

STATE OF NEW HAMPSHIRE
BEFORE THE
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.

FairPoint Communications, Inc.'s
Motion For Partial Reconsideration of
This Commission's Letter Order
Concerning The Filing of Settlement Agreements

NOW COMES FairPoint Communications, Inc. ("FairPoint"), by and through its attorneys, Devine, Millimet & Branch, Professional Association, and respectfully submits this Motion For Partial Reconsideration of This Commission's Letter Order Concerning The Filing of Settlement Agreements. In support of this motion, FairPoint states as follows:

Factual Background

1. In this proceeding, FairPoint seeks Commission approval of a transaction through which it would acquire control of the land line assets and operations of Verizon New England Inc. ("Verizon") in New Hampshire. This case has been pending since January 2007.
2. FairPoint has arrived at settlement agreements with some of the intervenors in this proceeding, including certain CLEC and RLEC intervening parties among others. CLECs and RLECs are in competition with one another, and, in many

instances, with FairPoint. For that reason, the individual settling CLECs and RLECs and FairPoint have viewed and consider the terms of the settlements confidential.

3. The terms of the settlement agreements have been kept confidential, because each contains competitively sensitive information concerning a particular RLEC or CLEC that would give RLEC or CLEC competitors a competitive advantage against the settling parties.

4. Discovery in this proceeding has been extensive. Yet not one party to these proceedings has even asked for the RLEC settlement agreements. Only one party – the CLEC coalition of Bayring, segTel and Otel – has asked for the confidential CLEC settlement agreements. Since that time, FairPoint has arrived at a settlement with the requesting CLEC entities as well. While some intervenors may desire to review the competitive information of the others reflected in the confidential settlement agreements for other purposes, none of the CLEC and RLEC entities, nor any other intervenor in this proceeding, has any reason why they need to see the settlement agreements for purposes of this proceeding.

5. The CLEC settlement agreements do not constitute agreements for tariffed services or interconnection or unbundled network elements pursuant to the Communications Act of 1934 as amended. As such, the settlement agreements need not be filed with this Commission by law or regulation. The parties to the agreements, therefore, legitimately view them as confidential and are entitled to treat them as such under applicable law.

6. Notably, the settlement agreements at issue cannot become effective unless or until the Joint Petitioners obtain all necessary regulatory approvals and the

merger transaction that forms the basis of this proceeding closes. The agreements, in other words, may never come into effect. Further, no services will be ordered from FairPoint, nor any Section 251 agreements amended, unless and until the merger closes and FairPoint becomes the service provider in lieu of Verizon. At such time, FairPoint will make such filings as are required under federal and state law.

7. On October 19, 2007, this Commission issued a letter order concerning procedural issues associated with this proceeding. In that letter order, this Commission expressed a determination to review all settlement agreements and ordered FairPoint to file copies of the settlement agreements on October 22, 2007. Consistent with treatment in this docket, the Commission permitted FairPoint to file the settlement agreements as Highly Confidential, Confidential, or Public. Even the Highly Confidential designation however, includes dissemination to parties other than this Commission and its Staff.

8. Given the extremely sensitive nature of much of the content of the settlement agreements, in particular the type of competitive information they reveal, FairPoint seeks partial reconsideration of this Commission's letter order, by way of a modification of the order confirming that FairPoint may file the settlement agreements with the Commission under seal for Commission and Staff review alone. FairPoint will happily share these settlement agreements with the Commission and Staff; FairPoint believes, however, that no other party or intervenor has any need nor reason (other than to gain a competitive advantage) to obtain or review the settlement agreements.

Argument

I. Standard of Review

9. Pursuant to RSA 541:3, this Commission may grant motions for rehearing of any order or decision made by the Commission if good reason for rehearing is stated in the motion. Re City of Nashua, 2006 WL 4059090 (NHPUC September 22, 2006), page

2. As set forth below, FairPoint demonstrates good reason for this Commission to partially reconsider its letter order of October 19, 2007, and, therefore, pursuant to RSA 541:3, FairPoint is entitled to such reconsideration.

