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July 13, 2007

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Debra Howland  
Executive Director & Secretary  
NH Public Utilities Commission  
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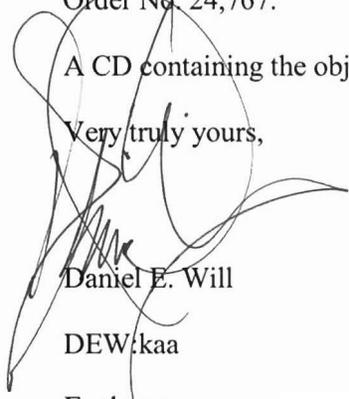
Re: DT 07-011 Verizon New England, Inc., Bell Atlantic Communications, Inc., NYNEX  
Long Distance Co., Verizon Select Services Inc., and FairPoint Communications, Inc.

Dear Ms. Howland:

Enclosed for filing in the above-matter is an original and seven (7) copies of FairPoint Communications, Inc.'s Objection to the Office of Consumer Advocate's Motion for Rehearing of Order No. 24,767 and the Office of Consumer Advocate's Amended Motion for Rehearing of Order No. 24,767.

A CD containing the objection is also enclosed.

Very truly yours,

  
Daniel E. Will

DEW:kaa

Enclosures

cc: Electronic Service List

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.

**Objection Of FairPoint Communications, Inc. To**  
**Office of Consumer Advocate's Motion for Rehearing of Order No. 24,767**  
**Regarding FairPoint Communications, Inc.**

**And**

**To 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**

NOW COMES FairPoint Communications, Inc. ("FairPoint") and pursuant to New Hampshire Public Utilities Commission (the "Commission) Procedural Order No. 24,733, respectfully objects to the Motion for Rehearing of Order No. 24,767 Regarding FairPoint Communications, Inc. and to the Amended Motion for Rehearing of Order No. 24,767 Regarding FairPoint Communications, Inc. or in the Alternative, Motion to Vacate Order No. 24,767, filed by the Office of the Consumer Advocate ("OCA").

**Introduction**<sup>1</sup>

1. This objection pertains to two, related motions OCA has filed, the first a motion for reconsideration of an order of this Commission denying OCA's motion to compel, and the second, an amended motion for reconsideration, or, in the alternative, to vacate that order. The following explains the procedural posture as it has evolved concerning OCA's motions.

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<sup>1</sup> In order to avoid unnecessary repetition, FairPoint incorporates by reference its Objection by FairPoint Communications, Inc. to Second Motion to Compel by the Office of the Consumer Advocate (Group I Data Requests) and does not repeat the facts or arguments stated therein.

2. The issues raised in OCA's motions arose out of two motions to compel OCA filed in which OCA sought certain documents concerning negotiations and internal analyses and considerations prior to finalization of the merger agreement that outlines the transaction which is before the Commission in these proceedings. On June 22, 2007 the Commission issued Order No. 24,767 which, in relevant part, denied the OCA's motions to compel responses to Data Requests from FairPoint. Specifically, the Commission declined to compel FairPoint to produce documents concerning internal analyses of FairPoint's financial advisors and other financial information which FairPoint and FairPoint's Board of Directors considered internally in analyzing, and/or negotiating the transfer of assets to FairPoint in advance of executing the agreement which is the subject of this proceeding. The Commission relied on prior decisions, namely Public Service Company of New Hampshire, 89 NH PUC 226 (Order No. 24,310) (2004) and City of Nashua, Order No. 24,654 (Aug. 7, 2006), and stated that it would not "compel the discovery of information simply to shed light on the thinking of parties that enter into contracts subject to [its] review." Order No. 24,767 at p. 4.

3. The OCA filed a motion for reconsideration, subsequent to which, for reasons unrelated to OCA's motion, FairPoint voluntarily produced the documents OCA's motion for reconsideration specifically sought. That production fully resolved the dispute between OCA and FairPoint and rendered further motion practice before this Commission unnecessary. Now, despite the absence of any dispute, OCA presses for reconsideration of the order, or in the alternative, to vacate the order. OCA readily acknowledges that no dispute remains between OCA and FairPoint and OCA seeks no further relief from the Commission with respect to FairPoint.

