

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 07-011

VERIZON NEW ENGLAND, INC. et alia

**Joint Petition for Authority to Transfer Assets and Franchise
to FairPoint Communications, Inc.**

**Order on Motions to Compel Discovery
Submitted by the Office of Consumer Advocate**

ORDER NO. 24,767

June 22, 2007

This case concerns the joint petition of Verizon, New England, Inc. and certain of its affiliates to transfer Verizon's network of land lines and its utility franchise to FairPoint Communications, Inc. In this order, we address three motions submitted by the Office of Consumer Advocate (OCA) to compel FairPoint to produce certain materials in discovery.

At issue are (1) a pleading captioned "Office of Consumer Advocate's Second Motion to Compel FairPoint's Responses to Group I, Set I Data Requests," submitted on May 18, 2007, (2) a pleading captioned "Office of Consumer Advocate's Third Motion to Compel FairPoint's Responses to Group 1, Set 1 Data Requests," filed on May 30, 2007, and (3) a pleading captioned "Office of Consumer Advocate's Second Motion to Compel Verizon's Responses to Data Requests" filed on June 8, 2007. FairPoint objected to the first two motions on May 25, 2007 and June 8, 2007, respectively. Verizon submitted an objection to the third motion on June 18, 2007.

I. Motions Seeking to Compel Discovery from FairPoint Communications

The May 18 motion concerns four data requests – nos. 15, 38, 43 and 44 – from the first group of data requests OCA tendered to the joint petitioners in April pursuant to the procedural schedule established for this docket. *See* Order No. 24,733 (March 16, 2007), slip op. at 6-7 (approving procedural schedule proposed by parties and Staff).¹ At issue are materials prepared by FairPoint or its outside advisors that relate to FairPoint’s internal deliberations as to its negotiations with Verizon and the agreement FairPoint ultimately reached with Verizon. The May 30 motion concerns similar data requests from the same group (nos. 14, 17, 23 and 26), posed as queries seeking background on the filing FairPoint made with the U.S. Justice Department in connection with the approval for the asset transfer required under the Hart-Scott-Rodino Act. The arguments and positions taken by the disputants are essentially identical in the two motions.

OCA characterizes the responses received to the data requests as incomplete, incorrect and non-responsive. According to OCA, the documents are likely to reveal the extent to which the amount of debt to be assumed by FairPoint in connection with the deal either increased or decreased over the course of the Company’s negotiations with Verizon, and would also allow OCA “to trace or compare model results to the actual accounting and financial data to illustrate gaps if any between financial model results presented by [FairPoint witness Walter E. Leach, Jr.]

¹ As noted in Order No. 24,733, the parties and Staff proposed, and we approved, a rules waiver that involved a hearings examiner conducting telephone conferences to resolve discovery disputes as they arose, at least in the first instance. We regard the pending discovery motions as outside that framework, inasmuch as the procedural schedule contemplated that the hearings examiner would address discovery problems arising out of any objections made to discovery requests. The pending OCA motions, in contrast, arose after the OCA received responses from FairPoint and deemed such responses to be inadequate. In these circumstances, it is expeditious simply to resolve the pending motions by order of the Commission.

and actual accounting data.” May 18 Motion at 8. Further, according to OCA, requested cash-flow analyses would tend to illuminate “the critical financial metric of free cash flow, upon which the financial viability of the new entity rest[s].” *Id.* at 9. It is OCA’s position that “the proposed merger and acquisition was the product of *a process* which took place over many, many months” prior to the actual agreement and thus that it would be “unreasonable and incorrect” to determine that the documents do not relate to the requisite public interest determination to be made by the Commission. *Id.* at 10 (emphasis in original). In OCA’s view, allowing FairPoint to avoid providing internal documents that antedate the January 14, 2007 agreement with Verizon would allow FairPoint “to make arbitrary and self-serving distinctions about what documents pertaining to the acquisition they will or will not produce, to the detriment of . . . the public interest.” *Id.* at 11. Finally, with respect to presentations made to the FairPoint board of directors, the requested information is “some of the most important information that must be analyzed in this case” because “the information that was utilized to inform senior management and board members during the acquisition process can provide the clearest view of the main issues in the transaction, and the potential impact on the company and its ratepayers.” *Id.* at 13. OCA notes that such information would be “free of ‘spin’ due to fiduciary, legal and business responsibilities of senior management.” *Id.*

The May 30 motion reprises the arguments made by OCA on May 18. In both motions, OCA stresses that since it does not know what full responses to the data requests would reveal, it cannot state with full particularity how these responses would be admissible as evidence or would lead to the discovery of admissible evidence. Neither motion, however, requests that FairPoint be directed to compile an index or summary of the documents.

