

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 OBJECTION TO
FAIRPOINT'S MOTION TO COMPEL**

The Office of Consumer Advocate (the "OCA") respectfully objects to the motion to compel filed by FairPoint Communications, Inc. ("FairPoint") on August 24, 2007 ("FairPoint's motion"). In support, the OCA states the following facts and law.

I. Introduction

1. FairPoint propounded 80 data requests upon the OCA.
2. The OCA objected completely to only one: FP OCA 54.¹
3. The disputed data request, as modified by FairPoint, asks the OCA "to identify whether and the extent to which any portion of [Ms. Baldwin's] testimony or exhibits were prepared and/or used in the [Verizon] AFOR docket[, DT 06-072]," see Exhibit 1 to FairPoint's motion to compel, and to produce that information.

See Exhibit A, email from Patrick C. McHugh to Rorie Hollenberg and Meredith Hatfield dated August 24, 2007.

¹ FairPoint seems to suggest that the OCA acted unreasonably in objecting to data requests. See FairPoint's motion, paragraphs 1 and 2, at pp. 1-2 (emphasis added), describing how FairPoint has responded to "nearly 1,500 data requests," how FairPoint asked the OCA "*only* eighty (80) data requests," and how the OCA "voiced objections to nearly half" of FairPoint's data requests. In its written objections, however, the OCA indicated its intention to respond to all but three of FairPoint's data requests: 54, 56 and 59. Following discussions with FairPoint, the OCA agreed to respond to two of these three: 56 and 59. Rather than enumerate the many disputes related to obtaining information from FairPoint, in response to FairPoint's suggestion of unreasonableness, the OCA lets the record speak for itself.

4. For the reasons stated below, FairPoint's motion lacks merit and should be denied.²

II. Statement of Facts

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5. The OCA actively participated in the Commission's investigation of an alternative form of regulation (AFOR) for Verizon New Hampshire, DT 06-072. The OCA retained Susan Baldwin to testify on its behalf in that docket.
6. That docket, which remains open at this time, has not had any activity for approximately one year. At the time when activity in that docket suspended, Ms. Baldwin was working with the OCA to prepare testimony. Due to the circumstances, Ms. Baldwin never finalized or filed her testimony.
7. The disputed data request seeks documents from the AFOR docket, which are not public, in draft form only, and contain specific information about the OCA's litigation strategy.
8. If the Commission rejects the proposed transaction between Verizon and FairPoint, the Commission may continue to explore the possibility of an AFOR for Verizon. If that occurs, the OCA would likely continue with its work in that

² FairPoint also seems to suggest in its motion that the OCA did not act in good faith when negotiating the discovery disputes. See FairPoint's motion, paragraph 10, p. 3, "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." With respect to this suggestion and these statements, the OCA responds as follows. The OCA's "summary" rejection of FairPoint's clarification of the data request should be viewed in the context of the "summary" response of FairPoint to the OCA's request for clarification. See Exhibit 2 to FairPoint's motion, message of Daniel E. Will to Rorie Hollenberg sent Thursday August 23, 2007 at 6:36 PM (by way of further clarification, this was in response to the message from Rorie Hollenberg to Daniel E. Will sent Thursday, August 23, 2007 at 4:35 PM; see Exhibit 1 to FairPoint's motion). Further, after sending its response to FairPoint's clarification, the OCA called FairPoint's local counsel and spoke with Patrick McHugh about its decision to maintain its objection to FairPoint's data request, as clarified. Lastly, the reason that the OCA did not "deliver" its rejection until the morning that the motion to compel was due resulted from the fact that FairPoint did not deliver its clarification until approximately 6:30 pm the previous evening. The OCA conveyed its rejection as soon as possible following its receipt of that clarification, at approximately 9:00 am the following morning. See Exhibit 2 to FairPoint's motion.

docket, and in doing so, would rely heavily upon the contents of its files and work product, including Ms. Baldwin's work.

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9. As FairPoint itself has stated, "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." *Objection by FairPoint Communications, Inc. to Second Motion to Compel by the Office of the Consumer Advocate (Group I Data Requests)*, May 25, 2007, paragraph 21, p. 7.
10. "The Commission is charged with reviewing this specific proposed transaction to determine whether it will adversely affect the public interest." *Id.*
11. "The Commission's only concern, therefore, is the transaction before it." *Id.* See also *Order No. 24,767, Order on Motions to Compel Discovery Submitted by the Office of Consumer Advocate, June 22, 2007 (refusing to compel the production of documents related to period of time before agreement with Verizon NH was approved by FairPoint's Board of Directors)*.
12. To assert that this docket and the AFOR docket are related is absurd.³ The main things that these two dockets have in common are that they are both telephone dockets involving Verizon, and that Ms. Baldwin is the OCA's witness.
13. The OCA's position in this docket is presented in the August 1 testimony of Ms. Baldwin and Mr. Brevitz. Both the testimony of Ms. Baldwin and Mr. Brevitz contain specific information about the source of their opinions.

³ To argue otherwise is "tantamount to declaring compelling commonality between Britain's Winston Churchill and a Thomas' English Muffin." *Verizon New Hampshire's Opposition to OCA's Motions for Reconsideration and Consolidation, DT 06-072/DT 04-019, July 24, 2006.*

14. In addition, between them, on August 28, 2007, Mr. Brevitz and Ms. Baldwin answered 101 data requests propounded by both FairPoint and Verizon, and provided CD-ROMs with source documents, workpapers, and other materials requested by the companies.

