STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 07-011

VERIZON NEW ENGLAND, INC., ET ALS AND FAIRPOINT COMMUNICATIONS, INC. JOINT PETITION FOR AUTHORITY TO TRANSFER ASSETS AND FRANCHISE TO FAIRPOINT COMMUNICATIONS, INC.

OPPOSITION OF THE NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION, INC. AND COMCAST PHONE OF NEW HAMPSHIRE, LLC TO FAIRPOINT'S MOTION FOR PARTIAL RECONSIDERATION OF THE COMMISSION'S LETTER ORDER CONCERNING THE FILING OF SETTLEMENT AGREEMENTS AND MOTION FOR CLASSIFICATION OF SUCH SETTLEMENT AGREEMENTS AS PUBLIC OR, IN THE ALTERNATIVE, CONFIDENTIAL EXHIBITS

The New England Cable and Telecommunications Association, Inc. ("NECTA") and Comcast Phone of New Hampshire, LLC ("CPNH") submit their Opposition to FairPoint Communications, Inc.'s Motion for Partial Reconsideration of the Commission's October 19, 2007 Letter Order ("October 19 Letter Order"). In addition, NECTA and Comcast move that in accordance with Commission procedures and the terms of the Protective Agreement between FairPoint/Verizon and NECTA/CPNH, the Commission classify settlement agreements filed by FairPoint and certain parties to this proceeding as public or confidential information, available to the public or signatories of protective agreements entered into with FairPoint/Verizon.

THE COMMISSION'S OCTOBER 19, 2007 LETTER ORDER

On October 11, 2007, Freedom Ring Communications, LLC d/b/a Bayring Communications, LLC, segTEL, Inc. and Otel TeleKom, Inc. filed a letter with the Commission requesting that FairPoint be directed to file with the Commission certain settlement agreements reached between FairPoint, but which FairPoint indicated that it would not file with the Commission for approval and would not make the terms of the settlements available to all CLECs.

The above-named CLEC parties expressed their concern that undisclosed settlements entered into by FairPoint might result in discriminatory preferences contrary to RSA 378:10. They also noted that issues raised by the settling CLECs in pre-filed testimony, which they stated had been resolved through their settlements with FairPoint, included "issues of generic interest to all CLECs in this proceeding" as opposed to issues solely of interest to a single CLEC (October 11, 2007 letter at 1, 2). The October 11, 2007 letter at 3 requested that the Commission require the settling parties "to promptly file their settlement agreements with the Commission, to explain how they will be implemented, to explain whether the terms will be available to all CLECs, and to explain why they should be approved."

In its October 19 Letter Order, the Commission noted that a number of settlement agreements between FairPoint and other parties (including one with competitors and wholesale customers of Verizon and future competitors and wholesale customers of FairPoint) had been filed with the Commission, while other settlement agreements had

not been submitted to the Commission. The Commission directed that all unfiled settlement agreements be filed with the Commission by October 22, 2007. The Commission allowed FairPoint to make an initial designation of these settlement agreements as public, confidential or highly confidential. The October 19 Letter Order further provided that, "...the parties to any settlement agreement may be asked about the terms of the settlement agreements into which they have entered" (October 19 Letter Order at 2).

FAIRPOINT'S MOTION FOR PARTIAL RECONSIDERATION

During the evening following the October 22, 2007 hearing in this matter, FairPoint served the parties by email with a Motion for Partial Reconsideration of the October 19 Letter Order. On October 23, 2007, FairPoint made available hard copies of its Motion. The Commission afforded the parties an opportunity to respond to FairPoint's Motion by October 26, 2007.

FairPoint has requested that the Commission grant partial reconsideration of and modify the October 19 Letter Order by "confirming that FairPoint may file the settlement agreements with the Commission under seal for Commission and Staff review alone."

