

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**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.**

**Order on Motions for  
Protective Order and Confidential Treatment**

**ORDER NO. 26,040**

**July 11, 2017**

**APPEARANCES:** Orr & Reno, by Susan S. Geiger, Esq., on behalf of Consolidated Communications Holdings, Inc.; Primmer Piper Eggleston & Cramer PC, by Paul J. Phillips, Esq., on behalf of FairPoint Communications, Inc.; Scott J. Rubin, Esq., on behalf of the Communications Workers of America (CWA) Local 1400 and the International Brotherhood of Electrical Workers (IBEW) Locals 2320, 2326, and 2327, that form the IBEW System Council T-9; and David K. Wiesner, Esq., on behalf of Commission Staff.

In this Order, the Commission grants, in part, and defers, in part, motions for protective order and confidential treatment concerning the proposed merger transaction between Consolidated Communications Holdings, Inc. (CCHI), and FairPoint Communications, Inc. (FairPoint). The Commission grants the motions to the extent they cover confidential, commercial, or financial information under RSA 91-A:5 that has been included in pre-filed testimony and hearing exhibits. With respect to any claimed confidential information included in discovery responses that were not admitted into evidence at hearing, the Commission defers decision on the motions and will keep that information confidential without redaction of the original responses or related documents, until a request for such information is made under RSA 91-A. Upon receiving any RSA 91-A request, the Commission will afford the party that provided the discovery responses an opportunity to redact the responses and related documents and to further support its arguments for continued confidential treatment.

## I. PROCEDURAL BACKGROUND

On May 31, 2017, the Commission issued Order No. 26,022 (Approval Order) approving the Stipulation and Settlement Agreement filed by CCHI, FairPoint, and Commission Staff (Staff). The Commission found that, subject to the approved settlement terms and conditions, CCHI is technically, managerially, and financially capable of maintaining FairPoint's obligations to provide basic telephone service throughout its franchise territory and to meet FairPoint's wholesale obligations arising under federal and state law. That finding was requested jointly by CCHI and FairPoint in connection with their proposed merger transaction.<sup>1</sup>

The Approval Order contains a more detailed summary of the procedural history of this proceeding. The Commission previously granted CCHI's motion for protective order and confidential treatment of its pre-filed direct testimony filed on January 17, 2017.<sup>2</sup> In the Approval Order, we referenced other motions for protective order and confidential treatment and motions for waivers of Puc Rules 201.04(b) and (c) filed by CCHI and FairPoint, as well as the oral motion for confidential treatment of Exhibit 38 made by counsel for CCHI during the second day of hearing on May 25, 2017. Approval Order at 3. The Commission indicated that, in the interest of accommodating the request of CCHI and FairPoint that an order making the required statutory findings be issued by May 31, the Commission expedited issuance of the Approval Order, and deferred ruling on the parties' pending motions for confidential treatment. Approval Order at 36-37.

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<sup>1</sup> Following the merger, Consolidated Communications, Inc. (Consolidated), a wholly-owned subsidiary of CCHI, will become the owner of FairPoint, which in turn is the owner of Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint-NNE) and Northland Telephone Company of Maine, Inc. (Northland). FairPoint-NNE and Northland are both incumbent local exchange carriers providing telephone service in New Hampshire.

<sup>2</sup> Transcript of Prehearing Conference 2/1/17 (Tr.) at 5.

## II. POSITIONS OF THE PARTIES

### A. CCHI

On April 26, 2017, CCHI filed “Unopposed Motions for Protective Order and Confidential Treatment, Partial Waiver of Puc Rules 201.04(b) and (c), and Partial Modification of Order No. 25,997” (CCHI 4/26/17 Motion). CCHI stated it had provided hundreds of written documents and electronic files in response to data requests propounded by Staff and the Labor Intervenors,<sup>3</sup> many of which contain information claimed to be “confidential” or “highly confidential” as it relates to Consolidated’s finances and business operations. CCHI 4/26/17 Motion at 2. According to CCHI, that confidential and highly confidential information was provided to Staff pursuant to N.H. Code Admin. Rules Puc 203.08(d) and to the Labor Intervenors pursuant to a protective agreement dated March 9, 2017, among CCHI, FairPoint, and the Labor Intervenors as parties. *Id.* Under the terms of that protective agreement, “confidential information” consists of data to be shared only with signatories to the protective agreement and with the Commission, while “highly confidential information” consists of commercially and/or competitively sensitive data to be shared only with the Commission (including, but not limited to, Staff and its consultants) and signatories to the protective agreement, provided that any such “highly confidential” information “has been and would continue to be withheld from parties that are or will be engaged in collective bargaining or business competition with the submitting parties, regardless of whether such party is a signatory to the protective agreement.” *Id.*