III. Applicable Standards

15. In proceedings such as these, “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, 731-732 (2001) (citations and internal quotation marks omitted).
16. 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), slip. op. at 3 (citations omitted). See also Re Verizon et al., Order No. 24,767, slip. op. at 4.
17. At the outer limits, where a motion to compel seeks discovery of information which could under no circumstances be considered relevant, the motion must be denied. Re PSNH, 86 NH PUC at 731-732.

IV. Argument

18. The information sought by FairPoint – the extent to which Ms. Baldwin’s testimony in this docket relates to her work in the Verizon AFOR docket – is neither relevant to Commission’s consideration of the proposed transaction, nor likely to lead to the discovery of relevant evidence for that purpose.
19. Importantly, all of the information sought by FairPoint is not public and some may qualify for protection from disclosure under the work product or attorney-client privilege. See Re City of Nashua, Order No. 24,681, October 23, 2006

(refusing to require disclosure of certain workpapers of expert witness associated with related work for another client, which workpapers “have not been released to the public” by this client). Also, the information sought by FairPoint may contain confidential information of Verizon in the AFOR docket that the OCA is prohibited from disclosing.⁴

20. To provide a response to FP OCA 54, the OCA would have to divert its very limited resources away from the substantive tasks in this docket (not to mention its other important work) to focus on an analysis of how these two unrelated dockets might intersect.
21. Moreover, if the Commission grants FairPoint’s motion, it will open the door to other such requests in this and other proceedings. Parties to one proceeding could use the precedent to obtain draft and non-public documents generated in another, unrelated proceeding.
22. For example, the Commission Staff’s witness in these proceedings, John Antonuk of Liberty Consulting, also participated on behalf of the Commission Staff in the Verizon Yellow Pages docket, DT 02-165. Like the Verizon AFOR docket, the Yellow Pages docket remains open and, if the Commission rejects the proposed transaction, may require further proceedings in the future (i.e., “second phase”). According to FairPoint’s logic, Mr. Antonuk would be required to disclose his Yellow Pages work in this docket, simply because he worked with Staff on both.
23. Similarly, FairPoint’s logic could be extended to require Staff to disclose all of Liberty Consulting’s work in all other unrelated dockets, including the pending

⁴ Although not included in its specific objection concerning FP OCA 54, the OCA included in its preliminary statement and general objections, as a basis for objecting to this and all other data requests, the confidential nature of the documents. See Exhibit B, paragraph 10, p. 2-3.

cost of cash for working capital gas docket. Although not a telephone docket, according to FairPoint, such disclosure might “demonstrate[] any particular bias or prejudice” or speak to “the nature of the relationship and history between” the Staff and Liberty. FairPoint’s motion, paragraph 13, p. 4. Setting aside the fundamental problem that these purposes asserted by FairPoint are not even relevant to the Commission’s determination in this proceeding, the mandated disclosure of work in an unrelated, pending docket would be unprecedented, unjust, and incorrect.

24. This set of circumstances could also occur for other parties who, like Staff and the OCA, draw from a relatively limited pool of specialized, public-utility consultants. Therefore, to order disclosure of the information FairPoint seeks could have far-ranging impacts in future cases.
25. The OCA is not aware of – and FairPoint does not point to – any instance where the Commission has ordered such disclosures as these or the disclosures sought by FairPoint’s pending motion to compel. Instead, FairPoint simply generally asserts that such disclosures “are routinely requested and produced in adversary proceedings.” FairPoint motion, paragraph 13, p. 4.
26. The OCA has made Ms. Baldwin available to respond to data requests and has, in response to data requests, supplied documents that she used to develop her testimony. That is what the Commission’s rules require. See Puc 203.09. See also, Re Hampton Water Works, Inc., 84 NH PUC 703, 704 (1999) (holding that where intervenor’s expert witness provides pre-filed testimony, intervenor has to make the witness available to respond to data requests and to supply documents the witness used to develop his testimony).

27. What the OCA will not agree to, and what the Commission's rules do not require, is the production of all (or any) documents relating to the assistance a witness gave to the OCA in a totally unrelated, pending docket. To do so would prejudice the OCA in the AFOR docket, and would and harm the interests of residential ratepayers.
28. The Commission should decline FairPoint's invitation to become "ensnared by issues that no doubt are important to [FairPoint] but have little bearing on the determinations the Commission must make." Re City of Nashua, Order No. 24,488, slip. op. at 7-8.
29. Because FairPoint's motion seeks discovery of information which could under no circumstances be considered relevant, and in fact whose disclosure would result in harm to the OCA, the motion must be denied. Re PSNH, 86 NH PUC at 731-732.

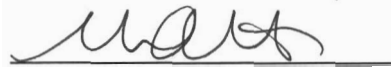
IV. Relief Requested

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

- A. Deny FairPoint's motion to compel the OCA's response to FP: OCA-54;
- B. If the Commission grants FairPoint's motion despite the OCA's vigorous objection, grant a reasonable extension of the schedule in this docket so that the OCA can attend to responding to the disputed data request;⁵ and
- C. Grant such other relief as justice requires.

⁵ This docket has taxed, and continues to tax heavily the OCA's very limited staff of 5. In addition to the normal challenges of such a complex docket, the work load has been compounded by the need to address the Joint Petitioners' maze of confidentiality. The OCA also is involved in numerous other active dockets. As a result, the OCA can not absorb the additional task required to respond to the disputed data request without additional time.

Respectfully submitted,




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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.

August 29, 2007



Meredith A. Hatfield