For the reasons below, the Commission should deny FairPoint's Motion for Partial Reconsideration. NECTA and CPNH further move that the Commission rule that these settlement agreements filed by FairPoint, like those previously filed, be classified as

public exhibits or, in the alternative, as confidential exhibits to be provided to parties that have entered into protective agreements with FairPoint/Verizon.[1]

ARGUMENT

I. LEGAL STANDARDS

The Commission had occasion to address the confidentiality of information submitted by the parties to this proceeding.[2] Documents provided by the parties have been classified under protective agreements as public, confidential or highly confidential. In its September 27, 2007 Order No. 24,792, the Commission observed that "... RSA 378:43 protects information filed by telecommunications utilities if first, such information is not general public knowledge or published elsewhere, second, measures have been taken to prevent dissemination in the ordinary course of business, and third, the information pertains 'to the provision of competitive services' or 'set[s] forth trade secrets that required significant effort and cost to produce' or is 'other confidential research, development, financial or commercial information, including customer, geographic, market, vendor, or product specific data, such as pricing, usage, costing, forecasting, revenue, earnings, or technology information not reflected in tariffs of general application'" (RSA 378:43, II).

The Commission further stated that it may, after notice and hearing, determine on its own or upon request of a party that information or records are not entitled to

[1] The right to make such a motion is recognized under the protective agreements in this matter as well as under the Commission's procedural rules and practices (Protective Agreement, paragraph 11).
[2] It is not clear that a settlement agreement constitutes information that is subject to the terms of the protective agreements entered into with Verizon/FairPoint.

confidential treatment under statute (Order No. 24,792 at 3). Similarly, while the Commission indicated that it would accept the parties' agreements to classify information, it clearly indicated that the classification of information by a party is subject to be revisited and "...the possibility of possible requests for public disclosure of information designated as confidential is consistent with longstanding Commission practice" (Order No. 24,792 at 3).

Under Puc Rule 203.08(n), where materials are submitted pursuant to RSA 378:43, the Commission may issue a protective order "requiring all other parties receiving the materials to maintain its confidentiality."

II. SETTLEMENT AGREEMENTS ARE NOT SUBJECT TO THE STATUTORY EXCEPTION TO PUBLIC DISCLOSURE UNDER RSA 378:43 I

The settlement agreements in question are not entitled to the exception from public disclosure under RSA 378:43 I. First, the settlement agreements were not provided by FairPoint to the Commission or Staff as part of or in support of its January 31, 2007 filing. Nor do the settlement agreements constitute information or records requested to be provided by the Commission or its Staff. Rather, FairPoint made known through a discovery response that it had entered into settlement agreements with some parties and had no intention of filing or otherwise disclosing them.

Second, settlement agreements by their nature are not the type of information covered by RSA 378:43 I. Multiple MOUs and settlements have been publicly filed in this proceeding. Among these publicly filed settlements is the October 18, 2007 Joint Settlement Stipulation among FairPoint and Freedom Ring Communications, LLC d/b/a

Bayring Communications, LLC, segTEL, Inc. and Otel TeleKom, Inc. (the "CLEC Settlement").

FairPoint's own conduct demonstrates that settlements are not entitled to treatment under RSA 378:43 I. Despite the fact that the CLEC Settlement involves parties that are current customers and competitors of Verizon and future customers and competitors of FairPoint (assuming Commission approval of the proposed merger transaction and merger closing)[3] FairPoint did not seek confidential treatment for the CLEC Settlement at the time of filing. Indeed, the CLEC Settlement was provided to all parties as a public document and was the subject of public testimony and public cross-examination during public hearings on October 22, 2007.

Even if the remaining settlement agreements are deemed to fall within RSA 378:43 I protections from public disclosure[4], at best they would be subject to a Commission protective order "requiring other parties receiving the material to maintain its confidentiality (Puc Rule 203.08 (n)). RSA 378:43 I does not create a bar against the provision of protected information to all parties under a protective order that maintains the confidentiality of protected information. The directive of the Commission, that "...the parties to any settlement agreement may be asked about the terms of the settlement agreements into which they have entered"(October 19 Letter Order at 2), could not reasonably be carried out if stakeholders were denied access to the settlement agreements.

[3] These parties will also be future competitors of FairPoint.

[4] No allegation has been made by FairPoint that these settlement agreements set forth trade secrets that required significant effort and cost to produce or constitute other confidential, research, development, financial or commercial information , including customer, geographic, market, vendor, or product specific data. Nor has any demonstration been made to this effect.