In opposition to the motions, FairPoint relies on two previous decisions by the Commission in connection with discovery disputes involving negotiations leading to agreements ultimately subject to Commission review. In *Public Service Co. of New Hampshire*, 89 NH PUC 226 (2004), the Commission refused to compel the production of documents related to negotiations between an electric utility and the contractor it selected to build a wood yard (in connection with plans to convert a coal-fired boiler to one capable of burning wood). The Commission ruled that, as to such confidential and competitively sensitive negotiations, and “[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem the information [to be] admissible.” *Id.* at 230. Similarly, in *City of Nashua*, Order No. 24,654 (August 7, 2006), *reh’g denied*, Order No. 24,671 (Sept. 22, 2006), the Commission refused to compel the City of Nashua to produce information concerning negotiations leading up to an agreement with an outside contractor for the operation of the water utility system the City is seeking to municipalize pursuant to RSA 38. In that decision, we noted that the standard for allowing discovery in Commission proceedings is a liberal one but is still subject to “principles of reasonableness and common sense.” Order No. 24,654, slip op. at 3. We observed that, “the facts that drive the Commission’s ultimate decision relate to the costs themselves, as fixed by the contracts in question, regardless of how the contracting parties may have regarded them during contract negotiations and regardless of whether the assumptions that drove such negotiations are at variance with public statements.” *Id.* at 4.

We agree with FairPoint that, in light of the two decisions cited above, it is 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. 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.” *Id.* at 3. 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.*

II. Motion Seeking to Compel Discovery from Verizon

The OCA motion with respect to Verizon concerns one data request, referenced as OCA 1-5.² The data request sought “a complete copy of Verizon’s business plan for the years 2004, 2005, 2006, 2007 and 2008.”

According to the OCA, when Verizon objected to this data request negotiations ensued and Verizon agreed to provide a response “regarding business plans that relate to New Hampshire.” June 8, 2007 Motion at 7. OCA states that it therefore did not press a motion to compel discovery as to this data request in light of the Verizon objection, assuming that Verizon would produce the agreed-upon response – business plans related to Verizon New Hampshire only, “to the extent that they exist.” *Id.* at 8. According to OCA, the response actually provided by Verizon was that “[b]usiness plans responsive to this request that pertain to New Hampshire operations do not exist and thus are not available.” *Id.* Verizon does not contest these factual assertions as to what transpired between the two parties.

² Also referenced in the motion are three additional data requests tendered by OCA to Verizon, denominated OCA 1-11, 1-113 and 1-114. Since we do not understand OCA to be seeking to compel responses to these data requests, we do not address them. The motion indicates that OCA intends to reserve its rights to compel responses to these data requests at an unspecified later time. We express no view as to whether this is permissible in the circumstances.

According to OCA, based upon information and belief Verizon has “some type of business plans, perhaps not prepared by state but instead by line of business or some other internal organization, that direct its activities in various areas of the business.” *Id.* OCA states that it seeks Verizon’s “complete business plans” to permit OCA to assess the extent to which such plans relate to the issues in this proceeding. In the view of OCA, if the business plan of Verizon New Hampshire’s corporate parent is the only such document available, such a plan would be “directly relevant to the merits of the proposed transaction for New Hampshire consumers because it likely discusses the overarching business priorities of Verizon NH’s corporate parent, which, in the absence of a New Hampshire-specific business plan (or plans), directs operations and investment in the state.” *Id.* at 8-9.

