

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 06-067

Freedom Ring Communications LLC d/b/a BayRing Communications
Complaint Against Verizon New Hampshire Regarding Access Charges

OBJECTION TO MOTION TO COMPEL

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and hereby objects to the Motion to Compel filed by the Competitive Carriers (“CLECs”), dated December 19, 2011.

I. BACKGROUND

On October 28, 2011, the Commission issued Procedural Order No. 25,284 which, among other things, established November 17, 2011 as the date on which the CLECs could submit a joint set on data requests to FairPoint. On that date, the CLECs submitted 35 data requests consisting of 88 subparts. On November 28, 2011, FairPoint submitted its objections to these data requests and indicated that it would not respond to all or parts of 13 of these requests. In subsequent discussions among the parties, this list was narrowed to 4 data requests or their various subparts. The CLECS have filed a Motion to Compel responses to those requests.

In their Motion to Compel, the CLECs correctly recite the correct standard in determining the appropriate scope of discovery: “whether the information being sought is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence.”¹ The

¹ Motion to Compel at 2. (citing Public Service Company of New Hampshire, DE 10-195, Order No. 25,174 on Motion for Confidentiality and Motions to Compel (“PSNH”).

CLECs further note that “New Hampshire law favors liberal discovery,”² but they fail to note that, broad though it is, this standard “does not exempt discovery requests from principles of reasonableness and common sense,”³ and that at the outer limits, where a motion to compel seeks discovery of information which could under no circumstance be considered relevant, the motion must be denied.⁴ As set forth below, the Motion to Compel meets neither the standards of reasonableness nor relevance.

II. SPECIFIC OBJECTIONS

A. Data Requests 10(c) – (f)

In Data Requests 10(c) – (f), the CLECs sought to probe the legal authority in any Commission orders that supports FairPoint’s position that it is entitled to propose an Interconnection Charge. FairPoint objected to this request as argumentative and in search of legal conclusions, theories or the results of legal research.

In their Motion to Compel, the CLECs state that they are merely “explor[ing] FairPoint’s knowledge concerning the justification in Commission precedent for its proposal,”⁵ which is another way of saying that they are attempting to convert FairPoint’s legal theories into discoverable “facts.” The CLECs justify these requests as so-called “contention interrogatories” and provide secondary authority that explains the validity of this type of discovery, at least as it pertains to federal court practice. However, a careful examination shows that the CLECs not

² *Id.* at 2.

³ City of Nashua, DW 04-048, Order No. 24,654 Order Denying Motion to Compel Discovery (August 7, 2006), *citing* State v. Barnes, 150 N.H. 715 719 (2004). *See also* McDuffey v. Boston & Maine R.R., 102 N.H. 179, 181 (1959) (“While the use of discovery in this state has been regarded as a remedial device which has been given a liberal application, we have attempted to indicate that it is subject to limitations”) (citations omitted).

⁴ Lower Bartlett Water Precinct, DW 99-166, Order No. 23,471 on Motion to Compel Discovery at 4-5 (May 9, 2000).

⁵ Motion to Compel at 5.

only have misconstrued the nature and role of contention interrogatories, but they have ignored the Commission's holding on this subject.

As the CLECs have described in the Motion to Compel, “[c]ontention interrogatories, as distinct from identification interrogatories, inquire into an opinion or contention that relates to fact or the application of law to fact.”⁶ The operative phrase here is “application of law to fact.” Just because an interrogatory seeks to explore some self-described “contention” does not make it a valid contention interrogatory. As another respected authority has stated, “[t]he rule is limited to opinions and contentions that relate to ‘fact or the application of law to fact.’ It does not authorize interrogatories calling for legal conclusions as such.”⁷ As an example, the authors describe situations in which a party is required to explain how the law under which that party seeks relief is invoked by the alleged facts. Such examples include negligence claims, in which a party is asked to cite the acts or omissions that are claimed to have constituted negligence or contributory negligence, even though this may involve opinions or conclusions regarding the applicable law. Patent claims are another example, in which a party is required to specify how a certain product qualifies as infringing under the law.⁸

These data requests do not involve such an application of law to fact. Rather, they in essence ask FairPoint to justify what right it has to hold its legal position – while disingenuously directing FairPoint to seek such justification in places that the CLECs believe it will not be found. According to Wright & Miller, such requests are objectionable. Using the example of a trademark case, they have reported that interrogatories calling for mere opinions respecting validity of a registered trademark and the right to register that alleged trademark would be

⁶ *Id.* at 5 (quoting 7-33 Moore's Federal Practice - Civil § 33.02[2][b]).