III. FAIRPOINT SHOULD BE DEEMED TO HAVE WAIVED ITS RIGHT TO LIMIT DISCLOSURE OF ITS OTHER CLEC SETTLEMENTS AS A RESULT OF ITS PUBLIC DISCLOSURE OF THE CLEC SETTLEMENT

Because FairPoint already has made a public disclosure of the CLEC Settlement, it should be deemed to have waived any right it may have had to request that only the Commission and its Staff receive additional settlements reached with other CLECs. This is especially true where, as here, FairPoint witness Lippold testified publicly that certain CLEC Settlement terms relating to the term of a pricing freeze and interconnection agreement extensions applied only to the three CLECs that entered into the CLEC settlement, while other terms of the CLEC Settlement applied generically to all interconnecting parties. The Commission should not deprive the parties from reviewing and asking questions regarding additional FairPoint settlements with several CLECs where public access to and public record treatment of the CLEC Settlement has occurred.[5]

IV. FAIRPOINT HAS FAILED TO DEMONSTRATE THAT ITS ADDITIONAL SETTLEMENTS SHOULD BE DISCLOSED SOLELY TO THE COMMISSION AND ITS STAFF

A. No Decision Cited by FairPoint Deals With a Settlement Agreement

At page 4 of its Motion for Reconsideration, FairPoint seeks reconsideration on two grounds: (1) the Commission allows parties to protect competitively sensitive, highly confidential information; and (2) no intervenor can claim any prejudice if only the

[5] FairPoint and the CLECs that entered into settlements with FairPoint must be held to be aware that settlements would need to be filed and the possibility of public disclosure of information designated as confidential.

Commission and its Staff are provided with the additional settlements with other CLECs. FairPoint's arguments are without merit.

None of the cases cited by FairPoint deal with the disclosure of settlement agreements. They deal with rulings on (1) production of pre-contract negotiations; (2) an internal competitive analysis performed by NYNEX that involved confidential business plans that NYNEX spent time and resources to develop; and (3) revenues of paper companies that would allow competitors to derive information about paper company energy usage, regarded as competitively sensitive information. These cases and the underlying principles are distinguishable from the issue of disclosure of settlement agreements, especially where FairPoint already has made public disclosure of the CLEC settlement agreement. Why one CLEC settlement agreement should be treated as a public document available to all parties and other CLEC settlements should be withheld from all parties except Commission Staff has not been addressed or explained by FairPoint.

For this reason, the Commission should grant NECTA and CPNH's motion that the settlements in question be classified as public records and made available to all parties.

B. Other Parties May be Prejudiced if FairPoint Were Allowed to Limit the Disclosure of its Other CLEC Settlements to the Commission and Staff

FairPoint ignores the prejudice to other parties that may result from the denial of access to the additional CLEC settlements. It would be untenable for the Commission to enable secret settlements, in part for the reasons articulated in the October 11, 2007 letter that led to the Commission's ordering the filing of all settlements and the availability of

settling parties to explain the terms of these settlements at hearing. In the present case, this is especially true where a given settlement contains terms or conditions that are at issue in this proceeding.

The CLEC Settlement is a prime example. Multiple terms and conditions in the CLEC Settlement apply across the board to all interconnecting parties that currently interconnect with Verizon and would interconnect with FairPoint if the proposed merger transaction is approved and the merger goes to closing. If the CLEC Settlement were secret, parties litigating issues in this case would have had no idea that FairPoint had made agreements on contested issues with some of the parties that had filed testimony raising the same issues raised by parties that have not settled with FairPoint.

Furthermore, parties raising issues that remain contested by FairPoint would have no idea whether they are being subject to inconsistent or discriminatory treatment by FairPoint. Such issues include, but are not limited to, the extension of interconnection agreements terms, preferential terms relating to the duration of a requested PAP waiver, and FairPoint agreements to pay for CLEC costs related to system conversions (directly or indirectly).

Similarly, FairPoint's agreement to fill trunking orders or other service requirements on an expedited basis, post closing, an agreement to offer preferential pricing for interconnection services, or an agreement to expedite the performance of services for a single carrier, would have discriminatory impacts on other service providers.

FairPoint's other arguments that its additional CLEC settlements may be kept secret are without merit. FairPoint is not a "market participant" in the Verizon footprint

at this time, but its settlements presume that it will take the place of Verizon. Indeed, FairPoint admits to agreeing in these additional CLEC settlements that terms of these settlements will require amendments to interconnection agreements after they are assigned by Verizon to FairPoint at the time of merger closing.[6] In this respect, these additional CLEC settlements are the same as the CLEC Settlement, which will require the amendment of existing (to be assigned) interconnection agreements in order to effectuate extensions of the terms of those agreements.

