

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 07-011

VERIZON NEW ENGLAND, INC. et alia

**Joint Petition for Authority to Transfer Assets and Franchise
to FairPoint Communications, Inc.**

Order on Motion for Rehearing of Order No. 24,767

O R D E R N O. 24,780

July 25, 2007

The Office of Consumer Advocate (OCA) seeks rehearing pursuant to RSA 541:3 of Order No. 24,767 (June 22, 2007), which addressed certain discovery disputes that had arisen between OCA and the joint petitioners in this docket. The underlying proceeding concerns the proposed transfer by Verizon New England, Inc. d/b/a Verizon New Hampshire (Verizon) and certain of its affiliates of the Verizon land line network in New Hampshire (along with similar networks in Maine and Vermont) and the associated utility franchise to FairPoint Communications, Inc. (FairPoint). For the reasons that follow, we deny the request to rehear the matters decided by Order No. 24,767.

At issue in Order No. 24,767 were three motions to compel discovery that had been submitted by OCA in May and early June. One of the motions, granted by the Commission, sought to compel certain discovery responses by Verizon. By motion filed on June 26, 2007, Verizon sought rehearing of this aspect of the Commission's decision. Verizon withdrew the motion on June 29, 2007, reporting that it and OCA had resolved their discovery dispute by agreement. Accordingly, by secretarial letter of July 5, 2007, the Commission confirmed that Verizon was no longer obliged to take any action to comply with Order No. 24,767.

Also addressed in Order No. 24,767 were two OCA motions to compel discovery responses from FairPoint. As noted in the order, the two motions made similar arguments, inasmuch as both motions concerned “materials prepared by FairPoint or its outside advisors that relate to FairPoint’s internal deliberations as to its negotiations with Verizon and the agreements FairPoint ultimately reached with Verizon.” Order No. 24,767, slip op. at 2; *see also* OCA Rehearing Motion at 1 (adopting this characterization of the disputes). The Commission denied both motions, prompting OCA’s request for rehearing.

On July 12, 2007, OCA submitted a pleading captioned “Amended Motion for Rehearing of Order No. 24,767 Regarding FairPoint Communications, Inc. or, in the Alternative, Motion to Vacate Order No. 24,767” (Amended Motion). FairPoint submitted a pleading in opposition to the original OCA motion, as well as the amended version, on July 13, 2007.

According to OCA, the Commission “misconstrued the information sought by the OCA as ‘information about the negotiations’ and not related to the ‘actual agreement of the joint petitioners.’” OCA Rehearing Motion at 1-2. OCA maintained in the original rehearing motion that it sought only information that is related to the terms of the agreement now pending before the Commission. The Consumer Advocate further directed the Commission’s attention to what OCA characterized as new evidence – i.e., a filing made by FairPoint with the federal Securities and Exchange Commission (on that agency’s Form S-4) subsequent to the OCA motions to compel discovery.

The Amended Motion reports on certain events that have transpired since the original motion. According to OCA, it learned on July 9, 2007 that FairPoint would not appeal certain rulings of the Maine Public Utilities Commission (Maine PUC) in that jurisdiction’s parallel

proceeding, concerning an effort by Maine's Office of Public Advocate (the counterpart agency to the OCA in Maine) to obtain documents from FairPoint that are substantially similar if not identical to the documents OCA is seeking here. It appears that the Maine PUC reached a result that is the opposite of the one adopted in Order No. 24,767 with respect to FairPoint documents. OCA reports that it now has access to the documents it sought from FairPoint, Amended Motion at 4 ("FairPoint has produced the disputed documents which were the subject of the OCA's Second and Third Motions to Compel"), but the OCA contends that the dispute nevertheless remains "justiciable," *id.* at 3. As an alternative to the requested RSA 541:3 rehearing, OCA asks the Commission to vacate Order No. 24,767, citing RSA 365:28 (vesting Commission with authority to "annul, set aside or otherwise modify any order made by it"), because of two unresolved issues: (1) the admissibility of the documents at hearing, and (2) the mere fact that the reasoning in Order No. 24,767 is "misconceived and incorrect." *Id.* at 4. Therefore, in the view of OCA, the Commission should vacate Order No. 24,767 with respect to Fairpoint as "moot *nunc pro tunc.*" *Id.*

