

**STATE OF NEW HAMPSHIRE
BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

Re: VERIZON NEW ENGLAND, INC.,
BELL ATLANTIC COMMUNICATIONS,
INC., NYNEX LONG DISTANCE
COMPANY, VERIZON SELECT SERVICES,
INC. AND FAIRPOINT COMMUNICATIONS,
INC. Joint Application for Approvals Related to
Verizon's Transfer of Property and Customer
Relations to Company to be Merged with and
into FairPoint Communications, Inc.

**DOCKET NO. DT07-011
SEPTEMBER 28, 2007**

**RESERVATION OF RIGHTS AND MOTION OF THE NEW ENGLAND
CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC. AND
COMCAST PHONE OF NEW HAMPSHIRE, LLC TO COMPEL RESPONSES
TO DATA REQUESTS BY FAIRPOINT COMMUNICATIONS, INC.**

INTRODUCTION

On September 25, 2007, FairPoint Communications, Inc. ("FairPoint" or "FRP") filed objections to 49 data requests filed by the New England Cable and Telecommunications Association, Inc. ("NECTA") and Comcast Phone of New Hampshire, LLC ("CPNH") on September 20, 2007, regarding FairPoint rebuttal testimony.

In those instances where FRP has objected but indicated its intention to provide a response subject to and without waiving its objection¹, NECTA and CPNH reserve their rights to move to compel in the event that a response provided is incomplete, inadequate or seeks to withhold information from NECTA and CPNH based upon a claim of confidentiality (NECTA and CPNH have executed protective agreements in this matter).

¹ These instances include NECTA/CPNH -22R, 24R, 26R, 27R, 37R, 39R, 46R, 49R, 53R, 55R, 56R, 57R, 58R, 59R, 60R, 62R, 63R, 65R, 66R, 78R, 80R, 81R, 90R, 91R, 92R, 93R, 94R, 102R, 104R, 106R, 110R, 112R, 115R, 123R, 124R, 132R and 133R.

In other instances, FRP has simply refused to answer specific data requests.² Counsel for NECTA and CPNH contacted FRP counsel by email on September 26, 2007, regarding these data requests and offered to discuss these disputed items in an effort to narrow the scope of the parties' discovery dispute. On September 27, 2007, counsel were able to narrow the scope of the parties' discovery disputes³. Counsel for NECTA and CPNH certify that the movants herein have made a good faith effort to resolve their discovery disputes with FRP informally, in accordance with Puc 203.09(i)(4). As a result, NECTA and CPNH file this Motion to Compel pursuant to Puc 203.07.

GENERAL LEGAL STANDARDS

The scope of discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *See, Re Public Service of New Hampshire*, 86 NH PUC 730, 731 (2001) (citation omitted); *Re Public Service of New Hampshire*, 89 NH PUC 226, 229 (2004) (citation omitted). *City of Nashua*, DW 04-048 (Order No. 24,681) (October 23, 2006) at 2.

The Commission will deny discovery requests only when it "can perceive of no circumstance in which the requested data will be relevant." *Re Public Service of New Hampshire*, 86 NH PUC at 731-732; *Re Public Service of New Hampshire*, 89 NH PUC at 229.

² FRP refused to provide responses to NECTA/CPNH -18R, 23R, 28R, 29R, 40R, 43R (a) and (c), 48R, 54R, 69R, 76R, 79R (a), 111R and 113R.

³ As a result of the parties' discussions, FRP has agreed to provide responses to NECTA/CPNH-18R, 23R, 40R, 43R (c), 69R, 76R, 111R and 113R. NECTA and CPNH reserve the right to seek further responses after review of the responses provided by FRP and expect that FRP will supplement its responses if any requested documents that are currently unavailable should become available during this proceeding. The parties' have each reserved their respective rights to object to or compel production of such documentation. In addition, the parties intend to conduct further discussion to determine if their discovery disputes can be further narrowed.

ARGUMENT

NECTA/CPNH-28R

This data request seeks an admission from FairPoint that its proposed cutover planning process effectively requires that existing wholesale customers of Verizon dedicate resources, both personal and economic, in order to participate in the efforts of FairPoint to take steps toward cutover prior to any Commission decision approving the proposed transaction. FairPoint has testified that its timeline involves giving notices to Verizon wholesale customers about new systems interfaces and working with carriers on more complex work related to e-bonding, months in advance of any Commission order approving the proposed transaction. At the same time, FairPoint in testimony has refused to compensate Verizon wholesale customers for incurring these costs without any compensation by FairPoint and any assurance of merger transaction approval.⁴ There is nothing vague about this specific request.

