

**ELECTRONIC MAIL**

March 17, 2017

Ms. Debra Howland  
Executive Director and Secretary  
New Hampshire Public Utilities Commission  
21 South Fruit Street  
Concord, NH 03301

NHPUC MAR17'17 PM 1:37

**Re: DT 16-872 (Joint Petition for Findings in Furtherance of the Acquisition of FairPoint Communications, Inc. and its New Hampshire Operating Subsidiaries by Consolidated Communications Holdings, Inc.)**

Dear Ms. Howland:

Please find enclosed this original letter and six written copies hereof, representing the Comments of FairPoint Communications, Inc. ("FairPoint") to the Staff's Written Statement Regarding Disputed Data Requests, which was submitted by Staff's counsel on March 15, 2017. FairPoint's Comments are to be submitted to F. Anne Ross, Esq., General Counsel, who was appointed Hearings Examiner in this proceeding in Order No. 25,997 (Mar. 7, 2017). As described further below, FairPoint intends to participate in the meeting with the Hearings Examiner now scheduled for Tuesday, March 21st, at 9:00 a.m. and looks forward to a productive discussion with the parties. FairPoint is confident that the discovery process can be successfully completed in accordance with the deadlines and events set forth in the Commission's existing Procedural Schedule.<sup>1</sup>

FairPoint has reviewed the Staff's Written Statement and provides the following information to explain the details of the discovery process to date, to underscore the extraordinary efforts the petitioners have made to provide vast amounts of data, and to provide updated data to the Hearing Officer. As an example, FairPoint notes that several of the entries in Staff's Response Matrix indicate "NO [RESPONSE] DATE OFFERED" with respect to FairPoint's responses, when in fact the deadline for FairPoint's discovery responses (March 17, 2017), as set by the Commission, has not yet passed. FairPoint expects to provide responses to each data request by the scheduled response deadline. The Staff's Written Statement, in FairPoint's view, unfairly

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<sup>1</sup> See Secretarial Letter dated February 3, 2017, from Debra A. Howland, setting the Procedural Schedule for this docket.

depicts the current status of discovery in the worst light and offers an incomplete picture for you to consider.

As an initial matter, FairPoint observes that Staff's Set 1 Data Requests to FairPoint included 84 data requests comprising 145 separate questions (including parts and subparts), which, when further broken down by sub-elements of the requests, comprised 307 individual requests for information. As a point of comparison, the sheer volume of information requested by the New Hampshire Staff vastly dwarfs the amount of information requested by Staff's counterparts in other northern New England states.

The most striking disparity between the states is that FairPoint's New Hampshire operating entities are substantially deregulated after they were classified as "excepted local exchange carriers" ("ELECs") under SB48 in 2012. While the other states may have to consider a wide array of statutory issues, those states have done so with targeted requests for current data focused on this specific transaction at this point in time. FairPoint remains concerned that several of Staff's data requests venture beyond not only the statutory scope of the present proceeding but beyond the Commission's statutory jurisdiction over the FairPoint entities.<sup>2</sup> The most significant factor in the present dispute over the New Hampshire Staff's data requests is the relevancy of the data sought, particularly for requests that seek data for the past five or more years. Beyond these issues, however, another significant factor is, very simply, the enormous number of data requests that Petitioners have had to digest.

The Petitioners have undertaken significant efforts to manage and address the volume of the Staff's data requests, which the Staff's Written Statement does not acknowledge. The Petitioners received Staff's Set 1 Data Requests late in the day on the Friday of President's Day Weekend (February 17th), together with an invitation from Michael Ladam "to schedule a conference call with FairPoint next week to explore potentially more expeditious and less formal approaches to obtaining some of the information sought through these data requests." Counsel for Consolidated contacted Mr. Wiesner on Monday, February 18th (President's Day) to arrange the conference call that Mr. Ladam had described. That conference call took place on Tuesday morning, February 19th, among the FairPoint and Consolidated attorneys and Mr. Wiesner. In that call, Petitioners' counsel tried to discern the purpose of several of the questions, in the hope of combining, streamlining or deleting related or duplicative questions without affecting the usefulness of the responsive information. But all questions about the meaning and purpose of the data requests were deferred to Staff's consultants, Liberty Consulting Group ("Liberty").

Petitioners then requested a conference call with Staff and Liberty, in which the Consolidated and FairPoint teams would participate, to pursue the "more expeditious and less formal approaches" that Mr. Ladam had suggested. During most of the week of February 18-24, however, the consultants from Liberty were involved in hearings in another state. A meeting with Staff was finally arranged for Friday morning, February 24th, with a conference call with Liberty to follow the same afternoon. At the morning meeting, the Petitioners again explored ways to reduce and streamline the data requests, but Staff again deferred to Liberty on any

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<sup>2</sup> See, e.g. *Complaint of Toledo Premium Yogurt, Inc. v. Toledo Edison Co.*, Case No. 91-1528-EL-CSS, 1993 WL 13744537 (Ohio Pub. Utils. Comm'n, Aug. 5, 1993) (where Ohio PUC's jurisdiction over a matter is limited, all discovery should be narrowly tailored to elicit evidence on the issues prescribed by the Commission).

questions involving the purpose or intention of particular data requests. Nevertheless, Mr. Wiesner expressed the Staff's view that each of Liberty's data requests was relevant to the Commission's overall statutory review. In addition, the Staff agreed to adopt measures to facilitate the submission of confidential materials.

A conference call among Staff, Liberty, FairPoint and Consolidated took place on the afternoon of Friday, February 24th. Unfortunately, Mr. Wiesner could not take part as he had to attend a conference in an unrelated matter. When Petitioners' counsel asked Liberty to explain the purpose or intention of certain data requests, the Liberty consultants objected that they did not have an attorney present and that the Petitioners' attorneys were attempting to raise relevancy challenges that could only be resolved by the Commission itself. The Liberty consultants refused to consider any requests to combine, reduce, or eliminate any data requests without a ruling on relevancy from the Commission. The conference call ended late on Friday afternoon without achieving any progress on managing the discovery process more efficiently, and with a full week having elapsed since the Staff's data requests were first propounded.

On March 1st, FairPoint provided substantive responses to 49 of the 84 data requests, indicated that it intended to respond to 22 of the remaining data requests, and raised "flat" objections to the other 13 data requests. On March 3rd, FairPoint provided substantive responses to 8 data requests and supplemented its earlier response to 1 data request. On March 6th, FairPoint provided substantive responses to 16 data requests and maintained "flat" objections to 11 others.

On March 7th, attorneys for the Petitioners spoke with Mr. Wiesner and proposed another telephone conference with the Liberty consultants to clarify the purpose and/or meaning of the open data requests. Immediately following the call with Mr. Wiesner, the Commission issued Order No. 25,997, granting Labors' Motion to Compel, in which the Commission clarified its view of the scope of discovery in the context of its statutory review of the present transaction.

On March 8th, a conference call took place among Staff and its attorney, Liberty, and discovery teams and attorneys for FairPoint and Consolidated. In that call, Liberty described a "matrix" it had prepared that summarized and analyzed the data responses it had received to-date from the Petitioners, including Liberty's assessment of what else it would need by way of responses. Mr. Wiesner proposed distributing the "matrix" to FairPoint and Consolidated and asking that they update the Liberty assessments with their own comments regarding the status of their respective data responses. Mr. Wiesner distributed the Liberty "matrix" to FairPoint and Consolidated on Thursday morning, March 9th. In his distribution email, Mr. Wiesner stated, "We expect that the revised and updated versions of the matrix will be provided to Staff and Liberty by the close of business on Monday, although we encourage parties to forward partially-completed sections of the matrix earlier in the interest of saving time."

On Friday, March 10th, in its continuing effort to work with Staff and Liberty, FairPoint returned a partially-completed "matrix." In its preliminary comments, FairPoint requested clarification from Staff and Liberty regarding 19 substantive data responses (some including multiple attachments) that FairPoint had provided that were inexplicably classified as "Flat Objections" on the Liberty "matrix." FairPoint also noted some apparent confusion between Consolidated's and FairPoint's responses in the Liberty analysis. FairPoint received no response to its

clarification requests from either the Staff or Liberty. Later in the afternoon of March 10th, FairPoint received Staff's Set 2 Data Requests, for which responses are due by Friday, March 17th.

On Monday, March 13th, FairPoint submitted its complete comments to the Liberty "matrix" regarding FairPoint's Set 1 data responses. In its comments, FairPoint indicated that it would provide substantive responses to all Set 1 data requests, with the possible exception of 4 data requests that are under further review. The deadline for FairPoint's responses is Friday, March 17th. FairPoint received no acknowledgement or response from Staff or Liberty regarding its submission.

On March 15th, Staff filed its Written Statement with the Commission. In its Statement, Staff for the first time states that 9 of 19 substantive responses that FairPoint had previously filed are inadequate. These are the same 19 responses for which FairPoint specifically sought clarification on March 10th but received no response from Staff or Liberty. Also for the first time, Liberty's "matrix" includes a column labeled "Purpose and Relevance of Request," which provides the explanations that the Petitioners had repeatedly requested from Staff starting from the time the Staff's Set 1 Data Requests were first served. FairPoint emphasizes that Staff and Liberty at no time provided these explanations prior to filing their Written Statement with the Hearings Examiner this week. The Liberty "matrix" identifies 41 FairPoint data requests as outstanding, including 15 requests propounded on March 10th as Set 2 Data Requests for which responses are not due until Friday, March 17th.

At the present time, FairPoint is diligently working to complete its responses to the remaining Set 1 Data Requests and to the new Set 2 Data Requests and expects to submit its responses to Staff by the close of business on March 17th.

As the foregoing discussion demonstrates, FairPoint has made repeated attempts to facilitate the efficient management and completion of the discovery process with Staff. In FairPoint's view, a significant amount of time has been lost because Staff and its consultants either refused or failed to address FairPoint's requests for clarification and explanation of the Staff's data requests. FairPoint has made its personnel available for calls and meetings with Staff and Liberty that have proved only marginally productive in achieving the "potentially more expeditious and less formal approaches" to discovery that Mr. Ladam invited the Petitioners to seek. Most significantly, Staff's Written Statement provides the Hearings Examiner with new information that Staff has consistently withheld from the Petitioners despite the Petitioners' repeated, specific requests for it – information that, if it had been provided as a tool at the beginning of discovery rather than offered as a rebuke at the end, would have greatly facilitated the process and quite likely would have avoided the dispute that Staff now brings to the Hearings Examiner for resolution.

FairPoint looks forward to the discussion with the Hearings Examiner to ensure that we can maintain the case schedule. The deadline for FairPoint's discovery responses has not yet passed as of the writing of this letter. FairPoint intends to participate in the meeting with the Hearings Examiner scheduled for Tuesday, March 21st. By that time, Staff will have the benefit of seeing FairPoint's complete responses to Staff's Set 1 and Set 2 Data Requests. Moreover, despite the

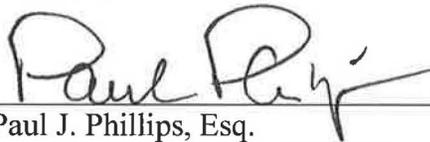
rigid tone of Liberty's written remarks in its "matrix," Liberty has orally expressed some flexibility in accepting, for example, fewer than "5 full years" of data from FairPoint as responsive to the data requests, and in accepting that FairPoint does not possess several of the reports and other documents that Liberty assumes it has. A technical conference is scheduled for Wednesday, March 22nd, with opportunities for oral discovery – a process that will now be aided by Liberty's explanations of the "Purpose and Relevance of [Each] Request."

In short, FairPoint believes that the present discovery process, though marked in some respects by shared frustrations and missed opportunities, can remain on track with the existing Procedural Schedule, so long as the remaining opportunities for completing the process are used efficiently and productively.

FairPoint is grateful to the Hearings Examiner for the opportunity to express its views and clarify its position about the discovery process. We look forward to the discussion with the Hearings Examiners on Tuesday and to the Technical Conference with Staff on Wednesday.

Thank you for your thoughtful attention to these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Phillips", written over a horizontal line.

Paul J. Phillips, Esq.  
Counsel for FairPoint Communications, Inc.