Moreover, the reasonableness of FairPoint's litigation position on the extension of existing interconnection agreement terms and the extension of those agreements that operate currently on a month to month basis (in some cases, for years) clearly is an issue if FairPoint is extending the terms of interconnection agreements for all but a select few parties to this proceeding. It already has been demonstrated on the record that FairPoint has agreed to 3 year extensions for all interconnecting carriers in Vermont (Exh. NECTA/CPNH 83P-excerpt from FairPoint Brief in Vermont Public Service Board Docket No. 7270 and related cross examination on October 22, 2007). The cumulative effect of these additional CLEC settlements on the reasonableness of FairPoint's positions on contested issues should be disclosed to all parties.

V. FAIRPOINT'S REMAINING ARGUMENTS ARE WITHOUT MERIT

FairPoint claims that disclosure of the additional CLEC settlement agreements would be contrary to Commission rules regarding the confidentiality of settlement discussions (FairPoint Motion at 8, 9). This claim misses the mark. Several settlement agreements, including the CLEC Settlement, have been filed publicly, all without

[6] FairPoint witness Lippold also testified to this effect on October 22, 2007.

contravening Puc 203.20(a) (regarding confidentiality of settlement discussions-not actual settlement agreements). Indeed, the Commission's Rules contemplate the filing of settlements, as FairPoint has done with multiple parties in this proceeding. The public filing of these additional settlement agreements does not involve the disclosure of confidential settlement discussions.

The fact that the additional CLEC settlements are not required to be filed with the Commission or may not need Commission approval under Section 252 of the federal Telecommunications Act (FairPoint Motion at 7) –at this time- has no bearing on the issue of the provision of the additional CLEC settlement agreements-like all other settlement agreements in this case-to the parties- as a matter of state law.

The provision of these additional settlement agreements to parties is a matter of substantial importance to this proceeding and denial of access to these additional settlements is prejudicial to other parties (as explained above) that are entitled to review these settlements in the same way that they have been able to review the CLEC Settlement.

VI. THE ADDITIONAL CLEC SETTLEMENTS SHOULD BE FILED PUBLICLY AND SERVED ON ALL PARTIES, BUT IN THE ALTERNATIVE, THEY SHOULD BE FILED AS CONFIDENTIAL INFORMATION

NECTA and CPNH maintain that settlement filings should be filed publicly and made available to all parties. Only through this disclosure can a full review of these settlements be conducted by the Commission, with the benefit of inputs from affected stakeholders. Without such disclosure, NECTA and CPNH would be denied the

opportunity to ask parties to the settlement agreements about the terms of the settlement agreements and determine how these settlements affect the resolution of contested issues in this proceeding that are generic in nature.

In the alternative and in order to balance the needs to NECTA and CPNH against FairPoint's and other parties' concerns about public disclosure of additional CLEC settlements, facilitate the resolution of issues and avoid undue delay in these proceedings, NECTA and CPNH recommend that the additional CLEC settlements be classified as confidential information under the terms of the protective agreement entered into with FairPoint and provided to all parties that have signed protective agreements in this matter.[7]

CONCLUSION

For the reasons above, FairPoint's Motion for Partial Reconsideration should be denied. The additional CLEC settlements should be treated as public filings that are no different than other settlements-including the October 18, 2007 CLEC Settlement. Any designation of the additional CLEC settlements as "highly confidential" should be denied to the extent that they overlap with any contested issues in this matter.[8] If the Commission does not order that the additional CLEC settlements be treated as public records, they should be classified as confidential and made available to all parties-including NECTA and CPNH- that have signed protective agreements.

---

[7] See paragraph 11 of protective agreement between NECTA/CPNH and FairPoint.

[8] For example, the provision of 3 year extensions of evergreen and other interconnection agreements as settlement terms ultimately must be filed with the Commission as amendments to existing interconnection agreements and become public.

Respectfully submitted,

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

By their attorneys,

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

Dated: October 25, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING OPPOSITION AND MOTION WAS SERVED THIS DAY UPON ALL PARTIES.

Dated: October 25, 2007 By: ______________________
Alan D. Mandl