In opposition, FairPoint contends that the Commission should deny the motion for rehearing as moot. According to FairPoint, "[t]he fact that a party disliked a Commission order and disagrees with the Commission's reasoning, in the absence of any dispute to adjudicate, does not create a justiciable controversy." FairPoint Opposition at 4. FairPoint further contends that, on the merits, OCA is not entitled to rehearing because the Commission correctly determined that "the only relevant information in this transaction was produced prior to July 9, 2007 in its responses to the OCA's Data Requests." *Id.* at 5. According to FairPoint, OCA seeks to reverse established Commission precedent, cited in Order No. 24,767, about the non-discoverability of

negotiation-related materials in support of a new principle that everything considered by the negotiating parties in advance of their actual agreement is discoverable because it had a bearing on whatever deal was ultimately struck.

We agree with FairPoint that because it is uncontroverted that OCA has now received the materials it sought via the two discovery motions, the controversy addressed in OCA's rehearing motion is no longer justiciable and the questions raised are moot. As the New Hampshire Supreme Court has noted, "the question of mootness is one of convenience and discretion and is not subject to hard-and-fast rules. Generally, however, a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." *In re Juvenile 2005-212*, ___ N.H. ___, 917 A.2d 703, 705 (2007) (quoting *Appeal of Hinsdale Fed. of Teachers*, 133 N.H. 272, 276 (1990)). "Academic" is an accurate way to describe a discovery dispute once the party seeking the discovery has acquired the materials through some other means.

Although the Court has recently noted that "[a] decision upon the merits may be justified where there is a pressing public interest involved or future litigation may be avoided," *In re Guardianship of R.A.*, ___ N.H. ___, ___, 920 A.2d 1213, 1215-16 (2007) (citation omitted), that is not the situation here, *see also Appeal of Hinsdale Federation of Teachers*, 133 N.H. 272, 276 (1990) (noting exception to mootness doctrine for questions that are "capable of repetition yet evade[] review") (citation omitted). To be sure, the underlying proceeding involving the proposed transfer of Verizon's land line network is of significant and pressing public interest, but the same cannot be said of the relatively arcane question of when documents shedding light on negotiations are discoverable in an administrative proceeding that addresses the question of

whether the product of those negotiations is consistent with the public interest. As the parties have noted, and as we observed in Order No. 24,767, this kind of discovery problem is one the Commission has addressed on more than one previous occasion, from which we infer that one more order discussing the issue is unlikely to affect the likelihood of whether similar problems will require adjudication in the future. Nor do such issues tend to evade review, given the availability of appropriate mechanisms resolving discovery disputes.

OCA advances, however, the argument that, although it now has the documents it sought to compel FairPoint to produce, the question of their admissibility remains unresolved. While a document that is discoverable is not necessarily admissible, (nor is a document that is not discoverable, though acquired through other means, necessarily inadmissible) OCA expresses concern that FairPoint may seek to rely on Order No. 24,767 to argue that the documents at issue here, which were found not to be discoverable but which were acquired through other means, may not become part of the record before the Commission in deciding the merits of the case. The admissibility of such documents is a separate question not properly the subject of rehearing in this instance but will be addressed at the appropriate time if raised during the hearings in this proceeding.

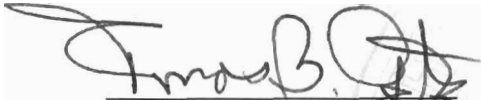
Although the Commission may conceivably take a different approach in the future, in this instance it would accomplish nothing to rehear a discovery dispute that developments in another jurisdiction have overtaken. Correspondingly, there is no necessity in these circumstances to vacate Order No. 24,767. Accordingly, we deny the OCA's motion for rehearing as moot and having stated no good reason for rehearing. Finally, we note that all of the disputes addressed in

that order have been resolved and, thus, no party need take further action with respect to the matters discussed therein.

