

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Verizon New England Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company, Verizon Select Services Inc. and FairPoint Communications, Inc.

Docket No. DT 07-011

**VERIZON NEW ENGLAND INC. ET AL.'S OBJECTION TO HEARING EXAMINER'S
SEPTEMBER 6, 2007 RECOMMENDATIONS**

Verizon New England Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Verizon Select Services Inc. ("Verizon") submit this objection to the Hearing Examiner's September 6, 2007 recommendations (the "Recommendations"). In support hereof, Verizon states as follows:

1. On September 6, 2007, the Commission convened a prehearing conference to consider issues raised by the Office of Consumer Advocate ("OCA") regarding the treatment of confidential information, including the redaction of confidential information from pre-filed testimony.

2. Prior to the prehearing conference, Irene Schmitt, an intervenor in this proceeding, filed a Motion for Clarification Regarding Confidentiality (the "Motion") in which she raised questions regarding the extent to which she had received confidential information from FairPoint and Verizon. As reflected in Ms. Schmitt's Motion, she had already been provided confidential information by Verizon with the exception of Hart-Scott-Rodino ("HSR") filings.¹ Schmitt Motion ¶ 2. Ms. Schmitt's Motion questioned whether Verizon had withheld

¹ Under the HSR Act, parties to certain acquisitions must make a pre-merger notification filing with the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"). The

other confidential information from her, despite her execution of a protective agreement in this proceeding.

3. Upon receipt of the Motion, Verizon's counsel contacted counsel for Ms. Schmitt and confirmed that Verizon had provided her with all Verizon confidential information with the exception of the HSR information, making Ms. Schmitt's Motion moot as it pertained to Verizon. Ms. Schmitt agreed to file an amended motion clarifying that it was only FairPoint, not Verizon, that had withheld confidential information from her, and as such, was the sole focus of her request.² See Schmitt Amended Motion ¶ 3 ("Upon reading the redacted version of the prefiled direct testimony of Staff and OCA sent to counsel for Intervenor Schmitt, counsel for Intervenor Schmitt realized that FairPoint withheld certain confidential materials from counsel for Intervenor Schmitt...").³ Thus, Ms. Schmitt sought no relief from Verizon in her Amended Motion.

4. Verizon attended the September 6, 2007 prehearing conference understanding that there was no outstanding issue between Verizon and Ms. Schmitt regarding access to the HSR information. This is reflected in Verizon's response to an inquiry by the Hearing Examiner who raised the issue of Ms. Schmitt's Amended Motion, stating that he "want[ed] to get a sense of to

purpose of these pre-merger filings is to provide the FTC and DOJ with the opportunity to determine whether the proposed merger is anti-competitive under federal law.

² As counsel for Ms. Schmitt explained in his cover letter of September 4, 2007 accompanying the amended motion: "There were several errors in the original Motion dated August 31, 2007. The only changes made were deleting the reference to Verizon on lines 3 and 4 of paragraph 3 on page 1 and in paragraph A on page 3. In addition, a new sentence was added at the end of paragraph 8 to include Verizon." That new sentence explained that: "Verizon pointed out an error in the Motion; the error has been corrected in this Amended Motion." Amended Motion of Intervenor Schmitt For Clarification Regarding Confidentiality ("Amended Motion") ¶ 8.

³ Even then, Ms. Schmitt made clear that she understood all along that she was not being provided HSR material from FairPoint (or, for that matter, Verizon) and was not seeking access to that material in her Amended Motion: "With the exception of the so-called 'Hart-Scott-Rodino' SEC filings and the FairPoint financial model, counsel for Intervenor Schmitt reasonably assumed that Verizon and FairPoint provided counsel for Intervenor Schmitt with the confidential materials which were being provided to Staff, OCA and the other parties." Schmitt Amended Motion ¶ 2.

what extent that remains a live dispute and how we can resolve it.” Transcript of September 6, 2007 prehearing conference (the “Transcript”) at 9. Turning to Verizon’s counsel, the Hearing Examiner inquired:

Mr. Kreis: Okay. Now, refresh my memory, does Ms. Schmitt have a similar problem with Verizon or does what you just said address all of Ms. Schmidt’s [sic] needs for information?

