STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

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.

FAIRPOINT'S OBJECTIONS TO LABOR INTERVENORS' MOTION TO COMPEL DISCOVERY

February 21, 2017

FairPoint Communications, Inc., on behalf of itself and its New Hampshire operating subsidiaries (collectively, "FairPoint"), submits the following Objections to the "Motion to Compel Discovery" ("Motion") filed by the Labor Intervenors[1] on February 15, 2017. In support of its objections, FairPoint states as follows:

1. In its Motion, Labor Intervenors seek to compel FairPoint's responses to three requests propounded in the Data Requests of Labor Intervenors, Set 1 – namely, **Labor 4**, **Labor 5**, and **Labor 11**, to which FairPoint has raised specific objections.

Labor 4 and Labor 5

2. In **Labor 4**, Labor Intervenors ask FairPoint to provide "all reports, analyses and complete Fairness Opinions provided to FairPoint's executives and Boards of Directors by outside advisors as well as internal staff."

3. In **Labor 5**, Labor Intervenors ask FairPoint to provide "all pro forma projections, created by or for Consolidated and/or FairPoint, in the greatest detail produced."

[1] The Labor Intervenors are: Communications Workers of America Local 1400 and International Brotherhood of Electrical Workers ("IBEW") Locals 2320, 2326 and 2327, which form IBEW System Council T-9.

4. Both of these data requests seek premerger information that was generated in contemplation of FairPoint's decision to enter into the December 3, 2016, Agreement and Plan of Merger (the "Merger Agreement"). FairPoint has objected to both data requests on a number of grounds, namely, that the requests are overbroad, unduly burdensome, and impermissibly vague, and seek information that is not relevant to the issues in this proceeding, as well as that the requests seek confidential information.

5. By their terms, **Labor 4** and **Labor 5** are not bounded by time or limited in scope and are therefore by definition overbroad and vague, and responding to these requests would be unduly burdensome for FairPoint.

6. Even assuming **Labor 4** and **Labor 5** could be narrowed in time or scope, however, the data requests are not relevant to the issues in this proceeding. The Labor Intervenors contend, by way of explaining the two data requests, that FairPoint "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." Motion, ¶ 15(c), at 6. But the factors that led FairPoint to decide to enter into the Merger Agreement are not relevant in this proceeding. Under RSA 374:30, II, the Commission is asked only whether Consolidated "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." The Commission must make findings based on the transaction as it actually exists, not based on information available to the parties that shaped their negotiations and might have caused them to consider other options or terms.

7. This Commission has adopted "an established principle that the Commission will not compel the discovery of information simply to shed light on the thinking of parties that enter

into contracts subject to our review." *In re Verizon New England, Inc.*, DT 07-011, Order No. 24,767 (June 22, 2007). "The rule we apply in these situations is that parties are entitled to obtain information in discovery if the information is 'relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. But, because the matter before the Commission relates to the actual agreement of the joint petitioners as opposed to the negotiations that preceded it, '[w]e do not perceive circumstances in which information about the negotiations . . . would become part of the record in this proceeding.'" '*Id.* (quoting *City of Nashua*, DW 04-048, Order No. 24,654 (Aug. 7, 2006), *reh'g denied*, Order No. 24,671 (Sept. 22, 2006)). The Commission should apply its established principle here and deny the Labor Intervenors' Motion.

8. The Commission's principle of barring discovery about pre-merger negotiations applies with even greater force in a proceeding, such as this one, involving ILEC-ELECs, over whom the Commission now applies a very narrow statutory review. The Labor Intervenors' speculation about FairPoint's pre-merger negotiating strategy, or about "assurances that FairPoint may have given to its stockholders, bear no relation to Consolidated's capabilities of maintaining ILEC-ELEC obligations in New Hampshire, which is the only question presently before the Commission.

9. Indeed, the data requests venture so far afield of the matters at issue in this proceeding as to raise a legitimate inference that the Labor Intervenors are more concerned about their 2018 collective bargaining negotiations with FairPoint than about the proposed 2017 merger with Consolidated. For this reason, FairPoint contends that the information the Labor Intervenors seek in **Labor 4** and **Labor 5** is highly confidential and commercially sensitive. Providing this information to the Labor Intervenors poses a significant risk of unfairly

disadvantaging FairPoint in its 2018 collective bargaining negotiations with the Labor Intervenors, which will occur irrespective of the outcome of the present proceeding.