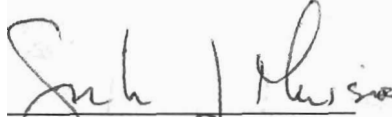
Based upon the foregoing, it is hereby

ORDERED, that the motion of the Office of Consumer Advocate for rehearing of Order No. 24,767 is DENIED.


By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of July, 2007.



Thomas B. Getz
Chairman

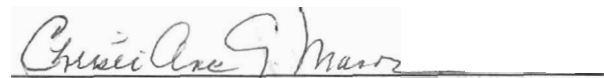


Graham J. Morrison
Commissioner



Clifton C. Below
Commissioner

Attested by:



ChristiAne G. Mason
Assistant Executive Director & Secretary

CHRISTOPHER J ALLWARDEN
PUBLIC SVC OF NEW HAMPSHIRE
780 NORTH COMMERCIAL ST
PO BOX 330
MANCHESTER NH 03105

NANCY BROCKWAY
NBROCKWAY & ASSOCIATES
10 ALLEN ST
BOSTON MA 02131

MARK C DEL BIANCO
3929 WASHINGTON ST
KENSINGTON MD 20895

JOHN ANTONUK
LIBERTY CONSULTING GROUP
65 MAIN ST
PO BOX 237
QUENTIN PA 17083-0237

STEVEN V CAMERINO
MCLANE GRAF RAULERSON & MIDD
11 SOUTH MAIN ST STE 500
CONCORD NH 03301

VICTOR D DEL VECCHIO
VERIZON NEW ENGLAND
185 FRANKLIN ST 13TH FL
BOSTON MA 02110-1585

KELLY ATWOOD
DEVINE MILLIMET & BRANCH PA
49 N MAIN ST
CONCORD NH 03302

MICHAEL CANNATA
LIBERTY CONSULTING GROUP
65A RIDGE RD
DEERFIELD NH 03037

GERALD M EATON
PUBLIC SERVICE COMPANY OF NEW H
780 N COMMERCIAL ST
PO BOX 330
MANCHESTER NH 03105-0330

SUSAN BALDWIN
17 ARLINGTON ST
NEWBURYPORT MA 01950

GENT CAV
OTEL TELEKOM INC
ONE SUNDIAL AVE STE 210
MANCHESTER NH 03103

GARY EPLER
UNITIL ENERGY SYSTEMS INC
6 LIBERTY LANE WEST
HAMPTON NH 03842-1720

KATHERINE E BARKER MARSHALL
KELLEY DRYE & WARREN LLP
3050 K ST NW STE 400
WASHINGTON DC 20007

ROBERT CIANDELLA
DONAHUE TUCKER & CIANDELLA
225 WATER ST
EXETER NH 03833-0630

DAN FELTES
NEW HAMPSHIRE LEGAL ASSISTANCE
154 HIGH ST
PORTSMOUTH NH 03802

ALEXANDRA E BLACKMORE
GRANITE STATE ELECTRIC COMPANY
25 RESEARCH DRIVE
WESTBOROUGH MA 05182

MICHAEL CLANCY
COVAD COMMUNICATIONS GROUP I
149 MARGARET BLVD
MERRICK NY 11566-3612

PAULA W FOLEY
ONE COMMUNICATIONS
24 ALBION RD STE 230
LINCOLN RI 02865

SARAH M BOSLEY
107 OXPENS RD
CARY NC 27513

FREDERICK J COOLBROTH
DEVINE MILLIMET & BRANCH
49 N MAIN ST
PO BOX 3610
CONCORD NH 03302

KARYN P FORBES
SHAHEEN & GORDON PA
107 STORRS ST
PO BOX 2703
CONCORD NH 03302-2703

DAVID BREVITZ
3623 SW WOODVALLEY TER
TOPEKA KS 66661

SEAN DANDLEY
DSCI CORPORATION
1050 WALTHAM ST
LEXINGTON MA 02421

SHELIA GORMAN
VERIZON
125 HIGH STREET
BOSTON MA 02110

07/25/07 Order No. 24,780 issued and forwarded
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Staff.