Mr. Del Vecchio: Ms. Schmidt?

Mr. Kreis: Yes.

Mr. Del Vecchio: No, I believe that the motion was directed, I think, --

Mr. Kreis: Okay.

Mr. Del Vecchio: -- as the Hearing Examiner saw, that they amended their motion.

Mr. Kreis: Super. So, I’ll ask counsel for Ms. Schmidt, if you don’t mind me interrupting you, Mr. McHugh, --....

Transcript pp. 12-13.⁴

5. Counsel for Ms. Schmitt then confirmed in a subsequent colloquy regarding pre-filed testimony that she was not seeking the HSR information from Verizon:

Mr. Del Vecchio: No, as I said, subject to ... the exception that, to the extent that there’s an HSR specific response included, and I don’t have their testimony in front of me, **we would not consent to that, as we have not consented before, and as I understood Mr. Linder was amenable. So, with that one exception.**

Ms. Brockway: Your Honor?

Mr. Kreis: **Is that okay with Mr. Linder?**

Mr. Linder: **Yes.**

⁴ At that point, the Hearing Examiner engaged in a lengthy discourse with FairPoint and Ms. Schmitt’s counsel regarding whether Ms. Schmitt should be granted access to certain FairPoint confidential information.

Transcript at 20 (emphasis added).

6. Despite the fact that counsel for Ms. Schmitt confirmed at the prehearing conference that she was seeking no relief from Verizon in her Amended Motion – as the filing and associated cover letter of September 4 also represented – and did *not* want HSR information, the Hearing Examiner, in response to prodding from OCA and counsel for the Labor intervenors, nonetheless volunteered: “I don’t see any reason why all parties shouldn’t get HSR.” He further stated that he would recommend to the Commission that it be disclosed to Ms. Schmitt, even though her counsel had admitted in writing and earlier at the prehearing conference that she was not seeking the information. Not surprisingly, counsel for Ms. Schmitt then did an abrupt about-face at the Hearing Examiner’s suggestion, stating: “And, our position now is, we would like that information.” Transcript at 26.

7. It is fundamentally inappropriate and prejudicial for a Hearing Examiner to create a controversy where none existed. In this case, Ms. Schmitt could not have been more clear from the outset that she was not seeking the HSR information from Verizon and had resolved her concerns with Verizon prior to attending the prehearing conference. This is demonstrated by the fact that Ms. Schmitt withdrew her initial Motion to remove the erroneous references to Verizon and re-filed the Amended Motion which sought confidential information only from FairPoint. If that were not clear enough, Ms. Schmitt’s counsel reiterated at the prehearing conference that she was not seeking the HSR information from Verizon. Despite being advised of her unequivocal position, the Hearing Examiner then actively encouraged Ms. Schmitt to abandon that position, and stated that he felt she should be granted access to HSR material – information she was not seeking and regarding which she filed no motion requesting relief.

8. The role of the Hearing Examiner is to consider and assist in the resolution of disputes, not to advocate on behalf of a particular party or issue. In this case, the Hearing Examiner stepped beyond his role not only by suggesting that a party abandon its position, but then by indicating that he would advocate for that new position on the party's behalf. The Commission should reject the Hearing Examiner's recommendation as to the HSR information, which is not only prejudicial but raises significant questions about the due process rights of parties.

9. In addition, the Hearing Examiner's position turns the Commission's discovery process on its head and is flatly inconsistent with the Commission's rules. Prior to attending the prehearing conference, Ms. Schmitt had never sought the HSR information in discovery. Specifically, Ms. Schmitt did not propound any data requests seeking the HSR information and had not filed a single pleading requesting access to it. Only OCA and Labor had previously sought the HSR information in discovery, which Verizon did not produce initially because of its significant concerns about the highly confidential nature of the information.

10. Pre-merger filings under the HSR are confidential and are 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, United States Code*, 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.

