

THE STATE OF NEW HAMPSHIRE

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OFFICE OF THE CONSUMER ADVOCATE

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July 12, 2007

Debra A. Howland
Executive Director & Secretary
New Hampshire Public Utilities Commission
21 S. Fruit St., Suite 10
Concord, NH 03301




Re: DT 07-011 Verizon New England/FairPoint Communications

Dear Ms. Howland:

Enclosed for filing with the Commission please find an original and seven copies of the Office of Consumer Advocate's (OCA's) Amended Motion for Rehearing or Motion to Vacate Order 24,767 Regarding FairPoint Communications, Inc.

Pursuant to the Puc rules copies of the Motions have been served on all parties in this docket electronically.

Sincerely,


Meredith A. Hatfield
Consumer Advocate

cc: service list

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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
AMENDED MOTION FOR REHEARING OF ORDER NO. 24, 767 REGARDING
FAIRPOINT COMMUNICATIONS, INC. OR, IN THE ALTERNATIVE,
MOTION TO VACATE ORDER NO. 24,767**

I. Introduction

The Office of Consumer Advocate (the "OCA") respectfully files this motion to apprise the Commission of events since the OCA's filing of its Motion for Rehearing of Order No. 24, 767 Regarding FairPoint Communications, Inc. (the "Rehearing Motion") and amend its Rehearing Motion. In relief, the OCA requests the Commission to either grant rehearing of Order No. 24,767 (June 22, 2007) (the "Order"), pursuant to RSA 541:3, on the remaining issues and requests for relief contained within the Rehearing Motion, or, in the alternative, pursuant to RSA 365:28, vacate the Order to the extent that it concerns FairPoint Communications, Inc. ("FairPoint"). In support, the OCA states the following facts and law.

II. Recent Events

1. On July 6, 2007, the OCA filed its Rehearing Motion. Since then, events have transpired which relate to some of the issues raised and some of the relief requested in the Rehearing Motion.
2. Specifically, on July 9, 2007, FairPoint notified the OCA of 1) its intention not to appeal the rulings in the Maine Public Utilities Commission

proceedings, which required FairPoint to provide to the Maine Office of Public Advocate unredacted copies of the documents referenced by FairPoint in its June 11 and July 2 amendments to the Form S-4 (the “Form S-4A documents”); and 2) its intention to provide these documents to the OCA, in response to OCA GI 1-43, which is among the data requests that are the subject of Order No. 24,767 and the OCA’s Motion. Later that day, FairPoint provided the OCA with a supplemental response to OCA GI 1-43, including the Form S-4A documents.¹

3. As a result of these events, the OCA amends its pending Rehearing Motion as set forth below or, in the alternative, moves to vacate the Order. In support, the OCA hereby incorporates by reference the facts, law and arguments contained with its Rehearing Motion.

III. Rule on Remaining Issues and Requests for Relief in Rehearing Motion

4. The Commission should rule on the remaining issues and requests for relief contained within the Rehearing Motion.
5. Notwithstanding production of materials by FairPoint, there remain issues underlying the remaining requests for relief in the Rehearing Motion. *See* Rehearing Motion, at 9, paragraphs C and D (also set forth as prayers for relief in this motion, *infra.* at paragraphs B and C).
6. These remaining issues include: 1) whether the Commission misconstrued the information requested by the OCA as concerning negotiations rather than the actual agreement of the joint petitioners; and 2) whether the Commission

¹ Also, a conference call between FairPoint, Labor, the OCA and the Maine Office of Public Advocate, on July 12, concerns in part these documents.

incorrectly concluded that the information sought by the OCA was neither relevant nor likely to lead to the discovery of admissible evidence.

7. These issues and requests for relief remain justiciable and should be addressed by the Commission. *See* ATV Watch v. New Hampshire Dept. of Resources and Economic, __ N.H. __, 923 A.2d 1061 (2007) (case remains justiciable to the extent remedies remain available). *See also*, In re Juvenile 2005-212, __ N.H. __, 917 A.2d 703 (2007) (matter presents a justiciable controversy because issues involved are neither “academic” nor “dead”); and Appeal of Hinsdale Fed. Of Teachers, 133 N.H. 272, 276 (1990) (quotations and citation omitted) (“[T]he question of mootness is one of convenience and discretion.”).

