

THE STATE OF NEW HAMPSHIRE

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July 6, 2007

Debra A. Howland  
Executive Director & Secretary  
New Hampshire Public Utilities Commission  
21 S. Fruit St., Suite 10  
Concord, NH 03301

NHPUC JUL 17 '07 PM 3:32

Re: DT 07-011 Verizon New England/FairPoint Communications

Dear Ms. Howland:

Enclosed for filing with the Commission please find an original and seven copies of the Office of Consumer Advocate's (OCA's) Motion to Extend Procedural Schedule and Request for Expedited Decision. This motion is in part a response to FairPoint's request to extend the testimony deadline for the Labor Intervenors.

Copies of the motion has been served on all parties in this docket electronically.

Sincerely,

A handwritten signature in cursive script, appearing to read "M.A. Hatfield".

Meredith A. Hatfield  
Consumer Advocate

cc: service list



**BEFORE THE 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.**

**Transfer of Assets to FairPoint Communications, Inc.**

**OFFICE OF CONSUMER ADVOCATE'S MOTION TO  
EXTEND PROCEDURAL SCHEDULE AND  
REQUEST FOR EXPEDITED DECISION**

The Office of Consumer Advocate (the "OCA") respectfully files and requests an expedited decision on this motion to extend the entire procedural schedule in this docket. In support, the OCA states the following facts and law.

**I. Introduction**

1. On January 31, 2007, Verizon New England (Verizon NE), Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Co., and Verizon Select Services, Inc. (collectively, Verizon) and FairPoint Communications, Inc. (FairPoint) (together, Joint Petitioners) filed with the Commission a joint petition seeking approval of a series of transactions that, if consummated, would result in FairPoint (through subsidiaries) acquiring the current Verizon NE franchise to provide wireline telecommunications services in New Hampshire and owning the network Verizon NE currently uses to provide those services.
2. The Joint Petitioners request, *inter alia*,<sup>1</sup> a determination by the Commission that the proposed transactions are for the public good pursuant to RSA 374:30

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<sup>1</sup> The Joint Petitioners also request that the appropriate subsidiary of FairPoint be designated an "eligible telecommunications carrier" pursuant to 47 U.S.C. §§ 254(e) and 214(e)(2) (concerning universal service assistance fund) for purposes of the affected service territory and that Verizon's current designation be rescinded. The Joint Petitioners further request that the Commission authorize Verizon NE to discontinue

(governing transfers of utility franchises and assets), RSA 374:26 (governing authority to operate as a public utility), and, to the extent necessary, RSA 374:33 (governing transfers of 10 or more percent of ownership of a public utility).<sup>2</sup>

3. The outcome of this case literally touches and concerns hundreds of thousands of utility customers, the welfare of the public at large and the State's economy. The importance of this case should not be underestimated.
4. On March 16, 2007, the Commission issued the procedural schedule.<sup>3</sup> The schedule created five separate issue tracks for discovery, and despite the magnitude of the case, included truncated discovery and dispute resolution timeframes that called for all first-round discovery to be completed between April and June. Since that time, the second phase of the schedule for rebuttal testimony and discovery was further compressed.<sup>4</sup>
5. The procedural schedule presently requires intervenors, including the OCA, to file direct testimony no later than noon on July 20.
6. Due to FairPoint's continuing disclosures of new and additional information during the past few weeks, the OCA seeks this extension of the procedural schedule.

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service as a public utility in New Hampshire pursuant to RSA 374:28 (governing authority to discontinue providing service as a public utility).

<sup>2</sup> See, e.g., Appeal of Verizon New England, Inc., 153 N.H. 50, 62 (2005) (finding that Verizon failed to request, pursuant to RSA 374:30, Commission approval to transfer Yellow Pages business) citing Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 483 (1984) (recognizing the "fact" that under RSA 374:30, all sales or transfers of regulated public utility property must be approved by the Commission after a finding that sales are for the public good); and Appeal of Legislative Utility Consumers' Council, 120 N.H. 173, 174 (1980). See also, Appeal of Public Serv. Co. of N.H., 168 PUR 4<sup>th</sup> 596, 676 A2d 101 (1996) (concerning RSA 374:26); Re Merrimack County Telephone, 87 N.H. PUC 278, 281-282 (2002) (recognizing that RSA 374:33 requires the Commission to consider whether an acquisition "[is] in the public interest", "provides net benefits to customers" and "is in the public good"); and Re Aquarion Water Company of New Hampshire 2006 WL 3326670 (N.H.P.U.C. Oct 31, 2006) (NO. 24,691, ID 149733) (reviewing transaction under public interest and public good standards of RSA 374:33 and RSA 374:30, respectively).