FairPoint's imposition of costs and risks upon existing wholesale customers of Verizon is clearly an issue in this proceeding. These costs and risks are relevant to the determinations to be made by the Commission, including whether the imposition of specific merger conditions are needed in order to ensure that wholesale customers are not harmed as a result of the proposed transaction .

⁴ FairPoint has already taken these positions on the record in Vermont Public Service Board Docket No. 7270.

FairPoint's objection is without merit. What amounts to a request for an admission should not be denied as argumentative. Discovery is supposed to help reduce the amount of cross-examination required during hearings.⁵

NECTA/CPNH-29R

This data request seeks an admission from Mr. Lippold that FRP has refused to compensate existing wholesale customers of Verizon for costs that they will incur if they act to accommodate FRP's current cutover planning timeline. While it may be understandable that FRP would take risks to spend funds on cutover readiness in advance of a Commission merger approval, given the large monthly TSA payments that it is required to make to Verizon post closing and pre cutover. FairPoint should not force existing wholesale customers of Verizon to spend money that they would not have to spend but for this transaction (and whether or not this transaction is approved).

The requested admission is proper. There is nothing vague or argumentative here- FRP simply does not want to admit in discovery what it will need to admit during cross-examination. As noted above, the information requested is relevant as to whether the Commission should consider merger conditions that safeguard wholesale customers from incurring costs that they would not incur but for the proposed transaction.

NECTA/CPNH-40R

An itemized breakdown of wholesale revenues by type of wholesale service requested here was provided to NECTA and CPNH by letter dated April 27, 2007 and is included in bate-stamped confidential information, we believe, at CFPNH 0013. This discovery request seeks to confirm whether the volume of wholesale revenue referenced by Mr. Lippold at page 8, lines 17-20, corresponds to the confidential numbers provided

⁵ FairPoint was cross-examined on this very issue in Vermont Public Service Board Docket No. 7270.

by FairPoint. FRP's objection is further weakened by its willingness to provide this information in response to NECTA/CPNH-102R in response to a data request directed to Mr. Leach's rebuttal testimony. The underlying factual basis for Mr. Lippold's statement is a proper subject for discovery.

FRP does not contest the relevance of the requested information. The information is not customer-specific, but merely breaks down the wholesale revenues that Mr. Lippold testifies are being acquired from Verizon into components parts, such as access, resale, network elements and the like.

NECTA/CPNH-43R

FRP has objected to providing "(a) documentation of the training programs 'for our business and wholesale organization' identified at pages 10-12 of Mr. Lippold's testimony. FRP does not contest the relevance or admissibility of the requested information. Instead, it erects as a shield against production of the requested information a *pro forma* "highly confidential" objection.

The training of a fully staffed wholesale organization should be considered one of many cutover readiness criteria to be satisfied before FRP should be allowed to give Verizon the irrevocable Notice of Readiness to Cutover under the terms of the TSA. Absent a merger condition that an independent third party consultant would be afforded an adequate opportunity to review and sign off on the wholesale training to be conducted by FairPoint prior to cutover (or earlier as well, if such training is due to occur before merger closing) as one of many cutover readiness criteria, wholesale service providers are unprotected against the risk that FairPoint will be unable to fill Verizon's shoes and serve the wholesale market as well as Verizon does today. FRP is hiring new personnel

and expects some Verizon employees involved in wholesale services to join its organization, but the level of experience of these future employees is unknown and they need to be trained on FairPoint's yet to be built and tested interface and back office systems. An independent third party consultant also must assure that training to be provided is sufficient to reduce the anti-competitive risks that would be created under FRP's proposal to combine its wholesale and mid/large size retail business customer organization.⁶

In order to limit the scope of FRP's concerns, NECTA and CPNH state that the provision of requested information relating to the wholesale operations of FRP would satisfy this request. Further, if FRP stipulated that an independent third party consultant would be charged with the review of the adequacy and completeness of wholesale training as cutover readiness criteria, NECTA and CPNH would withdraw their request for this training information. Without such assurance, wholesale customers should be able to confirm that FRP is fully staffed and trained to accommodate the needs of wholesale customers and review the extent of training provided by FRP.

NECTA/CPNH-48R

Mr. Lippold testified that "...interconnecting parties already have remedies should they conclude they have been harmed competitively or forced to bear unreasonable costs" (page 24, lines 4-5 of rebuttal). This data request asks Mr. Lippold to specify the "remedies" to which he has referred in his rebuttal testimony, documentation of each of these remedies, the amount and type of remedy he claims is available and any limitations on liability that FRP contends would apply to each such remedy.