IV. Vacate Order

8. In the alternative, the Commission should vacate its Order.
9. There are at least two bases upon which the Commission should vacate its Order.
10. Pursuant to RSA 365:28, the Commission retains the authority to “annul, set aside or otherwise modify any order made by it.” The only limitation on this authority is that the modification must satisfy the requirements of due process and be legally correct. *See* Appeal of the Office of the Consumer Advocate, 134 N.H. 651 (1991). The Commission may annul or set aside an order or one or more portions of an order if it is presented with new evidence or changed circumstances that persuade the Commission that its previous decisions are no longer valid. *See e.g.*, Re Verizon New Hampshire, 88 NH PUC 393 (2003) (portion of UNE Remand order vacated); Re Public Service Company of New Hampshire, 86 NH PUC 896 (2001) (protective order vacated); and Re Public

Service Company of New Hampshire, 82 N.H. P.U.C. 575 (1997) (orders denying cost recovery vacated).

11. First, as discussed above, FairPoint's production of the supplemental response to OCA GI 1-43 and the S-4A documents addresses only the issue of production.² See OCA's Second Motion to Compel FairPoint's Responses to Group I, Set 1, Data Requests, dated May 18, 2007 (the "Second Motion to Compel"); Office of Consumer Advocate's Third Motion To Compel FairPoint's Responses to Group I, Set 1, Data Requests, dated May 30, 2007 (the "Third Motion to Compel"); and Rehearing Motion, at 8-9, paragraph B. Two issues and the related requests for relief remain justiciable.
12. Therefore, on this basis, the Commission should vacate its Order as it applies to FairPoint as moot *nunc pro tunc*: FairPoint has produced the disputed documents which were the subject of the OCA's Second and Third Motions to Compel, and the Order ruled on these motions.³
13. Moreover, an additional basis for vacating the Order exists. Notwithstanding FairPoint's production, the Commission should vacate its Order because, as the OCA argues in the Rehearing Motion, it is misconceived and incorrect.

² In making this statement, the OCA assumes that the S-4A documents produced by FairPoint on July 9 are full and complete versions in all respects, with no pages or presentation documents excised or redacted.

³ Having produced the documents which lay at the heart of the OCA's Second and Third Motions to Compel, FairPoint should not now be able to rely on the Order as a basis for preventing the Commission from considering these documents at the hearings, on the basis of relevancy. The dispute before the Commission on the OCA's Second and Third Motions to Compel concerned whether the documents (which have now been produced) met the standard for discovery (*i.e.*, relevant or likely to lead to the discovery of admissible evidence). The parties were not litigating and the Commission did not rule on whether documents (which have not been produced) were admissible evidence. If the Commission vacates the Order, FairPoint and the OCA may litigate admissibility for purposes of the hearings at the appropriate time (*i.e.*, through pre-trial motions *in limine* or during the hearings).

Re Bell Atlantic, 87 NH PUC 76, 79 (2002) (citations omitted) (case law makes it clear that the Commission has the authority to correct its own errors).

14. If the Commission vacates its Order with respect to FairPoint, the OCA's Rehearing Motion would be moot. See Re New Hampshire Coalition of Comprehensive Information and Referral Services, 89 NH PUC 642, 644 (2004) (Commission annulled order due to technical concerns).

V. Position of FairPoint

15. Prior to filing, the OCA provided this Motion to FairPoint, and the company opposes this Motion.

VI. Relief Requested

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

- A. Grant rehearing of Order No. 24,767 as requested in the Rehearing Motion, as modified herein;
- B. Clarify Order No. 24,767 to the extent that the information requested by the OCA does not concern negotiations but relates to the actual agreement of the joint petitioners;
- C. Clarify Order No. 24,767 to the extent that the information requested by the OCA is relevant or likely to lead to the discovery of admissible evidence; or
- D. In the alternative, vacate Order No. 24,767 because the information requested by the OCA does not concern negotiations but relates to the actual agreement of the joint petitioners; and
- E. Vacate Order No. 24,767 because the information requested by the OCA is relevant or likely to lead to the discovery of admissible evidence; and

F. Grant such other relief as justice requires.

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.

July 12, 2007



Meredith A. Hatfield