<sup>3</sup> Order 24,733, March 16, 2007, pp. 6-7, and 20.

<sup>4</sup> Secretarial Letter Modifying Procedural Schedule, July 6, 2007.

## **II. Applicable Standards**

7. The Commission's rules include standards for the review of requests to extend time and to postpone a hearing.<sup>5</sup>
8. Puc 202.04 (c) states, "[t]he commission shall grant a request for an extension if:  
(1) the party making the request has demonstrated that circumstances would cause undue hardship or inconvenience unless the request were granted; and (2) the extension would not unduly delay the proceeding or adversely affect the rights of any party." Puc 202.04 also requires a written request, filed before the expiration of the deadline, and a good faith attempt to obtain consent of the parties.
9. Puc 203.13(c) states, "[t]he commission shall grant a request for postponement of a hearing if it finds that to do so would promote the orderly and efficient conduct of the proceeding." Puc 203.13 also requires a written request, at least seven days before a hearing, and good faith attempt to obtain concurrence of the parties.

## **III. FairPoint's Continuing Stream of Disclosures of New and Additional Information**

10. Pursuant to the original procedural schedule, the OCA propounded data requests to FairPoint on April 6, 2007. These data requests concerned Group I, Transactional and Financial Issues.<sup>6</sup> FairPoint's responses to these data requests were due April 27, if not objected to, and May 4, if compelled.<sup>7</sup>
11. On June 11 and July 2, 2007, following the period for discovery by intervenors and the technical sessions, FairPoint filed amendments to the Form S-4 with the Securities and Exchange Commission ("Form S-4A"), which related to numerous

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<sup>5</sup> See Puc 202.04 and Puc 203.13.

<sup>6</sup> Staff Report of Technical Session held on February 27, 2007, dated March 5, 2007.

Group I data requests<sup>8</sup> and critical financial issues related to the Commission's determination of whether the proposed transaction is in the public interest.

Specifically, these Form S-4A materials included and for the first time disclosed to the public the specific existence of crucial financial projections, cash flow, due diligence, and projected synergies analyses prepared by FairPoint's financial advisors.

12. On the evening of July 9, 2007, FairPoint provided the OCA with a supplemental response to OCA 1-43, which for the first time disclosed the contents of the June and July Form S-4A documents.<sup>9</sup> These documents concern "materials prepared by FairPoint or its outside advisors that relate to...the agreement FairPoint ultimately reached with Verizon."<sup>10</sup> Consequently, they are directly related to the Commission's determination of the public good.
13. On July 10, 2007, FairPoint filed yet another significant amendment to its Form S-4. The July 10<sup>th</sup> S-4A materials included an amendment to FairPoint's Master Services Agreement with Capgemini, in which a major task (software and systems implementation for "customer relationship management and billing platform" implementation) assigned to another vendor at the inception of the transaction is now assigned to Capgemini. As inducement for Capgemini to accept the task, in addition to being paid millions of dollars for the work, FairPoint granted

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<sup>8</sup> See e.g., OCA GI 1-38, 1-43, and 1-44, which requested information and documents related to work done for FairPoint by its investment advisors.

<sup>9</sup> FairPoint provided these documents to the OCA despite the fact that the Commission had ruled against the OCA's motions to compel a response to OCA 1-43, was among the data requests which the OCA sought to compel in its Second Motion to Compel FairPoint's Response to Group I, Set 1, Data Requests. In Order No. 24,767 (June 22, 2007), the Commission denied the OCA's motion. On July 6, 2007, the OCA filed a motion for rehearing of this order, as it pertained to FairPoint. On July 12, 2007, the OCA filed an amended motion for rehearing or, in the alternative, a motion to vacate Order No. 24,767. FairPoint filed an objections to these motions on July 12, too. The Commission has yet to rule on these motions.

<sup>10</sup> Order No. 24,767 (June 22, 2007) ("Order"), at 2.

Capgemini “perpetual, worldwide, paid-up license to use, copy, modify and sublicense” the software being developed for FairPoint and paid for by FairPoint and Verizon. In addition, the “work order number 2” to Capgemini identified in the amendment has not been provided to the parties,<sup>11</sup> and is indicated in the amendment itself to be in “draft” form only. These circumstances raise a very significant concern on the part of OCA, as this change could impact FairPoint’s overall plan, schedule, and cost of the systems and software development and integration effort, which are fundamental aspects of the proposed transaction.