4. OCA's motions lack merit. FairPoint's production of documents moots the need for any rehearing or reconsideration of Order No. 24,767. Furthermore, neither of the OCA's motions demonstrates good cause to support reconsideration or vacation of Order No. 24,767.

### Argument

#### **I. FairPoint Produced the Requested Documents, Therefore, the Motion for Rehearing is Moot**

5. "Generally, . . . a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." E.g., In re Juvenile No. 2005-212, \_\_\_ N.H. \_\_\_, 917 A.2d 703, 705 (2007); Appeal of Hinsdale Federation of Teachers, NEA-New Hampshire, NEA, 133 N.H. 272, 276 (1990). Unless a pressing public interest is involved, or the question is capable of repetition yet evading review, an issue that has already been resolved is not entitled to judicial intervention. See Appeal of Hinsdale Federation of Teachers, 133 N.H. at 276.

6. The OCA's motions to compel and the motion for reconsideration all sought to obtain documents prepared by FairPoint's financial advisors and other financial information which FairPoint received in the period of time leading up to and in advance of executing, the merger agreement. As OCA points out, FairPoint produced these documents on July 9, 2007.

7. FairPoint's production, which OCA concedes satisfies the relief OCA requested in the motion for reconsideration, leaves this Commission without a justiciable controversy. All that remains is OCA's request to engage in a now academic debate as to the reasoning of underlying order. Further action on the OCA's motion will unnecessarily consume Commission resources, but provide OCA no specific relief because reconsideration will not provide OCA with anything OCA has not already obtained. The request presented in the OCA's motion to

compel is both “academic” and “dead.” See, e.g., In re Juvenile, 917 A.2d at 705; Appeal of Hinsdale Federation of Teachers, 133 N.H. at 276.

8. The decisional law OCA cites in support of its argument that reconsideration is not moot only confirms the opposite and supports FairPoint’s opposition. See ATV Watch v. Department of Resources and Econ. Devel., \_\_\_ N.H. \_\_\_, 923 A.2d 1061, 1064 (2007) (holding that despite production of requested documents, possibility of further remedy under Right to Know law presented justiciable issue); In re Juvenile, 917 A.2d at 705 (holding that voluntary provision of services to juvenile did not moot need for court-ordered placement); Appeal of Hinsdale Federation of Teachers, 133 N.H. at 276-77 (acknowledging the possibility of different prior outcomes, but upholding mootness determination based upon facts and circumstances at time of review). In two of the decisions OCA cites, something remained for adjudication (unlike present circumstances in this matter), while in the third, nothing remained (exactly like the present circumstances in this matter) and mootness was affirmed.<sup>2</sup>

9. The fact that a party disliked a Commission order and disagrees with the Commission’s reasoning, in the absence of any actual dispute to adjudicate, does not create a justiciable controversy. The resolution of the discovery dispute between FairPoint and OCA to which Order 24,767 pertained obviates the need for any further action by this Commission.

## **II. The OCA Cannot Show That Order No. 24,767 Was Unlawful or Unreasonable or Good Cause to Reconsider Order No. 24,767, Therefore, the Motion for Rehearing Must Be Denied**

10. In addition to being moot, OCA’s motion states no basis on the merits for reconsideration of the order because in holding the information OCA sought to be irrelevant, this Commission overlooked neither fact nor applicable law. To succeed on a motion for rehearing,

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<sup>2</sup> The relief OCA seeks also finds no support in normal Commission practice. This Commission, for example, did not reconsider the portion of Order compelling Verizon’s production of certain business plans after Verizon and OCA resolved that document dispute.

the OCA “must demonstrate that the order [was] unlawful and unreasonable.” Re City of Nashua, 90 PUC 130, \*2 (Order No. 24,448) (2005) (citing RSA 541:3 and RSA 541:4).

“[G]ood cause for rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued.” Id. (citing Dumais v. State, 118 N.H. 309, 312 (1978)).