10. FairPoint seeks reconsideration of this Commission's letter order on two grounds. First, established Commission procedure and precedent acknowledge the reality that competitors often participate in Commission proceedings, and therefore, Commission procedure allows parties to protect competitively sensitive, highly confidential information. The CLEC and RLEC settlement agreements fall within the type of competitively sensitive information which this Commission routinely protects from dissemination, and the protection of those settlement agreements will in no way undermine the ability of this Commission to determine whether the underlying merger transaction will cause no net harm to the public interest. Second, not one intervenor in these proceedings can claim any prejudice arising out of review of the CLEC and RLEC settlement agreements by this Commission and Staff alone.

II. This Commission Has Repeatedly Refused To Require Production Of Competitively Sensitive Information That Would Result in Harm to a Petitioner.

11. This Commission has routinely recognized the importance of protecting a party against the competitive harm that would result from disclosure to competitors of

competitively sensitive information and has refused to allow parties' status as intervenors provide them with a competitive advantage. See, e.g., Re PSNH, 90 NH PUC 323 (2005) (holding that the public's interest in having access to the terms of agreements with coal providers was outweighed by the effects of public disclosure of such competitively sensitive information); Re PSNH, 89 NH PUC 327 (2004) (holding that the benefits of public disclosure of specific data as to the revenue of paper companies did not outweigh the harm in allowing competitors to derive information about the paper companies' energy usage, information that is competitively sensitive).

12. In Re Freedom Ring Communications, LLC, 82 NH PUC 454 (1997), this Commission noted that "[d]isclosure [of confidential and highly confidential information] would compromise the business plans of NYNEX and provide competitors with information that NYNEX has invested time and resources to develop, thereby unfairly advantaging competitors and jeopardizing ongoing commercial relationships that NYNEX has nurtured." In that decision, this Commission accepted NYNEX's contention that disclosure of highly confidential information, "such as... competitive analysis of competition in New Hampshire and NYNEX's assessment of its own and its competitors' specific competitive strengths and weaknesses" should be limited to the Commission, its Staff and the OCA, and should not be disclosed to the other parties to the docket. See id. See also Re PSNH, 89 NH PUC 226 (2004) (declining to compel production of sensitive and confidential pre-contract negotiations).

13. That analysis applies with equal force to the CLEC and RLEC settlement agreements at issue in this proceeding. The settlement agreements contain confidential competitive information that no party ought to have to divulge to any other in this docket.

The agreements contain terms and conditions that function in part on the basis of individual CLEC and RLEC (and FairPoint) business and strategic plans and models. Disclosure of the agreements to parties in this docket would have the effect of “unfairly advantaging competitors and jeopardizing ongoing commercial relationships. . . .”

Freedom Ring, 82 NH PUC at page 1. The information is of a nature that neither competitors nor any other party need or ought to receive, beyond this Commission and Staff. While certain parties might desire to review the settlement agreements for purposes other than these proceedings, this Commission has made clear that Commission proceedings should not be utilized to obtain competitive advantage.

14. This Commission has authorized in camera review and/or the filing under seal of highly confidential information. See, e.g., Re Verizon New Hampshire, 2006 WL 1815089 (NH PUC March 10, 2006) (parties agreed that Staff would review confidential competitively-charged information under seal); Re Jato Operating Two Corporation, 84 NH PUC 439 (1999) (granting a Motion for Leave to File Under Seal and/or a Protective Order relative to the filing of highly confidential financial statements, the disclosure of which could result in direct and immediate harm to the petitioner’s competitive position); Re Eastern Utilities Associates/Unitil Corp., 75 NH PUC 269 (1990) (noting that if parties fail to reach agreement regarding confidential treatment of a document, they can request that the Commission review the documents in camera to determine whether there is a valid claim for protection); Re Petrolane-Southern New Hampshire Gas Co., Inc., 73 NH PUC 473 (1988) (granting proprietary treatment of highly confidential information pending in camera review by the Commission and its Staff only, pursuant to a nondisclosure agreement). This Commission, in other words, recognizes the potential

competitive issues that can arise in proceedings such as these, in which competitors participate and are subject to discovery, and has established safeguards of the kind FairPoint seeks herein to allow Commission review of confidential and competitive information without placing participants in a given docket at a competitive disadvantage.

15. Accordingly, FairPoint requests that this Commission reconsider the letter order and permit FairPoint to file the CLEC and RLEC settlement agreements under seal for in camera review by this Commission and its Staff alone.