14. On July 12, 2007, during a five-hour plus teleconference, FairPoint provided new or additional information to the OCA and others about the newly-provided Form S-4A materials and FairPoint’s financial model. During the teleconference, the participants first learned of the heritage of the financial model, and had confirmed the difficulty or impossibility of making global changes to the model due to the extent of hard coded data within it, and the lack of formula links which have been broken or otherwise eliminated. FairPoint’s willingness and ability to undertake the proposed transaction is grounded in the financial model; the Commission’s understanding of the underlying assumptions and data lies at the heart of its determination of whether the proposed transaction is in the public interest.
15. Also on July 12, 2007, the OCA received new information from FairPoint that should have been provided in response to at least one data request, one which was propounded on April 6, and the other on June 11, 2007.<sup>12</sup> This information concerned projected synergies.<sup>13</sup>

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<sup>11</sup>The period for discovery had passed by the time this new development had occurred.

<sup>12</sup>During the teleconference on July 12, FairPoint discussed information provided to the OCA on June 21, 2007 in response to OCA FDR I-10. The OCA propounded OCA FDR I-10 as a follow-up to OCA GI 1-31

16. Late in the afternoon of July 16, the OCA learned from FairPoint's local counsel that FairPoint is filing an update to its Broadband Deployment Plan, which the OCA requested in OCA GII 1-19 (propounded on April 13<sup>th</sup>). FairPoint's counsel was not certain if this update would be provided before the OCA's testimony deadline and stated that further updates could be expected "as more information becomes available."
17. In addition, after the close of business on July 16, the OCA received via electronic mail supplemental responses to numerous data requests related to Group I including OCA GI 1-68 and 1-71, which requested all referenced attachments to the Agreement and Merger Plan at the center of this proceeding. The supplemental responses to these two data requests suggest that the original attachments have since been amended. At this late juncture, without an extension to the procedural schedule, the OCA does not have sufficient time to assess this supplemental information and the supplemental responses to Staff and Labor data requests, which were also provided in the email while finishing its testimony, which is due on Friday, July 20.
18. FairPoint's continued disclosure of new and further information suggests that it is not prepared to proceed with the procedural schedule as it currently exists. Further, FairPoint's late disclosures are extremely prejudicial to the parties, like the OCA, whose testimony is due in a few days. In essence, the OCA is

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(concerning synergies), which FairPoint had not supplemented. During the teleconference on July 12, FairPoint provided an electronic spreadsheet regarding synergies to the OCA and other participants. Thereafter, the OCA compared the paper and electronic versions of the synergies spreadsheets and determined that the documents provided on June 21 in response to the OCA FDR I-10 was not complete. For example, the paper version contained five pages, while the electronic version shows significantly more detail, including formulas and additional detail that would not appear on a printed version.

<sup>13</sup> It is the OCA's understanding that FairPoint will provide a CD with an electronic version of the spreadsheet as a supplement, but this document has not yet been received.

developing a position and testimony on issues that go to the heart of the case while the case itself continues to be developed by FairPoint.

19. This approach to the case, if allowed to continue, does not allow the parties to fully understand and assess the proposed transaction. Furthermore, it will result in confusing and inefficient intervenor testimony, which will likely require supplementation. There is no compelling reason to force the parties to follow the existing schedule to the detriment of developing cogent testimony in order to assist the Commission in making its determination of whether the proposed transaction is in the public interest.
20. The OCA has been diligent in its efforts to obtain responses to or respond disputes concerning its Group I data requests,<sup>14</sup> and in reviewing the company's responses to ensure that they are complete and responsive.
21. Nevertheless, FairPoint has failed to meet its ongoing responsibility to update its responses to data requests pursuant to Puc 203.09(k), and when it has supplemented its responses, in light of the procedural schedule, these efforts have not been timely and have in fact undermined the OCA's ability to meaningfully participate in the case.
22. While the OCA appreciates the complexity of this case, the substantial nature of FairPoint's obligations, and FairPoint's efforts to meet those obligations, the OCA