CCHI provided a detailed but non-exclusive listing of its discovery responses asserted to contain confidential or highly confidential information. *Id.* at 3. CCHI also sought confidential treatment for all of the confidential and highly confidential information contained in the

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<sup>3</sup> The “Labor Intervenors” are the Communications Workers of America (CWA) Local 1400 and the International Brotherhood of Electrical Workers (IBEW) Locals 2320, 2326, and 2327, that form the IBEW System Council T-9.

unredacted, confidential pre-filed testimony and attachments of witnesses Randy Barber, Randall Vickroy, John Antonuk, and Dr. Charles King, as well as “Mr. Barber’s confidential response to Consolidated’s data request 1-14 and other materials he provided in response to Consolidated’s data requests which he has designated as confidential (*i.e.* ‘Confidential Barber Tables’).”

*Id.* at 4.

CCHI asserted that the information for which it seeks confidential treatment represents competitively-sensitive confidential, financial, and commercial information that it “does not routinely disclose to anyone outside of its corporate organization or its authorized representatives,” and therefore that information is entitled to be protected from public disclosure under RSA 91-A:5, IV. *Id.* CCHI also cited the Uniform Trade Secrets Act, RSA Chapter 350-B, in support of its request. According to CCHI, it is “engaged in an intensely competitive industry over which the Commission has relatively limited regulatory authority,” and disclosure of its sensitive financial and commercial information would be an invasion of its privacy. CCHI also asserted that it would be competitively harmful if competitors were able to obtain access to such information. *Id.* at 5. CCHI maintained that the financial information in question was developed in connection with its decision to acquire FairPoint, a transaction over which the Commission has limited authority under RSA 374:30, II. *Id.* CCHI also noted that only the Labor Intervenors had intervened in the docket, and those intervenors had signed a protective agreement regarding that information. *Id.* CCHI concluded that “there is little if any, public interest associated with obtaining this competitively sensitive financial information.” *Id.* CCHI argued that, even if a public interest in disclosure of the information were to exist, it would be outweighed by its interest in maintaining the confidentiality of the information. *Id.*

CCHI requested that the Commission issue an order protecting the information described in the CCHI 4/26/17 Motion from public disclosure and “prohibiting copying, duplication,

dissemination or disclosure of it in any form,” and also extend its protection to cover “any discovery, testimony, argument or briefing in this docket relative to the confidential information.” *Id.* In addition, CCHI requested a waiver of Puc 201.04(b) and (c), which require the filing of redacted and unredacted versions of any documents containing confidential information for which a moving party seeks protective treatment. *Id.* CCHI further requested that the Commission modify Order No. 25,997 (March 7, 2017), to the extent that order “directs 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.” *Id.* at 5-6 (citing Order No. 25,997 at 15-16).

CCHI asserted it would be unduly burdensome to require redaction of “over 100 data request responses, many of which [include] several pages of written documents, and some of which include data furnished in electronic format, *i.e.* discs and excel spreadsheets which [include] numerous ‘workbooks.’” *Id.* at 6. CCHI noted that the Commission had, on its own motion, waived the redaction rules during the discovery phase of the proceeding. *Id.* (citing Order No. 25,997 at 15-16). CCHI argued that the reasoning underlying the waiver of Puc 201.04(b) and (c) during the discovery phase “holds true for the adjudicative phase of these proceedings as well,” especially if the information is not introduced into the record at hearing. *Id.* CCHI committed that, in the event it intended to introduce into evidence at hearing any confidential or highly confidential materials, it would submit the materials in redacted and unredacted shaded versions as required under Puc 201.04(b) and (c). *Id.* CCHI also indicated it would work with Staff and the other parties to identify any confidential information that they intended to introduce into evidence at hearing, so that redacted and unredacted versions could be submitted in accordance with the applicable rules. *Id.*