III. No Intervenor Can Demonstrate Any Prejudice Arising Out Of The Reconsideration FairPoint Seeks.

16. The partial reconsideration FairPoint seeks cannot result in prejudice to any intervenor in this proceeding, as a matter of law and a matter of fact. Not only do the settlement agreements fall outside of what must be filed with this Commission under applicable law, but the only party who requested to review the settlement agreements – the CLEC coalition – has now itself entered into a settlement agreement with FairPoint.

17. While FairPoint fully intends to provide the settlement agreements to this Commission and Staff, as a matter of law, the settlement agreements at issue are not of the type which must be filed with this Commission. The agreements need not receive Commission approval pursuant to Section 252 of the Communications Act of 1934 as amended. The agreements are simply confidential, private agreements between market participants.

18. The agreements, moreover, do not effectuate specific changes to any Verizon intercarrier agreements. Such amendments could not take effect until completion of this proceeding and closing of the transaction because FairPoint is not a party to Verizon's agreement at this time. At that time, to the extent the settlement

agreements express an intention to extend or otherwise modify any Section 251 agreements, the parties will necessarily make filings with this Commission to seek Commission approval of any amendments to Section 251 agreements made necessary by this settlement. At present, the settlement agreements are more in the nature of agreements to take certain actions in the future. At the point in time in which the parties must seek approval, this Commission will have full opportunity to assess any concerns, such as discrimination.

19. Beyond any legal obligations, no RLEC has requested any of the settlement agreements. The CLEC coalition has requested only that FairPoint file the agreements, not specifically that the CLEC coalition receive them. The CLEC coalition, in any event, has now arrived at a settlement with FairPoint which should obviate any further of the coalition's concern. At this point, no party articulates any need to receive the settlement agreements

20. Finally, disseminating the settlement agreements to any intervenor can serve no purpose in these proceedings. This Commission's rules view settlement conferences and related discussions as confidential and not subject to disclosure and proscribe their introduction as evidence in the proceedings to which they pertain. See Puc 203.20(a) ("All participants in settlement conferences shall treat discussions at settlement conferences as confidential and shall not disclose the contents of such discussions to third parties or seek to introduce them into evidence"). The settlement agreements at issue manifest FairPoint's confidential settlement discussions and negotiations to which no party may compel disclosure nor introduce as evidence in this proceeding. No party, therefore, can claim prejudice from the limited disclosure of the

RLEC and CLEC settlement agreements –to this Commission and Staff under seal – which FairPoint requests.

Conclusion

21. This Commission's rules and decisions contemplate the protection of highly confidential, competitively sensitive information from disclosure to competitors in Commission proceedings. Those rules and decisions compel the conclusion that the RLEC and CLEC settlement agreements in this proceeding should remain confidential. No party has asked for the settlement agreements (other than the CLEC coalition which has now entered into a settlement agreement with FairPoint), nor does any party have a reason, at least related to this proceeding, to ask for them. For all of these reasons, FairPoint requests that this Commission reconsider that portion of the letter order that requires FairPoint to disseminate the RLEC and CLEC settlement agreements to any party other than the Commission and Staff under seal.

WHEREFORE, FairPoint respectfully requests that this Commission:

- A. Partially reconsider the letter order of October 19, 2007; and
- B. Order that FairPoint must produce the RLEC and CLEC settlement agreements only to this Commission and its Staff under seal; and
- C. Grant such further and other relief as this Commission deems just, equitable and proper.

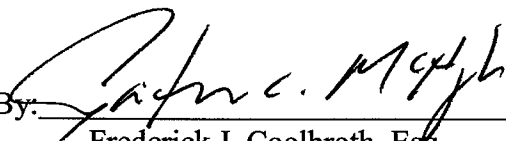
Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.

By its Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

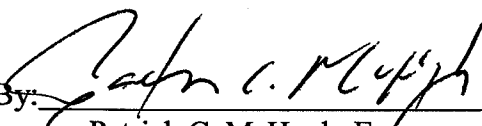
Dated: October 22, 2007

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served this day upon all parties.

Dated: October 22, 2007

By: 
Patrick C. McHugh, Esq.