(emphasis in the original). There are steep penalties for violations of 15 U.S.C. § 18a, including civil damages of up to \$10,000 per day. *See* 15 U.S.C. § 18a(g).⁵

11. Verizon subsequently produced the HSR information on a very limited basis to OCA, Staff and the Labor intervenors, which had received the HSR information under confidential treatment in another state proceeding. At no time during discovery in this docket did Ms. Schmitt seek the HSR information from Verizon; Ms. Schmitt did not at any time join in OCA or Labor’s Motion to Compel disclosure of the HSR information; and Ms. Schmitt did not file any other pleading requesting access to it. Equally important, underscoring the extraordinarily confidential nature of the HSR material, *no third-party intervenors* (other than state agencies and Labor) have been provided access to the HSR material in any of the state proceedings in Maine, Vermont and New Hampshire.

12. As the Commission is well aware, the procedural schedule in this docket established a very clear timeline and process for discovery. Verizon understood that issues regarding the HSR information had long been resolved with OCA’s Motion to Compel. Allowing the Hearing Examiner to reopen the issue, actively encourage parties to change their position, and compel disclosure of information well outside the time for relevant discovery would make a mockery of the procedural schedule and the Commission’s rules. If the

⁵ Further, the obligation to maintain the confidentiality of HSR filings has been strictly construed. In *Lieberman et al. v. Federal Trade Commission*, 771 F.2d 32 (2nd Cir. 1985), the Second Circuit considered whether the FTC could release an HSR filing to various state attorneys general authorized by 15 U.S.C. § 26 to bring suit on behalf of those injured by violations of the Sherman Act. The Second Circuit held that the “...limitation on the disclosure of premerger information to the ‘public’ [in 15 U.S.C. § 18a(h)] precludes confidential disclosure to state law enforcement officials.” *Lieberman*, 771 F.2d at 36. The Court noted that the attorneys general had not sought the premerger information “as part of an ‘administrative...action or proceeding,’ namely the FTC’s consent judgment proceeding.” *Id.* at 38, n. 12. The Court reasoned that “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 7A [15 U.S.C. § 18a(h)] show that Congress envisioned that only the Department of Justice and the FTC would use premerger information.” *Id.* at 39.

Commission were to adopt the Hearing Examiner's recommendation, it would encourage parties to seek prehearing conferences at any time to try and effect an end-run on prior discovery rulings and the rules governing discovery.

13. In its September 20 letter to the Commission, the OCA argues that the HSR information should be released to avoid having to make additional redactions from the pre-filed testimony. This is hardly a sufficient reason to compel the release of highly confidential information. There are very limited references to HSR information in the pre-filed testimony and thus any "burden" on OCA or others would be minimal at best. Further, the "burden" would fall on FairPoint and Verizon, which have agreed to reclassify the testimony to address the levels of confidentiality based on the Hearing Examiner's recommendation.

14. For these reasons, the Commission should reject the Hearing Examiner's recommendations regarding the HSR information.

WHEREFORE, Verizon respectfully requests that the Commission:

- A. Deny the Hearing Examiner's Recommendations as they relate to the HSR information; and
- B. Grant such other and further relief as the Commission deems necessary and just.

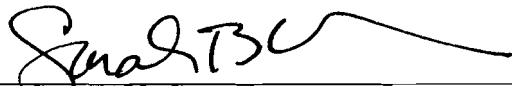
Respectfully submitted,

VERIZON NEW ENGLAND INC.
BELL ATLANTIC COMMUNICATIONS, INC.
NYNEX LONG DISTANCE COMPANY
VERIZON SELECT SERVICES INC.

By their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: September 21, 2007 By:

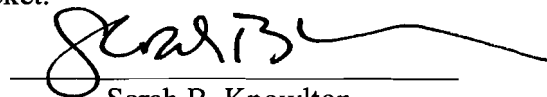


Steven V. Camerino
Sarah B. Knowlton
11 South Main Street, Suite 500
Concord, New Hampshire 03301
Telephone (603) 226-0400

Victor D. Del Vecchio, Esquire
Verizon New England Inc.
d/b/a Verizon New Hampshire
185 Franklin Street
Boston, MA 02110-1585

Certificate of Service

I hereby certify that on September 21, 2007, a copy of this Objection to Hearing Examiner's September 6, 2007 Recommendations has been forwarded to the parties listed on the Commission's service list in this docket.



Sarah B. Knowlton