⁷ Wright & Miller, 8B Fed. Prac. & Proc. Civ. § 2167 (3d ed.).

⁸ *Id.*

stricken.⁹ In other words, an interrogatory like Data Request 10, asking a party what right they have to assert a legal position, is objectionable

In any event, it is not necessary for the Commission to resort to secondary authority in ruling on this dispute. Primary authority in this case already establishes that the Commission frowns on “contention” interrogatories because they are essentially a waste of time. The Commission has explained *in this very proceeding*, that:

The six data requests at issue here do not meet [our] standard. Each of the six is either an attempt to elicit further legal characterizations or argument from an opposing party or an effort to engage an opposing party in what is essentially a written dialogue about what the Commission has or has not previously decided or what a particular witness has or has not said. These questions are argumentative and not reasonably calculated to assist Verizon in discovering facts admissible as evidence that it will need to advance its position at hearing. In arguing to the contrary, Verizon points out that Rule 36 of the Federal Rule of Civil Procedure, governing requests for admissions, allows a party to elicit opinions from an opposing party as to matters of both fact and law. To the extent this is so, it is inapposite for three reasons. First, data requests are a vehicle for developing factual information. Second, the federal rules do not apply in proceedings before the Commission. And, finally, Verizon has not styled its data requests as requests for admissions or taken the steps contemplated in Puc 203.09(j) to employ such a device.¹⁰

Data Requests 10(c) – (f) are precisely the types of requests that the Commission described above. They are strictly argumentative, designed solely to strip the nuances away from FairPoint’s legal arguments and reduce them to unqualified “fact,” or to elicit a rewording of FairPoint’s testimony that better serves the CLECs’ agenda in this proceeding. If the Commission permits this type of questioning, the parties will simply posture back and forth and in the end will have developed no “fact” that is the slightest use to the Commission in making a

⁹ *Id.* n. 4 (citing to *J. Schoeneman, Inc. v. Brauer*, 1 F.R.D. 292 (W.D. Mo. 1940)).

¹⁰ DT 06-067, Order No. 24,760 on Motion to Compel Discovery (June 7, 2007). Note that despite this holding, the CLECs encourage the Commission to accept federal practice as persuasive in this case. Motion to Compel n.3.

determination in this proceeding. These data requests do not go to the subject matter of this proceeding and are irrelevant. FairPoint should not be compelled to answer them.

B. Data Request 10(g)

In Data Request 10(g), the CLECs asked FairPoint to describe the network functions for which the Interconnection Charge is designed to recover costs, notwithstanding Mr. Skrivan's testimony that this is not its purpose.¹¹ FairPoint objected to this request as argumentative. In their Motion to Compel, the CLECs state that this request is justified because "the issue of whether a switched access rate element recovers the cost of a particular component of a switched access service has been a significant issue in this case from the beginning [and] therefore, is plainly relevant."¹² Actually, the opposite is true. This is a settled issue, at least at this point in the proceeding. The Commission has made clear its position that the CCL charge is not solely a contribution element. Furthermore, it has emphasized that:

FairPoint [is not prevented] from raising other arguments that elements of contribution are necessary to meet its financial needs. . . . FairPoint may propose other changes to its tariff, including contribution elements, that it might consider necessary for achieving the revenues it needs. For avoidance of doubt, we will allow FairPoint to introduce evidence and make argument about the extent to which the CCL rate element has historically provided some contribution to general overhead

Mr. Skrivan has testified that the Interconnection Charge is designed to recover costs that no other switched access element is designed to recover. The Commission has expressly permitted this type of testimony. Seen in this light, Data Request 10(g) is fruitlessly argumentative, redundant, and irrelevant. The Commission should not compel FairPoint to respond to it.