On May 18, 2017, CCHI filed a motion for protective order and confidential treatment in connection with its pre-filed rebuttal testimony (CCHI 5/18/17 Motion). CCHI sought confidential treatment for specific portions of the rebuttal testimony of Michael Shultz and Steven Childers, as well as certain of the attachments to their testimony and an attachment to Gabe Waggoner's rebuttal testimony, which it claims contains confidential information. CCHI 5/18/17 Motion at 2. CCHI also sought protective treatment for Confidential Rebuttal Attachment MJS 1-A, because it contains the same information as a confidential supplemental response to Staff Data Request 1-80 (Confidential Attachment Staff 1-80-A). *Id.* In support of its confidentiality requests, CCHI essentially reiterated the arguments it made in the CCHI 4/26/17 Motion. *Id.* at 2-4. CCHI concluded by requesting that the Commission issue an order protecting the information described from public disclosure and prohibiting copying, duplication, dissemination, or disclosure of it in any form, as well as extending protection to cover any discovery, testimony, argument, or briefing relative to that confidential information. *Id.* at 4.

During the second day of hearing on May 25, 2017, counsel for CCHI made an oral motion for confidential treatment of Exhibit 38, which contains a summary of FairPoint NNE's New Hampshire intrastate revenues during recent years. Tr. 5/25/17 at 75-76.

**B. FairPoint**

On April 26, 2017, FairPoint filed an “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)” (FairPoint Motion). FairPoint sought protective treatment of 55 “confidential” or “highly confidential” attachments to its responses to data requests propounded by Staff and the Labor Intervenors. FairPoint Motion at 4-5. FairPoint also requested “confidential (or highly confidential) treatment” for all of the confidential and

highly confidential information in the unredacted pre-filed testimony and attachments of Randy Barber, Randall Vickroy, John Antonuk, and Dr. Charles King. *Id.* at 5.

According to FairPoint, the information contained in the documents and testimony for which it requested confidential treatment is competitively-sensitive confidential, financial, and commercial information that it “does not routinely disclose to anyone outside of its corporate organization or its authorized representatives who are subject to confidentiality obligations.” *Id.* at 5. FairPoint argued that such information is entitled to be protected from public disclosure under RSA 91-A:5, IV and RSA 91-A:3, II(j). *Id.* Like CCHI, FairPoint also relied on the Uniform Trade Secrets Act, RSA Chapter 350-B.

FairPoint asserted that it is engaged in a highly competitive communications marketplace over which the Commission exercises relatively limited regulatory authority, and that “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.” *Id.* at 6. According to FairPoint, 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, and therefore the public interest in the information is not sufficient to outweigh FairPoint’s interest in keeping its competitively-sensitive financial and commercial information confidential. *Id.* at 6-7.

FairPoint requested that the Commission issue an order protecting the specified documents and testimony from public disclosure and prohibiting copying, duplication, dissemination, or disclosure of the information in any form, as well as extending protection to cover any use or discussion of the confidential information in any discovery, testimony, hearing, argument, or briefing, in this proceeding. *Id.* at 7. FairPoint further requested that the

Commission extend its waiver of the document redaction requirements of Puc 201.04(b) and (c) from the discovery phase to the adjudicative phase of this proceeding. *Id.*

According to FairPoint, it had “deliberately avoided” including confidential and highly confidential information in its testimony and narrative discovery responses, “choosing instead to [separate and] attach confidential (or highly confidential) documents in their entirety in both paper and electronic formats.” *Id.* FairPoint asserted that redaction of 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.” *Id.* (citing Order No. 25,997 at 15-16). FairPoint argued that the Commission’s “reasoning applies with equal force to the adjudicative phase of this Docket,” noting that the direct testimony submitted by Staff and the Labor Intervenors had “relied very little on the confidential or highly confidential information produced in discovery by FairPoint.” *Id.*

FairPoint maintained that requiring extensive redactions of those documents would “serve no useful purpose if very little of the subject information [were] introduced into the evidentiary record during the hearings.” *Id.* FairPoint committed that, if it intended to introduce into evidence at hearing any of the confidential or highly confidential materials described, or any other confidential information, it would submit that information in redacted and unredacted shaded versions as required under Puc 201.04(b) and (c). *Id.* at 7-8. FairPoint also indicated its intention to work with Staff and the Labor Intervenors to identify confidential information that they intended to introduce into evidence at hearing so that redacted and unredacted versions could be submitted in accordance with the applicable rules. *Id.* at 8.

### **C. Labor Intervenors and Commission Staff**

Neither Staff nor the Labor Intervenors opposed or objected to the requests for confidential treatment made by CCHI in the CCHI 4/26/17 Motion, in the CCHI 5/18/17 Motion,



or through the oral motion made by CCHI's counsel during the second day of hearing, or to the requests for confidential treatment made by FairPoint in the FairPoint Motion.