10. For all these reasons, the Commission should not compel FairPoint to provide responses to **Labor 4** and **Labor 5** to the Labor Intervenors.

Labor 11

11. In **Labor 11**, Labor Intervenors ask FairPoint to "provide all documents FairPoint submitted in section 4(d)(i) of its Hart Scott Rodino filing . . ." Among other reasons, FairPoint has objected that the requested documents are not relevant in this proceeding, are not reasonably calculated to the lead to the discovery of admissible evidence, and should not be disclosed to the public generally or to the Labor Intervenors in particular because of the risk of putting FairPoint at an unfair disadvantage in its 2016 collective bargaining negotiations with the Labor Intervenors.

12. The Labor Intervenors seek documents filed as part of FairPoint's pre-merger submission to the Federal Trade Commission ("FTC") pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (the "HSR Act"). Under the HSR Act, parties to certain acquisitions must make a pre-merger notification filing with the FTC and with the Antitrust Division of the U.S. Department of Justice ("DOJ"). The purpose of these pre-merger filings is to provide the FTC and the DOJ an opportunity to determine whether the proposed merger is anti-competitive under federal law.[2]

[2] The Federal Communications Commission ("FCC") is also considering competitiveness issues in its review of this transaction. However, Labor Intervenors did not submit any comments to the FCC concerning the present transaction by the February 13, 2017 deadline. *See* WC Docket No. 16-417, Notice of Pleading Cycle (DA 17-52, Jan 12, 2017). The Labor Intervenors cannot now contend that they need FairPoint's HSR filings in this proceeding to explore competitiveness issues in New Hampshire.

13. Pre-merger filings under HSR are confidential and protected from disclosure under the Freedom of Information Act. 15 U.S.C. § 18a(h) provides that:

> Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

14. The federal courts have strictly enforced the HSR confidentiality obligation, so that even state attorneys general authorized by 15 U.S.C. § 26 to bring suit on behalf of victims of Sherman Antitrust Act violations cannot gain access to HSR premerger information. *See, e.g., Lieberman, et al. v. Federal Trade Commission*, 771 F.2d 32, 37 (2nd Cir. 1985) ("[Section 18a(h)'s] limitation on the disclosure of premerger information to the 'public' precludes confidential disclosure to state law enforcement officials."). While § 18a(h) contains an exception from the confidentiality obligations when disclosure "may be relevant to any administrative or judicial action or proceeding," the Second Circuit in *Lieberman* referenced "the FTC's consent judgment proceeding" as an example of such a proceeding, 771 F.2d at 37 f.n. 12, and went on to say:

> *Congress did not contemplate the use of premerger information by state officials*. That is to say, although a state official can seek a preliminary injunction against an illegal merger under federal antitrust law, the structure and legislative history of section [18a] show that *Congress envisioned that only the Department of Justice and the FTC would use premerger information*. Congress enacted section [18a] to facilitate federal prevention of unlawful mergers by insuring that relevant data was furnished to federal authorities in time to enable them to act before the "merging firms are ... irreversibly scrambled." The statute is premised on disclosure followed by a short waiting period; section [18a](b)(2) allows the federal authorities to terminate that waiting period if "neither [the FTC or the Department of Justice] intends to take any action," while section [18a](e) provides for extensions of the waiting period if the federal authorities ask for additional information. At the same time, section [18a](f) provides for prompt

> consideration of premerger actions by federal authorities. And the House Report on section [18a] refers only to the premerger actions of federal authorities. *See* H.R.Rep. No. 1373, *reprinted* in 1976 U.S. Code Cong. & Ad. News at 2639–43. As the *Mattox* Court [*Mattox v. FTC*, 752 F.2d 116 (5th Cir.1985)] recognized, giving state authorities the premerger information and the chance to bring suit more easily might well mean big delays in the fast world of mergers—delays Congress has not countenanced. We doubt if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight committees reacting to Commission or Justice Department decisions whether to block large-scale mergers of national or international significance. . . .

Id., at 39-40 (notes and footnotes omitted).