11. The OCA argues that the Commission misconstrued the disputed data requests and that the documents OCA sought relate not to the “thinking of the parties that enter into contracts,” but to the terms of the pending agreement. Viewed most broadly, OCA argues for a reversal of the established decisions upon which this Commission relied, which unequivocally confirm that the Commission concerns itself with the deal as struck, and not the myriad of possible iterations that parties may have considered prior to entering into a contract. See Public Service Company of New Hampshire, 89 NH PUC 226 (Order No. 24,310) (2004) and City of Nashua, Order no. 24,654 (Aug. 7, 2006). As the Commission determined in response to OCA’s motions to compel, the only relevant information in this transaction was produced prior to July 9, 2007 by FairPoint in its responses to the OCA’s Data Requests.

12. Although OCA states to the contrary, the terms of the contract under which the assets will be transferred to FairPoint are contained in the agreement that FairPoint’s Board of Directors approved on January 14, 2007. As the Commission recognized, information and documents relevant to that agreement were previously produced by FairPoint in response to the OCA’s and other parties’ comprehensive Data Requests. OCA sought pre-deal information concerning negotiations, analyses and considerations which prior Commission orders flatly hold to be irrelevant. See Re City of Nashua, Order No. 24,654 (deciding that given encyclopedic

amount of discovery and lack of showing of centrality of information to case, discovery was not appropriate).

13. For OCA to now argue that the pre-deal information concerns the deal as struck would render every document leading up to every transaction relevant in commission proceedings concerning that transaction. On OCA's logic, all pre-deal materials could be viewed as (remotely) relating to the final deal, to the extent those pre-deal materials reflect the parties' considerations, negotiations and analyses leading up to the final deal. While the history leading up to the final deal may be interesting to a particular party or intervenor, that history has no relevance to the central question before this Commission, namely, whether the transaction - the final deal - will cause no harm to the public interest. For that reason, this Commission has, through a series of consistent orders, made clear that information reflecting pre-deal negotiations, assumptions and analyses, is not subject to discovery. OCA's argument would obliterate the logical line this Commission has drawn between materials that directly concern the transaction before it versus materials that concern any number of transactions that might have been.

14. The OCA presents no evidence that was not available at the time of its initial motions which tends to show that the Commission's Order should be reconsidered. FairPoint did not deny the existence of other documents prepared by its financial advisors or that it received other financial information during its negotiation of the agreement to transfer assets. To the contrary, FairPoint simply established that the documents were neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and, therefore, not discoverable. The amended S-4 to which OCA cites, does not give rise to new evidence. It simply discusses documents from FairPoint's financial advisors which FairPoint has always acknowledged, at least categorically, exist.

15. The disclosure of documents in an S-4 disclosure, moreover, does not make the documents relevant to proceedings before this Commission. Disclosure to shareholders through SEC filings and pursuant to federal securities laws has no bearing on whether a transaction will cause no harm to the public interest, which is the Commission's inquiry in these proceedings.

**Conclusion**

16. For the above stated reasons, FairPoint respectfully requests that OCA's Motions.

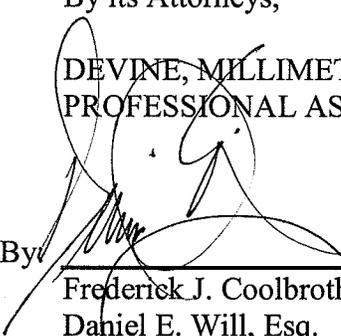
Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.

By its Attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: July 13, 2007

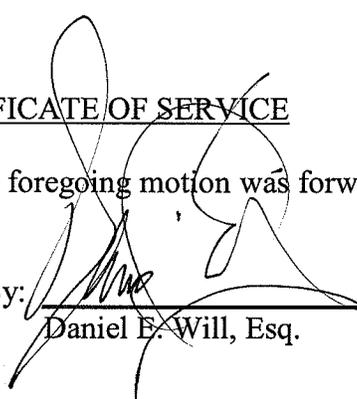
By: 

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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.

Dated: July 13, 2007

By: 

Daniel E. Will, Esq.