STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 07-011

VERIZON NEW ENGLAND, INC., BELL ATLANTIC COMMUNICATIONS, INC., NYNEX LONG DISTANCE CO., VERIZON SELECT SERVICES, INC., AND FAIRPOINT COMMUNICATIONS, INC.

Petition for Authority to Transfer Assets and Franchise

Order on Motion to Compel Discovery

O R D E R N O. 24,789

September 21, 2007

On September 10, 2007, Verizon New England and its co-petitioning affiliates (collectively, Verizon) moved pursuant to N.H. Code Admin. Rules Puc 203.09(i) to compel the Office of Consumer Advocate (OCA) to provide responses to four data requests (denominated in the motion as nos. 8 through 11) in the above-referenced docket. The underlying case involves the request of Verizon for authority to transfer its New Hampshire landline network and utility franchise to FairPoint Communications, Inc. Merits hearings are scheduled to commence on October 22, 2007.

Verizon tendered the four data requests, among others, to OCA on August 10, 2007. OCA objected to the data requests on a timely basis. On August 24, 2007, Verizon filed a pleading captioned "Notice of Reservation of Rights Concerning OCA's Objection to Verizon's First Set of Data Requests." The pleading indicated that, in the face of OCA having objected to certain data requests but also having indicated that it would be providing at least some kind of response to them, Verizon wished to reserve its right to compel responses to these questions.

OCA filed an opposition to the discovery motion on September 13, 2007. In essence, OCA's position is that the Commission should deny the motion for the reasons stated in

connection with a previous discovery determination, *Freedom Ring Communications LLC*, Order No. 24,760 (June 7, 2007). In that order, the Commission refused to compel a response to discovery requests that were "either an attempt to elicit further legal characterizations or argument from an opposing party or an effort to engage in what is essentially a written dialogue about what the Commission has or has not previously decided or what a particular witness has or has not said." *Id*., slip op. at 2.

In data request no. 8, Verizon sought the position of an OCA witness, Susan Baldwin, with respect to whether "changes in the Telecommunications Act of 1996 and the Commission's pro-competitive policies implementing the Act are not relevant to a Commission review of Verizon NH's overall service quality today[.]" The data request went on to seek a statement of Ms. Baldwin's basis for her position, also asking that she, "[i]f relevant, . . . identify any Commission Order incorporating these policies into the existing service quality measures and standards and provide a copy of each Order."

OCA provided its response to this data request on August 28, 2007. The only substantive response provided by OCA was that "Commission orders are publicly available." Otherwise, OCA characterized the data request as "argumentative," adding that

> [t]he merits of Verizon NH's service quality problems and the quality of service standards applicable to Verizon NH are not subject to dispute in this docket. The request seeks information and/or a review of documents that is equally available to the requestor and can be undertaken by the discovering party as readily as by Ms. Baldwin or the OCA, and therefore [the request] is unduly burdensome.

We agree with OCA that the request not calculated to lead to the discovery of facts admissible at hearing and therefore not appropriate for compelled response. *See id*. (denying discovery motion on that basis).

"[T]he rule for when discovery is appropriate in proceedings before the Commission is a liberal one: [D]iscovery should be relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. At the same time, the standard . . . does not exempt discovery requests from principles of reasonableness and common sense." *City of Nashua*, Order No. 24,654 (August 7, 2006), slip op. at 3 (citing *State v. Barnes*, 150 N.H. 715, 719 (2004) (holding that, even in a criminal case, discovery decisions will be sustained unless "untenable" and "unreasonable") and *McDuffey v. Boston & Maine R.R.*, 102 N.H. 179, 181 (1959) ("While the use of discovery in this state has been regarded as a remedial device which has been given a liberal application, we have attempted to indicate that it is subject to limitations"), internal quotation marks and other citations omitted).

Given the obvious familiarity of the disputants with both the Telecommunications Act and prior Commission orders discussing service quality, common sense suggests that OCA cannot tell Verizon anything the companies do not already know with respect to the extent to which Ms. Baldwin's positions about service quality issues have support in federal law or Commission precedent.

In arguing to the contrary, Verizon cites a treatise, *Moore's Federal Practice*, to the effect that, at least under the Federal Rules of Civil Procedure, it is acceptable to pose an interrogatory in discovery that asks a party to assert a position or to explain such a position with regard to how the law applies to the facts. Again citing the same treatise, Verizon maintains that such an interrogatory is not objectionable merely because it calls for opinion or contention. OCA points out that, as we observed in the recent *Freedom Ring Communications* order, the Federal Rules of Civil Procedure do not govern discovery in Commission proceedings.

We agree with Verizon that as a matter of Commission practice and procedural rules, it would be improvident to declare flatly that data requests of this type are always out of bounds. If, for example, an OCA witness were suggesting without elaboration that New Hampshire law, or some provision of the Telecommunications Act, compelled dismissal of Verizon's petition, it would be reasonable in discovery to require the witness to expound upon such legal theories. The soundest exercise of our discretion here, however, is to deny Verizon's request that we compel OCA to respond to data request no. 8.

Although all four of the data requests at issue are appended to the motion, Verizon offers no argument or discussion specific to data request nos. 9 through 11. As Verizon suggests, these three data requests are similar in nature to no. 8, although, unlike no. 8, they do not ask the witness to opine about a specific statute and its effect on the issue under discussion. In any event, we understand Verizon to be suggesting that our decision as to data request no. 8 should be dispositive as to all four data requests. To the extent this assumption is incorrect, Verizon has waived any arguments specific to data requests 9 through 11. *New Hampshire Dep't of Environmental Services v. Marino*, ___ N.H. ___, ___, 928 A.2d 818, 828 (2007).

In its motion, Verizon purported to reserve the right to revise its prefiled rebuttal testimony should the Commission grant the discovery motion, a request opposed by OCA. The issue is moot and we therefore do not consider it.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Verizon New England, Inc. and its affiliates of September 10, 2007, seeking to compel the Office of Consumer Advocate to respond to certain data requests, is **DENIED**.

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

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary