions of the testimony of Susan M. Baldwin (Highly Confidential Levels 1, 2 and 3, Confidential and Public) and four versions of David Brevitz's testimony (Highly Confidential Levels 1 and 2, Confidential and Public). The OCA filed its testimony with the Commission, as required, on August 1.
14. No other party nor the Commission's Staff filed more than one confidential version and one public version of their testimony.
15. The amount of time and resources that it took for the OCA to produce multiple, different versions of redacted testimony was enormous. The cost of these efforts was magnified by the fact that – because of the confidentiality of the contents – all but the public version of the testimonies had to be produced to parties in paper form.
16. Despite this, the OCA took these steps to abide by both FairPoint's and Verizon's confidentiality designations in good faith. In doing so, it attempted to balance the need to participate in this docket in the most meaningful way possible, with the company's detailed requirements for confidential treatment of thousand of pages of documents central to the case. Although the OCA considers the interests of its constituency in accessing information to be of the utmost importance, it seemed imprudent to divert resources from the primary task at hand – careful and thoughtful analysis of the proposed transaction on their behalf – in order to wage

confidentiality battle with the companies at the Commission.⁶ In so deciding, the OCA also believed that both companies were acting in good faith.

17. Shortly after filing its testimony, the OCA observed, in testimony filed publicly by others (in New Hampshire and Maine), information and data which it believed, based upon FairPoint's confidentiality memoranda and directions, that it was prohibited from disclosing.
18. Also, on August 7, 2007, the OCA received a copy of an email sent by counsel for the Labor Intervenors to counsel for FairPoint and Verizon, which raised concerns with the levels of confidentiality created by the companies, and requested a fully unredacted version of the OCA's testimony (Highly Confidential Level 1).
19. In an effort to clarify its understanding and resolve whether portions of the OCA's testimony need not be redacted, and whether additional parties could have access to higher levels of testimony, on August 8, 2007, the OCA inquired with FairPoint's local counsel.
20. At that time, the OCA also raised its concern that, going forward, confidentiality requirements and treatment must be clarified as quickly as possible in order for the OCA to respond properly and in a timely manner to FairPoint's data requests on the OCA's testimony.
21. In this discussion, FairPoint's local counsel indicated words to the effect that, while he appreciated the OCA's efforts to comply with the company's directions regarding confidential treatment of information, he felt that the OCA should not take extreme measures to redact information. After all its efforts to protect

⁶ The outcome of this case literally touches and concerns hundreds of thousands of utility customers, the welfare of the public at large and the State's economy. The importance of this case should not be underestimated.

FairPoint's confidential and "proprietary" information and data, and the seriousness of the need to abide by confidentiality agreements, the OCA was taken aback by this response. In closing, FairPoint's local counsel said that he would consult with the company and report back to the OCA.

22. Later that day, August 8, the OCA heard from an associate in local counsel's office. The associate asked the OCA to direct her to an example in another party's public testimony of information that the OCA considered confidential and, as a consequence, redacted from its testimony. The OCA's staff attorney provided an example and explained in general terms how the OCA handled the redaction process. The associate said that she would get back to the OCA the following day.
23. The next day, August 9, 2007, the associate in local counsel's office called the OCA. She indicated that they had taken a look at the issue raised by the OCA and that local counsel would call us the following day to discuss it.
24. Local counsel did not call or otherwise contact the OCA the following day or in the days that followed.
25. On August 10, however, the OCA received FairPoint's data requests concerning the OCA's testimony. To the OCA's dismay, FairPoint did not use its own confidentiality classification system for its non-public data requests to the OCA. These data requests, which pertain to the company's own confidential materials, did not correspond in any way to the four categories of confidentiality created by the company and required for the OCA's testimony (and, presumably, for the OCA's responses to these data requests). Instead, FairPoint's data requests that

involve information under any of the levels of confidentiality were all labeled “Proprietary.”

26. On the morning of the next business day, August 13, the OCA sought to clarify this additional issue regarding the data requests with FairPoint’s local counsel.
27. Although it received a quick acknowledgement of the inquiry from an associate of local counsel, the OCA received no further response. Nevertheless, the OCA turned to the task at hand and the upcoming deadline for the OCA’s response to the data requests.
28. The following day, August 14, the OCA spoke with counsel for another party in the docket, Alan Linder, Esq. At that time, the OCA learned that Mr. Linder, who had received the “Confidential” versions of the OCA’s testimony, also sought access to less redacted (i.e., higher level of confidentiality) versions. Also at that time, the OCA learned, as stated by its local counsel to Attorney Linder, that counsel for FairPoint felt that the OCA have redacted more than was necessary from its testimony.
29. Surprised and concerned by this characterization (not to mention the fact that FairPoint shared its opinion with another party and not the OCA), the OCA immediately contacted FairPoint’s local counsel and requested an explanation. The OCA mentioned the discussion with Attorney Linder and his request for access to less redacted versions of the OCA’s testimony. The OCA also asked local counsel for responses, by Friday, August 17, 2007, to three requests: 1) the OCA requested FairPoint to prepare and provide a redlined version of the OCA’s testimony showing, to the extent that they exist, overbroad redactions; 2) the OCA requested FairPoint to resolve the requests of the Labor Intervenors and NHLA

for access to less redacted versions of the OCA's testimony; and 3) the OCA requested FairPoint to clarify the level or levels of confidentiality pertaining to FairPoint's non-public data requests pursuant to FairPoint's own classification system.

30. At approximately 3:45 p.m. on Friday August 17, FairPoint's local counsel contacted the OCA to request additional time to respond to the OCA's requests. The OCA agreed that FairPoint could respond by the end of the day on Monday August 20.
31. On August 20, FairPoint local counsel again contacted the OCA to request additional time to respond to the OCA's requests for clarification. At that time, FairPoint local counsel stated that all three requests would be responded to the following day. In the spirit of cooperation, the OCA agreed to allow additional time for the company to respond (by mid-day August 21). At that time, more than three weeks had passed since the OCA filed its testimony.
32. On August 21, the OCA received an email from an associate of FairPoint's local counsel. Therein, he indicated that FairPoint was unable to designate the levels of confidentiality of its non-public data requests to the OCA (according to its own memorandum and classification system) without some "general information" about the OCA's response to these questions. According to FairPoint, the confidential designation of its redactions to its data requests depends upon the OCA's answers to these questions. The OCA strongly disagreed (and disagrees), believing instead that FairPoint should have to abide by its own classification system.
33. Later on August 21, FairPoint responded to the OCA's three requests.

- FairPoint agreed to permit the attorneys for the Labor Intervenors to have access to the Highly Confidential Level 1 version of the OCA's testimony. In doing so, FairPoint agreed to what the OCA asked for back before the OCA undertook the process of redaction and production of multiple versions of its testimony: to combine the top two levels of FairPoint's confidentiality classification system.
- FairPoint indicated that it would not agree at this time to providing Mr. Linder with a less redacted version of the OCA's testimony.
- FairPoint provided the OCA with its suggestions for how the testimony of Ms. Baldwin and Mr. Brevitz could be less redacted. FairPoint also agreed to revise all five versions of the OCA's testimony and distribute the revised versions to the Commission, parties and Staff.

34. The OCA immediately hand-delivered a disk containing electronic copies of all nine versions of its testimony (5 versions of Ms. Baldwin's testimony and 4 versions of Mr. Brevitz's testimony).

35. On August 23, the OCA received from FairPoint a disk containing the revised Highly Confidential Level 1 versions of Mr. Brevitz's and Ms. Baldwin's testimony.

36. Upon reviewing FairPoint's suggestions for revisions, the OCA has determined that many 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. Some of FairPoint's suggestions also appear to impact the confidential designation of Verizon documents.

37. These recent developments highlight the lack of consistency of the confidentiality rules and the need for Commission intervention and guidance at this time.
38. Moreover, as referenced above, the parties and Staff seem to be subject to different confidentiality rules. This is so despite the fact that FairPoint's memorandum was specifically addressed to the OCA and Staff, and the Labor Intervenors are similarly situated to OCA and Staff in terms of the access to highly confidential information.
39. The OCA lacks the resources to continue to manage this administrative issue without the Commission's assistance.
40. Furthermore, to the extent that documents previously filed and those to be filed with the Commission purport to contain confidential information, it is ultimately the Commission's decision as to whether any of that information is ultimately kept confidential or made available for public consumption. See RSA 91-A. The same is true for alleged confidential portions of hearings. Consequently, Commission intervention is most appropriate at this time.

II. Applicable Standards

41. "In order to facilitate proceedings and encourage informal disposition, the [Commission] shall, upon the motion of any party ... schedule one or more prehearing conferences."⁷
42. The purpose of a prehearing conference includes consideration of "matters which aid in the disposition of the proceeding."⁸

⁷ Puc 203.15 (a). See also RSA 541-A:31, V (b) (presiding officer may schedule prehearing conference).

⁸ Puc 203.15 (c)(6). See also RSA 541-A:31, V(c)(7) (prehearing conference may include "matters which aid in the disposition of the proceeding").

43. The Commission may designate the hearings examiner to preside over a prehearing conference.⁹

III. ISSUES FOR CONSIDERATION

44. In requesting a prehearing conference, the OCA seeks assistance and guidance from the Commission, through its designee. Particularly, the OCA aims to clarify a number of issues related to the confidentiality requirements unilaterally imposed by both FairPoint and Verizon as a condition of disclosure in discovery.

45. As is apparent from the multiple levels of the OCA's testimony as well as the history of the issue in this docket, these requirements have proven to be very complicated, difficult to negotiate and cumbersome to comply with. From a practical perspective, these requirements have proven unworkable for the OCA.