In opposition, Verizon’s position is that OCA should be bound by a written agreement the consumer advocate made, in resolution of the parties’ dispute over OCA 1-5, to seek only business plans “since 2004 and NH only.” Verizon Objection of June 18 at 1. According to Verizon, after entering into this agreement with respect to OCA 1-5, “Verizon subsequently undertook a further review and responded in good faith that ‘Business plans responsive to the request that pertain to New Hampshire operations do not exist and thus are not available.’” *Id.* at 2. It is Verizon’s position here that, “[n]ow unhappy with the deal it struck and Verizon’s answer that it does not have any business plans that pertain to New Hampshire – whether or not specific to or generated by Verizon NH or otherwise – OCA now asks the Commission to force Verizon to produce business plans that fall well outside the scope of the agreed upon request.” *Id.*

In addition, Verizon asks the Commission to deny the discovery motion because OCA is seeking to compel production of “confidential information of the highest order that is wholly irrelevant to this proceeding.” *Id.* According to Verizon, the discovery request OCA seeks to press would involve business plans of Verizon Communications, Inc., a company not subject to the jurisdiction of the Commission. Verizon also states that it has “repeatedly” informed OCA that such business plans contain no information “specific to the assets at issue in this investigation.” It is Verizon’s position that, while OCA has a right to conduct discovery on matters relevant to whether the FairPoint transaction would be in the public interest, OCA “does not have the right to put on trial the business plans of Verizon NH’s corporate parent.”

Verizon’s arguments are unpersuasive. As noted, *supra*, the standard we apply in discovery matters 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. Information meeting this standard is discoverable regardless of whether it was prepared by and/or relates to an affiliate or affiliates of the recipient of the request, and regardless of whether any such affiliate falls within the Commission’s regulatory jurisdiction.³ Indeed, it is reasonable to assume that, to the extent the sale of the franchise and assets of Verizon New England to FairPoint is the result of or pursuant to a written business plan of the seller, the plan would not be set forth in a document of Verizon New England but, rather, of its owner. It is not surprising that such business plan would essentially say nothing specific to

³ We note that Verizon does not suggest here that it is *unable* to produce business plans that are responsive to OCA’s request because the documents belong to one or more affiliates – only that Verizon should not be *required* to produce the documents in the circumstances. We thus conclude that Verizon has waived any argument based on inability to produce.

Verizon New Hampshire's operations – after all, Verizon plans to divest them – but, rather, would reflect at the

parent company level various strategic determinations as to which lines of business to develop and which, if any, to shed.

Nor can we agree with Verizon that the mere discovery of those strategic determinations would amount to putting the business plans of Verizon New Hampshire's corporate parent on trial. Even assuming that business plans responsive to the request would be inadmissible at hearing on this ground, it is enough that the information is reasonably calculated to lead to the discovery of other information that *would* be admissible. Verizon, which, unlike OCA, has possession of any documents responsive to OCA 1-5 and knows whether the information in them meets this standard, nowhere states that the information fails to meet the threshold for discoverability. Verizon simply attempts to cause us to apply a different and more restrictive test.

We likewise cannot agree with Verizon that the highly confidential nature of the documents in question justify their protection from discovery. It is our understanding that Verizon and OCA have entered into a confidentiality agreement that should be adequate to protect any privacy interest implicated by production of documents responsive to OCA 1-5.

OCA is entitled to all Verizon documents responsive to OCA 1-15, regardless of whether such documents are in the possession of Verizon New Hampshire or an affiliate. Since Verizon has now fully assessed what materials exist that are responsive, it is reasonable, given the looming deadline for preparation of testimony by OCA's witnesses, to require Verizon to produce the documents immediately.

Based upon the foregoing, it is hereby

ORDERED, that the motions of the Office of Consumer Advocate captioned “Second Motion to Compel FairPoint’s Responses to Group I, Set I Data Requests” and “Third Motion to Compel Fairpoint’s Responses to Group 1, Set 1 Data Requests,” submitted on May 18, 2007 and May 30, 2007, respectively, are DENIED; and it is further

ORDERED, that the motion of the Office of Consumer Advocate captioned “Office of Consumer Advocate’s Second Motion to Compel Verizon’s Responses to Data Requests” submitted on June 8, 2007 is GRANTED; and it is further

ORDERED that Verizon New Hampshire produce all documents responsive to the request at issue in the June 8, 2007 motion by the close of business on June 27, 2007.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of June, 2007.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary