

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DT 16-872
Consolidated Communications Holdings, Inc.

Joint Petition for Findings in Furtherance of the Acquisition of FairPoint
Communications, Inc. and its New Hampshire Operating Subsidiaries by
Consolidated Communications Holdings, Inc.

**MOTION OF LABOR INTERVENORS
TO COMPEL RESPONSES TO DISCOVERY REQUESTS**

Communications Workers of America Local 1400 and International Brotherhood of
Electrical Workers ("IBEW") Locals 2320, 2326, and 2327, that form the IBEW System Council
T-9 (collectively "Labor Intervenors") pursuant to NH Code of Administrative Rule Puc
203.09(i) and 203.07 hereby Move to Compel Responses to Discovery Requests of Labor
Intervenors, Set 1, requests 1-5, 9-11, 13-14, 17-18, 23-28, 31, and 32.

The grounds for this Motion are:

1. On December 29, 2016, Consolidated Communications Holdings, Inc.
("Consolidated") and FairPoint Communications, Inc. ("FairPoint") filed a Joint Petition with the
New Hampshire Public Utilities Commission ("Commission") requesting a Commission finding
under RSA 374:30, II that Consolidated contains the requisite managerial, financial, and
technical capabilities to own and operate FairPoint's New Hampshire business as an incumbent
local exchange carrier. The finding is requested as part of the proposed merger of FairPoint with
and into Consolidated.

2. The proposed Transaction is part of a larger transaction under which FairPoint
and Consolidated (together, the "Joint Petitioners") are proposing to merge a new subsidiary of
Consolidated (Falcon Merger Sub, Inc.) with and into FairPoint, with FairPoint as the surviving

company. The result of the proposed transaction would be that Consolidated will become the upstream holding company of both FairPoint and its New Hampshire operations.

3. On January 19, 2017, Labor Intervenors filed a Petition to Intervene which was granted during the Prehearing Conference on February 1, 2017. Tr. 2/1/2017 at 17.

4. On February 3, 2017, counsel for Labor Intervenors served Discovery Requests of Labor Intervenors, Set 1, on the Joint Petitioners. Because the documents were served on a Friday afternoon, counsel for Labor Intervenors advised Joint Petitioners' counsel that they could treat the requests as having been served on the following Monday, February 6.

5. In accordance with the procedural schedule, FairPoint and Consolidated served their Objections to Labor Intervenors' discovery requests on February 10, 2017.

6. FairPoint objected to three requests: Labor 4, 5, and 11. Copies of FairPoint's objections to those requests, each of which includes the text of the request, are attached hereto as Appendix A.

7. Consolidated objected to 18 requests: Labor 1, 2, 3, 5, 9, 10, 13, 14, 17, 18, 23, 24, 25, 26, 27, 28, 31, and 32.¹ Copies of Consolidated's objections to those requests, each of which includes the text of the request, are attached hereto as Appendix B.²

8. On February 15, 2017, counsel for Labor Intervenors, FairPoint, and Consolidated met by conference call for approximately one hour in an attempt to resolve these discovery matters. With the exception of two requests (noted in the footnote to paragraph 7, above), counsel were unable to resolve the objections. Indeed, counsel for Joint Petitioners indicated that, because this was the first case brought under the 2012 amendments to RSA 374:30, they

¹ Labor 5 requested information from both Consolidated and FairPoint, and both companies objected to the request.

² Consolidated's objections also included objections to Labor 6 and 7. During the conference with counsel on February 15, 2017, Consolidated withdrew those objections.

required a ruling from the Commission concerning the scope of this proceeding prior to responding to most of Labor Intervenors' discovery requests.

The undersigned counsel hereby certifies that this conference call constituted a good-faith attempt by all counsel to resolve the objections informally, as required by Rule Puc 203.09(i)(4).

9. All parties acknowledge that the scope of this proceeding is defined by the specific issues set forth in RSA 374:30, II, which requires the Commission to find that "the utility to which the transfer is to be made is technically, managerially, and financially capable of maintaining the obligations of an incumbent local exchange carrier set forth in RSA 362:8 and RSA 374:22-p."

10. The standard for proper discovery in New Hampshire is stated in the Superior Court's rules as follows: "Unless otherwise limited by order of the court in accordance with these rules, *parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*" N.H. Super. Ct. R. 21(b) (Scope of Discovery) (emphases added). While this rule is not strictly applicable in cases before the Commission, the Commission has applied the same general scope of discovery in its proceedings, stating: "there must be some showing that the information being sought is or is likely to lead to relevant

evidence that would be admissible in the proceeding." *City of Nashua*, DW 04-048; Order No. 24,494 (July 29, 2005), 2005 N.H. PUC LEXIS 76, citing *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167 (2001).

11. All of the requests to which the Joint Petitioners have objected either relate directly to relevant information or are "likely to lead to relevant evidence that would be admissible in the proceeding" as required by precedent. Nearly all of the requests at issue concern the financial capabilities of Consolidated and/or seek the Joint Applicants to provide more complete information concerning matters expressly stated in Joint Petitioner's petition, exhibits, and/or testimony.

12. Consolidated has pre-filed direct testimony in this proceeding from witnesses who address the three aspects of Consolidated's capabilities, as set forth in the statute. On financial issues, Consolidated submitted testimony from the parent company's chief financial officer, Mr. Childers.

13. Mr. Childers addresses the issue of Consolidated's financial fitness under the statute by providing certain information about Consolidated's past financial performance and its projected financial performance if the proposed transaction were to occur, including a summary of projections of synergy savings from the proposed combination of the two companies.

14. During the prehearing conference, Consolidated's counsel summarized Mr. Childers's testimony as follows:

So, with respect to Consolidated's financial capabilities, I briefly note that Mr. Childers' prefiled testimony contains information concerning that issue. Mr. Childers is Consolidated's CFO. The Company's financial and operating results for the past five years are very consistent and solid on a stand alone basis, and specifically good when you compare them to other peers. The Company contributes or continues to reinvest 16 to 17 percent of its revenue back into its business. Consolidated's revenue --

excuse me -- credit rating is favorable as compared with its peer companies and is rated higher than FairPoint's.

The acquisition of FairPoint by Consolidated is expected to produce a financially strong company and produce approximately \$55 million in synergies. Consolidated's enterprise capitalization will be approximately \$4 billion post-closing, so FairPoint's assets will become part of a much larger and stronger balance sheet. The combined company will have scale, improved purchasing power, increased market diversity and fiber based assets, all of which will help to deliver new products and services, and improve and expand the fiber network and service quality. Cash flow will improve for the combined company at closing given that Consolidated's recent financing will result in better terms and reduced interest costs for FairPoint's debt.

Tr. 2/1/2017 at 22-23.

15. The discovery requests to which the Joint Petitioners objected relate directly to matters raised in Mr. Childers's testimony and other representations about the proposed transaction and its effects on Consolidated and FairPoint. In particular:

a. **Labor 1** requests a complete copy of all schedules, exhibits, and similar attachments to the Agreement and Plan of Merger, which is Attachment 2 to the Joint Petition. Labor Intervenors submitted this request because the document provided in Attachment 2 to the Joint Petition is not a complete copy of the agreement between FairPoint and Consolidated. Specifically, the preamble to the agreement begins: "This AGREEMENT AND PLAN OF MERGER, dated as of December 3, 2016 (as amended, supplemented or otherwise modified from time to time, and *together with all exhibits and schedules hereto*, this "Agreement"), is entered into by and among ..." (Joint Petition, Attachment 2, p. 1 (Bates 26) (emphasis added)). In other words, the attachment as provided by the Joint Petitioners is not a complete copy of their agreement; in order to fully understand that agreement -- including the obligations being undertaken by Consolidated that may affect its financial and technical capabilities -- it is necessary to review the exhibits and schedules that are an integral part of the agreement.

b. **Labor 2** requests all documents relating to Consolidated's loan agreement for merger-related financing. Mr. Childers refers to and summarizes this financing on pages 7-8 of his pre-filed testimony. Under New Hampshire law, the "best evidence rule" requires that an original document be provided when the contents of the document are at issue. N.H. Evid. Rule 1002.³ Moreover, while a summary -- such as the summary contained in Mr. Childers's testimony -- may be admissible in evidence, that is only the case "if its accuracy as a summary of admissible evidence can be established. ... [T]he material summarized must at least be available for examination and copying." *Smith v. State*, 125 N.H. 799, 805, 486 A.2d 289, 293 (1984) (citations omitted). This requirement was subsequently incorporated into the Rules of Evidence, as follows: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. *The originals, or duplicates, shall be made available* for examination or copying, or both, by other parties at reasonable time and place." N.H. Evid. Rule 1006 (emphasis added).

c. **Labor 3, 4, and 5** request copies of reports, analyses, and fairness opinions from Consolidated's and FairPoint's financial advisors, as well as any internally generated financial projects and analyses. In Labor Intervenors' experience, these documents are likely to provide detailed financial analyses, projections, and assumptions concerning the financial effects of the proposed transaction on Consolidated. (FairPoint also had to analyze the effects of the proposed transaction on Consolidated to assure FairPoint's stockholders that the stock they would receive from the transaction reasonably reflected the value of the FairPoint business.) Mr. Childers made specific representations in his testimony concerning the expected

³ Labor Intervenors recognize that the Rules of Evidence do not strictly apply in matters before this Commission. RSA 365:9 and RSA 541-A:33, II; and Rule Puc 203.23(c). Nevertheless, the Rules of Evidence provide persuasive authority concerning the permissible scope of discovery before the Commission. See, e.g., *Power New England LLC*, DE 12-295; Order No. 25,576 (Sept. 25, 2013), 2013 N.H. PUC LEXIS 143 ("although the rules of evidence do not apply in Commission proceedings, the Commission applies the standards applicable in the Superior Court").

financial effects of the proposed transaction on Consolidated, including various financial metrics and expected synergy savings from combining the two companies. Childers pre-filed testimony, pp. 8-14 and Exhibit SLC-2. The requested documents would test the basis for Mr. Childers's testimony and provide the underlying analyses, including the "financial model and pro forma projections" to which Mr. Childers refers on page 10 of his testimony. These documents may be relevant in and of themselves, but there can be no question that they are likely to contain information that could lead to relevant, admissible information about Consolidated's current and/or post-transaction financial capability.

d. **Labor 9, 10, and 11** request documents concerning the due diligence efforts of the Joint Petitioners, their analyses of likely synergy savings from the proposed transaction, and related financial analyses. Similar to the requests in Labor 3-5, these documents relate directly to representations made by Mr. Childers in his testimony. For example, he describes in general terms the synergy savings Consolidated expects from the proposed transaction. Childers pre-filed testimony, p. 13. These requests seek the documents on which Mr. Childers relied, as well as related documents that may contain either a different view of, or more detailed information about, the projected synergies that appear to be critically important to evaluating Consolidated's post-transaction financial condition.

e. **Labor 13, 14, and 17** request specific information to which the Joint Petitioners referred in their Petition, including additional information about the number and type of customers Consolidated has experience serving and documentation for Consolidated's alleged "record of providing a high quality customer experience." These requests not only go directly to representations Consolidated made in its Petition, they also are relevant to the issue of

Consolidated's technical and managerial capabilities to own and operate FairPoint in New Hampshire.

f. **Labor 18** requests copies of Consolidated's most recent credit rating reports, to which Consolidated referred on page 11 of its Petition. Labor Intervenors do not understand the basis for objecting to the provision of documents that clearly form the basis for an assertion made in the Petition itself.

g. **Labor 23 through 28** request the detailed documents and data on which Mr. Childers relied for various statements in his testimony, including timelines for achieving synergy savings, details of the leverage ratio calculations he provided in his testimony, details of the alleged improvement in Consolidated's dividend pay-out ratio post-transaction, and analyses related to the tax savings discussed generally in Mr. Childers's testimony. Frankly, all of these requests are routine matters in discovery: a witness makes general or conclusory statements and other parties are entitled to seek the basis for those statements (including documents and data relied upon) and otherwise test the accuracy of those statements. With all due respect to the Joint Petitioners, Labor Intervenors cannot fathom a reason for objecting to asking a witness to provide back-up information for statements the witness made in testimony. There is no doubt that these requests are likely to contain information that could lead to relevant, admissible information.

h. **Labor 31 and 32** request additional information about Consolidated's post-transaction financial condition. Labor 31 requests information that Consolidated provided to its lenders and Labor 32 requests a traditional "sources and uses of funds" calculation that shows where the money is coming from to close the transaction and where that money will be spent. Once again, these are foundational documents that help to provide a very basic

understanding of Consolidated's post-transaction financial capability and that go directly to representations made in the Petition and pre-filed testimony.

16. Finally, Labor Intervenors would note that all of the discovery requests to which Joint Petitioners objected were asked in substantially similar form in the parallel proceeding before the Maine Public Utilities Commission, and Joint Petitioners answered all of those requests (many of which were subject to a protective order) in that proceeding. This was raised with counsel during the conference call, but that fact did not dissuade counsel from continuing to pursue their objections before this Commission. While Labor Intervenors recognize that the scope of jurisdiction is different in this proceeding than it is in the Maine proceeding, these requests all go to the basic financial, technical, and managerial capabilities of Consolidated, and those issues are equally before this Commission and the Maine commission.

WHEREFORE, the undersigned counsel for Labor Intervenors requests this Commission compel the Joint Petitioners to provide complete and accurate responses to Discovery Requests of Labor Intervenors, Set 1, requests 1-5, 9-11, 13-14, 17-18, 23-28, 31, and 32 within three days after the entry of the Commission's order compelling such responses.

Respectfully submitted,

Labor Intervenors,

BY:



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