¹¹ See Skrivan Supplemental Testimony at 8.

¹² Motion to Compel at 6.

C. Data Request 15

In Data Requests 15, the CLECs asked FairPoint to describe, quantify, and identify *all* bill credits, adjustments, corrections, settlements, uncollectible amounts, out-of-period usage, errors or omission of *any* kind, and (without qualification) “any trends.”¹³ FairPoint objected to this request as overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. In their Motion to Compel, the CLECs justified this request with the uninformed assertion that “[t]he information exists in FairPoint’s computerized systems, . . . should be available through a computerized report . . . and is not an undue burden to provide.”¹⁴ On the contrary, this information (related to over 300 million minutes of traffic) is not tracked and compiled in the ordinary course of business. It would be extremely time-consuming and laborious to provide it, especially when it would be to no benefit that the CLECs have clearly articulated.

As part of their justification for this data request, they have vaguely raised the specter of “FairPoint’s billing issues since the cutover” without explaining the degree to which this relates to CABS billing or providing a basis for the insinuation that this billing is materially unreliable. However, the CABS data used in Mr. Skrivan’s’ calculations conforms to industry-standard collection and reporting processes that are familiar to all parties, lends itself to independent verification, and is consistent across time periods. Using it as the basis for calculating the Interconnection Charge is a reasonable under the circumstances. The detailed dissection that this data request requires has all of the earmarks of a fishing expedition unrelated to the issues in this proceeding. It is not reasonably calculated to lead to admissible evidence, and FairPoint should not be compelled to respond to it.

¹³ *Id.* at 7 (emphasis supplied).

¹⁴ *Id.* at 8.

D. Data Request 16

In Data Requests 16, the CLECs referred to previous request AT&T-19 and again asked FairPoint to find justification for its proposed Interconnection Charge in Commission orders. Furthermore, this request sought to engage FairPoint in a discussion involving loaded questions as to the impact on FairPoint of the Commission's Order *Nisi*, topped off with an inquiry as to the basis for an opinion that Mr. Skrivan never expressed. FairPoint objected to these requests on numerous grounds, including that they seek legal conclusions and are not reasonably calculated to lead to the discovery of admissible evidence.

In regard to requests AT&T-19(e)-(h), the CLECs admitted that they were contention interrogatories, "[m]uch like data request CLECs-10 above . . . designed to elicit the justification for FairPoint's proposal . . . seek[ing] FairPoint's position regarding such justification."¹⁵ Indeed, Data Requests AT&T-19(e) and (f) are not only "like" Data Request 10, they are the same. For all of the reasons that FairPoint described above, the Commission should not compel FairPoint to respond to these requests.

Data Requests AT&T-19(g) and (h) are in a class by themselves. These two requests presuppose "facts" regarding what FairPoint is entitled to, and then require FairPoint to respond to rhetorical questions describing the CLEC position. Repeated verbatim, they are:

g) Explain how FairPoint could have lost any revenue, to which it is purportedly entitled to recover, when the Order *Nisi* directed the application of the CCLC rate only to instances when FairPoint actually provided the CCLC.

h) Since the CCLC has traditionally been used to recover common line, e.g., loop costs, to the extent FairPoint did not perform any common line function, why is it reasonable that FairPoint should be paid as if it had provided a common line function?

¹⁵ *Id.* at 10.

It is obvious that these questions are not directed at eliciting facts that will aid the Commission in arriving at a conclusion. They are merely restatements of the CLECs' position that FairPoint is not entitled to recover costs attributed to the CCL charge, with a challenge to FairPoint to rebut them. This is precisely the type of "written dialogue about what the Commission has or has not previously decided or what a particular witness has or has not said" that the Commission condemned in Order No. 24,760, discussed *supra* at 4. FairPoint submits that this type of exchange is better left to briefs, and that FairPoint should not be compelled to respond to this request.