⁶ NECTA and CPNH have opposed such a combined organization.

Mr. Lippold injected the issue of remedies available to interconnecting parties in his own testimony and the parties are entitled to an explanation, through discovery, of the specific remedies to which he is referring.

As we do not know what remedies Mr. Lippold had in mind and upon what his opinion in rebuttal testimony is based, NECTA and CPNH are entitled to a data response. They should not be required to guess what Mr. Lippold relied upon as a basis for his testimony or to conduct fishing expeditions among a myriad of interconnection agreements and tariffs on file with the Commission.

NECTA/CPNH-54R

FRP witness Skrivan was requested to provide the Verizon Performance Assurance Plan to which he referred on page 6, line 10 of his rebuttal testimony. FRP does not contest that the information request is irrelevant. Instead, it suggests that the PAP is on file with the Commission and need not be produced.

FRP should be compelled to produce the specific PAP documentation mentioned by Mr. Skrivan. PAP documentation has undergone changes over the years and intervenors should not be forced to guess at what PAP documentation Mr. Skrivan covered in his rebuttal testimony.

By comparison, Verizon's PAP documentation in Vermont was tendered by Verizon at Board request in order to assure that the PAP document discussed during hearings would be included as an exhibit. Verizon obliged and provided copies of its current Vermont PAP to the parties electronically. Again, intervenors should not have to guess at what PAP documentation Mr. Skrivan relied upon in his rebuttal testimony.

FairPoint should be compelled to provide this document. Provision of this document in an electronic format or on CD would not be unduly burdensome for FRP.

NECTA/CPNH-79R

FRP has refused to provide the “detailed testing strategy document and test results” referred to by Mr. Haga at page 33, lines 8-10 of his rebuttal testimony. FRP refuses to provide information based on claims of high confidentiality, trade secret information and the like, without any support whatsoever for these objections.

The Commission has rejected FRP’s classification of this documentation as highly confidential and directed that it be provided to all parties who have entered into protective agreements in this matter. Order No. 24,792 (September 27, 2007).

FRP’s desire to conduct testing in secret, without sharing results, does not breed confidence in an open and transparent process that would assure affected wholesale customers of FRP’s readiness for cutover. This issue is major concern for wholesale customers that interconnect with the ILEC and are dependent on the success of the cutover. If the cutover goes badly, as it did in Hawaii, then interconnecting carriers will be damaged, as will their customers and consumers that wish to be customers. Given the large TSA payments that FRP must make to Verizon each month after closing, it is readily apparent that FRP could decide to conduct its cutover even if it were aware that post cutover problems would affect retail and wholesale customers alike. In its judgment, it might be a sound trade off to avoid 2-3 months of TSA payments at \$13-14 million per month and spend some post cutover dollars to fix problems that were known in advance of cutover during a 2-3 month period following cutover.

This risk of this scenario is reinforced by FRP's seeking to waive PAP obligations for a period of 30 days before and 60 days after Cutover, in expectation that it cannot meet performance assurance standards that apply to Verizon prior to and for some period of time after Cutover. Without knowledge of test plans and test results, interconnecting carriers would be unable to raise concerns regarding FRP's cutover readiness, which could be considered by an independent third party. They would not know whether all system testing that affects the flow through of wholesale orders has been effectively conducted and that flow through rates are satisfactory.

Given the compelling interests on interconnecting carriers, the requested information should be made available to NECTA and CPNH on a confidential basis, as the Commission appears to have required in Order No. 24,792.

NECTA/CPNH-111R

The information requested appears to be the same requested in NECTA/CPNH-102R. Assuming that FRP provides the requested information in response to NECTA/CPNH-102R, it can simply cross reference to that response. FRP's objection should be overruled. See also, the discussion above regarding NECTA/CPNH-40R. FRP may be able to answer these requests by cross-referencing the confidential information provided on April 27, 2007, and discussed above in connection with NECTA/CPNH-40R.

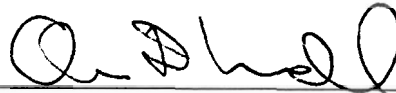
CONCLUSION

For the reasons above, the Commission should grant NECTA and CPNH's Motion to Compel.

Respectfully submitted,

NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION,
INC. AND COMCAST PHONE OF NEW
HAMPSHIRE, LLC

By its attorneys,



Alan D. Mandl
Smith & Duggan LLP
Lincoln North
55 Old Bedford Road
Lincoln, MA 01773
(T) (617) 228-4464
(F) (781) 259-1112
amandl@smithduggan.com

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