

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 16-872

**Consolidated Communications Holdings, Inc.
and FairPoint Communications, Inc.**

**FAIRPOINT'S UNOPPOSED MOTION FOR PROTECTIVE ORDER
AND CONFIDENTIAL TREATMENT RE: DISCOVERY RESPONSES
AND PREFILED TESTIMONY; AND UNOPPOSED MOTION TO
EXTEND WAIVER OF RULES PUC 201.04(b) & (c)**

Pursuant to RSA 91-A:5, IV, RSA 91-A:3, II(j), and N.H. Admin. Rule Puc 203.08, FairPoint Communications, Inc. (“FairPoint”) hereby moves the New Hampshire Public Utilities Commission (the “Commission”) to grant confidential treatment to certain information provided to the Commission Staff and to the Communications Workers of America Local 1400 (“CWA”) and the International Brotherhood of Electrical Workers Locals 2320, 2326, and 2327 (“IBEW”) (the CWA and IBEW, together, “Labor Intervenors”) in the course of the discovery process in the above-captioned matter. Pursuant to N.H. Admin. Rule Puc 201.05, FairPoint also respectfully moves the Commission to extend its waiver of N.H. Admin. Rules Puc 201.04(b) and (c) to allow the below-described confidential documents to continue to be maintained entirely under seal without requirement of particularized redaction.

The undersigned counsel for FairPoint has reviewed these Motions with counsel for the Commission Staff, the Labor Intervenors, and Communications Holdings, Inc., none of whom oppose the Motions.

In support of its Motions, FairPoint states as follows:

1. The present proceeding concerns a petition jointly submitted by FairPoint and Consolidated Communications Holdings, Inc. (“CCHI,” and, with FairPoint, the “Petitioners”) requesting findings by the New Hampshire Public Utilities Commission (“PUC”), pursuant to

RSA 374:30, II, in relation to a proposed stock acquisition and merger that will result in an indirect transfer of control of FairPoint and its New Hampshire operating subsidiaries to CCHI.

2. The PUC convened a prehearing conference in this matter on February 1, 2017, during which the PUC granted a motion to intervene by the Labor Intervenors.

3. Following the prehearing conference, the Commission Staff conducted a technical session that resulted in an agreement among the Commission Staff, the Petitioners, and the Labor Intervenors on a procedural schedule that included a period of discovery among the parties and Staff. The Commission adopted the procedural schedule for this proceeding by Secretarial letter dated February 3, 2017.

4. The procedural schedule in this proceeding was later modified by agreement among the parties and the Staff, and the modified procedural schedule was adopted by the Commission in a Secretarial Letter dated April 5, 2017.

5. A discovery dispute arose in this proceeding involving the scope and relevance of certain data requests propounded by the Labor Intervenors to the Petitioners in light of the statutory basis of this proceeding under RSA 374:30, II. In Order No. 25,997, issued by the Commission in this Docket on March 7, 2017, the Commission granted the Labor Intervenors' Motion to Compel Discovery, recognizing "the general preference to permit liberal discovery in litigated matters before the Commission. . . ." Order No. 25,997 (Mar. 7, 2017), at 14. However, the Commission also recognized that the Joint Petitioners' assertion "that information obtained through discovery might be used by the Labor Intervenors to their advantage in later collective bargaining negotiations represents a legitimate concern." *Id.* at 16. Accordingly, the Commission instructed the parties "to address that concern in their non-disclosure agreements or file a motion for confidential treatment specifying the information proposed to be afforded that heightened level of protection." *Id.*

6. Also in Order No. 25,997, the Commission on its own motion under Puc 201.05 determined that “the redaction requirements of Puc 201.04(b) and (c) may prove unduly burdensome for parties during the discovery phase,” and accordingly waived the redaction requirement for confidential materials submitted during discovery in this proceeding. The Commission “direct[ed] the parties to redact any discovery information claimed to be confidential, in the manner specified in Puc 201.04(b) and (c), at the time a motion for confidential treatment is filed with respect to that information.” *See* Order No. 25,997, at 15-16.

7. On March 9, 2017, the Petitioners and the Labor Intervenors entered into a Protective Agreement, a copy of which is appended here as **Exhibit A**. The Protective Agreement establishes a process for identifying and protecting information that is disclosed by a party (the “Disclosing Party”) through discovery or testimony and that the Disclosing Party deems to be confidential or highly confidential. Under the terms of the Protective Agreement, both confidential and highly confidential information are protected from public disclosure, and highly confidential information is further protected from disclosure to any party or individual that is or will be engaged in collective bargaining or business competition with the Disclosing Party. *See* Protective Agreement ¶¶ 1(A) & (B), at 3, and ¶ 3, at 4-5.