### **III. COMMISSION ANALYSIS**

Under RSA 91-A:5, IV, records of "confidential, commercial or financial information" are exempted from disclosure, and the New Hampshire Supreme Court has adopted a three-step balancing test for determining whether certain documents meet this designation. *See, e.g., Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552-54 (1997); *Lambert v. Belknap County Convention*, 157 N.H. 375, 382-83 (2008). The first consideration is whether disclosure of the information sought to be protected involves a privacy interest. The second consideration is whether the public has an interest in disclosure of the information. Finally, the public's interest in disclosure is balanced against the privacy interests at stake to determine whether disclosure is warranted. *See, e.g., segTEL, Inc. d/b/a FirstLight Fiber*, Order No. 25,825 at 5-6 (October 13, 2015).

We have reviewed the information claimed to be confidential in the pre-filed testimony and in the other documents and materials admitted as exhibits during the hearings in this proceeding, and we find that information meets the standards for exemption under RSA 91-A:5, IV and should be afforded confidential treatment. The information represents non-public, commercially-sensitive financial and operational information of companies engaged in a competitive industry that is subject to limited state regulation in New Hampshire. Both CCHI and FairPoint have represented that the information at issue is not routinely disclosed to anyone outside of their corporate organizations or authorized representatives. Although the public has an interest in disclosure of that confidential information because we considered it in reaching our decision, we have determined that CCHI's and FairPoint's respective privacy interests outweigh the public's interest in disclosure of this information. We therefore grant the CCHI 5/18/17

Motion and CCHI's oral motion regarding Exhibit 38 made during the second day of hearing, and we grant the CCHI 4/26/17 Motion and the FairPoint Motion to the extent they cover confidential information introduced into evidence during the hearings in this matter.

With respect to the discovery response materials described in the CCHI 4/26/17 Motion and the FairPoint Motion, we are unable to determine whether those materials contain information eligible for protective treatment because they are not redacted to show the specific information considered confidential. In view of the volume and scope of the relevant discovery materials, however, we recognize that full redaction of all such materials may be unduly burdensome. We also note that the discovery responses that were not admitted into evidence form no part of the record for decision in this proceeding, thereby diminishing the public's interest in their disclosure.

We therefore defer decision on affording confidential treatment to those discovery materials claimed to be confidential that were not admitted into evidence as hearing exhibits, and we extend our waiver of the redaction requirements of Puc 201.04(b) and (c) as granted in Order No. 25,997. Pursuant to Puc 203.08(c), the materials will not be disclosed to the public until such time as the Commission rules on the relevant motion for confidential treatment. Those materials will be kept confidential without redaction unless and until a request for their disclosure is made under RSA 91-A. Upon receiving any such RSA 91-A request, the party that provided the discovery response materials will be afforded an opportunity to redact the materials and to further support its arguments for continued confidential treatment by the Commission. The Commission will then determine whether or not to grant the motion for protective treatment of any such discovery materials alleged to be confidential.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the motion for protective order and confidential treatment filed by Consolidated Communications Holdings, Inc., on May 18, 2017, is hereby GRANTED; and it is

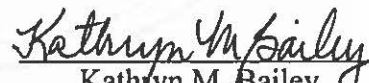
**FURTHER ORDERED**, that the oral motion for confidential treatment of Hearing Exhibit 38 made on behalf of Consolidated Communications Holdings, Inc. on May 25, 2017, is hereby granted; and it is

**FURTHER ORDERED**, that the motions for protective order and confidential treatment filed on April 26, 2017, by Consolidated Communications Holdings, Inc., and by FairPoint Communications, Inc., are GRANTED, in part, and DEFERRED, in part, as discussed in this Order; and it is

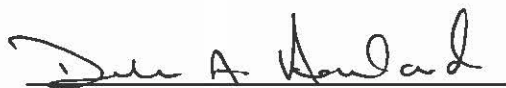
**FURTHER ORDERED**, that the document redaction requirements of Puc 201.04(b) and (c) are waived, such that any discovery materials claimed to be confidential shall be redacted, in the manner specified in those rules provisions, only at the time a request is made for their disclosure under RSA 91-A.

By order of the Public Utilities Commission of New Hampshire this eleventh day of July, 2017.

  
Martin P. Honigberg  
Chairman

  
Kathryn M. Bailey  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director