Finally, Data Request AT&T-19(h)(i) asks why Mr. Skrivan believes that it is not "anticompetitive" for FairPoint to propose that it be compensated in its access rates for CCL or loop costs in instances when competitors are supplying those loops and FairPoint is not supplying those loops. The problem with this request is that Mr. Skrivan has never testified one way or another on this subject. Again, this is merely a restatement of the CLECs' position, with the added feature that it puts words in Mr. Skrivan's mouth. It is not a request that is calculated to produce admissible evidence, and FairPoint should not be compelled to respond to it.

E. Data Request 19

In Data Request 19, the CLECs asked FairPoint to respond to earlier interrogatory One Comm-11, which asked "[i]f FairPoint were permitted to raise basic rates to compensate for CCL revenues it is unable to collect, would that be preferable to raising other access rate components?" FairPoint objected to this request on the grounds that it called for speculation. In their Motion to Compel, the CLECs justify this request with two lines of reasoning, both of them unrelated to the actual subject of the question.

First, even though this question has nothing to do with any law, the CLECs argue that this is a “question of future laws” because of a previous FairPoint response that referred to restrictions contained in the Settlement Agreement in DT 07-011.¹⁶ Having thus reframed this question, the CLECs invoke the authority of *PSNH*, citing the Commission’s finding that “the effect of ‘future laws’ was a consideration in the contract at issue” and therefore was a valid line of questioning.¹⁷ The CLECs then proceed to claim that “[t]he situation here is the same,”¹⁸ and thus FairPoint should be compelled to respond, even though the question did not ask about future laws. However, the situations are not the same, and the CLECs’ reliance on *PSNH* is inapt. This is because the CLECs have failed to disclose that the contract at issue in the *PSNH* case expressly provided that interpretation and performance of the contract would be controlled by “future laws,” the understanding of which was an important fact in the case.¹⁹ Thus, the Commission was not making a general holding regarding the scope of discovery obligations, but was instead making a particular finding in light of the specific facts of the *PSNH* case. There is no such thing as a “future laws” rule of discovery in Commission jurisprudence, and FairPoint should not be compelled to respond to this request on this basis, particularly when this is not the subject of the request.

The CLECs also justify this request by asserting that it “merely asks FairPoint for information that it unquestionably possesses regarding what happens when the [Settlement Agreement] restriction is lifted.”²⁰ In other words, FairPoint should be compelled solely on the CLECs presumption that FairPoint possesses *current* facts about a *future* event that is not even

¹⁶ Motion to Compel at 13.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *PSNH* at 25-26.

²⁰ Motion to Compel at 14.

the subject of the request. Nothing could be more speculative, and less likely to produce useful information for a Commission decision, than a question like this.

The CLECs' justifications aside, this data request is unanswerable on its face. It asks for FairPoint to opine on subjective "preferability," which depends on the observer, of which there are many in this proceeding. The question of whether an increase in basic rates is preferable to any other cost recovery solution will have different -- and conflicting -- answers for end user customers, FairPoint, traffic-terminating CLECs, and IXC's. There is no single, factual response. As Mr. Skrivan stated in his previous response to this question, this is a policy determination that only the Commission can make. While Mr. Skrivan can, and has, described a cost recovery alternative, there is no way that he or any other party can respond to Data Request 19 in any way that will lead to admissible evidence. Any attempt to do so will only lead to the type of fruitless dialogue that the Commission has previously condemned in this proceeding. FairPoint should not be compelled to respond to this data request.

III. CONCLUSION

None of the disputed data requests is reasonably calculated to produce admissible evidence in this proceeding, if they produce any evidence at all. Most of them bear the hallmark of the types of requests that the Commission has already found objectionable in this proceeding. They are either an attempt to elicit further legal characterizations or argument from FairPoint in response to loaded questions, or an effort to engage FairPoint in a pointless dialogue about what the Commission has or has not previously decided. FairPoint respectfully requests that the Commission deny the Motion to Compel on all counts.

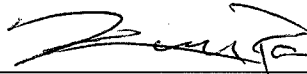
Respectfully submitted,

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Dated: December 29, 2011

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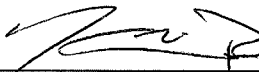
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing objection was forwarded this day to the parties by electronic mail.

Dated: December 29, 2011

By:



Kevin M. Baum