8. During the discovery phase of this proceeding, from March 1, 2017, through April 13, 2017, FairPoint provided responses to 155 data requests propounded by the Commission Staff and the Labor Intervenors. FairPoint’s responses included 72 separate Attachments, of which there were 17 Public Attachments, 31 Confidential Attachments, and 24 Highly Confidential Attachments.

9. Rather than seek confidential or highly confidential treatment for each of the 56 Confidential or Highly Confidential Attachments, FairPoint submitted its data responses accompanied by written statements of its intent to file a motion for confidential treatment pursuant to Rule Puc 203.08(d).

10. The 55 Confidential or Highly Confidential Attachments to FairPoint's data responses, for which FairPoint now seeks protective treatment, include the following:

Confidential Attachments (31)

- Confidential Attachment 1 to Response to Staff 1-14;
- Confidential Attachment 1 to Response to Staff 1-19;
- Confidential Attachments 1 through 7 to Response to Staff 1-20;
- Confidential Attachments 1 and 2 to Response to Staff 1-28;
- Confidential Attachment 1 to Response Staff 1-39-SS;
- Confidential Attachments 1, 2 and 3 to Response to Staff 1-46;
- Confidential Attachment and Supplemental Confidential Attachment to Response to Staff 1-52;
- Confidential Attachment to Response to Staff 1-55;
- Confidential Attachment to Response to Staff 1-57;
- Confidential Attachment 1 to Response to Staff 1-62-S;
- Confidential Attachments 1, 2 and 3 to Response to Staff 1-68;
- Confidential Attachments 1 and 2 to Response to Staff 1-75;
- Confidential Attachments 1, 2 and 3 to Response to Staff 1-79;
- Confidential Attachment 1 to Response to Staff 2-15;
- Confidential Attachment 1 to Response to Staff 4-3; and
- Confidential Attachment 2 to Response to Labor 4.

Highly Confidential Attachments (24)

- Highly Confidential Attachment 1 to Response to Staff 1-5-S;
- Highly Confidential Attachment 1 to Response to Staff 1-6;
- Highly Confidential Attachments 1 through 3 to Response to Staff 1-11;
- Highly Confidential Attachment 1 to Response to Staff 1-30-S;
- Highly Confidential Attachment 2 to Response to Staff 1-30-S;
- Highly Confidential Attachment 1 to Response to Staff 1-33;
- Highly Confidential Attachment 1 to Response to Staff 1-34;
- Highly Confidential Attachment 1 to Response to Staff 1-36;
- Highly Confidential Attachment 1 to Response to Staff 1-38;
- Highly Confidential Attachments 1 and 2 to Response to Staff 1-49;
- Highly Confidential Attachment 1 to Response to Staff 1-51;

- Highly Confidential Attachment 1 to Response to Staff 1-58-S;
- Highly Confidential Attachment 1 to Response to Staff 1-60;
- Highly Confidential Attachment 1 to Response to Staff 1-63;
- Highly Confidential Attachment 1 to Response to Staff 1-74;
- Highly Confidential Attachment 1 to Response to Staff 1-82-S;
- Highly Confidential Attachment 1 to Response to Staff 1-83-S;
- Highly Confidential Attachment 1 to Response to Staff 2-10;
- Highly Confidential Attachment 1 to Response to Staff 3-3;
- Highly Confidential Attachment 1 to Response to Staff 3-15; and
- Highly Confidential Attachment 1 to Response to Labor 11.

11. In addition to requesting confidential treatment for the documents referenced in Paragraph 10 above, FairPoint requests confidential (or highly confidential, as the case may be) treatment for all of the confidential and highly confidential information contained in the unredacted (confidential) prefiled testimony and attachments of Randy Barber, Randall Vickroy, and John Antonuk/Dr. Charles King.

12. The information contained in the documents and testimony listed in Paragraphs 10 and 11 above is competitively sensitive confidential, financial and commercial information that FairPoint does not routinely disclose to anyone outside of its corporate organizations or its authorized representatives who are subject to confidentiality obligations. As such, the information is entitled to protected from public disclosure under RSA 91-A:5, IV and from public discussion under RSA 91-A:3, II(j). *See also* RSA Chapter 350-B (Uniform Trade Secrets Act).

13. Rule Puc 203.08 provides, in pertinent part, that “[t]he Commission shall upon motion issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5, or other applicable law, based upon the information submitted pursuant to [Rule Puc 203.08(b)].” N.H. Code of Admin. Rules Puc 203.08(a).

14. Records that contain “confidential, commercial, or financial information” are expressly exempt from public disclosure and from discussion in public meetings. RSA 91-A:5, IV; RSA 91-A:3, II(j).