15. Despite the express requirement under federal law to maintain the confidentiality of HSR filings, and the inability even of state law enforcement officials to obtain access to such information to enforce federal antitrust laws, the Labor Intervenors assert an entitlement to review the requested portions of FairPoint's HSR filing. Without citing to any statute or case to support their Motion, they assert that **Labor 11** requests "documents concerning the due diligence efforts of the Joint Petitioners, their analyses of likely synergy savings from the proposed transaction, and related financial analyses." Motion, ¶ 15(d), at 7. Labor Intervenors further assert that **Labor 11**, though expressly directed to FairPoint, "relate[s] directly to representations made by [Consolidated witness] Mr. Childers in his [prefiled] testimony" and to "documents on which Mr. Childers relied. . ." *Id.*

16. Labor Intervenors' attempts to sidestep the strict confidentiality requirements governing FairPoint's HSR filing must be rejected. If Labor Intervenors wanted to determine the basis of FairPoint's assessment of Consolidated's capabilities, they could have posed such a question directly. **Labor 11** is a needlessly roundabout means to such an end, since the request runs smack into the confidentiality provisions of Section 18a(h) of the HSR Act, and since the information that Labor Intervenors would gain if the Commission were somehow to overlook those federal confidentiality provisions is not even relevant to this proceeding. As with **Labor 4**

and **Labor 5**, Labor Intervenors in **Labor 11** seek information about FairPoint's premerger assessments of Consolidated, when the only issue before the Commission is its own assessment of Consolidated's capabilities in light of the transaction as it actually exists. Once again, Labor Intervenors' Motion must be defeated by the "established principle that the Commission will not compel the discovery of information simply to shed light on the thinking of parties that enter into contracts subject to our review." *In re Verizon New England, Inc.*, DT 07-011, Order No. 24,767 (June 22, 2007).

17. As with **Labor 4** and **Labor 5**, the Commission's established principle regarding the non-relevance of pre-merger negotiations and assessments should apply with even greater force under the narrow statutory review that the Commission now gives to merger transactions involving ILEC-ELECs under RSA 374:30, II. In adding subdivision II to RSA 374:30, the Legislature made clear that the Commission is not asked to approve such a transaction and is instead directed to limit its actions to a finding that Consolidated "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." Thus, even the Commission's assessment of Consolidated's technical, managerial and financial capabilities is limited to the issue of maintaining FairPoint's existing ILEC-ELEC obligations regarding basic retail service (in RSA 362:8) and wholesale services (in RSA 374:22-p). The Labor Intervenors' efforts to shoehorn FairPoint's general assessment of Consolidated's suitability for a merger into such a narrow standard of statutory review are not relevant to this proceeding or reasonably calculated to lead to the discovery of admissible evidence.

18. In light of the lack of relevance of such information to the present proceeding, and similar to FairPoint's concerns about **Labor 4** and **Labor 5**, responding to **Labor 11** would

sweep in such vast amounts of confidential data that FairPoint has a legitimate concern about the risks of disclosing such highly confidential information to parties who will be negotiating new collective bargaining agreements with FairPoint in 2018. Allowing the Labor Intervenors access to such information would give them an unfair bargaining advantage in those negotiations, which will occur irrespective of the outcome of the present proceeding. FairPoint should not be compelled to accept such an inequitable result.

19. For all these reasons, Labor Intervenors' Motion to Compel FairPoint to respond to **Labor 11** should be denied.

WHEREFORE, FairPoint respectfully requests that the Commission:

A. DENY the Labor Intervenors' Motion to Compel Discovery with respect to FairPoint's objections to **Labor 4**, **Labor 5**, and **Labor 11**; and

B. GRANT such additional relief as the Commission deems necessary and just.

Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.
and its New Hampshire operating subsidiaries

By their Attorneys,

Primmer Piper Eggleston & Cramer PC

Dated: February 21, 2017 By: _____

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Certificate of Service

I, PAUL J. PHILLIPS, hereby certify that on February 21, 2017, a copy of the foregoing "FairPoint's Objection to the Labor Intervenors' Motion to Compel Discovery" was forwarded to all parties listed on the Commission's electronic service list in DT 16-872.

Paul J. Phillips