46. The OCA simply can not afford to continue to expend its limited time and resources on such non-substantive, administrative issues. Doing so detracts from its work on the essential, substantive issues pending before the Commission and disserves the OCA's constituents, the residential ratepayers of New Hampshire.

47. The OCA, a public agency, should not have to continue to solely bear the burden of, and the costs associated with, protecting FairPoint's and Verizon's non-public information merely as a consequence of its participation in this docket and fulfillment of its statutory duties.

48. Among the issues that presently concern the OCA are:

Whether the confidentiality requirements imposed by the companies are appropriate, reasonable and fair?

⁹ RSA 363:17 and Puc 203.14 (c).

- Now that FairPoint has determined that previously-redacted portions of the OCA's testimony may be released to additional parties, whether revised versions of the OCA's testimony may be filed with the Commission, parties and Staff notwithstanding the fact that the period for discovery on the testimony has passed?
- If, as the OCA believes, FairPoint's suggestions for un-redacting the OCA's testimony are inconsistent with FairPoint's own redactions of its prefiled testimony and its confidential designations of data responses and attachments, whether FairPoint should have to make public versions of those documents available to the Commission, parties and Staff?
How should redactions be handled going forward (e.g., in responses to data requests propounded upon Intervenors)? Will a uniform system of redaction apply to all parties and Staff? Should the companies bear the burden and expense of performing the redactions?
How should treatment of this information in other states impact its treatment in New Hampshire? For instance, in Vermont, on August 22, the Vermont Department of Public Service ordered Verizon and FairPoint to identify any portions of any parties' testimony which it believed contained confidential information.¹⁰ The DPS specifically ordered the companies to convey this information in a single filing, made jointly.

¹⁰ See Memorandum of Susan Hudson, Clerk of the Vermont Public Service Board, to the Parties in PSB Docket No. 7270, dated August 22, 2007, Attachment A.

- Whether the Companies are required to abide by their own confidentiality conditions? For instance, in its rebuttal testimony, will the companies use their own levels of confidentiality to redact their testimony?
- How will the confidentiality requirements manifest themselves during the hearing? What process will be followed?
- How can the manner in which the companies' confidential information is protected be simplified?

49. To the extent that additional issues of interest to the Commission are not explicitly mentioned above or encompassed within the issues presented above, the OCA is willing to discuss and receive guidance from the hearings examiner on these issues.

50. The difficulties encountered by the OCA and other parties with regard to access to the companies' confidential information suggest more, not less, problems ahead.

51. Timely consideration of these issues will be an efficient and effective use of the Commission's resources.

III. Position of Parties and Staff

52. The Commission's rules do not require the OCA to seek the position(s) of the other parties about the relief requested by this motion.

53. Nevertheless, to facilitate an expeditious decision on its motion, the OCA made a good faith effort to seek the positions of the parties. Prior to filing, we received positions from the following parties:

Labor Intervenors and New Hampshire Legal Assistance on behalf of

Irene Schmidt support the motion;

One Communications does not oppose the motion; and

National Grid and Unitil Service Corporation take no position.

IV. Relief Requested

Wherefore, the OCA respectfully requests that the Commission provide the following relief:

- A. Designate a hearings examiner forthwith to preside over a prehearing conference to consider the issues raised in this motion, as requested herein;
- B. Schedule an immediate prehearing conference before the hearings examiner and require both FairPoint and Verizon to participate; and
- C. Grant such other relief as justice requires.

Respectfully submitted,



Meredith A. Hatfield
Rorie E. P. Hollenberg
Office of Consumer Advocate
21 S. Fruit St., Ste. 18
Concord, N.H. 03301
(603) 271-1172
meredith.hatfield@puc.nh.gov
rorie.hollenberg@puc.nh.gov

CERTIFICATE OF SERVICE

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

August 24, 2007



Meredith A. Hatfield

OCA's Motion for Prehearing Conference
ATTACHMENT A

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

MEMORANDUM

To: Parties in PSB Docket No. 7270

From: Susan Hudson, Clerk of the Board

Re: Confidential Information

Date: August 22, 2007

A large portion of the testimony and exhibits in this docket has been filed under the Protective Agreement as Allegedly Confidential. In some cases, motions have been made to protect specific elements of prefiled testimony. In other cases, motions have been filed referring to underlying discovery materials, but do not list specific lines in testimony or specific exhibits attached to testimony.

The volume of confidentiality claims for materials proposed to be in the evidentiary record is unprecedented. In order to better manage this large volume of material and so that any order granting confidential treatment accurately describes the covered information, the Board requests additional information from the parties who are making the confidentiality claims.

Not later than Friday, August 31, 2007, Verizon and FairPoint shall provide a complete listing of the elements of prefiled testimony, filed by any party, to which Verizon or FairPoint wish to allege confidentiality. The single filing should be made jointly by Verizon and FairPoint. An electronic copy shall be e-mailed to the Clerk (psb.clerk@state.vt.us) and to the parties in an Excel spreadsheet format. The filing shall contain the information shown in the sample attached to this memorandum.