15. In determining whether to grant protective treatment, the Commission applies a three-step analysis developed by the New Hampshire Supreme Court. *Unitil Corp. v. Northern Utilities*, DG 08-048, Order No. 25,014 (Sept. 22, 2009), slip op. at 3 (citing *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008)). The analysis first requires an evaluation of whether there is a privacy interest at stake that would be invaded by the disclosure. Second, where such a privacy interest is at stake, the public’s interest in disclosure is assessed. Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. Finally, when there is a public interest in disclosure, that interest is balanced against any interests in non-disclosure. *Lambert*, 157 N.H. at 382-83.

16. FairPoint’s request for confidential (or highly confidential, as the case may be) treatment of the documents and testimony listed in Paragraphs 10 and 11 above meets the foregoing test. The information that FairPoint seeks to protect is private, competitively sensitive financial and commercial information that FairPoint does not publicly disclose. FairPoint is engaged in a highly competitive communications marketplace over which the Commission exercises relatively limited regulatory authority. Public disclosure of the subject information would be an invasion of FairPoint’s privacy and would give FairPoint’s competitors an unfair business advantage over FairPoint in the competitive marketplace. Moreover, public disclosure would not provide the public with information about the conduct or activities of the Commission or other parts of state or local government in New Hampshire. The public interest in the information is therefore not enough to outweigh FairPoint’s interest in keeping its competitively

sensitive financial and commercial information confidential. Public disclosure of this information is not warranted in this proceeding.

17. FairPoint respectfully requests that the Commission issue an order protecting the documents and testimony listed in Paragraphs 10 and 11 above from public disclosure and prohibiting copying, duplication, dissemination or disclosure of the information in any form. FairPoint further asks that the Commission's order extend to any use or discussion of the aforesaid information in any discovery, testimony, hearing, argument or briefing in this Docket.

18. FairPoint also requests that the Commission extend its waiver of N.H. Adin. Rules 201.04(b) & (c) to the adjudicative phase of this Docket. The referenced rules normally require the submission of redacted and unredacted versions of confidential documents for which a party seeks confidential treatment. In both its discovery responses and its own prefiled testimony, FairPoint has deliberately avoided including confidential (or highly confidential, as the case may be) information in its narrative responses and testimony, choosing instead to attach confidential (or highly confidential, as the case may be) documents in their entirety in both paper and electronic formats. Redacting those documents would be extremely burdensome, for the reasons noted in the Commission's Order No. 25,997 regarding the discovery phase of this proceeding. *See* Order No. 25,997, at 15-16.

19. The Commission's reasoning applies with equal force to the adjudicative phase of this Docket. FairPoint notes that the Direct Testimony submitted thus far by the Commission Staff and the Labor Intervenors have relied very little on the confidential or highly confidential information produced in discovery by FairPoint. Undertaking painstaking redactions of those documents will serve no useful purpose if very little of the subject information is introduced into the evidentiary record during the hearings.

20. In the event that FairPoint intends to introduce into evidence at hearing any of the confidential or highly confidential material noted above, or any other confidential information,

FairPoint intends to submit it in the manner specified in N.H. Admin. Rules Puc 201.04 (b) and (c). FairPoint intends to work with Staff and the other parties to identify confidential information that they intend to introduce into evidence at hearing so that redacted and unredacted versions can be submitted in accordance with the above-referenced rules.

WHEREFORE, FairPoint requests that the Commission:

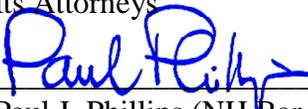
- A. Issue an order that exempts from public disclosure and public discussion and otherwise protects the confidentiality of the unredacted information listed in Paragraphs 10 and 11 above;
- B. Issue an order granting a waiver of the provisions of N.H. Admin. Rules Puc 201.04(b) and (c) with respect to the redaction requirement for each of the documents listed in Paragraph 10 above; and
- C. Grant such additional relief as the Commission deems appropriate.

Respectfully submitted,

FAIRPOINT COMMUNICATIONS, INC.

By: Primmer Piper Eggleston & Cramer PC,
Its Attorneys

Dated: April 26, 2017

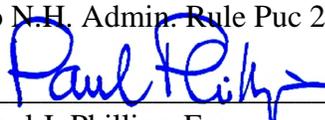
By: 

Paul J. Phillips (NH Bar #20788)
Primmer Piper Eggleston & Cramer PC
900 Elm Street, 19th Floor
P.O. Box 3600
Manchester, NH 03101-3600
Phone: (603) 626-3300
pPhillips@primmer.com

CERTIFICATE OF SERVICE

I, Paul J. Phillips, Esq., hereby certify that on the date indicated below, I caused the attached to be served electronically pursuant to N.H. Admin. Rule Puc 203.11(a)(1).

Dated: April 26, 2017



Paul J. Phillips, Esq.