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<sup>14</sup> For some of the history of the discovery disputes between the OCA and FairPoint and the OCA's efforts to resolve these disputes, see OCA's Motion to Compel FairPoint's Response to Group I, Set 1, Data Requests, dated April 20, 2007; OCA's Second Motion to Compel FairPoint's Response to Group I, Set 1, Data Requests, dated May 18, 2007; and OCA's Third Motion to Compel FairPoint's Response to Group I, Set 1, Data Requests, dated May 30, 2007. During the discovery phase of this proceeding, the OCA has maintained regular contact with FairPoint concerning the status of its responses to data requests. During this time, the OCA has provided FairPoint with lists of missing or incorrect responses and attachments. The OCA has also attempted to facilitate FairPoint's fulfillment of its production responsibilities by memorializing many of the agreements reached between the OCA and FairPoint on disputed discovery.



will suffer undue hardship or inconvenience if an extension of the procedural schedule is not granted.

23. Presently, the OCA faces finalizing and filing its testimony in a few days without the benefit of a reasonable opportunity to assess and assimilate the continuing stream of information that FairPoint has only just provided.<sup>15</sup> FairPoint's approach to this case thus far, coupled with the extremely compressed procedural schedule, risk making the OCA's participation in this case on behalf of Verizon's residential customers ineffective.

24. The OCA retained expert consultants to assist it with reviewing the "encyclopedic" amount of complex and highly technical information developed thus far in this case, and with developing testimony. Due to the importance of this case for Verizon NH customers and the State as a whole, the legislature specifically granted the Commission the authority to make a special assessment on behalf of the OCA.<sup>16</sup> The OCA takes very seriously the use of ratepayer funds for expert consultants, and as such, seeks to limit the number of versions of direct, rebuttal and supplemental testimony that must be filed in this case.

25. A stay of these proceedings would not unduly delay these proceedings or adversely affect the rights of any party. In fact, a failure to extend the procedural schedule will do so. There is no reason to rush these proceedings. There is no

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<sup>15</sup> During this time, in addition to finishing the substance of its testimony, the OCA will also need to create five different versions of the testimonies of its two witnesses, which correspond to the multiple levels of redaction created by FairPoint.

<sup>16</sup> HB 316 (2007).

legal requirement that the Commission dispose of the proposed transaction within a certain time period.<sup>17</sup>

26. In light of the circumstances, the stay requested by the OCA will promote the orderly and efficient conduct of these proceedings.<sup>18</sup> Among other benefits, a stay will allow the parties and Staff to incorporate all relevant information received to date which will result in more complete testimony to assist the Commission in its review of the huge volume of detailed information in this case, and may avoid the need to file supplemental testimony and the additional delays that would result from supplemental testimony. In short, it is most efficient for the parties to fully address the critical issues in this case now, as opposed to attempting to address them piecemeal as FairPoint continues to develop its plans for the transaction.

### **III. Position of Parties and Staff**

27. Prior to filing, the OCA made a good faith effort to seek the positions of the parties. Prior to filing, we received positions from the following parties:

- BayRing, segTEL, Otel, Covad, One Communications, Level 3 Communications, NECTA/Comcast, and New Hampshire Legal Assistance support the motion.

Staff does not support a complete stay but stated in an email that it supports “modification of the schedule, if necessary, in the current schedule to accommodate late-filed information produced by the petitioners.”

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<sup>17</sup> *Contra* RSA 369:8, II (b) (requiring within 30 days, with the opportunity for a 30-day extension, Commission to make a preliminary determination of whether a corporate merger or acquisition will have an adverse effect on rates, terms, service or operation of a public utility within the state).

<sup>18</sup> *See* Puc 203.13.

- Labor intervenors, the seven municipalities, National Grid, and Unitil do not oppose the motion.
- FairPoint and Verizon oppose the motion.
- PAETEC and the eight ILEC members of the New Hampshire Telephone Association take no position.

#### **IV. Relief Requested**

Wherefore, the OCA respectfully requests that the Commission provide the following relief:

- A. Grant a hearing on this motion to allow the parties an opportunity to present their views;
- B. Grant an extension of the procedural schedule for all parties (except for the settlement conferences scheduled for July 25 – 27) to allow the parties and Staff sufficient time to analyze newly received information so that it can be included in Intervenor testimony;
- C. Direct the parties to develop a new procedural schedule which limits delays during the settlement conferences scheduled for July 25 – 27, 2007; and
- D. Grant such other relief as justice requires.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

July 17, 2007

A handwritten signature in black ink, appearing to read 'M. Hatfield', is written over a light gray rectangular background.

Meredith A. Hatfield