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DEBRA A HOWLAND
EXEC DIRECTOR & SECRETARY
NHPUC
21 SOUTH FRUIT STREET, SUITE 10
CONCORD NH 03301-2429

ANTHONY HANSEL
COVAD COMMUNICATIONS CO
600 14TH ST NW
STE 750
WASHINGTON DC 20005

KIMBALL L KENWAY
CURTIS THAXTER STEVENS BRODER &
ONE CANAL PLAZA 10TH FLR
PO BOX 7320
PORTLAND ME 04112-7320

PATRICK MCHUGH
DEVINE MILLIMET & BRANCH PA
111 AMHERST ST
PO BOX 719
MANCHESTER NH 03101

MEREDITH A HATFIELD
OFFICE OF CONSUMER ADVOCATE
21 SOUTH FRUIT ST STE 18
CONCORD NH 03301

CHARLES KING
LIBERTY CONSULTING GROUP
65 MAIN ST
PO BOX 237
QUENTIN PA 17083-0237

JUDITH MESSENGER
PAETEC COMMUNICATIONS INC
ONE PAETEC PLAZA
600 WILLOWBROOK OFFICE PARK
FAIRPORT NY 14450

RORIE HOLLENBERG
OFFICE OF CONSUMER ADVOCATE
21 SOUTH FRUIT ST STE 18
CONCORD NH 03301-2429

SARAH KNOWLTON
MCLANE GRAF RAULERSON & MIDD
100 MARKET ST STE 301
PORTSMOUTH NH 03801

CAROL MILLER
NEW HAMPSHIRE INTERNET SERVICE
PO BOX 8008
NASHUA NH 03060

ROBERT T HYBSCH
PUBLIC SERVICE COMPANY OF NEW H
780 NORTH COMMERCIAL ST
PO BOX 330
MANCHESTER NH 03105-0330

WALTER E LEACH JR
FAIRPOINT COMMUNICATIONS INC
521 E MOREHEAD ST STE 250
CHARLOTTE NC 28202

KATHERINE B MILLER
DONAHUE TUCKER & CIANDELLA PL
225 WATER STREET
PO BOX 630
EXETER NH 03833-0630

NANCY JACOBSON
ONE COMMUNICATIONS
24 ALBION RD STE 230
LINCOLN RI 02865

ALAN LINDER
NH LEGAL ASSISTANCE
48 SOUTH MAIN ST
CONCORD NH 03301

ROBERT J MUNNELLY JR
MURTHA CULLINA LLP
99 HIGH ST 20TH FLR
BOSTON MA 02110

JEREMY L KATZ
SEGTEL INC
PO BOX 610
LEBANON NH 03766

SHIRLEY J LINN
FAIRPOINT COMMUNICATIONS INC
521 E MOREHEAD ST STE 250
CHARLOTTE NC 28202

JOHN NESTOR III
VERIZON NEW HAMPSHIRE
900 ELM ST STE 1927
MANCHESTER NH 03101-2008

HEATHER KAUFMAN
NEW HAMPSHIRE ELECTRIC COOPER
579 TENNEY MT HIGHWAY
PLYMOUTH NH 03264

ALAN D MANDL
SMITH & DUGGAN LLP
LINCOLN NORTH
55 OLD BEDFORD RD
LINCOLN MA 01773-1125

ROGELIO E PENA
PENA & ASSOCIATES LLC
4845 PEARL EAST CIR STE 101
BOULDER CO 80301-6113

GREGORY M KENNAN
ONE COMMUNICATIONS
24 ALBION RD STE 230
LINCOLN RI 02865

MARLA B MATTHEWS
GALLAGHER CALLAHAN & GARTREL
214 N MAIN ST
CONCORD NH 03301

DONALD PFUNDSTEIN
GALLAGHER CALLAHAN & GARTREL
214 N MAIN ST
P O BOX 1415
CONCORD NH 03302

PAUL J PHILLIPS
PRIMMER PIPER EGGLESTON & CRAM
421 SUMMER ST
PO BOX 159
ST JOHNSBURY VT 05819-0159

SCOTT SAWYER
38 THIRD ST
BARRINGTON RI 02806

DARREN R WINSLOW
UNION COMMUNICATIONS
13 CENTRAL ST
PO BOX 577
FARMINGTON NH 03901

CHRISTOPHER J POLLART
RUBIN AND RUDMAN LLP
50 ROWES WHARF
BOSTON MA 02110

GREGG STRUMBERGER
LEVEL 3 COMMUNICATIONS LLC
1025 ELDORADO BLVD
BROOMFIELD CO 80021

SUZANNE WOODLAND
CITY OF PORTSMOUTH
1 JUNKINS AVENUE
PORTSMOUTH NH 03801

KAREN M POTKUL
XO COMMUNICATIONS SERVICES INC
1601 TRAPELO RD STE 397
WALTHAM MA 02451

BRIAN SUSNOCK
THE DESTEK NETWORKING GROUP I
ONE INDIAN HEAD PLAZA
NASHUA NH 03060

R EDWARD PRICE
CHOICE ONE COMMUNICATIONS INC
100 CHESTNUT ST 14TH FLR
ROCHESTER NY 14604

BEN THAYER
BAYRING COMMUNICATIONS
359 CORPORATE DR
PORTSMOUTH NH 03801-2888

AUDREY J PRIOR
FAIRPOINT COMMUNICATIONS INC
155 GANNETT DR
SOUTH PORTLAND ME 04106

KELLY TOROSIAN
IBEW NH
46 THIRD ST
MANCHESTER NH 03102-4596

SUSAN ROCKEFELLER
CURTIS THAXTER STEVENS BRODER &
ONE CANAL PLAZA
PORTLAND ME 04112-7320

ROJEAN TULK
FAIRPOINT COMMUNICATIONS INC
155 GANNETT DR
SOUTH PORTLAND ME 04106-6942

SCOTT J RUBIN
3 LOST CREEK DR
SELINGROVE PA 17870

ROBIN E TUTTLE
FAIRPOINT COMMUNICATIONS INC
521 E MOREHEAD ST STE 250
CHARLOTTE NC 28202

ARPIAR G SAUNDERS JR
SHAHEEN & GORDON PA
PO BOX 2703
CONCORD NH 03302-2703

RANDY VICKROY
LIBERTY CONSULTING GROUP
65 MAIN ST
PO BOX 237
QUENTIN PA 17083-0237

GARY A ABBOTT
48 GRANDVIEW RD
BOW NH 03304

SUSI NORD
32 MURRAY HILL RD
CANDIA NH 03034-2616

JESSICA CLARK
161 LONDONDERRY TURNPIKE
HOOKSETT NH 03106

STACEY L PARKER
12 TOZER RD
BEVERLY MA 01915

MARLENE M DECHANE
PO BOX 123
BARRINGTON NH 03825-0123

CHRIS RAND
600 SOUTHSTARK HIGHWAY PO BOX 8
WEARE NH 03281

BILL HAMILTON
900 ELM ST STE 702
MANCHESTER NH 03101

WILLIAM STAFFORD
600 SOUTH STARK HWY
PO BOX 87
WEARE NH 03281

BARBARA HULL RICHARDSON
101 MORGAN RD
RICHMOND NH 03470-4909

JUNE E TIERNEY
112 STATE ST
MONTPELIER VT 05620-2601

JAMES MONAHAN
114 NORTH MAIN ST STE 401
CONCORD NH 03301

RALPH J MONTEFUSCO
172 WOODBURY ROAD
BURLINGTON VT 05408

GAIL MORRISON
PO BOX 133
SANBORNTON NH 03269

STEPHEN NELSON
2 STARK HIGHWAY SOUTH
DUNBARTON NH 03045

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INTERESTED PARTIES

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